From Expressivism to Communication in Transitional Justice: A Study of the Trial Procedure of the Extraordinary Chambers in the Courts of Cambodia

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A thesis submitted for the degree of Doctor of Philosophy of
The Australian National University

July 2014
DECLARATION

I hereby declare that this thesis is exclusively the result of my own work.

Cheryl White
DEDICATION

To the unrepresented of S-21
ACKNOWLEDGEMENTS

When I was writing the thesis I often had classical music playing on my computer or phone. There were moments when the purity, intensity or beauty of the sound in the background seemed to carry me through the intellectual waters I was navigating. There was also a symphony of support in friends, family, colleagues and strangers who made my journey lighter and ultimately achievable. I would like to acknowledge them.

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ABSTRACT

From Expressivism to Communication in Transitional Justice: A Study of the Trial Procedure of the Extraordinary Chambers in the Courts of Cambodia

From the mid-1990s transitional justice was typically theorised through the lens of the expressivism of the international criminal trial. In other words, the international trial became the primary vehicle for signalling an end to impunity for international crimes through the enforcement of international norms, and modelling of legitimate legal process for societies transitioning to democratic governance. Developments in the form and procedure of courts making up the international criminal justice system suggest scope for their evaluation on an alternative, or at least, complementary theoretical basis. Drawing on work by transitional justice theorists Mark Osiel and Frédéric Mégret, the evolution of victim participation rights in criminal justice, research in peace studies, and the proceedings of the first trial at the Extraordinary Chambers in the Courts of Cambodia (ECCC), this thesis develops a communicative theory of the transitional trial. The essence of this theory is that properly controlled dialogical trial proceedings activate the communicative capacity of trials, connecting the work of the Court with the communities affected by the crimes they address.

The thesis studies the dissonance between the expressive and the communicative value of transitional trials. Social engagement with the past is implicit in formulations of the notion of transitional justice, but dialogue within trials is limited to evidentiary matters, unless flexibility in trial procedure permits broader discussion within the bounds of criminal law principles. The communicative trial creates space for dialogue and re-evaluates trial procedure models in light of the social purposes of transitional justice.

A communicative theory admits engagement with the past under conditions of truth-telling within criminal process not strictly limited to factual proofs, but extending to the causes and effects of crimes. Communicative trials admit narrative testimony controlled by inquisitorial judges for both retributive and reconciliatory purposes. Proceedings are representative of
both national and international interests, and provide substantive inclusion of victims’ voices under due process principles. The Court is connected to civil society networks which act as intermediaries between the institution and the affected community.

My study of the ECCC trial proceedings suggests a legacy of the transitional court beyond the expressivism of international criminal justice and the functional objectives of United Nations state-building. I conclude that the ECCC’s politicised nature did not limit the scope for dialogue and space for reflection made possible by the Court’s largely inquisitorial procedure. Exchanges during proceedings and the inclusion of the voices of the accused and crime survivors expanded the trial dialogue. The representative and dialogic nature of the proceedings enhanced the ECCC’s communicative capacity. The communicative value of the trial in a society where public discourse on the crimes of the former regime has been suppressed is especially significant.
<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
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<tbody>
<tr>
<td>CGDK</td>
<td>Coalition Government of Democratic Kampuchea</td>
</tr>
<tr>
<td>CPK</td>
<td>Communist Party of Kampuchea</td>
</tr>
<tr>
<td>CPP</td>
<td>Cambodian People’s Party</td>
</tr>
<tr>
<td>ECCC</td>
<td>Extraordinary Chambers in the Courts of Cambodia</td>
</tr>
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<td>FUNCINPEC</td>
<td><em>Front Uni National pour un Cambodge Indépendent, Neutre, Pacific et Coopératif</em></td>
</tr>
<tr>
<td>ICC</td>
<td>International Criminal Court</td>
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<td>ICTR</td>
<td>International Criminal for Rwanda</td>
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<tr>
<td>ICTY</td>
<td>International Criminal for the Former Yugoslavia</td>
</tr>
<tr>
<td>ILM</td>
<td>International Legal Materials</td>
</tr>
<tr>
<td>KPLNF</td>
<td>Khmer People’s National Liberation Front</td>
</tr>
<tr>
<td>KPRP</td>
<td>Khmer People’s Revolutionary Party</td>
</tr>
<tr>
<td>PDK</td>
<td>Party of Democratic Kampuchea</td>
</tr>
<tr>
<td>PRK</td>
<td>People’s Republic of Kampuchea</td>
</tr>
<tr>
<td>PRT</td>
<td>The People’s Revolutionary Tribunal</td>
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<tr>
<td>SCC</td>
<td>Supreme Court Chamber</td>
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<tr>
<td>SCSL</td>
<td>Special Court for Sierra Leone</td>
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<td>SOC</td>
<td>State of Cambodia</td>
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<td>STL</td>
<td>Special Tribunal for Lebanon</td>
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<tr>
<td>UNGA</td>
<td>United Nations General Assembly</td>
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<td>UNSC</td>
<td>United Nations Security Council</td>
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<td>UNTS</td>
<td>United Nations Treaty Series</td>
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<td>UNTAC</td>
<td>United Nations Transitional Administration in Cambodia</td>
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<td>UNMIK</td>
<td>United Nations Transitional Interim Administration in Kosovo</td>
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<td>UNTAET</td>
<td>United Nations Transitional Administration in East Timor</td>
</tr>
<tr>
<td>VCLT</td>
<td>Vienna Convention on the Law of Treaties</td>
</tr>
</tbody>
</table>
# TABLE OF CONTENTS

DECLARATION.................................................................................................................. i

DEDICATION .................................................................................................................. ii

ACKNOWLEDGEMENTS.................................................................................................. iii

ABSTRACT ......................................................................................................................... v

ABBREVIATIONS ............................................................................................................. vii

TABLE OF CONTENTS ..................................................................................................... viii

TABLE OF CASES .............................................................................................................. xvii

TABLE OF LEGISLATION ................................................................................................... xx

TABLE OF TREATIES ......................................................................................................... xxii

CHAPTER ONE
THE NATURE OF THE TRANSITIONAL TRIAL................................................................. 1

I INTRODUCTION ............................................................................................................. 1

II TRIALS IN TRANSITIONAL JUSTICE THEORY ......................................................... 8

III EXPRESSIVISM AND THE TRANSITIONAL TRIAL ................................................. 14
    A Expressivism and Social Meaning ............................................................................. 14
        1 Expressivism and Legal Action ............................................................................. 15
        2 Expressivism and Criminal Law ......................................................................... 16
        3 The European Union and Expressive Criminal Law .......................................... 21
    B Criminal Law and Transitional Societies ................................................................. 22
        1 Criminal Law Principles and Atrocity Crimes .................................................... 22
        2 Justifying Punishment in Transitional Societies ............................................... 23
        3 The Expressivism of International Trials ............................................................ 26
IV  TOWARDS A COMMUNICATIVE THEORY OF THE TRANSITIONAL TRIAL ........................................31
A  Trial Process as Dialogue in Transitional Justice Theory ........................................35
B  Communication and Representation in the Transitional Trial ................................39

CHAPTER TWO
THE DEVELOPMENT OF THE TRANSITIONAL TRIAL ..................................................44
I  INTRODUCTION ..............................................................................................................44

II  PROSECUTING INTERNATIONAL CRIMES ............................................................44
A  The International Military Tribunal at Nuremburg .................................................46
B  The International Military Tribunal for the Far East in Tokyo ................................50
C  International Crimes and the Cold War .................................................................52

III  CREATING INTERNATIONAL CRIMINAL COURTS ........................................56
A  The International Criminal Tribunal for the Former Yugoslavia ..........................57
B  International Criminal Tribunal for Rwanda .........................................................58
C  Norm Development by the ad hoc Tribunals .........................................................59
D  Expressive Surplus and Communicative Deficit at the ad hoc Tribunals ...............60
E  Creation of the International Criminal Court (ICC) ..............................................64
   1  Negotiating the Rome Statute .............................................................................64
   2  The Mission of the ICC .....................................................................................65
   3  Primacy of National Jurisdiction and Complementarity ..................................65
   4  Victims’ Participation and Redress ....................................................................66
   5  Jurisdiction and Capacity Limits .......................................................................70

IV  HYBRID AND INTERNATIONALISED COURTS .................................................71
A  Courts under UN Transitional Authority Mandate ..............................................74
   1  East Timor ..........................................................................................................74
   2  Kosovo ................................................................................................................77
B  Hybrid Courts .........................................................................................................81
   1  The Special Court for Sierra Leone ....................................................................81
      a) Political Action Creating the SCSL ...............................................................82
      b) Expressive vs Communicative Dimensions of the SCSL ............................85
IV CONCLUSION .................................................................................................................. 173

CHAPTER FIVE
TRIAL DIALOGUE IN CASE 001 ...................................................................................... 175

I INTRODUCTION ................................................................................................................. 175

II THE CASE FILE .............................................................................................................. 176
A Profile of the Accused ....................................................................................................... 176
B The Court’s Examination of Duch .................................................................................. 182
   1 Duch and CPK Policy .................................................................................................... 183
   2 The Co-Prosecution Voice .......................................................................................... 186
   3 The Co-Defence Response ......................................................................................... 187
C The Participation of the Accused at Trial ................................................................. 188

III TRIAL DIALOGUE AND WITNESS TESTIMONY ...................................................... 189
A Mam Nai ......................................................................................................................... 189
B François Bizot at M-13 .................................................................................................. 192
C David Chandler on the CPK in history ......................................................................... 193
   1 S-21 - The ‘total institution’ ...................................................................................... 194
   2 Duch’s character and conduct at S-21 ..................................................................... 196
   3 S-21 and dehumanisation ......................................................................................... 197
D Françoise Sironi-Guilbaud and Ka Sunbaunat ............................................................ 199
E Chhim Sotheara ............................................................................................................. 206
F Duch’s Bid for Release ................................................................................................. 209

IV CONCLUSION .............................................................................................................. 210

CHAPTER SIX
THE VOICE OF THE VICTIM IN CASE 001 ................................................................. 212

I INTRODUCTION ................................................................................................................. 212

II THE VICTIM AND TRANSITIONAL TRIALS ............................................................. 213
A Fairness and Legitimacy in International Trials ......................................................... 215
   1 Victim-Witness Testimony at the ad hoc Tribunals ................................................. 216
The Victim at the ICC ................................................................. 217

Victim Participation at the ECCC .............................................. 218

a) Civil Party Questioning of Witnesses ..................................... 219
b) Limits on Civil Party Submissions on Sentencing ..................... 220
c) Civil Parties and Character Evidence ..................................... 220

III SURVIVOR STORY-TELLING AT THE ECCC ......................... 223

A Testimony of Direct Victims of S-21 ....................................... 224
1 Vann Nath .............................................................................. 224
2 Chum Mey ............................................................................. 227
3 Bou Meng ............................................................................. 229

B The Testimony of Indirect Victims of S-21 ......................... 230
1 Bou Thon .............................................................................. 230
2 Antonya Tioulong ................................................................. 232
3 Hav Sophea ........................................................................ 233
4 Neth Phally ......................................................................... 234
5 Robert Hamill ..................................................................... 235
6 Chum Sirath ....................................................................... 237

C The Social Value of Victim Participation ................................. 239

IV CONCLUSION ........................................................................ 240

CHAPTER SEVEN
THE VOICE OF THE COURT IN JUDGEMENT .......................... 242

I INTRODUCTION ....................................................................... 242

II PERSONAL JURISDICTION ....................................................... 243

A The Trial Chamber’s Decision ................................................. 243

B The Supreme Court’s Appraisal ............................................. 244

1 Scope of the terminology ‘senior leaders’ and ‘most responsible’ .......... 245

2 Interpreting the terminology .................................................... 247
III NORMATIVE ANALYSES OF DUCH’S CRIMES ........................................... 251
   A In the Trial Chamber ........................................................................... 251
      1 Proving Grave Breaches of the Geneva Conventions ............................. 252
      2 Proving Crimes against Humanity Charges ....................................... 254
   B In the Supreme Court .......................................................................... 257

IV SENTENCE .............................................................................................. 259
   A The Trial Chamber Findings on Sentence ............................................. 259
   B The Supreme Court Review .................................................................. 263

V SCC REVIEW OF THE REMEDY FOR UNLAWFUL DETENTION ........... 267

VI CIVIL PARTY APPLICATIONS ............................................................... 270
   A Trial Chamber Determination ................................................................ 270
   B Supreme Court Determination of Civil Party Appeals ............................ 271
      1 The Definition of Victim at the ECCC ............................................... 271
      2 Civil Party Application Process .......................................................... 272
      3 Trial Chamber Error in Determining the Standard of Proof? .................. 274

VII REPARATIONS ...................................................................................... 275
   A Trial Chamber Ruling ........................................................................... 275
   B Supreme Court Review ........................................................................ 276

VIII CONCLUSION ...................................................................................... 277

CHAPTER EIGHT
THE LEGACY OF THE DUCH TRIAL: A COMMUNICATIVE THEORY OF THE
TRANSITIONAL TRIAL.............................................................................. 280

I INTRODUCTION ...................................................................................... 280

II COMMUNICATIVE DYNAMICS AT THE ECCC ................................. 282
   A Communicative Aspects of Civil Party Participation .............................. 283
   B Civil Society Support and Communication ........................................... 287
   C Role-Sharing between National and International Trial Actors .............. 293
III ELEMENTS OF THE COMMUNICATIVE TRIAL .............................................. 296
A Representation ................................................................................................................. 298
  1 Trauma in Post-Khmer Rouge Cambodia ................................................................. 298
  2 Duch – ‘Monster’ and Human Being ......................................................................... 300
B Trial Dialogue .................................................................................................................. 302
C Communication and Judgement .................................................................................... 305
  1 Trial Chamber Ruling on Civil Party Submissions on Character ............................... 305
  2 Supreme Court Rulings: Sentence and Duch’s Detention ......................................... 306
  3 Reparations .................................................................................................................. 307

IV CONCLUSION .............................................................................................................. 310

BIBLIOGRAPHY .............................................................................................................. 316
I Books/Articles/Reports ................................................................................................. 316
II UN Resolutions and Selected Documents .................................................................. 338
  A UN Resolutions ........................................................................................................ 338
  B Selected Documents ................................................................................................ 339
III Media Releases .......................................................................................................... 341
### TABLE OF CASES

#### I INTERNATIONAL

##### A European Court of Human Rights

*Chraidi v Germany (Chamber Judgement)* (Application No. 65655/01, 26 October 2006)

*Dzelili v Germany (Chamber Judgement)* (Application No. 65745/01, 10 November 2005)

*Korbley v Hungary (Grand Chamber Judgement)* (Application No. 9174/02, 19 September 2008)

##### B International Court of Justice

*Accordance with International Law of the Declaration of Independence in Respect of Kosovo (Advisory Opinion)* I.C.J. Reports 2010 p 403

##### C International Criminal Court

*Judgment on the Appeal of Mr Thomas Lubanga Dyilo against the Decision on the Defence Challenge to Jurisdiction of the Court pursuant to Article 19 (2) (a) of the Statute of 3 October 2006)* Appeals Chamber, (Case No. ICC-01/04-01/06 (OA4), 14 December 2006)

*Prosecutor v Thomas Dyilo Lubanga (Decision establishing the principles and procedures to be applied to reparations)* (Trial Chamber 1, Case No. ICC-01/04-01/06, 7 August 2012)

##### D International Criminal Court for the Former Yugoslavia

*Prosecutor v Aleksovski (Judgement)* Appeals Chamber, (Case No. IT-95-14/1, 24 March 2000)

*Prosecutor v Delalić, Mucić, Delić & Landžo (Judgement)* Trial Chamber, (Case No. ICTY-IT-96-21-T, 22 November 1998)

*Prosecutor v Delalić, Mucić, Delić & Landžo (‘Celebici’) (Appeal Judgment)* Appeals Chamber, (Case No. ICTY-IT-96-21A, 20 February 2001)

*Prosecutor v Kunaric, Kovac & Vukovic (Judgement)* Trial Chamber, (Case No. ICTY IT-96-23/1 & IT 96-23/1, 22 November 2001)
Prosecutor v Kunaric, Kovac & Vukovic (Appeal Judgement) Appeals Chamber, (Case No. ICTY- IT-96-23/1 & IT 96-23/1, 22 November 2002)

Prosecutor v Obrenović (Sentencing Judgement) Trial Chamber 1, (Case No. ICTY- IT-02-60/2-S, 10 December 2003)


Prosecutor v Tadic (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) Trial Chamber, (Case No. ICTY-94-1-AR72, 2 October 1995)

E  International Criminal Court for Rwanda

Prosecutor v Akayesu (Judgment) Trial Chamber 1, (Case No. ICTR-96-4-T, 2 September 1998)

Prosecutor v Barayagwiza (Appeal Judgement) Appeals Chamber, (Case No. ICTR-97-19, 3 November 1999)

Prosecutor v Kambanda (Judgement) Trial Chamber 1, (Case No. ICTR-97-23-S, 4 September 1998)

Prosecutor v Musema (Judgement) Trial Chamber 1, (Case No. ICTR 96-13 27 January 2000)

F  International Military Tribunal at Nuremburg

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Treaty of Peace between the Allied and Associated Powers and Germany28 June 1919, 11 Martens Nouveau Recueil (Ser 3) 323; reprinted in 2 Bevans 43

G  United Nations Human Rights Committee

II HYBRID AND INTERNATIONALISED COURTS

A Extraordinary Chambers in the Courts of Cambodia


Consideration of the Pre-Trial Chamber Regarding the Disagreement between the Co-Prosecutors pursuant to Internal Rule 71 Pre-Trial Chamber, (Disagreement 001/18-11-ECCC/PTC, 18 August 2009)

Considerations of the Pre-Trial Chamber Regarding the International Co-Prosecutor’s Appeal Against Order on the Admissibility of Civil Party Applicant Robert Hamill (Case File No. 003/07-09-2009-ECCC/OCIJ-PTC 02, 24 October 2011)

Considerations of the Pre-Trial Chamber Regarding the International Co-Prosecutor’s Appeal Against the Decision on Re-Filing of Three Investigative Requests Pre-Trial Chamber (Case File No. 003/07-09-2009- ECCC/OCIJ-PTC 06, 15 November 2011)

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Decision on Civil Party Co-lawyers’ Joint Request for a Ruling on the Standing of Civil Party Lawyers to make Submissions on Sentencing and Directions Concerning the Questioning of the Accused, Experts and Witnesses Testifying on Character Trial Chamber, (Case File No. 001/18-07-2007-ECCC/TC, 9 October 2009)

Decision on Civil Party Participation in Provisional Detention Appeals Pre-Trial Chamber, (Case No. 002/19-09-2007-ECCC/OCIJ-PTC 01, 20 March 2008)

Decision on Nuon Chea’s Appeal against Order Refusing Request for Annulment Pre-Trial Chamber, (Case No. 002/19-09-2007– ECCC/OCIJ (PTC 06) D55/18, 26 August 2008)


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‘Order on Resuming the Judicial Investigation’ Office of the Co-Investigating Judges, (CF003/07-09-2009-ECCC-OCIJ-D28, 2 December 2011)


B Special Court for Sierra Leone

Prosecutor v Charles Ghankay Taylor (Judgment) Chamber II, (Case No. SCSL-03-01-T, 18 May 2012)


C Special Tribunal for Lebanon

# TABLE OF LEGISLATION

## III INTERNATIONAL


Charter of the International Military Tribunal at Nuremburg – Annex to the Agreement for the Prosecution of the Major War Criminals of the European Axis (‘London Agreement’) (8 August 1945) 82 UNTS 279

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### A Cambodia

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C  Kosovo

TABLE OF TREATIES


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CHAPTER ONE
THE NATURE OF THE TRANSITIONAL TRIAL

I INTRODUCTION

Don’t be afraid of death — just tell the truth! We reconstructed ourselves for the revolution, now we must change for humanitarian reasons — more than a million people died at the hand of the CPK.¹

The appeal above by the accused to a witness in the first trial at the Extraordinary Chambers in the Courts of Cambodia (ECCC) in 2009 was communication of a kind rarely seen in internationalised criminal justice process. It captures an important feature of these proceedings, which is seldom analysed in the legal literature. The immediate communicative force of this statement within Cambodian society is in contrast to accounts of international trials as primarily expressive, that is, concerned with reflecting the development and enforcement of international norms, or demonstrating due process standards.

This thesis studies the dissonance in transitional justice between the expressivism of international criminal trials and their communicative value. Expressivism is publicly constructed meaning through authoritative statements or action. Legal instruments establishing a norm, or political action creating an institution are vehicles of expressivism. The instrument or action constitutes one-sided messaging to a national group or international society at large.

An example of an expressive instrument is the 1948 Genocide Convention, which contains a definition of genocide.² In the face of widespread impunity for international crimes, during

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¹ CPK refers to the Communist Party of Kampuchea, the organisation behind the Khmer Rouge regime in Cambodia from 17 April 1975 to 6 January 1979. *Transcript of Trial Proceedings - Kaing Guek Eav ‘Duch’* (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, (Case File No. 001/18-07-2007-ECCC/TC, Day 45, 15 July 2009) 64; See also Laura MacDonald, ‘After Two Days of Questionable Witness Testimony, Duch Lectured his Former Subordinate — “Just Tell the Truth” ’ *Cambodia Tribunal Monitor* (15 July 2009).

the Cold War of 1948–1991, the expressivism of the Genocide Convention signalled a prohibition on acts constituting genocide to the world. However, the definition of genocide was limited to acts directed only against national, ethnic, racial or religious groups, with intent to destroy the group either in whole or in part.³ State-sponsored repression of political, social or economic sectors of populations fall outside the Convention definition. While the instrument created the norm, it was also expressive by virtue of what it excluded from the realm of prosecution. Thus, expressivism can be interpreted both positively and negatively. Another example of expressivism is the action taken by the Security Council in establishing international tribunals to prosecute violations of international humanitarian law in the Former Yugoslavia and Rwanda in the 1990s.⁴ While the political action was expressive of international will to deter future criminal enterprises and resulted in the enforcement of practically dormant norms, the tribunals struggled to secure the support of the communities they served.⁵ The actions attracted both support and criticism. Expressivism as a theoretical basis for international criminal trials seems limited at best in that it belies the complexity of the social contexts in which it is applied.

In criminal justice, expressivism is concerned with the publicly constructed meaning of a trial. Meaning is derived from the authority of the prosecuting institution as it enforces norms, and ritually engages the mechanism of sentencing or acquittal as a direct outcome of formal criminal procedure. In the transitional justice context, the court’s demonstration of due process standards is designed to reflect a model of justice for a society recovering from crimes mass atrocities formerly perpetrated with impunity. The expressivism of the transitional trial marshals impartial judicial interpretation of international norms, pronouncement of guilt or innocence, and imposition of punishments in appropriate cases.

Engaging a communicative theory of trials involves a change in emphasis from the direct outcomes of trials to trial process. The word ‘communicative’ implies a readiness to impart

³ Genocide Convention art II.
ideas/information and openness to engage with another. A communicative theory of the transitional trial admits discussion of the past under conditions of truth-telling within criminal process not strictly limited to factual proofs, but extending to causation and the consequences of crimes.

Communicative trials adapt trial procedure to produce representative and discursive proceedings that accommodate divergent views within the bounds of due process principles. Trials become communicative to the extent that they are representative and discursive. Representation within trial procedure is made possible by including the voices of members of constituencies with a legitimate interest in the subject matter of the proceedings. This includes victims of crimes, as well as national and international trial actors. Discursive proceedings permit the airing of opposing views of the crimes with scope for deliberation on those views.

The justice forum of the communicative trial is mediated by flexible rules of procedure applied by a judiciary imbued not only with retributive purpose, but also the court’s reconciliatory role within the subject society. Accordingly, judges apply a broader procedural brush to facilitate discursive proceedings that find resonance in the wider community. While the expressivism of sentencing subsists in the communicative trial, discursive proceedings will have indirect outcomes which manifest in both the immediate and longer term, as the messages of the trial process resonate with live debates in the transitioning society and beyond.

Expressivism as a theoretical basis of the transitional trial cannot do justice to the complexities surrounding the commission of crimes of mass atrocity and societal dynamics in the aftermath of repressive totalitarian regimes. In fact, a focus on expressivism may perpetuate injustice by downplaying the communicative capacity of trials. The nature of the Cambodian conflict, the massive victim toll, impediments to proper reckoning with past violence and the wide ranging social impacts of the Khmer Rouge regime were hardly to be resolved, even symbolically, by the convictions of a few perpetrators more than thirty years after the events. The expressivism of sentencing is of limited usefulness if it is not combined with deeper engagement with the causes and effects of the crimes being prosecuted.
To date transitional trials have exhibited what I describe as expressive surpluses and communication deficits. By this, I mean that the expressivism of the norm of accountability and the international rule of law has taken precedence over provision for the transitioning society’s engagement with its history of large scale violence within the sanctity of a court of justice. This is not to suggest that transitional justice can be confined to a courtroom, or that it is in any way a single process, but rather that more can be contributed by trials to the long-term process of recovery from mass atrocity than has been recognised in the literature, or tested in transitional courts.

Drawing on work by transitional justice theorists, developments in human rights law, the evolution of victim participation rights in criminal justice and the proceedings of the first trial at the ECCC, this thesis develops a communicative theory of the transitional trial. My study of the trial procedure of the ECCC shows that trial conventions modified to create representative, discursive proceedings may reduce expressive surpluses by expanding the communicative capacity of the transitional trial.

A communicative theory of trials challenges the prevailing view within transitional justice theory that trials largely address the demand for accountability, and non-judicial and restorative justice mechanisms address other key social issues in the wake of conflict. I posit that live issues within the recovering society such as trauma, the need for truth, trust, reconciliation and reparation may be validly raised to some degree within communicative proceedings and without compromising the integrity of the trial form. The dialogue made possible within communicative trial proceedings may encompass factors aiding a society’s engagement with its violent past. It also connects with the work of existing networks of local and international support surrounding the court, and may even generate new initiatives towards social repair.

This chapter considers the nature of the transitional trial within the broader field of transitional justice theory. I examine the essence of transitional justice against the background of the trend towards trials as the dominant transitional justice mechanism underpinned theoretically by expressivism. I interrogate expressivism as the theoretical basis of transitional trials by analysis of its application in national and international criminal justice
systems. The complexities and limits of expressivism highlight the need for the development of a communicative theory of the transitional trial to aid deliberative recovery from crimes of mass atrocity. A discussion of the work of Mark Osiel and Frédéric Mégret provides a foundation from which a communicative theory of transitional trials may be developed.

My study of the trial proceedings of the ECCC suggests a legacy of the transitional court beyond the expressivism of international criminal justice and the functional objectives of United Nations state-building. Drawing on the work of Osiel and Mégret, developments in human rights law, the evolution of victim participation rights in criminal justice and my study of the proceedings of the first trial at the ECCC, I argue for movement towards a communicative theory of transitional trials. The methodology is interpretive analysis of ECCC trial transcripts, trial judgements, constitutive documents of transitional courts and secondary source materials across the transitional justice field.

In this chapter, I highlight the ambiguous nature of expressivism as the theoretical basis of the transitional trial and suggest an alternative means of evaluating transitional trials based on communicative theory. Two key elements of communicative trials are discursivity and representation in trial proceedings. By discursivity, I mean dialogue in trial proceedings going to the social context and consequences of the crimes prosecuted.

In Chapter Two I extend the analysis of expressivism to the political actions of creating international transitional courts. From 1993, in the post-Cold War era the notion of the transitional trial took on expressive value as the two ad hoc Tribunals created by the UN Security Council prosecuted perpetrators of international crimes in the Balkans and Rwanda. However, the societies most affected by the crimes were largely remote from the processes of those trials. Later transitional trial models, which gradually incorporated features to enhance communication between the courts and the societies affected by the crimes, suggested the possibility of evaluating trials from a communicative as well as an expressive basis.

Chapter Three describes the political culture of Cambodia and the nature of the Khmer Rouge regime. The regime escaped international judicial scrutiny for more than two decades after
the ruling elite was ousted by the Vietnamese invasion in 1979. I describe the deprivation of rights suffered by the Cambodian people in the decades following the regime, and the successor governments’ policies of reconciliation by forgetting to underscore the significance of the communicative trial in such a context. I then discuss the politically tortuous road that led to the negotiation of an agreement with the United Nations to create an internationalised transitional court in Cambodia in order to end the impunity of those most responsible for Khmer Rouge crimes.

In Chapter Four I introduce the features of the ECCC which imbue it with increased communicative capacity. While the politics surrounding the Court continued to threaten its legitimacy, analysis of innovations in the ECCC procedural form reveals the potential for tipping the balance away from the expressivism of its trials to their communicative value. The shared roles between international and national actors in the Court, the judges’ incorporation of the civil party action into the inquisitorial procedure and the added purpose of the Court of assisting reconciliation are identified as working together to produce a more representative and discursive trial procedure.

In Chapter Five I examine how the Trial Chamber judges, attentive to the retributive and reconciliatory purposes of the Court, examined the case against the accused, Kaing Guek Eav alias Duch. I conclude that their procedural approach permitted trial dialogue beyond matters of strict culpability to the broader causes, context and consequences within which the crimes in question occurred. Causal understanding cannot be underestimated in a society where collective memory has been suppressed. In addition to profiling the life of the accused within a turbulent historical period in Cambodia, the proceedings included his confessions and commentary of the mechanics of the Khmer Rouge regime, as well as his engagement with witnesses. Expert witnesses provided factual data going to the guilt of the accused but were also invited to give their opinion on broader matters such as the nature of the crimes in history, as well as the psycho-dynamics of the accused during and after the regime. The open nature of the proceedings and their wide transmission in Cambodia and beyond allowed the public communication of facts behind the crimes to foster deeper reflection and enquiry about the regime. The procedural approach also allowed experts to support the civil parties’ case
for reparations, and to represent the nature of victimhood flowing from the Khmer Rouge era.

*Chapter Six* explores how the inquisitorial judges accommodated disagreements between court actors and managed the demands of victim participation in the trial proceedings. Through analysis of trial transcripts, I examine how the trial dialogue flowed from civil party story-telling in support of their reparations claim. This includes discussion of exchanges between the civil parties and the accused, and other court actors under the ECCC’s procedural scheme. I find the frame of evidentiary procedure and the dialogue facilitated by the particular judicial approach at the ECCC allowed closer examination of issues raised in testimonies and produced discourse which resonated with social debates beyond the courtroom.

The legal analysis of the case against Duch and the processes of judgement and appeal are dealt with in *Chapter Seven*. I examine the Trial Chamber and Supreme Court Chamber judgments for their expressive and communicative value. The Trial Chamber’s pursuit of a kind of ontological truth in determining the case, rather than the pluralistic approach to truth under adversarial procedure brought a holistic analysis of guilt which communicated the causes and effects of Duch’s crimes in the course of interpreting international norms in the Cambodian context.

The Supreme Court Chamber’s (SCC) analysis of the grounds of appeal, while rich in expressivism, had communicative dimensions. A measure of dissent between the SCC judges communicated a diversity of views on the interpretation of standards of procedural fairness in transitional contexts. The judges remedied defects in the victim participation application process and overturned the Trial Chamber’s revocation of the civil party status of a number of victims. The judgement of the SCC reflects a deliberately objective approach to sentencing that is firmly aligned with the expressivism of international criminal punishment. Overall, therefore, the process of judgment was both expressive and communicative.
Chapter Eight completes the analysis by examining the legacy of the ECCC’s communicative trial proceedings. While the expressivism of punishment endures at the ECCC, its representative and dialogic proceedings offer a distinct alternative to the ambiguous social detachment of other international trials. The elements of communication in ECCC proceedings are revisited through discussion of the recurrent themes of trauma and the victim/perpetrator equation in Cambodia. Other communicative dynamics peculiar to the ECCC’s form and context are also discussed to reveal a different reading of the Duch trial through the lens of communication.

An open and transparent justice process in the wake of the Khmer Rouge regime eluded Cambodians. A trial platform which permits discursive engagement with facts hidden from citizens for decades, and discourse that at least in part addressed their cries for truth and justice stands in contrast to the silence and injustice they have endured for so long. The communicative value of the trial in a society where public discourse on the crimes of the former regime has been suppressed is especially significant. Networks of active support throughout and after the trial by national and international civil society groups enhanced the ECCC’s communicative capacity.

The operational problems of the ECCC, including political opposition to the investigation of later cases by the Cambodian government, did not jeopardise the fairness of the trial of Kaing Guek Eav alias Duch. The inquisitorial mode of procedure activated greater participatory rights controlled by a judiciary mindful of the trial’s reconciliatory purpose. The representative and dialogic proceedings of Case 001 elevated the trial’s communicative value over expressivism within the society most affected by the crimes before the Court. In addition, the ECCC found ways to respond dynamically to the hope reposed in it by those who fought for the Court’s creation and actively supported its social purpose through other communicative means.

II  TRIALS IN TRANSITIONAL JUSTICE THEORY

While the meaning of the term transitional justice is not immediately apparent, there is consensus that transitional justice is concerned broadly with how post-conflict societies come
to terms with their history of large scale violence. The notion of post-conflict justice, sometimes used interchangeably with the term transitional justice, is more narrowly focused on the norm of accountability for past human rights abuses, combating impunity and restoring failed or weakened national justice systems following internal conflicts. The two concepts converged in the notion of transitional justice articulated in the United Nations Secretary-General’s 2004 report:

The notion of ‘transitional justice’… comprises the full range of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation.

The significance of communication is implicit in this formulation, which targets the affected society’s engagement with its past as the focal point of transitional justice work.

According to the Secretary-General, the range of justice mechanisms or processes that may be engaged includes:

Both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth seeking, institutional reform, vetting and dismissals, or a combination thereof.

Transitional justice is not limited to a single mechanism. However, the form and philosophy of the respective mechanisms affect the nature and depth of engagement with the past that is possible within each as they operate. In other words, dialogue on the past will be shaped by the form that transitional justice assumes. Generally, truth-seeking mechanisms provide victims and perpetrators of crimes with a locally-based forum for dialogue on the crimes

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9 Ibid.
committed. Based on principles of restorative justice, the proceedings are victim-centred and operate to reintegrate offenders through relatively flexible procedure.\textsuperscript{10} Criminal trials, on the other hand, follow rules of evidentiary procedure and fair trial conventions towards retributive outcomes.\textsuperscript{11} Dialogue in trials is limited to evidentiary matters, unless flexibility in trial procedure permits broader discussion within the bounds of criminal law principles.

Evaluations in the transitional justice literature of the range of justice modalities highlights the scope for engagement with the past and the benefits of dialogue through restorative justice or non-judicial forms.\textsuperscript{12} Trials, on the other hand, are described as ‘top-down’ mechanisms dominated by legal and political philosophy disconnected from the on-the-ground realities of transitioning societies.\textsuperscript{13} Dialogically oriented processes, including truth commissions and more locally-based restorative justice mechanisms were found to more directly address key issues that recovering societies face both during and after political transitions. Parmentier has identified the key concerns of those societies as: the search for truth, ensuring accountability, provision of reparations, promotion of reconciliation, dealing with the trauma of victims, trust between individuals and groups in the post-conflict context, and dialogue between individuals and sectors of the society.\textsuperscript{14}

However, the choice of which justice mechanism will be engaged in the aftermath of conflict is inevitably entwined with the dilemmas of transitional politics.\textsuperscript{15} Teitel has argued that the choice boils down to the question of whether to punish or grant amnesty to former regime


\textsuperscript{14} Ibid 555-557.

representatives responsible for atrocities. The political transitions from authoritarian regimes to the fledgling democracies of the Americas in the 1980s illustrate how choices between transitional justice mechanisms may be made. In those states the preference for truth commissions to demarcate the authoritarian past from the democratic present was conditioned by considerations around maintaining the fragile peace, as old political and military elites retained sufficient power to threaten political stability if they faced prosecution. Nevertheless, victims of crime support groups pressed for trials of perpetrators of atrocious crimes, and human rights organisations advocated an end to impunity for gross violations of human rights.

In the following decade two international tribunals were created by UN Security Council Resolutions to address breaches of international criminal law in the Former Yugoslavia, and in Rwanda. This marked the re-emergence of international criminal justice, absent since its first appearance after the Second World War at the International Military Tribunals of Nuremburg and Tokyo. The rationale informing the choice of trials as post-conflict justice mechanisms for the Balkans and Rwanda, and others that were subsequently created in Sierra Leone, Kosovo, East Timor and Cambodia was that of accountability and deterrence of perpetrators. In 2002, the Rome Statute of the International Criminal Court (ICC) established a permanent justice mechanism, with jurisdiction over the most serious international crimes. Ending impunity for such crimes and contributing to their prevention in the interests of world peace and security was the Court’s stated purpose. McEvoy argued that a strong positivistic scholarship began to pervade transitional justice theory as generous resourcing of international and national tribunals brought legal formalism to the field.

16 Teitel above n 6, 27.
17 Orentlicher above n 15, 12-13.
18 Fletcher above n 6, 575.
21 ICC Statute, Preamble.
was informally colonised by lawyers, and legalism represented by retributive justice models came to dominate the theoretical discourse of the field.\textsuperscript{23}

Legal formalism or legalism harnesses what Bourdieu referred to as the force of law; the mysterious and pervasive influence of law in social, political and intellectual life.\textsuperscript{24} The notion of the rule of law is far from solidified in societies subject to, or recovering from, repressive regimes.\textsuperscript{25} Legal institutions, and legal instruments such as new constitutions, may not only symbolise a break with the past regime, but represent the legitimacy of the new path being forged toward a just and democratic future. However, legalism also operates to preserve law and legal convention from irrelevant considerations, and may fence off legal considerations from social history, politics or morality.\textsuperscript{26} Confining transitional justice to the importance of law in the new society and the legal analysis of crimes may close off the prospect of deeper social engagement with the past, by keeping it within a limited frame where dialogue is largely excluded.\textsuperscript{27}

When transitional trials exclude dialogue they may serve the relevant politico-legal mission but miss the essence of transitional justice. Uncovering patterns of criminality through factual or forensic truth may provide some recognition of the past by individuals or groups in society.\textsuperscript{28} However, as the South African Truth and Reconciliation Commission noted in its 1998 report, the complex, multi-faceted nature of truth includes ‘the social or dialogic truth, established through interaction, discussion and debate.’\textsuperscript{29} Excluding truth of this nature from trial process is also inconsistent with the fundamental tenet of transitional justice of assisting a society’s attempts to come to terms with its past. On the other hand, expanding the theoretical framework of accountability to better understand the nature of atrocity crimes and

\begin{flushright}
\textsuperscript{23} Ibid 412.  \\
\textsuperscript{26} Judith Shklar, Legalism: Law, Morals, and Political Trials (Harvard University Press, 1964), 2. \\
\textsuperscript{27} McEvoy above n 22, 417. \\
\textsuperscript{28} Parmentier above n 12, 132. \\
\end{flushright}
their consequence through facilitated trial dialogue may connect the legal process with broader social needs.

Creating space for dialogue within the transitional trial entails engaging with concepts and principles underpinning criminal law procedure. This involves interrogating the structures of the criminal trial and investigating procedural models conducive to the expansion of trial dialogue for the social purposes of transitional justice. International criminal trials have engaged predominantly adversarial criminal procedure. The adversarial model of procedure of common law systems featured impartial adjudication, formal procedural rules and party control over the proceedings through partisan advocacy. Adversarial trial proceedings take the form a contest or dispute which unfolds as two adversaries present their cases and challenge their opponent’s view of the case before a ‘relatively passive decision maker whose principal duty is to reach a verdict.’ The structure of the trial is that of a clash between advocates—one prosecuting and the other defending the accused party. The truth-finding process is also dualistic, but subject to judicial reasoning and the elimination of reasonable doubt. The inclusion of other parties to the procedure not called for the purposes of either advocate poses normative and practical problems due to the construction of the trial as a battle between two sides only.

Some internationalised transitional trials have engaged the inquisitorial criminal procedure of national civil law legal systems. Inquisitorial proceedings are not contests but judicially led investigative actions. Judicial officers, as state authorities, control the pre-trial investigation and trial proceedings to faithfully uncover the truth as to what happened.

35 Decaigny above n 33, 239.
Objectivity in the pursuit of the truth requires judicial investigation of inculpatory and exculpatory evidence.\textsuperscript{36} There is an emphasis on narrative testimony which is unrehearsed and not rigidly constrained by inflexible procedural rules. Witnesses, victims and the accused may speak in narrative form and victims may have legal status beyond that of witness only. Narrative testimony and victim rights present less structural and normative challenges to proceedings controlled by inquisitorial judges and in which counsel for the prosecution, defence and victims have subordinate roles.\textsuperscript{37}

Do either of these procedural models provide a sound theoretical basis for the transitional trial and a structural framework conducive to wider trial discourse? In the next section I engage with this question by interrogating the notion of expressivism as the theoretical basis of the international transitional trial.

\section*{III EXPRESSIVISM AND THE TRANSITIONAL TRIAL}

In this section I discuss the nature and complexity of expressivism as it operates in national and internationalised spheres of criminal justice.\textsuperscript{38} I begin with a discussion of the nature of contemporary expressivist discourse. I then examine the trajectory of expressivism in criminal law from its origins in sociological theory to its modern application in international criminal justice.

\subsection*{A Expressivism and Social Meaning}

Expressivist ideas derive from a range of disciplines including philosophy, sociology, semiotics, law and economics.\textsuperscript{39} While not embodying a distinct moral, legal or linguistic

\textsuperscript{36} McGonigle above n 32, 71.
\textsuperscript{37} Ibid 73.
\textsuperscript{38} I use the term internationalised here in a general sense but discuss the distinction between international and internationalised courts in Chapter Two.
theory, expressivist writings provide analyses of the social meaning of action—individual and collective. Action is expressive and carries meaning, notwithstanding the intentions of actors. Social meaning, distinguished from individual meaning, is contingent on the particular society within which the meaning of certain actions, inactions or statuses are interpreted. Nevertheless, individual actions will often be informed by social norms and governmental actions may reinforce or alter norms. Expressivism is therefore concerned with how social meaning is constructed through political action and the techniques engaged to amplify, change or blur meaning.

1 Expressivism and Legal Action

Areas of law which have been the subject of expressivist analysis include United States constitutional and environmental law, and criminal law more broadly. Expressivist critiques of law have generally focused on actions that express particular moral responses to certain substantive values. Endangered species legislation, for example, may symbolise a certain ideal relationship between humans and the environment. Emissions trading scheme legislation, on the other hand, may reflect an economic approach to environmental protection rather a broader normative principle. Thus, expressivist analysis of a law’s content may reveal that it has more to do with the general statement it makes than its consequences, for instance, in the form of behavioural change.

Expressivism is also concerned with the regulation of social meaning. Legislation that is contrary to law or results in social harm is judicially evaluated through both doctrinal and

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42 Lessig above n 39, 951.
43 Sunstein above n 40, 2022.
44 Lessig above n 39, 951.
45 Anderson above n 39, 1531-1556.
46 Ibid 1504.
47 Sunstein above n 40, 2024.
48 Ibid.
expressive structures. Doctrinal analysis highlights certain values as objectively significant within the legitimate state; for example, the constitutional value of the equality of citizens of the United States.\textsuperscript{49} An expressivist judicial analysis will examine attitudes towards that value and elucidate their social meaning. Thus, a judicial finding that racially segregated schools promote inequality because they embody a message of inferiority, or attitudes of disrespect, highlights the constitutional value through an expressive interpretation structure.\textsuperscript{50} In summary, modern expressivist conceptions of legal actions focus on the expressive content of law and the public construction of social meaning through legal process.\textsuperscript{51}

2 \hspace{1cm} \textit{Expressivism and Criminal Law}

The criminal law of national criminal justice systems is inherently expressive.\textsuperscript{52} The moral condemnatory message of the criminal law towards criminal conduct is backed by the coercive power of the state to protect core values.\textsuperscript{53} The state power was justified in moral and political philosophy on the basis of either retribution or crime control.\textsuperscript{54} Retribution carries the notion of ‘just dessert’ for past criminal wrongdoing.\textsuperscript{55} By contrast crime control or consequentialist theories of punishment are forward-looking and aim to achieve individual and general deterrence.\textsuperscript{56} Punishment deters the offender from repeating the crime and its institutionalisation prevents wider offending.\textsuperscript{57}

\begin{flushleft}
\textsuperscript{49} Anderson above n 39, 1544
\textsuperscript{50} Ibid.
\textsuperscript{51} Ibid.
\textsuperscript{56} Matt Matravers, ‘Introduction’ in Matt Matravers (ed), Punishment and Political Theory (Hart Publishing 1999), 1, 1-2.
\textsuperscript{57} Simon Bronitt and Bernadette McSherry, The Principles of Criminal Law (Thomson Reuters, 3\textsuperscript{rd} ed, 2010) 21.
\end{flushleft}
Expressivism in criminal law circumvents both approaches to the notion of punishment by emphasising its expressive and symbolic purpose. Contemporary theories of expressive punishment derive from the work of Emile Durkheim. Writing in the context of social crisis due to the perceived moral decline of late 19th century France, Durkheim’s theory of criminal punishment stemmed from his conception of crime as acts that offend ‘strong and defined states of the collective conscience.’ Punishment avenged outrage to the collective conscience or the morality of society.

Although it proceeds from a quite mechanical reaction, from movements which are passionate and in great part unreflective, [punishment] does play a useful role. Only this role is not where we ordinarily look for it. It does not serve, or else only serves quite secondarily, in correcting the culpable or in intimidating possible followers. From this point of view, its efficacy is justly doubtful and in any case, mediocre. Its true function is to maintain social cohesion intact, while maintaining all its vitality in the common conscience.

Punishment is collective action through an authorised intermediary acting in the interests of justice and social solidarity. Implicitly, Durkheim assumed a pre-existing solidarity which he categorised as of two types: mechanical and organic. Mechanical solidarity is associated with ‘likenesses’ which attach the individual to the social group. Norms are well defined and there is common observance of sacred rituals. Organic solidarity arises from the complex division of labour in society, where social cohesion is based on bonds created by networks of interdependence, economic reciprocities and the autonomy of the individual person. Rather than the conformity required within mechanical societies, the organic solidarity of

59 Emile Durkheim, The Division of Labor in Society George Simpson trans, (Free Press, 1933) 80 [trans of De la division du travail social (first published 1893)].
60 Ibid 88.
61 Ibid 108.
62 Ibid 96.
63 Ibid 25.
64 Ibid 105-106, 30.
65 Ibid 131.
modern societies embraces difference, diversity and disagreement under a morality of individualism.\textsuperscript{66}

Durkheim conceived of the division of labour positively but warned of its possible pathological manifestations where rules establishing relationships between social actors are threatened. This could produce a state of ‘anomie’ or breakdown in the social fabric.\textsuperscript{67} Durkheim saw the potential for anomie in the rampant individualism of the new Industrial Age, and read attacks on an individual’s constitutional rights as a threat to the moral order.\textsuperscript{68} His public support of the wrongly convicted Captain Dreyfus in 1894, a French officer who was also a Jew, was based not on sympathy for the victim or protection of other’s rights in the future, but the preservation of the moral life of the Third Republic of France.\textsuperscript{69}

Durkheim charted an intellectual course between the opposing philosophical schools of liberalism and communitarianism. Along with other theorists including Weber and Marx, Durkheim criticised the narrow categorisation of Western societies in terms of economics and the self-interest characteristic of the laissez-faire liberalism of his day. He claimed that liberalism so conceived left little space for the shared belief systems and conventions advocated by communitarians as necessary to society. Analysing France’s historical traditions, ideals and structural elements, Durkheim drew from key features of each school of thought to arrive at a mediating idea: the common good of society and the freedom of the individual meet in the central moral ideals of the society and the institutions which represent and protect them.\textsuperscript{70} Thus, whether within mechanical or organic societies, only authoritative action to publicly enforce moral rules will prevent social disintegration.\textsuperscript{71}

\textsuperscript{66} Garland above n 58, 27.
\textsuperscript{67} Durkheim above n 59, 353.
\textsuperscript{68} Mark S. Cladis, \textit{A Communitarian Defence of Liberalism: Emile Durkheim and Contemporary Social Theory} (Stanford University Press, 1992) 8.
\textsuperscript{69} Ibid 24.
\textsuperscript{70} Ibid 9, 27-28.
\textsuperscript{71} Durkheim above n 59, 397.
Joel Feinberg’s modern formulation of the expressive value of punishment rejected the notion of punishment as the infliction of hard treatment of a convicted individual by the state. Feinberg asserted:

Punishment is a conventional device for the expression of attitudes of resentment and indignation, and of judgments of disapproval and reprobation, either on the part of the punishing authority or of those ‘in whose name’ the punishment is inflicted. Punishment, in short, has a symbolic significance largely missing from other kinds of penalties.\textsuperscript{72}

Punishment’s expressive cast reflects its instrumental purpose.\textsuperscript{73} Punishment expresses the community’s condemnation of the criminal offence and from it certain symbolic functions are derived.\textsuperscript{74} These include authoritative disavowal of the criminal practice;\textsuperscript{75} symbolic non-acquiescence in the crime;\textsuperscript{76} vindication of the law in practice to encourage citizenry;\textsuperscript{77} and the absolution of others by punishing the guilty, thus relieving the innocent from suspicion particularly when there are few suspects.\textsuperscript{78}

Beyond its instrumental value, punishment is expressive from a sociological perspective.\textsuperscript{79} Garland described criminal punishment as both a discrete legal mechanism for dealing with criminal wrongdoing through public condemnation, and a social institution embodying multiple symbolic meanings which capture the social ethos, identity and emotion of the relevant community.\textsuperscript{80} Bronitt and McSherry also concluded that punishment may have more symbolic than instrumental value, particularly in light of its failure to deter crimes.\textsuperscript{81}

From either an instrumentalist or a sociological standpoint, the common denominator of the expressivism of punishment is the moral condemnation conveyed. However, modern

\textsuperscript{72} Joel Feinberg, ‘The Expressive Function of Punishment’ (1965) 49 \textit{The Monist} 397, 400 (Feinberg’s emphasis in the use of italics).
\textsuperscript{73} Bronitt above n 57, 30.
\textsuperscript{74} Feinberg above n 72, 401.
\textsuperscript{75} Ibid 404.
\textsuperscript{76} Ibid 405.
\textsuperscript{77} Ibid 406-407.
\textsuperscript{78} Ibid 408.
\textsuperscript{79} Bronitt above n 57, 30.
\textsuperscript{81} Bronitt and McSherry, above n 57, 30.
expressivist analysis demonstrated how the meaning of moral denunciation is constructed. Kahan’s expressivist analysis of the punishment of shaming compared to imprisonment, posits that the expressive value of punishment does not turn only on whether, or to what extent, a mode of punishment expresses moral condemnation. Rather, it is the way in which the moral condemnation accords with more fundamental and various cultural worldviews that make a particular form of punishment more socially acceptable and consequently, politically economical. Kahan’s work engaged the four cultural indicators of hierocracy, individualism, egalitarianism and communitarianism, to evaluate shaming and incarceration in terms of their acceptability as moral condemnation.

Kahan found that citizens wanted punishments to not only express condemnation but also ‘to express it in way that coheres with, rather than assaults, their more basic cultural commitments.’ Shaming as a form of moral condemnation was unacceptable to some social groups because like corporal punishment, shaming summoned the symbols of hierarchy or the collective which conflicted with their strong social commitments to egalitarianism and individualism. Incarceration, on the other hand, condemns in multiple registers with meaning acceptable to all four cultural sectors:

Hierarchists can see [incarceration] as supplying a delicious form of debasement for those who resist their proper place in the social order; communitarians, a fitting gesture of banishment for those who wrongfully renounce social obligation; individualists, a reciprocal deprivation of liberty for those who fail to respect the liberty of others; and egalitarians, a uniquely democratic metric of punishment for persons who enjoy value by virtue of their capacity for autonomy.

Kahan concluded that political actors seeking the allegiance of multiple cultural groups engaged the ambiguity of the social meaning of incarceration to entrench the prison as an

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83 Kahan drew from the work of Aaron Wildavsky, ‘Choosing Preferences by Constructing Institutions: A Cultural Theory of Preference Formation’ (1987) 81 American Political Science Review 1; See also Mary Douglas, Natural Symbols: Exploration in Cosmology (Barrie & Rockliff, 1970) 54-68.
84 Kahan above n 82, 2086.
85 Ibid 2087.
86 Ibid 2089.
enduring symbol of moral condemnation.\textsuperscript{87} So constructed, the expressivism of imprisonment outweighed its social and economic costs.

3 \textit{The European Union and Expressive Criminal Law}

The expressive value of criminal law may also be engaged regionally or internationally. The European Union’s (EU) power to pass criminal laws is limited to serious crimes with cross-border dimensions.\textsuperscript{88} The EU decision to harmonise the definitions of racism and xenophobic crime within all member States has been the subject of expressivist analysis.\textsuperscript{89} Arguments justifying the laws were based on factors outside any cross-border dimension to the racist and xenophobic crime. These included: the extent of race-based crimes, the lack of uniformity in national laws on the subject, problems in securing cooperation between jurisdictions and the difficulty of fighting crimes in States where prosecution originates from a complaint by a victim.\textsuperscript{90} However, such reasons might equally apply to other crimes, but not necessarily ground any EU-wide legal action.\textsuperscript{91}

The criminal law’s expressive value provided sufficient justification for the new legislation.\textsuperscript{92} Since the legislation promoted two of the EU’s main priorities — human rights and the battle against racism within member countries, it supported an evolving EU mission.\textsuperscript{93} By harnessing the criminal law’s expressive purposes in defence of common values and the punishment of those who treat them with contempt, the legislative action reinforced the political power and identity of the EU beyond the limits of its essentially economic

\begin{flushright}
\textsuperscript{87} Ibid 2090.
\textsuperscript{89} Turner above n 52, 555-583.
\textsuperscript{90} Ibid 569
\textsuperscript{91} Ibid.
\textsuperscript{92} Ibid.
\end{flushright}
mandate. This attracted criticism of the EU for ‘moral posturing’ and use of the legislative power for making value statements only. That the final form of the laws does not require full harmonisation, and national authorities remain responsible for enforcement also leads to the conclusion that their expressive value exceeds any practical outcomes. What the political action demonstrates is how the traditional expressive capital of criminal law may be transferred to the international law context with or without enforcement.

B Criminal Law and Transitional Societies

Years of conflict and suppression of populations by violent regimes involving crimes of mass atrocity may threaten or destroy the social fabric of those societies, rendering them amply susceptible to the anomie feared by Durkheim in relation to modern industrial societies. Given the fragile nature of transitional societies, how well does criminal justice drawn largely from stable Western polities transfer to such societies?

1 Criminal Law Principles and Atrocity Crimes

Pursuant to the legal instruments creating them, transitional courts impose punishments on the individuals they convict of national and/or international crimes within their jurisdiction. The core international crimes that are prosecuted — genocide, crimes against humanity and war crimes have a collective character in terms of perpetration and mass victimisation. International crimes carry elements of system criminality which distinguish them from national crimes. This led international criminal courts to craft legal responsibility doctrines that help establish the liability of individuals who designed or planned a common criminal plan yet without directly engaging in criminal acts.

94 Turner above n 52, 571.
96 Turner above n 52, 571.
97 Drumbl above n 11, 577-578.
Judicial developments in international criminal procedure of this kind attracted criticism for their perceived deviation from traditional criminal law principles of individual culpability. The doctrine of joint criminal enterprise in particular, developed by the ICTY, was criticised for distorting criminal procedural standards by removing the requirement of proof of a direct causal link between the commission of crimes and the actual perpetrator.99 One strand of the doctrine permits conviction of individuals based on the foreseeability of the criminal acts committed pursuant to the common criminal plan. Since the doctrine fails to admit the pressures and confusion affecting conduct within conflicts, as well as legitimate grounds for policy decisions, it seemed to stretch the stigma of conviction beyond socially acceptable bounds.100 Tinkering with traditional doctrines may also produce negative responses to the work of the Court as the net of prosecution may appear to not discriminate sufficiently and so catch individuals loosely connected with the plan.101 Adaptation of criminal law concepts to the context of mass atrocity may therefore produce the perception, if not the actuality, of unfair justice processes.

2 Justifying Punishment in Transitional Societies

The transposition of the national criminal law analogy to the transitional justice sphere brought with it the traditional justifications of punishment: retribution and deterrence, as well as the rehabilitation of offenders. Post-conflict justice literature recorded apparent incongruities or at least equivocal operation of those justifications.102

The adequacy of retribution in grounding international criminal punishment was challenged on numerous fronts. The creation of transitional courts and tribunals is made possible by the

100 Damaska above n 98, 353.
101 Ibid.
selective exercise of political will, usually in the face of humanitarian crises and violation of human rights and international humanitarian law.\textsuperscript{103} In the case of political action to create international criminal tribunals, hybrid, and national courts with international elements, the international community may in fact carry some responsibility for the occurrence of atrocities.\textsuperscript{104} The delayed responses of the international community to the Balkan, Rwandan and Cambodian crises are cases in point.\textsuperscript{105} Transitional trials typically target for prosecution the leaders and primary architects of criminal regimes.\textsuperscript{106} While selectivity in prosecutions has the effect of not condemning whole or large swathes of populations for mass violence, it may also be the result of political concerns often on the part of successor regimes and creators of the court around wider accountability. Thus, selectivity in prosecutions means that retribution operates in a very limited sense.\textsuperscript{107}

In addition, and apart from the conspicuous disproportion between maximum sentences and crimes of mass atrocity, retribution may also operate in a discriminatory way in the transitional context.\textsuperscript{108} DeGuzman argued that, although communal harm caused by gender-based crimes may be greater in mass atrocity contexts than that resulting from killing crimes, the latter were given priority by international prosecutors.\textsuperscript{109} This was either because of the prosecutorial policies of international courts or the inappropriate transfer of national crime selection priorities to transitional contexts.\textsuperscript{110}

Furthermore, the selectivity in prosecutions belies the social complexity and group dynamics surrounding the commission of mass atrocity crimes.\textsuperscript{111} Characterising most national crimes as ordinary crime resulting from individual deviation from accepted social norms, Drumbl

\textsuperscript{103} Sloan above n 54, 50.
\textsuperscript{104} I discuss the legal distinctions in the categorisation of transitional courts and tribunals in Chapter Two.
\textsuperscript{105} Sloan above n 54, 47.
\textsuperscript{106} Ibid 50.
\textsuperscript{108} Margaret M. deGuzman, ‘Choosing to Prosecute: Expressive Selection at the International Criminal Court’ (2011-2012) 33 \textit{Michigan Journal of International Law} 265, 301.
\textsuperscript{109} deGuzman above n 102, 515, 522-523.
\textsuperscript{110} Ibid.
\textsuperscript{111} Drumbl above n 11, 567.
noted that international crimes have a collective character distinct from the social deviance targeted by national criminal justice systems.\textsuperscript{112} In the context of the Rwandan genocide, the population disengaged from the existing normative framework. This facilitated a form of ethnic cleansing on a massive scale with broad societal participation.\textsuperscript{113}

Deterrence as justification for punishment is also equivocal in the transitional justice context. In national criminal justice systems, deterrence, based on the utilitarian theory of Jeremy Bentham, relies on an assumption of the inherent rationality of the perpetrator of crime, although Bentham acknowledged the limits of deterrence theory even within stable national justice systems.\textsuperscript{114} Mass atrocity is often perpetrated pursuant to a collective pathology or amorality.\textsuperscript{115} Nevertheless, scholars argued that international criminal courts in particular, may, by virtue of their very existence, disempower perpetrators who manipulate conflict situations to ensure their political survival.\textsuperscript{116} Akhavan argued that even selective convictions by international authorities contribute to the fight to end the culture of impunity which accepts gross abuses of human rights.\textsuperscript{117} He also concluded that, after seven years and without any actual convictions by the ICC at that stage, suspected international crime perpetrators in Uganda engaged in cost/benefit calculations in response to the issuance of warrants by the Court.\textsuperscript{118}

In the same vein, Sloan suggested that we ought not to underestimate the reputational injury to powerful elites in contexts of conflict by the threat of prosecution for killing crimes.\textsuperscript{119} And deGuzman advocated leveraging the greater reputational damage arising from indictments for sex crimes.\textsuperscript{120} It seems, therefore, that through the threat of international

\begin{itemize}
  \item \textsuperscript{112} Ibid.
  \item \textsuperscript{113} Ibid 570.
  \item \textsuperscript{114} Bronitt above n 57, 23.
  \item \textsuperscript{115} Sloan above n 54, 58; Drumbl above n 11, 590.
  \item \textsuperscript{117} Payam Akhavan, ‘Beyond Impunity: Can International Justice Prevent Future Atrocities?’ (2001) 95 American Journal of International Law 1, 2.
  \item \textsuperscript{119} Sloan above n 54, 74.
  \item \textsuperscript{120} deGuzman above n 102, 524.
\end{itemize}
exposure, punishment may avert some specific criminal action. As to general deterrence, Sloan suggested that the moral educative role of punishment over the longer term may encourage aversions to criminal behaviour more than the immediate cost/benefit analyses that may be undertaken by international criminal perpetrators. Empirically, Bass found evidence that a number of ICTY indictments, or fear of them, averted some war crimes but not wider extermination programs in the Balkans.\(^\text{121}\)

However, it seems clear that individuals involved in mass violence will not always have control over their conduct in the face of social cataclysm orchestrated by agents of governments, military units or other entities. \(^\text{122}\) Individual liability for crime that generally assumes a perpetrator’s voluntary participation in extraordinary crime therefore strikes a dissonant note.\(^\text{123}\)

Rehabilitation of the offender as justification in the theory of punishment dates to the 18\(^{\text{th}}\) century.\(^\text{124}\) International human rights law made the social rehabilitation and restoration of criminal offenders a primary objective of imprisonment.\(^\text{125}\) However, in practice, at the ad hoc Tribunals rehabilitation considerations only arose in cases where defendants pleaded guilty to at least some of the charges laid against them.\(^\text{126}\)

3 \textit{The Expressivism of International Trials}

As international criminal justice was given form from the 1990s through the creation of a suite of transitional courts, Tallgren noted its representation as an ideal system of criminal

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\(^{122}\) Drumbl above n 11, 571.

\(^{123}\) Ibid 572.


\(^{125}\) \textit{International Covenant on Civil and Political Rights}, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), art 10 (3).

justice based on a national model which could not in fact, be identified in any local context.\textsuperscript{127}

Notwithstanding the shortcomings of the national analogy of criminal law transposed to transitional societies, expressivism pervaded international criminal justice theory. International criminal proceedings were conceived as having didactic value in their narrations of the particulars of mass violence and documentation of atrocities followed by the shaming and sanction of perpetrators. Communication and expressivism were conflated as Drumbl described the ‘dramaturgy’ of trials in terms of moral education with transformative potential through the repudiation of collective criminality.\textsuperscript{128}

Judicial statements enforcing international norms are another source from which the expressive value of international trials derives.\textsuperscript{129} Such statements construct the meaning of international norms in general and specific ways. In \textit{Prosecutor v Aleksovski}, the ICTY declared that retribution in international criminal law in a general sense, ‘is not to be understood as fulfilling a desire for revenge but as duly expressing the outrage of the international community at these crimes’.\textsuperscript{130} Other statements conveyed more specific social meaning of norms with the authority of the international court.\textsuperscript{131} As to the norm against genocide pursuant to the 1948 Genocide Convention for instance, Amann argued that international judges must take care in expressing the social meaning of the norm.\textsuperscript{132} Too loosely construing the Convention definition of genocide could undermine the understanding that genocide is unique.\textsuperscript{133} On the other hand, ‘too rigidly withholding protection from deserving groups could give rise to perceptions that the law is unfairly selective, or that it fails to comprehend the true nature of today’s tragedies.’\textsuperscript{134} Amann added that judicially construing the elements of the Convention definition in accordance with recognised subjective and objective criteria in relation to the context at hand, with careful exposition ‘will convey condemnation in a manner rife with expressive meaning.’ This will in turn, not

\begin{footnotes}
\footnotemark[127]\textsuperscript{127} Tallgren above n 102, 567.
\footnotemark[128]\textsuperscript{128} Drumbl above n 107, 174-175.
\footnotemark[129]\textsuperscript{129} Amann above n 39, 142.
\footnotemark[130]\textsuperscript{130} \textit{Prosecutor v Aleksovski (Judgement)} (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No. IT-95-14/1, 24 March 2000) [185].
\footnotemark[131]\textsuperscript{131} Amann above n 39, 142-43.
\footnotemark[132]\textsuperscript{132} Ibid 95.
\footnotemark[133]\textsuperscript{133} Ibid 142.
\footnotemark[134]\textsuperscript{134} Ibid 142-43.
\end{footnotes}
only nurture the norm but also enhance the legitimacy of the system of international criminal justice.135

Scholars pointed to the expressivism of other aspects of international criminal trials. Paraphrasing Feinberg, Sloan highlighted the expressive dimensions of international punishment:

By punishing perpetrators of serious international crimes, the international community attempts authoritatively to disavow that conduct, to indicate symbolically its refusal to acquiesce in the crimes, to vindicate international human rights norms and the laws of war, and to absolve ethnic or national communities, as collectives, of guilt by punishing individual perpetrators.136

Recognising the diversity of the international community and what may be construed as the immediate incompatibility of its norms within some transitional contexts, he argued that appropriate sentencing practice will ultimately help produce international social solidarity as to norms:

Over time, punishment by international criminal tribunals can shape as well as express social norms. And the international sentencing process can reinforce and vindicate those norms even if it cannot, alone, realistically be expected to deter or fulfil retributive aspirations held by each affected local constituency.137

While sentencing conveys the distinctive symbolic significance of punishment by its expressive power, the legitimacy and authority of sentences requires careful calibration of crime and punishment. The latter must carry the right degree of international condemnation relative to other defendants before the particular tribunal, and fit the circumstances of the offender.138

135 Ibid 143.
136 Sloan above n 54, 71.
137 Ibid 85.
138 Ibid 82-83.
Separate and public sentencing hearings where the process includes taking account of the different normative universes in which perpetrators operate, their status, role and background, will enhance the legitimacy of sentencing decisions. Echoing Durkheim, Sloan emphasised the moral significance of the ritual of sentencing as approaching the sacred in its significance. Moreover, it is the process of punishment that constitutes the appropriate ritual. Sentences issued only in writing and attached to lengthy judgments without ritual performance will not have the necessary expressive effect.

An expanding range of transitional courts with international elements were assigned multiple goals by their creators, which broadened their expressivism. Those courts and tribunals were to transpose human rights and international criminal norms to transitional societies; conduct exemplary proceedings which promote respect for due process and foster the rule of law in the affected communities; provide space for the voice of victims of the international crimes; and produce an authoritative historical record of the context of the relevant crimes. The Special Court for Sierra Leone was also to contribute to the process of national reconciliation and build the legal capacity of personnel, local and international. The Extraordinary Chambers in the Courts of Cambodia was to be a model of justice within a society where the independence of the judiciary was compromised by executive interference.

However, Damaska, drawing largely on analyses of the ad hoc Tribunals, concluded that operationally, the multiplicity of goals had negative implications for courts in terms of their expressive value at large and within their subject communities. To sharpen the expressive purpose of transitional trials, Damaska advocated narrowing the priorities of international

\[139\] Ibid 90-91.
\[140\] Ibid 89.
\[142\] Ibid.
\[143\] Fletcher above n 6, 578.
\[144\] Damaska above n 98, 331.
\[145\] UNSC Res 1315, UN Doc S/Res/1315 (14 August 2000) Preamble, [7].
\[147\] Damaska above n 98, 331-335.
criminal justice to the global effects of human rights violations.\textsuperscript{148} By this, ‘judges are freer to follow impulses of disengaged reason and to concentrate on matters like the perfection of the normative content of international criminal law, or the expansion of its reach.’\textsuperscript{149}

Damaska argued that it is more appropriate for international courts to make their priority the broad goal of accountability for international crimes and the stigmatisation of inhumane actions that prosecutions expose to the world.\textsuperscript{150} He asserted that the central mission of international criminal justice should be the didactic one of strengthening the public sense of accountability for human rights violations. From interdisciplinary literature on norm acceptance through persuasion, he argued that over the longer term wider compliance with human rights norms may result from consistent denunciation of inhumane conduct and elevate the humanitarian principles implicit in such statements.\textsuperscript{151} Damaska added that ‘ideas are contagious, and may change perceptions of what is to one’s own advantage, so that previously disinterested human rights concern may turn into an aspect of self-interest.’\textsuperscript{152} His optimistic conception of trials orchestrated for maximum expressive effect suggested that ultimately a universal social solidarity may emerge over the longer term by consistent international adjudication. However, he noted that the didactic power of courts stems from their perceived legitimate authority. Legitimacy is a matter of considerable importance to international courts since they lack the coercive power of national courts. Much, therefore, turns on the quality of their decision-making and the procedure they adopt.\textsuperscript{153}

The conception of individual criminal responsibility traditionally carried no notion of victims’ justice.\textsuperscript{154} However, McCarthy argued that victim redress may express ideas as forceful as that of denunciation of an individual’s conduct as justification for punishment.\textsuperscript{155} He also argued that the victim redress regime under the ICC Statute had an expressive

\textsuperscript{148} Ibid 335.
\textsuperscript{149} Ibid.
\textsuperscript{150} Ibid 345.
\textsuperscript{151} Ibid.
\textsuperscript{152} Ibid 346.
\textsuperscript{153} Ibid.
\textsuperscript{155} Ibid 366.
dimension which goes some way towards ameliorating the limitations of the national criminal law analogy in transitional societies. An expressive function for victim redress can be identified in the recognition it gives not only to the harm the crime inflicted but the wrongfulness of the conduct:

Redress represents an authoritative pronouncement that the conduct to which the victim was subjected was a specific, and particularly grave type of wrong, namely a crime under international law. When viewed in this light, the provision of victim redress arguably acquires an appreciable symbolic significance alongside the practical assistance it provides to victims of crimes under international law.\(^{156}\)

McCarthy considered that the ICC victim reparations scheme had particular expressive value in that compensation may be awarded by the Court in specific cases, and victims of crimes within the jurisdiction of the Court and their families may also benefit in a general sense from the ICC’s Victims Trust Fund.\(^{157}\)

Thus, the legal actions of prosecution, sentencing, victim redress, due process modelling and judicial statements constitute an armoury of expressivism in international criminal justice. These limit the expressivism of trials to authoritative one-sided messages delivered through a select group of courts. In the next section, I discuss literature which admits a conception of the criminal trial as communicative as distinct from expressive.

IV TOWARDS A COMMUNICATIVE THEORY OF THE TRANSITIONAL TRIAL

The moral and political philosophy of Jürgen Habermas provides a starting point for consideration of the role of communication in legal processes. Habermas’ social theory of modernity challenged the classical tradition which gave pre-eminance to practical reason in shaping norms based on moral precepts for the purpose of creating reasonable social and political order.\(^{158}\) Habermas argued that norm development was also subject to

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156 Ibid.
157 Ibid 369.
‘communicative reason.’ Derived from the ‘linguistic telos of mutual understanding’ communicative rationality had guided the development of societies.159 Drawing from anthropology and the work of Durkheim, Habermas saw language and linguistic understanding through communication as crucial in building social solidarity. He considered that Durkheim had neglected the significance of ‘speech acts’ in the formation of the collective conscience and posited that communicative actions were the driving force of social solidarity.160

Habermas developed a theory of communicative action to guide social reconstruction. In this he departed from the dominant Weberian theory of action, which emphasised ‘purposive activity and purposive rationality.’161 While practical reason was received in the reconstructive social theory of Habermas, it did not provide the ‘blueprint’ for a normative theory of law and morality. Instead, practical reason was guided by the networks of social discourse which fuel and form the opinions that drive the democratic process, and ultimately confer legitimacy on legal institutions.162

In the area of moral philosophy, discourse theory had been influenced by the notion of will-formation in the Kantian sense and Aristotelian conceptions of ethics. Habermas advocated a break in legal theory from the framing of law from a purely normative perspective or political philosophy and posited a discourse theory of law based on communicative action. He argued that in modern society there was often little connection between political theory and legal theory, and that normative approaches were constantly in danger of losing touch with social realities.163 For this reason the ‘production of legitimate law’ required the mobilisation of the communicative freedom of citizens to permit the formation of political beliefs.164

159 Ibid 4-5.
161 Ibid 2.
162 Habermas above n 158, 5.
163 Ibid 5-6.
164 Ibid 146-147.
Communicative freedom operates in the public sphere largely through civil society networks. From the perspective of liberal democratic theory, Habermas saw the social space for communications in the public sphere as signalling pressure points and thematising problems in society to be taken up by parliamentarians.\textsuperscript{165} His theory highlighted the socially integrating impact of communicative and non-coercive processes.\textsuperscript{166} For Habermas, law was the medium through which communicative action was transformed from the level of simple interactions to the abstract level of organised constitutional relationships.\textsuperscript{167} Trials also operate in the public sphere. While trial dialogue is moderated by rules of procedure, courts are spaces where a degree of communicative freedom is permitted and where communicative reason may operate. Implicitly, Habermas saw a role for courts in reckoning with the social impact of mass crimes as trial actors engaged with the trauma of past violence and confronted the complexities of perpetration.\textsuperscript{168}

Within criminal law philosophy, Antony Duff wrote of the communicative element of punishment and distinguished it from that of expression. Duff argued that punishment is communication rather than expression because:

\begin{quote}
The idea of communication involves, as that of expression need not, the idea of a reciprocal and rational activity. Expression requires only one who expresses; if there is someone at whom it is directed, that person need figure only as its passive recipient; and if it aims (as it need not) to bring about any effect on its recipient, that intended effect could be entirely non-rational – it need not be mediated by the recipient’s reason or understanding. By contrast, communication requires someone to, or with, whom we try to communicate; that person must (if communication is to be successful) be an active participant in the process, who receives and responds to the communication; and that reception and response must (or at least be intended to) be rational, in that communication appeals to the other’s rational understanding.\textsuperscript{169}
\end{quote}

Conceiving punishment as ‘mode of rational communication (primarily with the offender)’ to move him or her towards repentance reflected a kind of civic duty in the state, through the

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{165} Ibid 359.
\item\textsuperscript{166} Ibid 6.
\item\textsuperscript{167} Ibid 437.
\item\textsuperscript{168} Osiel above n 6, 173.
\item\textsuperscript{169} Antony Duff, ‘Punishment, Communication and Community’ in Matt Matravers (ed), \textit{Punishment and Political Theory} (Hart Publishing 1999) 48, 49.
\end{enumerate}
\end{footnotesize}
law, to treat all its citizens as ‘as rational, responsible agents.’

Criticising Duff’s theory, Ivison argued that while all criminal defendants are owed respect as rational and moral actors, Duff’s formulation simply justified ‘the murky ambiguities of punishment’ in communicative terms. Ivison argued:

[Punishment] is always in danger of being corrupted by the intrusion of desires for revenge or resentment, often fuelled and borne by cultural and social markers of race, gender, and class, and by historical contexts difficult to contain and transcend.

Ivison highlighted the complexity of punishment’s communicative value in multi-cultural societies, and in contexts where more than one source of law applies. Citing the Australian context, where the history of colonial relations with indigenous peoples continues to affect social attitudes towards appropriate criminal norms and punishment, he questioned the extent to which fundamental values are shared within a single polity. He concluded:

This is critical for the communicative theory of punishment, for if we cannot show that a community of citizens share a set of fundamental norms and values, then it is not clear exactly what is being communicated to the offender via the ‘communicative punishments’ carried out in the name of the community.

However, Duff maintained that the trial was a forum in which all members of a polity, by virtue of shared membership, call one another to account for public wrongs through fair legal process which is communicative and not merely expressive. Trials take this form because of a duty to both victims and perpetrators to establish the wrongfulness of crimes. Bronitt and McSherry go further by arguing that trials are a site where social meaning is both contested and fleshed, thus raising the communicative potential of the dialogue and debates of criminal trial process. In the next section I examine how transitional justice theorists have

\[\text{\textsuperscript{170}} \text{Ibid}.\]
\[\text{\textsuperscript{172}} \text{Ibid 100.}\]
\[\text{\textsuperscript{173}} \text{Antony Duff, ‘Authority and Responsibility in International Law’ in Samantha Beeson and John Tasioulos (eds), \textit{The Philosophy of International Law} (Oxford University Press, 2010) 589, 594-595.}\]
\[\text{\textsuperscript{174}} \text{Bronitt above n 57, 30.}\]
interpreted the criminal trial in transitional contexts beyond the goals of expressivism to reveal scope for a communicative theory of such trials.

A **Trial Process as Dialogue in Transitional Justice Theory**

Mark Osiel took up the theme of dialogue or discursivity in trial process in the context of transitional justice theory. Osiel’s conception of the transitional trial emphasised the conversations of the trial process rather than judicial suasion or the didactics of punishment. His theory located the communicative capacity of transitional trials in discursive procedure designed to foster public deliberation over past abuses by former regimes, to assist the society’s transition to democracy. Osiel’s reference points were national post-conflict trials including the 1961 Eichmann trial and the 1985 Argentinian Military trials initiated by President Raul Alfonsín. He did not directly address the ad hoc Tribunals on which Damaska based his view of the expressive value of international criminal justice.

Osiel took as his analytic starting point the theory of Emile Durkheim on punishment and social solidarity. He regarded Durkheim’s conception of the role of the criminal law and courts in organic (industrialised) societies as too limited. Courts in particular operate not simply as ‘interpreters of a society’s collective conscience’ whose essential unity is buttressed by moral values enshrined in the law. Rather, courts have a creative function as well as capacity within the trial to accommodate disagreements within communities, including those deeply divided politically and where populations have been traumatised by state-sponsored violence. Osiel argued that limiting courts to producing authoritative pronouncements that reinforce an illusory solidarity in such societies failed recognise the benefits of discursive engagement with a society’s past, which can be cultivated by the process of prosecution. On his analysis, a discursive solidarity, not entertained by

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175 Osiel above n 6, 2-3, 37-55.
176 Ibid 1.
179 Osiel above n 6, 35.
180 Ibid 39.
Durkheim, can be fostered by the internal dynamics of the trial accompanied by public
discussion of matters raised beyond the walls of the courtroom.  

Discursive solidarity admits the reality and possible co-existence of conflicting
interpretations of history, whereas the Durkheimian view assumed there was only one story
to be told which evoked shared societal indignation at a breach of universally accepted moral
principles. Osiel conceived the transitional court as a site of civil dissension where parties
to the trial express opposing views of justice and the past events mediated by the ritual
application of legal procedure. A process of soul-searching by the affected community
accompanies the trial and though painful, it is also poetic. In describing the effect of the
trial of Adolf Eichmann in Israel, Osiel cited a Jewish poet’s metaphorical description of the
trial as capturing ‘the duality of our existence,’ that is, of the Jews ‘as a murdered people and
the story of Israel as nation sitting in judgment.’

Trials thus retain the element of social drama envisaged by Durkheim but, more importantly,
according to Osiel:

The judicial task …is to employ the law of evidence, procedure, and professional
responsibility to recast the courtroom drama in terms of the ‘theatre of ideas’ where large
questions of collective memory and even national identity are engaged.

By putting such issues at the forefront of the proceedings, the court contributes to the
emergence of a new social solidarity based not on consensus but engagement with
difference.

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181 Ibid.
182 Ibid 140.
183 Ibid 51.
184 Ibid 16.
185 Ibid citing Haim Gouri, ‘Facing the Glass Booth’ in Geoffrey H Hartman (ed), Holocaust Remembrance:
186 Ibid 3.
187 Ibid.
Osiel’s approach means that the trial’s concern with retribution, deterrence and broader expressivism will be reduced. While procedural rules will to some degree need to be modified, they must also constrain the public spectacle of the trial and stimulate public discussion ‘in ways that foster the liberal virtues of toleration, moderation, and civil respect.’ The pedagogical purpose of trial proceedings then is to ‘stimulate reflection’ not only on past wrongdoing but on prospective norms. While there is some correspondence here with Damaska’s view of expressivism, Osiel’s work harnesses the socio-political dynamics of the transitional trial for deeper localised purposes.

The significance of trials for mass atrocities calls for interpretation beyond the ‘curative’ or even symbolic meaning attached to punishment. However, Osiel left open the question of whether transitional courts ‘can entirely reconcile the traditional functions of criminal law: retribution and deterrence, with the dramaturgical demands of monumental didactics.’ This is because such trials play out a ‘two-level game: legal and political, doctrinal and historiographical.’ Therefore, Osiel stressed that because the community’s legal concepts and doctrines will typically ‘have been severed from the underlying moral and political issues at stake’, judges and court actors must apply a broad procedural brush. Crucially, the judiciary must allow all parties to the proceedings to ‘widen the spatial and temporal frame of courtroom story-telling’ to permit parties ‘to flesh out their competing interpretations of history’ and examine how the country was brought to a state where the crimes in question could happen. In this way debate within the court may resonate with public discourse beyond the courtroom.

From discursive engagement with the historico-legal story told within the court, bolstered by freedoms of speech, press and assembly outside the court, a discursive solidarity emerges. Discursive solidarity crystallises as common ground between differing perspectives on

188 Ibid 2
189 Ibid.
190 Ibid 50-51.
191 Ibid 293.
192 Ibid 296.
193 Ibid.
194 Ibid 50.
justice and the events of the past which is settled on by means of engagement and cooperation to form the fabric of new collective memory.\textsuperscript{195}

Damaska accepted Osiel’s view of the communicative value of civil dissension in transitional trials insofar as debates at trial concern contextual issues surrounding the alleged crimes. However, Damaska cautioned against advancing the didactic role of transitional courts as entertaining anything in the ‘theatre of ideas’ that flouts moral fundamentals or agreements on basic protections.\textsuperscript{196} Damaska suggested that any focus on narrow questions that stray from the universal moral minima of human rights law and its enforcement might lead to the suggestion that human rights are ‘no more than an ethnic custom of the West’ and as such incompatible with the ideals of international criminal justice.\textsuperscript{197} Similarly, he concluded that the trial platform ought not to permit the accused ‘freedom to advance his/her own account of events, unconstrained by legal relevancy’ and from which may be propagated views international criminal justice would otherwise discourage.\textsuperscript{198} While not opposed to adapting international criminal justice to local legal culture, Damaska sought to preserve its ‘educational mission’ within specific bounds and cautioned against providing space for enemies to represent international criminal justice as an ‘alien imposition.’\textsuperscript{199}

However, Osiel did not advocate the latitude in court proceedings feared by Damaska. His emphasis is on the capacity of the liberal trial model (with some procedural modifications), to foster essential dialogue in transitional societies from which local social solidarity destroyed by conflict may re-emerge. Legal procedure adapted to provide public space for reflection on the past mediates debate within the court. Although punishment of offenders forms part of the legal process, it is not the predominant ritual towards rebuilding solidarity. It is the process of engagement and deliberation begun by the trials that nurtures the fractured society over the longer term.

\textsuperscript{195} Ibid 51.
\textsuperscript{196} Damaska above n 98, 346-347.
\textsuperscript{196} Ibid 347.
\textsuperscript{197} Ibid.
\textsuperscript{198} Ibid 359.
\textsuperscript{199} Ibid 349.
Osiel does not engage with the modifications to criminal procedure that international courts have made. In particular, he does not address the role of victims’ voices in trial proceedings. His theory is a generic one based on the potential of legal process, sympathetically administered to foster deliberative recovery in the transitional society. Damaska’s view of the precedence of the expressive value of the transitional trial is also limited because his conclusions are based on the experience of the ad hoc Tribunals where the victim voice is absent, except as witness under adversarial procedures. Both theories have scope for deeper and richer interpretation if the victim is included through legal procedure which is more broadly dialogic and representational.

B Communication and Representation in the Transitional Trial

The creation of a platform from which views of monumental past events may be openly communicated was significant in the Cambodian context. The long-term impunity of the Khmer Rouge imposed collective amnesia on the society either by the necessity of non-reflection during the period of rebuilding crushed lives after the Khmer Rouge revolution, or the insistence upon forgetting by successive governments for the purpose of political stability. This is discussed in historical context in Chapter Three.

The Cambodian government’s connections (past and current) with remnant Khmer Rouge cadre affected the negotiation of the Agreement for creation of the ECCC with the UN. The government insisted that the court be located in Cambodia and comprised of a majority of Cambodian judges. Of international concern was Cambodia’s poor record of human rights enforcement, weak legal infrastructure and poorly trained judiciary, known to be subject to political interference. These factors called for special measures within the Agreement to ensure the Court functioned according to minimum international standards of justice. The

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201 See Report of the Secretary-General on the Khmer Rouge Trials UN Doc. A/57/769 (31 March 2003), [1], [11], [28-29].
202 Ratner, above n 200, 213. The special measures are discussed in Chapter Four.
special measures are discussed in Chapter Four. The ultimate form of the Court was a compromise to accommodate Cambodian sovereignty within an institution respecting human rights and due process of law.

Frédéric Mégret has pointed to the form of the ECCC in his analysis of hybridity in transitional trial forms. I discuss hybrid courts in detail in Chapter Two. The main elements of such courts are: their creation within the state where crimes were perpetrated; combined application of local and international law; and shared staffing of courts by national and international personnel. Mégret saw in the hybrid transitional court the potential for greater representation of interests affected by the crimes it prosecutes.

Mégret posited that the dual nature of certain international crimes provides a normative basis for the hybrid court form. Even where there is political will and functional domestic courts to support local prosecutions, the magnitude of some international crimes may so threaten our sense of humanity that an international interest in accountability arises. The ownership of such crimes by both national and international constituencies through the hybrid court form offered more representational justice by identifying and acknowledging the communities affected by them. He also suggested there should be ‘as much correspondence as possible between the nature of the crimes and the nature of the institutions judging them.’

Mégret departed from the dominant view of the expressive purpose of transitional trials when he described hybrid tribunals as ‘sophisticated attempts at striking the best possible balance between the competing pulls of sovereignty and universalism in a way that

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205 Mégret above n 203, 742.
206 Ibid 747.
207 Ibid 737.
208 Ibid 740-743.
209 Ibid 727.
maximizes the representational function of international criminal justice.210 While recognizing that formation of the ECCC was ‘probably above all a result of the pull and shove of international political negotiations,’ he described the Tribunal as one for whom the hybrid form was an appropriate fit.211 Describing the infamous Cambodian killing fields as a product of ‘domestic genocide…borne of the nihilist folly of a totalitarian regime,’ he concluded that a national court would not have done justice to what the world now views as clear breaches of humanity’s most fundamental norms.212 The presence of international judges at the ECCC signals the international interest in the prosecution of the perpetrators, while an international court situated in The Hague would not do justice to the conspicuous national interest in judging the crimes.213

The representational function identified by Mégret is realised by a shift in focus from the outcomes of the transitional trial in the form of verdicts and sentences, to their process.214 This, he wrote, invites recognition of the ‘symbolic, aesthetic or communicative function’ of such trials.215 Referring to Durkheim, he suggested that transitional trials function to reconstitute the social through the theatre of hybrid court processes.216 By focusing on the proceedings of the trial rather than their legal outcomes, the range of voices in trial processes expands the sociological meaning of the trial beyond the language of retribution and deterrence.217

Mégret did not examine the ECCC’s form in detail. However, as I discuss in Chapter Three, the application of inquisitorial criminal procedure under Cambodian law at the ECCC permits inclusion of the victim’s voice in proceedings through the civil party action to an unprecedented extent, which suggests a broader scope for representation of affected constituencies. This contrasts with the limited representational nature of proceedings in the

210 Ibid 747.
211 Ibid 747.
212 Ibid.
213 Ibid.
214 Ibid 742.
215 Ibid.
216 Ibid.
217 Ibid 741.
ICTY, where the victim role is restricted to that of witness under adversarial procedure. Moreover, the ICTY attracted criticism from Balkan communities because it was perceived as too remote from the affected communities and as such unrepresentative.\textsuperscript{218}

I suggest that the work of Osiel and Mégret taken together offers two markers of a communicative theory of trials: discursivity (or dialogue) and representation in trial process. Further indicators are recognition of victims’ rights to redress and representation under international law, and the potential of inquisitorial trial procedure for broadening the ambit of trial discourse.\textsuperscript{219} In addition, some peace and reconciliation studies inform the interpretation of the transitional trial in communicative terms. For example, Lederach’s web analogy of peace building, wherein the ‘critical yeast’ is the network of relationships connecting the multiple contributors to justice and reconciliation processes, could be seen at work at the ECCC.\textsuperscript{220} Networks of civil society groups actively engaged with the work of the Court through victim support and facilitated justice dialogue within communities. In addition, Valerie Braithwaite’s work on hope, power and governance theory advocated making room within political and legal institutions for the doing of the extraordinary through the design of institutional structures that respect competing voices, but allow collective hopes to be articulated and engaged.\textsuperscript{221} This had application at the ECCC by the willingness of trial actors to accommodate the voices and hopes of Cambodian society through structures and processes which fostered communication within and beyond the trials.

The expressivism of the transitional trial has some value in the divided and damaged societies they address. A small number of convictions, due process modelling and ritualised judicial pronouncements may promote rule of law development and advance the norm of accountability internationally. However, this thesis questions whether reliance on the theory of expressivism approaches the essence of transitional justice. The case of the ECCC presents

\textsuperscript{218} Dickenson above n 204, 301-305.  
\textsuperscript{219} This is discussed in detail in Chapter Four.  
a transitional justice mechanism whose communicative elements may outweigh the expressive value of its trials.
CHAPTER TWO
THE DEVELOPMENT OF THE TRANSITIONAL TRIAL

I  INTRODUCTION

The nature of expressivism discussed in Chapter One is reflected in the political actions creating international transitional courts. The courts and tribunals created since the Cold War era of 1948–1991 were vested with the expressive capital of the international community. This chapter explores the complexity of expressivism and its limitations as the theoretical basis of international transitional trials.

The chapter provides an overview of courts making up the modern international criminal justice system and identifies the general and specific expressivism underpinning its constituent courts. I argue that each court exhibited an expressive surplus in terms of their goals and success in bringing the perpetrators of international crimes to justice. However, there was a corresponding deficit in their communicative value by virtue of their lack of resonance within the communities they served.

An evolution in court forms brought hybrid transitional courts which, because of their blend of national and international elements, promised more locally relevant justice processes. The courts also began to incorporate features to enhance communication between the institutions and the societies affected by the crimes. This suggested the possibility of evaluating trials from a communicative as well as an expressive basis. However, the predominantly adversarial criminal procedure applied in most internationalised transitional trials may perpetuate a continuing communication deficit by too strictly limiting dialogue within trial proceedings.

II  PROSECUTING INTERNATIONAL CRIMES

Until recently, when a state failed to criminalise conduct or prosecute individuals where it had an obligation to do so under international law, there were few prospects of accountability
for international crimes.\(^1\) The prosecution of individuals for criminal offences is a function of the state pursuant to national criminal law. Criminal jurisdiction stems from the notion of the sovereignty of states under international law.\(^2\) Jurisdiction over crimes committed within states flows from the essential territoriality of sovereignty, while the principle of nationality gives states jurisdiction to prosecute nationals extraterritorially.\(^3\) Under the Westphalian world order, this was easily interpreted by states as freedom of action within sovereign territory towards their citizens with no guarantee of basic individual rights or international oversight of government actions. Internal sovereignty therefore, almost completely insulated governments and their representatives from criminal prosecution for abuse of their own citizens.\(^4\) Furthermore, sovereignty safeguarded state actors under international law by the grant of immunity to representatives of sovereign states from the legal processes of other states.\(^5\)

However, from the 1990s the international community endorsed the norm of accountability by instituting the first international criminal tribunals to enforce international human rights and humanitarian law. Those tribunals, and others that emerged to form the modern system of international criminal justice, prosecute individuals for crimes which are regarded as international due to their connection to international peace and security or their capacity to jolt the conscience of humanity.\(^6\) At a minimum those crimes include genocide, crimes against humanity and potentially piracy and aggression.\(^7\) It has also proved possible to prosecute terrorism under a national criminal code in at least one court brought into being by the United Nations Security Council.\(^8\)


\(^{2}\) Ibid.


\(^{7}\) Williams above n 1, 2.

\(^{8}\) See discussion of the applicable law of the Special Tribunal of Lebanon in this chapter.
The path to vesting international courts with power to hold political leaders and others individually accountable for responsible for atrocity crimes began at the Nuremburg and Tokyo International Military Tribunals. Initiated by the Allied powers following the Second World War, the Tribunals were exercises in victors’ justice by international trial. The broader authority of later international criminal tribunals reinforced the limits of state sovereignty. However, tension remained between the international interest of maintaining peace and security, enforcing international criminal law and the enduring force of the sovereignty of states. These factors were reflected in both political action and inaction towards creating international courts to prosecute international crimes. An overview of political actions with respect to the creation of international criminal justice institutions will illustrate the interplay of the above factors.

A The International Military Tribunal at Nuremburg

Following Germany’s seizure of Austria and Czechoslovakia in September 1939, Adolf Hitler’s declared intention to invade Poland marked the beginning of the Second World War. In 1942, as reports of mass atrocities by German forces were received the Allied Powers established the United Nations War Crimes Commission to investigate and gather evidence of war crimes. In the Moscow Declaration of 1 November 1943 Britain, France and the Soviet Union expressed determination to prosecute Nazi operatives for war crimes. The War Crimes Commission set the stage for creation of the first international trials at the end of the war by preparing a Draft Convention for the Establishment of a United Nations War Crimes Court.

However, the form of the trials was not quickly agreed upon between the Allied powers. Execution of the Nazi leadership of Germany was initially favoured between the Allies, but

9 Williams above n 1, 2.
10 Bassiouni above n 5, 403-404.
America ultimately pressed for trials and triumphed.\textsuperscript{13} Set against Stalin’s initial preference for the mass shootings of Germans with some show trials, and the United States Treasury Secretary Henry Morgenthau’s plan for harsh treatment of Germany with summary execution of many Germans, was Henry Stimson’s opposition to summary executions. Stimson saw that option as vengeful, uncivilised and politically counter-productive in breeding more war.\textsuperscript{14} The Stimson view, which ultimately prevailed, called for a display of due process in substantively American style.\textsuperscript{15} Trials of Nazi war criminals were designed to expose to the German people the system of Nazi terror and demonstrate American resolve to destroy any residue of it.\textsuperscript{16} Trials rather than summary justice reflected the Stimson sense of the nobility of the American legal tradition, with criminal procedure consistent with the United States \textit{Bill of Rights} as its public expression.\textsuperscript{17}

In 1945 at the London International Assembly, a group of scholars and public officials developed the norms that emerged in the 1945 Charter of the International Military Tribunal of Nuremburg (IMT).\textsuperscript{18} There, the United States advanced the argument that the future peace of the world would be served by an international judicial determination that aggressive war is a crime under international law warranting individual criminal prosecution of those most responsible.\textsuperscript{19}

The decision to hold trials also seemed to establish a foundation for a new world order based on the rule of law.\textsuperscript{20} Indeed, the Charter of the IMT did lay a foundation for the development of a body of international criminal law and the creation of the new generation of international

\begin{itemize}
\item \textsuperscript{13} Gary Bass, \textit{Stay the Hand of Vengeance: the Politics of War Crimes Tribunals} (2000) 147.
\item \textsuperscript{14} Ibid 151.
\item \textsuperscript{15} Ibid.
\item \textsuperscript{16} Ibid 163 citing the \textit{Stimson Diaries}, Volume 48, 36, 44.
\item \textsuperscript{17} Ibid 165, 173.
\item \textsuperscript{18} Bassiouni above n 5, 404; See also \textit{Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis Powers} and \textit{Charter of the International Military Tribunal} 82 UNTS 279.
\item \textsuperscript{19} Bass above n 13, 75.
\item \textsuperscript{20} Leila Nadya Sadat, ‘The Nuremburg Paradox’ (2010) 58 \textit{American Journal of Comparative Law} 151, 153.
\end{itemize}
courts which emerged nearly five decades later.\textsuperscript{21} However, the reality of the Nuremburg trials was their creation for expressive effect within narrow parameters.

Amann argued that at Nuremburg the expression of condemnation of the evils of Nazism received as much attention as the punishment of indicted war criminals.\textsuperscript{22} In his opening statement the Head of the United States prosecution team, Robert H. Jackson, captured the essence of the trials when he spoke of the defendants not as individuals, but as ‘symbols of an evil that had befallen Europe and that must never recur.’\textsuperscript{23}

What makes this inquest significant is that these prisoners represent influences that will lurk in the world long after their bodies have turned to dust. We will show them to be living symbols of racial hatreds, of terrorism and violence, and of the arrogance and cruelty of power. They are symbols of fierce nationalism and militarism, of intrigue and war-making which have embroiled Europeans generation after generation, crushing its manhood, destroying its homes, and impoverishing its life.\textsuperscript{24}

Couched in these terms, the statement had expressive value in its condemnation of the Nazi authorities while not denouncing the nation as whole.

The IMT brought the first charges for crimes against humanity under Article 6 (c) of its Charter, but the crime was limited to the context of war or aggression towards other states.\textsuperscript{25} Connecting crimes against humanity to a state of war made possible the prosecution of Nazi officials for war crimes and large-scale, systematic persecution based on racial, religious, or political grounds against German Jews during the war. However, the requirement of a state of war prevented prosecutions for systematic persecution of Jews prior to the war.

\textsuperscript{23} Ibid.
\textsuperscript{24} Opening Statement of Supreme Court Justice, Robert H. Jackson, Chief Prosecutor for the International Military Tribunal, 21 November 1945, reprinted in \textit{Trial of the Major War Criminals before the International Military Tribunal} (1948) Volume 2, 99.
Accordingly, the IMT Charter’s jurisdictional limits meant that the trials failed to fully comprehend the scope of the holocaust and the victimisation of European Jewry.26

The IMT considered whether the Charter’s provisions on crimes against peace and crimes against humanity constituted retroactive criminal law.27 In justification, the Tribunal construed the Article 6 (a) crime of crimes against peace provision as rooted in the larger principle of justice in circumstances where treaties are defied and neighbouring states are attacked without warning.28 The prosecution of crimes against humanity was justified in terms of the offence to humanity the crimes represented grounded in humanity itself, the law of nations and natural law.29 As such the legal status of the charge transcended the precedence of national law pursuant to the principle of state sovereignty.30 The perpetrators of such a crime were assumed to be enemies of mankind under international law and thus attracting universal jurisdiction.31

Thus, the IMT’s judgement of Nazi war criminals confronted the violent effects of extreme manifestations of state sovereignty and attendant unbridled disregard for human dignity.32 Harnessing the expressive capital of criminal law with its condemnatory language and structures, the IMT declared certain limits to state power and sovereign immunity when it stated that ‘individuals have international duties which transcend the national obligations of obedience imposed by the individual State.’33

However, the IMT based its judgement primarily on Germany’s diplomatic and military records of the Nazi period. While the availability of documentary evidence and large pools of financial assistance largely from the United States to support legal teams made for

27 Cryer above n 21, 39-40, 248-249, 286.
30 Ibid.
31 Ibid 2557.
33 IMT Judgment above n 28, 221.
expeditious trials, the involvement of crime survivor communities was minimal. The failure to include victim testimony or any substantive forum for victim communities further narrowed the breadth and nature of the proceedings. This maximised the trials’ expressive value to a global audience, but minimised their communicative capacity within affected constituencies.

B The International Military Tribunal for the Far East in Tokyo

The creation of the International Military Tribunal for the Far East (IMTFE) was by unilateral political action. Unlike the IMT, the drafting of the Tokyo Tribunal’s Charter was by executive order, rather than an international conference. Following the Potsdam Declaration on 14 August 1945, the United States Joint Chiefs of Staff commissioned General Douglas MacArthur to set up international courts for the investigation and arrest of Japanese war crimes suspects. On 19 January 1946, MacArthur ordered the creation of the IMTFE to implement the terms of the Japanese surrender to the Allied powers. The Allies were consulted after the issuance of the order; a position purportedly justified by the greater military contribution of the United States against Japan and victory in the war. Like the IMT, the IMTFE had jurisdiction over war crimes, crimes against humanity, and crimes against peace. Participation in a common plan or conspiracy to commit crimes against peace, and crimes against humanity were also within the Tribunal’s jurisdiction. Beyond this similarity, as Cryer wrote, ‘it is almost as if the Nuremberg and Tokyo IMTs are related in the manner that Dorian Gray was to his painting.’

Though the IMT was certainly criticised as representing victor’s justice, it conducted trials in a manner generally perceived as fair. The IMTFE, on the other hand, has been assessed

35 Ibid.
37 Cryer above n 21, 43-44.
38 Beigbeder above n 36, 38.
39 Cryer above n 21, 46.
as fair in terms of its governing instruments, but substantively unfair in their application.\textsuperscript{40} The nature of selectivity in the indictment process and unfairness towards the defendants at trial stand out as the reasons the Tokyo trials are now ‘almost totally ignored.’\textsuperscript{41} Several of the Tribunal judges were opposed to the exclusion of Japanese Emperor Hirohito from prosecution. Judge Bernard found the exclusion on grounds of expediency for the Allied occupation in Japan unacceptable.\textsuperscript{42} Tribunal President Webb also saw the emperor’s immunity from prosecution as in the interests of the occupying power, and voted against the death penalty for the defendants on the grounds that Hirohito, who had the greatest authority over conduct of the war, had not been indicted.\textsuperscript{43}

Judge Pal criticised the prosecution arguments and asserted that the legitimacy of the trial was tarnished by the hypocrisy of the Allies towards the defendants. After a history of Western colonial coercion, the Japanese defendants should not have been condemned for following European precedents in warfare. Moreover, no crime committed by the defendants approached the ubiquity of dropping nuclear bombs on Hiroshima and Nagasaki.\textsuperscript{44}

West Germany initially rejected the Nuremburg precedents but following reunification they were widely accepted within the country. Moreover, in 1998, Germany was a strong supporter of the creation of the International Criminal Court.\textsuperscript{45} However, the Tokyo trials failed to acquire legitimacy in Japan.\textsuperscript{46} There was a corresponding lack of pedagogical value as international trial models. Thus, Drumbl concluded that the didactic value of international proceedings is not guaranteed.\textsuperscript{47} Unredeemed from the bias of victors’ justice and unilateral political action, the IMFTE seems a model of the potential problems associated with

\textsuperscript{40} Neil Boister and Robert Cryer, \textit{The Tokyo International Military Tribunal: A Reappraisal} (Oxford University Press, 2008) 324-5.
\textsuperscript{41} Cryer above n 21, 47.
\textsuperscript{43} Ibid.
\textsuperscript{44} Ibid 207.
\textsuperscript{46} Boister above n 40, 316, 321.
\textsuperscript{47} Mark A. Drumbl, \textit{Atrocity Punishment and International Law} (Cambridge University Press, 2007) 175.
prosecuting international crimes in such a mode. The IMFTE legacy therefore, is correspondingly expressive in a negative sense.

C International Crimes and the Cold War

While the International Military Tribunals established a jurisdictional foundation for the prosecution of international crimes, the period of the Cold War (1948–1991) was a one of expressive political inaction with respect to the creation of international transitional courts. However, the period saw the development of human rights and international criminal law, albeit constrained by state sovereignty concerns.

After the IMT trials, the United Nations General Assembly unanimously affirmed principles of law of law enshrined in the IMT Charter.\(^48\) The United Nations (UN) also commissioned a formulation of the Nuremburg principles by the International Law Commission.\(^49\) A new legal framework for human rights law emerged but encountered opposition centred on sovereignty issues. In 1948, the Universal Declaration of Human Rights (UDHR) was adopted, proclaiming rights pursuant to Article 55 of the United Nations Charter. Article 55 called for ‘universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion,’ while Article 56 invoked members’ commitment to cooperate in the achievement of that purpose.\(^50\) That criminal sanction might attach to a state’s failure to comply with human rights standards was not contemplated then as states continued to view their dealings with their own citizens exclusively as a matter of national prerogative in line with Article 2 (7) of the Charter, subject only to the UN Security Council enforcement power to maintain international peace and security pursuant to Chapter VII.\(^51\)

\(^{48}\) UNGA Res 95 (1) UN Doc A/RES/1/95 (11 December 1946).


\(^{50}\) UN Charter arts 55, 56.

\(^{51}\) Dugard above n 25, 277.
In the same year, the Convention on the Prevention and Punishment of the Crime of Genocide established a duty of states to prosecute human rights violations amounting to genocide.\textsuperscript{52} While it was envisaged that the Convention would include protection against genocidal acts for social and political groups, the negotiators of the Convention ultimately determined to exclude the possibility.\textsuperscript{53} Article II of the Convention defines genocide by reference to five acts directed only against a ‘racial, religious, national or ethnical group with intent to destroy the group in whole or in part.’\textsuperscript{54} Limiting the crime in this way was the result of drafting at the insistence of the Soviet Union to exclude alleged atrocities against political, social or economic groups.\textsuperscript{55} Government-sponsored repression of political or social groups therefore falls outside the Convention definition.

The Genocide Convention also provided that genocidal acts would be ‘tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal institution as may have jurisdiction’ to do so.\textsuperscript{56} In practice, both the limits of the definition of the crime and the absence of any international criminal tribunal until 1993 meant that individuals who committed acts against political groups with genocidal intent could evade prosecution. Orentlicher argued that opposition from states on the basis that members of governments might be subject to prosecution, and that this could threaten conditions of international peace effectively inverted the justification for the Nuremberg prosecutions of crimes against humanity.\textsuperscript{57} Thus, the Convention was expressive for what it excluded from the realm of prosecution.

Added to the developing human rights framework were regional Conventions, such as the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, as well as the International Covenant on Civil and Political Rights (ICCPR) in 1966. Both enhanced certain rights granted under the UDHR and provided machinery for gathering data.

\textsuperscript{52} Convention on the Prevention and Punishment of Genocide Opened for signature 9 December 1948, 78 UNTS 277(entered into force 12 January 1951) [Genocide Convention].
\textsuperscript{53} Cryer above n 21, 176.
\textsuperscript{54} Genocide Convention. art II.
\textsuperscript{55} Ratner above n 4, 246.
\textsuperscript{56}Genocide Convention art VI.
\textsuperscript{57} Orentlicher above n 29, 2559.
on signatory state’s compliance, while allowing a means for individual recourse to international monitoring bodies when rights were violated.\(^{58}\) However, the instruments were similarly expressive in what they failed to include; for example, both were silent as to the culpability of state officials under international law for gross human rights violations against their own citizenry. Furthermore, the failure of the UN to create a permanent international criminal court seemed to indicate that prosecutions to enforce law against serious violations of human rights would not receive international support even as evidence of state-sponsored violence increased.\(^{59}\)

During the years of the Cold War as international tensions between the Soviet Union and the United States mounted, the lack of political will within the UN Security Council on security matters hampered action to address impunity for international crimes occurring on a massive scale in numerous states.\(^{60}\) In cases of civil war where egregious human rights violations occurred within the territory of a state, the international community did not intervene and justice mechanisms in the aftermath of conflict were decided upon by successor regimes based on national political imperatives.\(^{61}\)

In some states, trials were chosen as the appropriate transitional justice mechanism; for example, the case of trials in 1975 of leaders of the military junta that ruled Greece from 1967–1974.\(^{62}\) As the Soviet empire declined and former authoritarian regimes transitioned towards democracy, amnesty laws and truth commissions were engaged in the Americas to placate powerful military elites unwilling to cooperate if faced with prosecutions. The experience of Argentina in the 1980s exemplifies the nature of political transitions of the time: first, resistance by a former military dictatorship to national elections without amnesty laws; second, subsequent attempts by the elected president Raul Alfonsín to prosecute top

\(^{58}\) Dugard above n 25, 277.

\(^{59}\) Ibid.


\(^{61}\) Dugard above n 25, 278.

military leaders for past abuses met with uprisings leading to the making of an end date for trials and creation of a truth commission as a substitute for compromised trial process.\textsuperscript{63}

Thus, in the several decades after the Nuremburg trials, accountability for grave human rights violations was captive to the ‘realpolitik of political settlements’ often with impunity for state-sponsored atrocities.\textsuperscript{64} In the background however, the UN commissioned work by the International Law Commission on a draft code of offences against the peace and security of mankind continued, and a framework for international criminal law through an expanding body of treaty law was emerging.\textsuperscript{65} The Geneva Conventions of 1949 and the 1977 Protocols thereto codified international humanitarian law and obligated states to extradite or prosecute individuals responsible for interstate crimes wherever they located them.\textsuperscript{66} The 1984 Convention against Torture required States parties to criminalise and prosecute certain offences committed within their territory and established universal jurisdiction in the event of failure to prosecute.\textsuperscript{67}

Incremental legal limits placed on sovereign prerogatives in this way also informed debates among human rights activists and international lawyers on the role international law could play in shaping the policies of new governments towards the crimes of former regimes, and in protecting fragile new democracies.\textsuperscript{68} Simultaneously an international grassroots movement challenged international acquiescence to the pervasive state practice of impunity.\textsuperscript{69}

Scholarly debate continued between transitional justice theorists on the dynamics, benefits and shortcomings of the various justice mechanisms that might be engaged to assist fragile

\textsuperscript{65} UNGA Resolution 177 (II) UN Doc A/RES/177(II) (21 November 1947).
\textsuperscript{66} Geneva Convention IV Relative to the Prevention of Civilian Persons in Time of War opened for signature 12 August 1949 75 UNTS 287 art 146.
\textsuperscript{68} Orentlicher above n 29, 2542.
\textsuperscript{69} Laplante above n 63, 934.
societies. However, as Cold War tensions subsided, the 1980s trend in transitional justice of amnesty, with or without truth commissions, to mark a new government’s departure from an old regime was overtaken by new legal action at the geopolitical level.

III CREATING INTERNATIONAL CRIMINAL COURTS

In 1992, the spectre of ‘ethnic cleansing’ in the Balkans involving the forced removal of populations, brutality and inhumane acts against civilians raised the prospect of another holocaust in Europe. World public opinion opposed inaction by the international community and threatened the credibility of the UN. The UN Security Council, pursuant to Chapter VII of the UN Charter, took the unprecedented step of creating an international criminal tribunal to prosecute violations of international humanitarian law occurring on a massive scale in the territory of the Former Yugoslavia. Thus, by ad hoc political action unconstrained by sovereignty concerns, the Security Council tested the expressive force of international criminal prosecutions.

The new tribunal was the International Tribunal for the Former Yugoslavia (ICTY). In 1994, by similar ad hoc process, the Security Council created the International Criminal Tribunal for Rwanda (ICTR). The two international tribunals became known as the ad hoc Tribunals. Although experimental in nature, they inaugurated trials rich in expressivism as the dominant mode of transitional justice in societies riven by mass violence.


The establishment of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in 1993 occurred during an armed conflict as peace negotiations were not completed until several years after the Tribunal’s creation. Akhavan noted that, while these circumstances were unique, the ICTY represented demand for institutionalised justice which ‘perhaps inadvertently’ became an integral part of the peace process.\(^{75}\) Against the long-term practice of \textit{realpolitik} overriding justice for the perpetrators of mass crimes, Scheffer argued that multiple reports made by the United States to the Security Council in early 1993, which substantiated the commission of atrocities in Bosnia and Croatia, made it implausible to dismiss the issue of accountability.\(^{76}\) Following the Council’s unanimous endorsement of an ‘in principle’ resolution to establish a criminal tribunal to address identified crimes within the Former Yugoslavia, the United States Secretary of State Madeleine Albright addressed the Council:

\begin{quote}
There is an echo in this chamber today. The Nuremburg principles have been reaffirmed. We have preserved the long-neglected compact made by the community of civilised nations 48 years ago in San Francisco to create the United Nations and enforce the Nuremburg principles. The lesson that we are accountable to international law may have finally taken hold in our collective memory. This will be no victor’s tribunal.\(^{77}\)
\end{quote}

Over the following years, scholars claimed the expressive value of punishment in deterring perpetrators of crimes that were now firmly prohibited in human rights and international humanitarian law.\(^{78}\) In time the ICTY conveyed the ‘moral propaganda of international criminal justice’ against would-be aggressors at large.\(^{79}\)

\(^{75}\) Akhavan above n 71, 259.
\(^{76}\) David Scheffer, \textit{All the Missing Souls: A Personal History of the War Crimes Tribunals} (Princeton University Press, 2012), 22.
\(^{77}\) Ibid.
\(^{79}\) Ibid (Akhavan) 742.
The ICTY as the first international tribunal of its kind had functional difficulties in its first years. It took 14 months to appoint a prosecutor due to the opposition of Russia to any NATO country appointment or any Muslim. The ICTY struggled until after the negotiation of the Dayton Peace Accords to secure cooperation from states of the Former Yugoslavia and NATO forces in the investigation of cases and arrest of accused persons. By 1997, however, international forces were providing security for on-site investigations and were arresting higher level ICTY indictees. This gave impetus to efforts to deter conflict entrepreneurs who were invested in the violent manipulation of social values to consolidate their economic or political power. The expressive potential of enforcement or even the prospect of it through issuance of warrants promised to dissuade existing or future perpetrators through the loss of reputation and power.

B International Criminal Tribunal for Rwanda (ICTR)

In April 1994, a murderous rampage by Rwandan extremists attempted to expel the Tutsi people from Rwanda. The Special Rapporteur of the United Nations Commission on Human Rights, Rene Degni, reported on the unprecedented nature of the massacres in Africa, adding that they were systematic and incited by the media. Referring to the definition of genocide in the Genocide Convention he noted that evidence of the elements of the crime existed. The UN Security Council established a commission of experts to investigate violations of international humanitarian law in Rwanda, while the idea of establishment of an international tribunal circulated in the media and in diplomatic circles. By November 1994, the UN Security Council determined that ‘genocide and other
systematic, widespread and flagrant violations of international humanitarian law committed in Rwanda’ constituted a threat to international peace and security. The Security Council adopted Resolution 955 to authorise creation of the International Criminal Tribunal for Rwanda (ICTR) pursuant to Chapter VII of the Charter.

The creation of the second tribunal seemed indicative of the determination to signal an end to impunity for international crimes. Supporters of the new institutions, including international scholars, legal professionals and leaders of human rights organisations rallied in support of the two ad hoc Tribunals as representing foundational steps towards the credible enforcement of international humanitarian law, and development of a body of jurisprudence to instil universal norms within fractured societies.

C Norm Development by the ad hoc Tribunals

While both institutions experienced operational problems in their early years, they nonetheless produced a body of expressive jurisprudence. Convictions for genocide were achieved and elements of the crime refined. In the area of war crimes enforcement the Tadic appeal decision affirmed that war crimes could be committed in both international and internal armed conflicts.

The ad hoc Tribunals also contributed to development of international criminal law in the area of sexual violence. The ICTR’s Akayesu decision established that sexual violence

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92 Ibid.
93 See for example, Prosecutor v Kambanda (Judgement) (International Criminal Tribunal for Rwanda, Trial Chamber 1, Case No ICTR-97-23-S, 4 September 1998); Prosecutor v Akayesu (Judgement) (International Criminal Tribunal for Rwanda, Trial Chamber 1, Case No ICTR 96-4-T, 2 September 1998); Prosecutor v Musema (Judgement) (International Criminal Tribunal for Rwanda, Trial Chamber 1, Case No ICTR 96-13 27 January 2000).
94 Prosecutor v Tadic (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) (International Criminal Tribunal for the Former Yugoslavia) Trial Chamber, Case No ICTY-94-1-AR72, 2 October 1995) [97-137].
including rape constituted the enumerated act of serious bodily and mental harm under Article 2 (2) (b) of the Genocide Convention. While the statute of the ICTY granted jurisdiction to prosecute rape as a crime against humanity, the ICTR reshaped formulations of the elements of the crime as physical invasion of a sexual nature in coercive circumstances. In Prosecutor v Kunaric the Tribunal held that the key criterion was lack of consent and violation of sexual autonomy. Furthermore, in the Appeal Chamber, it was held that while force or threat of force may be relevant in providing evidence of the absence of consent, force is not an element per se. The ICTY also found that rape can constitute torture where the elements of torture are satisfied and secured convictions on that basis.

Thus, from court chambers in The Hague and Arusha, Tanzania, international judges of the ad hoc Tribunals developed and expanded the normative content of human rights and international humanitarian law jurisprudentially. The international criminal justice paradigm emerged as the judges elucidated human rights norms and applied them to the two post-conflict contexts through formal due process of law.

D Expressive Surplus and Communicative Deficit at the ad hoc Tribunals

Underpinning the emergent justice paradigm was the view that international criminal accountability is preferable to private vengeance, compromised national criminal justice, collective amnesia or amnesty regarding past crimes of atrocity. International criminal trials were also espoused as mollifying victims’ calls for justice thereby fostering

95 Prosecutor v Akayesu (Judgement) (International Criminal Tribunal for Rwanda, Trial Chamber 1, Case No 96-4-T, 2 September 1998) [706-707].
96 Prosecutor v Akayesu (Judgement) (International Criminal Tribunal for Rwanda, Trial Chamber 1, Case No 96-4-T, 2 September 1998) [597-598].
97 Prosecutor v Kunaric, Kovac & Vukovic (Judgement) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No ICTY IT-96-23/1 & IT 96-23/1, 22 November 2001) [440-460].
98 Prosecutor v Kunaric, Kovac & Vukovic (Appeal Judgement) (International Criminal Tribunal for the Former Yugoslavia) Appeals Chamber, Case No ICTY IT-96-23/1 & IT 96-23/1, 22 November 2002 [129].
99 Prosecutor v Delalić, Mucić, Delić & Landžo (Judgement) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No ICTY IT-96-21-T, 22 November 1998) [475-497].
101 Alvarez above n 91, 374.
reconciliation, while promoting the national and international rule of law.\textsuperscript{103} They were conceived as operating to end the impunity of those who violate human rights, while providing a mechanism for the transformation of social norms in developing democracies.\textsuperscript{104} Both ad hoc Tribunals were richly expressive in a positive sense in terms of their multiple goals, their achievements in securing convictions of high-level perpetrators and the development of international norms.\textsuperscript{105} However, their communicative value in the communities they served proved to be minimal. While the ICTY offered the perception of legitimacy, impartiality and efficacy attached to international trial proceedings, their remoteness from, and lack of connection with, local Balkans constituencies eroded their legitimacy.\textsuperscript{106} An empirical study in 1999 indicated that perceptions of the ICTY by a large sample of lawyers and judges of various ethnic backgrounds within Bosnian society were poorly informed about the work of the Tribunal and suspicious about its methods and trial outcomes.\textsuperscript{107} Further studies revealed that negative local perceptions of the ICTY increased over time among Bosnians, Croats and Serbs alike.\textsuperscript{108} The lack of perceived legitimacy stemmed from the lack of inclusion of the local population, even as observers, and the application of adversarial criminal procedure unfamiliar to local legal professionals trained in the inquisitorial procedure of the civil law tradition.\textsuperscript{109} Similarly, at the ICTR, survivor witnesses complained of being poorly treated by the Tribunal and felt estranged by the nature of the proceedings, which were alien to the communal justice

\begin{thebibliography}{99}
\item Alvarez above n 91, 374.
\item Damaska above n 100, 331-335.
\item Dickinson above n 106, 302-303 citing Justice Accountability Survey above n 107, 144-47.
\end{thebibliography}
In both transitional contexts under the adversarial procedural model, the role of the victim in proceedings was limited to that of witness. This had the effect of excluding non-probative facts which local audiences might have viewed as relevant. Consequently, victim story-telling was truncated and may have led to a distortion of the historical record. Drumbl also observed that the international procedure of the ICTR failed to sufficiently address the structural dynamics of the Rwandan genocide and failed to provide a clear voice to key stakeholders in the justice process to support communal reconciliation. Raub suggested that the primacy of ICTR jurisdiction deprived the local government of the right to try defendants under local law and attendant legitimacy at a crucial time in the nation’s recovery.

In the former Yugoslavia, politicians capitalised on the ICTY’s unpopularity with local populations and spread negative information about the work of the Tribunal to expand their political power. The late incorporation of outreach programs attempted to redress perceptions of bias and lack of information about the work of the Courts among local populations. The programs revealed that the facilitation of dialogue among those involved in the conflict is crucial in altering perceptions of the past and has flow-on effects within recovering communities. Thus, the ad hoc Tribunals exhibited an expressive surplus with a corresponding communicative deficit due to the lack of resonance with the affected transitional societies.

Against this background, massive case loads, delays and cost overruns precipitated operational strategies to implement completions plans for both Tribunals. This involved

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111 Drumbl above n 47, 176-177.
114 Ramji-Nogales above n 108, 29.
115 Ibid 30.
the transfer of cases from the jurisdiction of the ad hoc Tribunals to national courts. This had the incidental expressive effect of nationalising the process of accountability.\textsuperscript{117}

At the ICTY, the strategy resulted in a change in the Tribunal’s jurisdictional relationship with national courts in Bosnia and coincided with demand at the national level for the establishment of a federal war crimes court in Bosnia Herzegovina.\textsuperscript{118} By the end of 2004 a War Crimes Chamber in the State Court of Bosnia and Herzegovina not only facilitated implementation of the completion strategy, but made possible the exercise of domestic criminal jurisdiction over international humanitarian law violations.\textsuperscript{119}

The War Crimes Chamber (WCC) was established by Bosnian law amending the Law on the State Court.\textsuperscript{120} The Office of the Higher Commissioner interpreted its powers under the Dayton Peace Accords as including promulgation of laws with respect to the judiciary.\textsuperscript{121} International and national judges were appointed to the WCC and under the revised Rule 11bis of the ICTY Rules of Evidence and Procedure, both cases and investigative files were transferred from the Tribunal to the national court from 2005, albeit with the ICTY retaining a monitoring role over domestic prosecutions.\textsuperscript{122} In the process the ICTY came to play a more direct role in local-capacity-building through processes of norm leadership and transfer of best practices.\textsuperscript{123}

While the national War Crimes Chamber assisted by the ICTY staff ultimately engaged Bosnians in justice processes, the administrative action was precipitated by the need to wind up the work of the international court. The ICTY, although activating wider outreach in its later years, retained its communication limiting adversarial process.


\textsuperscript{119} Ibid.

\textsuperscript{120} Williams above n 1, 106.

\textsuperscript{121} Ibid 103.

\textsuperscript{122} Ibid.

\textsuperscript{123} Burke-White above n 118, 335-339, 347.
Negotiating the Rome Statute

Despite their poor image at the local level, the expressive model of justice provided by the temporary ad hoc Tribunals as they tackled the complex task of prosecuting the perpetrators of genocide and other international crimes galvanised many states towards creation of a permanent international justice mechanism to address the atrocity crimes of the modern era.\textsuperscript{124} Creation of an international court by treaty permitted states’ input into an institution that potentially threatened sovereign interests through holding senior government officials internationally accountable for certain international crimes.\textsuperscript{125} This issue coloured negotiations between states and the drafters of the ICC Statute over a period of four years as a balance between State interests and a credible form of permanent international justice was sought.

The final form of the Statute was fleshed out at the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court in Rome from 15 June 1998 to 17 July 1998.\textsuperscript{126} The complex and sometimes controversial negotiations involved navigating a path through conflicting conceptions of the Court held either by blocs of States or individual States refined by input from NGO Coalitions representing a wider constituency of interest within the international system.\textsuperscript{127} Ultimately, the resultant instrument reflected a compromise to accommodate the particular interests of States, while expressing the international normative interest of repressing international crimes through the existence of a permanent institution.\textsuperscript{128} The Statute of the Court came into force on 1 July 2002.\textsuperscript{129}

\textsuperscript{124} Broomhall above n 6, 71.
\textsuperscript{125} Ibid.
\textsuperscript{126} Ibid.
\textsuperscript{127} Broomhall above n 6, 72-73.
\textsuperscript{128} Ibid.
\textsuperscript{129} Rome Statute of the International Criminal Court, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) [ICC Statute].
The Mission of the ICC

Reflecting the hopes of the Court’s founders, the Preamble of the ICC Statute situates the Court within the state-based international system as a permanent justice mechanism with jurisdiction over ‘the most serious crimes of concern to the international community’ for the purpose of ending impunity for such crimes and contributing to their prevention in the interest of world peace and security.¹³⁰

Achievement of the ICC mission is influenced by three factors: first, the ICC Statute reaffirms State sovereignty through recognition of the primacy of national prosecution over international crimes in the concept of ‘complementarity’;¹³¹ second, there is a delicate interplay between the independence of the ICC in mounting international prosecutions and respect for the role of the Security Council under the UN Charter in the maintenance of international peace and security;¹³² and third, a statutory regime of cooperation and support between States Parties in investigations and other prosecutorial processes.¹³³

Primacy of National Jurisdiction and Complementarity

Under the Rome Statute the exercise of ICC jurisdiction and admissibility are embedded in the joint operation of two fundamental elements of the international legal system: jurisdiction in criminal matters in accordance with state sovereignty based on the principles of territoriality and active personality (Article 12); and an admissibility regime based on the concept of complementarity (Article 17), whereby judicial proceedings may only be activated when States with jurisdiction are either unwilling or unable genuinely to exercise the right to prosecute.¹³⁴ State sovereignty therefore operates to make the ICC a court of last resort for

¹³⁰ ICC Statute Preamble.
¹³² Broomhall above n 6, 82.
¹³³ Ibid 83; Kaul above n 131, 578.
¹³⁴ Kaul above n 131, 577.
cases where primary jurisdiction over perpetrators of international crimes will not or cannot be properly exercised through national criminal justice systems.\textsuperscript{135}

Article 12 attaches specific preconditions to the exercise of jurisdiction by the Court. The ICC may exercise jurisdiction when either the State of the territory where the crime is committed or the State of nationality of the accused is party to the Statute.\textsuperscript{136} The principles of territoriality and nationality thus preclude the exercise of jurisdiction by the State of custody of a suspect or the State of nationality of victims.\textsuperscript{137} However, Article 12 (3) allows non-State parties to give consent to the Court’s jurisdiction by way of an ad hoc declaration filed with the Registrar.\textsuperscript{138}

The regime of primacy and complementarity has an expressive dimension. Burke-White noted the positive expressive value of prosecuting a globally renowned despot in a model international court in The Hague.\textsuperscript{139} On the other hand, it may be negatively expressive to extract the suspected perpetrator from the domestic context of the crimes and risk portrayal of the proceedings as ‘an international abstraction rather than the prosecution of crimes rooted in particular societal causes.’\textsuperscript{140}

\section*{4 Victims’ Participation and Redress}

The ICC was the first international court with a statutory scheme which included active victim participation rights in trial proceedings.\textsuperscript{141} The Court also took steps to ensure the effective protection and treatment of victims as they interacted with the ICC in order to

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\begin{flushleft}
\textsuperscript{135} Ibid.
\textsuperscript{136} ICC Statute art 12 (2) (a), (b).
\textsuperscript{138} ICC Statute article 12 (3).
\textsuperscript{141} McGonigle Leyh, above n 34, 225.
\end{flushleft}
prevent any further victimisation.\textsuperscript{142} The statutory inclusion of rights to participation in trial proceedings, reparation and the creation of a victims’ trust fund by the ICC suggested a shift in international criminal trials from purely retributive justice to recognition of their restorative potential. In practice, while ICC trials were more victim-oriented than previous international courts, the Court’s adoption of adversarial proceedings meant that a victim-centred approach to justice did not eventuate.\textsuperscript{143}

During the ICC Statute negotiations, France and some civil law countries argued for a participatory regime along the lines of the French civil law system which grants victims civil party status within the criminal proceedings.\textsuperscript{144} However, the ICC’s adversarial procedure rendered the victim a potential third protagonist in ICC trials which threatened to upset the balance of the dual party procedural model.\textsuperscript{145} The ICC statutory provisions on victim participation, bearing the marks of the ‘so-called constructive ambiguity of diplomatic negotiations’ were interpreted in the light of the adversarial priorities of guarding the rights of the defendant, and maintaining equality between the prosecution and defence.\textsuperscript{146}

The key provision is Article 68 (3) whereby the Court may permit the ‘views and concerns’ of victims to be presented in proceedings when their ‘personal interests are affected’ subject to the condition that such participation not be ‘prejudicial to, or inconsistent with the rights of the accused and a fair and impartial trial.’\textsuperscript{147} The provision makes victim participation conditional upon protection of the rights of the defendant for the purpose of fair trials. Zappalà argued that the primacy of the rights of the accused was the bedrock of modern criminal procedure from which judicial interpretation of the details and limits of victim participation at the ICC should proceed.\textsuperscript{148} In a minority judgement, Judge Pikis expressed

\textsuperscript{142} Luke Moffett, \textit{Justice for Victims before the International Criminal Court} (Routledge, 2014) 128-129.
\textsuperscript{143} Ibid 90.
\textsuperscript{147} ICC Statute Article 68 (3).
\textsuperscript{148} Zappalà above n 146, 143-145, 164.
the view that the victim’s right to express views and concerns in proceedings was ‘highly qualified’ participation in adversarial proceedings which are characterised by the equality of arms principle.149 The majority of other judges sought to qualify the victim’s right to participate in relation to the defendant’s right and to differentiate victims to the proceedings from the prosecution by highlighting their lesser status as ‘participants’ as opposed to parties.150 In the Lubanga case, the Court declared the purpose of victims presenting their views and concerns was not the equivalent of giving evidence but may ‘assist the court in its approach to the evidence in the case.’151 This suggested a functional rather a restorative purpose to victim participation.

Where victims are permitted to participate it is through legal representatives.152 The Court has emphasised the neutrality of the representatives because they are not the equivalent of auxiliary prosecutors in civil law jurisdictions, but rather assistants to the judges’ in their work of determining the truth.153 Victim participation rights at the investigative stage were also limited. The Appeals Chamber declared that investigations were inquiries conducted by the Prosecutor and not judicial proceedings to which victims might be admitted to put their views and concerns. Victims may make ‘representations’ to the Prosecutor under Articles 15 (2) and 42 (1) of the ICC Statute, but this amounts to little more than writing a letter to the Prosecutor.154 Thus, while the ICC has recognised the needs and rights of victims to be protected from risks to safety and the possibility of trauma, the Court has progressively taken

149 Prosecutor v Jean-Pierre Bemba Gombo (Fourth Decision on Victims’ Participation) (International Criminal Court, Trial Chamber 111, Case No.ICC-01/05/08, 12 December 2008)[15-19]; Prosecutor v Lubanga (Decision on the Manner of Questioning Witnesses by the Legal Representatives of Victims) (International Criminal Court, Trial Chamber 1, Case No ICC-01/04-01/06, 16 September 2009) [24].
150 Prosecutor v Lubanga (Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/003/06 and a/015/06 concerning the ‘Directions and Decision of the Appeals Chamber of 2 February 2007, International Criminal Court, Appeals Chamber, Case No ICC-01-04-01/06, 13 June 2007) [15 -19].
151 Prosecutor v Lubanga (Decision on the request by victims a/0225/06, a/0229/06 and a/0270/07 to express their views and concerns in person and to present evidence during the trial) International Criminal Court, Trial Chamber 1, Case No ICC-01-04-01/06, 26 June 2009) [25].
152 ICC Statute art 68 (3); Rules of Evidence and Procedure rules 90-92.
153 Prosecutor v Lubanga (Decision on the Manner of Questioning Witnesses by the Legal Representatives of Victims) International Criminal Court, Trial Chamber 1, Case No ICC-01-04-01/06, 16 september 2009) [25, 29].
154 Moffett above n 142, 117.
a restrictive approach to victims’ participation rights in trial proceedings and investigations to protect those of defendants as well as the independence of the Prosecutor.\textsuperscript{155}

In 2011, Van den Wyngaert questioned whether the victim participation system was meaningful enough to justify the Court’s considerable investment in it, and recommended a parallel forum for the exercise of victims’ reparation rights severed completely from the criminal proceedings.\textsuperscript{156} Van den Wyngaert considered that a separate Victims’ Reparations Commission would not conflict with the basic purpose and expressive ideal of the ICC ‘which is to fight impunity.’\textsuperscript{157} McCarthy also viewed the ICC as ill-equipped to support the restorative purposes of victim participation pursuant to reparative justice theory.\textsuperscript{158} Nevertheless, he argued that the Court’s victims reparations regime from which victim participation rights flow had expressive value and offered scope for flexibility in administering international criminal justice.\textsuperscript{159}

However, the selectivity of prosecutions at the international level means that relatively few victims will be eligible for reparations. Furthermore, at the ICC reparations hearings are severed from trial proceedings except to the extent that the Court may grant victims leave to express their views and concerns pursuant to Article 68 (3). In any case, reparations hearings are not automatic; they proceed upon request by a victim or are initiated by a motion of the Court. Thus, there is no actual right to reparation, although there may be expressive value in the reparations mandate through its acknowledgement of harm caused by the crimes and the possibility of a degree of redress for the suffering of certain victims.\textsuperscript{160}

Under the ICC Statute, reparations may be ordered by the Court against a convicted person to, or in respect of victims of crimes (Article 72 (2). The Court may also order that an award

\textsuperscript{155} Ibid 142.
\textsuperscript{156} Van Den Wyngaert above n 144, 494.
\textsuperscript{157} Ibid.
\textsuperscript{158} Conor McCarthy, ‘Victim Redress and International Criminal Justice: Competing Paradigms or Compatible Forms of Justice’ (2012) 10 Journal of International Criminal Justice 351, 363-364. McCarthy identified restorative purposes as (\textit{inter alia}) addressing harm between victims and perpetrators, affecting a measure of healing, and touching the brokenness of the transitional context.
\textsuperscript{159} Ibid 369-372.
\textsuperscript{160} Moffett aboven 142, 162.
for reparations be made though the Trust Fund for Victims (TFV) established pursuant to Article 79. The TFV hold funds or property collected by fines or forfeiture from convicted persons by order of the Court, as well as donations and contributions from the Assembly of States parties. The funds are administered to cover awards made against indigent defendants and provide material support to victims whether or not the Court has made a reparations award against a convicted person. This has resulted in assistance to individual victims and the funding of community projects which have aided a broader spectrum of victims. In 2012, the Court released the principles and procedures to be applied by the Court to reparations awards in the Lubanga case. These recognised the symbolic and transformative potential of reparations resulting from consultation with victims and their representatives. While such consultation is removed from the proceedings, the principle suggests that communicative action through the TFV’s administration of reparations may produce social benefits not attainable through solely retributive processes. Moffat added a further gloss here, arguing that reparations reflect an external element to justice at the ICC which might catalyse states to fulfil their obligations to victims by means of ‘reparative complimentarity.’

5 Jurisdiction and Capacity Limits

The temporal jurisdiction of the Court is limited to crimes committed after the entry into force of the Statute (Article 11(1)). Therefore, many situations of impunity pre-dating the formation of the ICC and later situations occurring in non-signatory states fall outside its jurisdiction. Even a Security Council referral of a situation involving crimes committed before entry into force of the Statute cannot be accepted by the Court because the ICC is a creature of Statute rather than of the Security Council. Furthermore, even where ICC jurisdiction arises, the capacity of the Court to investigate and prosecute cases at any one

161 Ibid 155.
162 Ibid 156.
163 Prosecutor v Thomas Dyilo Lubanga (Decision establishing the principles and procedures to be applied to reparations) (International Criminal Court, Trial Chamber 1, Case no ICC-01/04-01/06, 7 August 2012) [40] [209] [239-240].
164 Moffett above n 142,187-194.
165 Cryer above n 21 138.
time is limited to no more than a few senior figures of particular criminal regimes. Nevertheless, the necessary selectivity in prosecutions and limited jurisdiction did not rob the ICC of its positive expressive value as ‘a new model of accountability’ functioning at the global level.

IV HYBRID AND INTERNATIONALISED COURTS

While the limited jurisdiction of the ICC did not preclude the creation of new ad hoc Tribunals, the spiralling costs of running the ICTY and ICTR became a disincentive to create new courts based on that model. In addition, varying political positions within the Security Council with respect to some national contexts made the consensus that characterised action with respect to the Bosnian and Rwandan conflicts impossible. In the case of a proposal for justice for Khmer Rouge crimes in Cambodia, for instance, old Cold War alignments and past colonial action militated against support for an ad hoc tribunal by permanent Security Council members, China, Russia and France. In addition, perceptions of the ad hoc Tribunals as disconnected from on-the-ground realities of the communities they served prompted experimentation in new justice forms.

The hybrid court emerged as a new model of post-conflict justice. This type of court combined the expertise and credibility of international justice with a degree of ownership of the justice process from within the national contexts of relevant atrocities. Hybridity in each tribunal arises from their mixed jurisdiction in terms of applicable law, and composition by a blend of national with international judicial and administrative personnel.

Locating the hybrid court within the territory where crimes were perpetrated offered the prospect of greater legitimacy of proceedings in the eyes of local communities than the ad

168 Schabas above n 85, 32.
169 Ibid.
170 Higgonet above n 166, 349.
171 Dickenson above n 106, 295.
hoc Tribunals had achieved.\footnote{Ibid 296.} Locally-based justice mechanisms also increased the prospect of international norm penetration, while punishment of high-profile individual offenders promoted the rule of law in transitioning societies. National location and the blending of international with national elements also offered capacity-building and infrastructure development potential in states where national criminal justice systems were too weak or corrupt to conduct fair and efficacious legal process independently.\footnote{Ibid 307-308.} Hybrid courts were therefore imbued with expressive value beyond the traditional ambit of criminal law.

The hybrid court which gives voice to both international and domestic concerns was justified on the grounds of the duality of international crimes.\footnote{Mégret above n 140, 741.} Mégret argued that in a case where crimes of a certain magnitude are committed within a single state, the nature of those crimes has both national and international dimensions, giving rise to dual jurisdiction over the crimes.\footnote{Ibid.} Moreover, the participation of international and national actors in hybrid trial proceedings provides more representative transitional justice.\footnote{Ibid 747.}

Greater representation was also made possible by the grant of participation rights to victims in some hybrid courts and sometimes with remedies for harm suffered by them under international law. While States may fail in their primary obligation through their national legal systems to enforce human rights and international humanitarian law, hybrid tribunals activate both accountability for violations and a right to reparations for victims.\footnote{Bassiouni above n 5, 720; See 2006 Basic Principles and Guidelines on the Right to a remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (adopted by UN General Assembly Resolution 60/147, 16 December 2005) (2006) 13 IHRR 90.}

The preceding discussion of hybridity emphasised the blending of national and international elements in courts designed to render transitional justice \textit{in situ}. Scholars of international criminal justice initially wrote of the hybrid court form in similarly generic terms. The UN noted that the particular hybridity or degree of internationality of individual transitional
courts was dictated by the on-the-ground political realities of the relevant national context and the extent of local legal capacity to hold fair trials.\textsuperscript{178}

Williams made a distinction between the hybrid and internationalised court based on each court’s mode of creation and jurisdictional basis.\textsuperscript{179} She argued that to date hybrid courts were created by either treaty or UN Security Council resolution; examples are the Special Court for Sierra Leone (SCSL) by treaty, and the Special Tribunal for Lebanon (STL) by Security Council resolution.\textsuperscript{180} However, Williams suggested that practice does not indicate that an internationalised court can be established by either treaty or SC resolution. Rather, internationalised courts are established under national law but carry international elements. The War Crimes Chamber of the State Court of Bosnia and Herzegovina, discussed earlier, is an example of one form of internationalised court. Another is the Iraqi High Tribunal (IHT), which was created as a national court by the occupying powers applying international humanitarian law. A third form of internationalised court is one authorised by a United Nations transitional administration; the mixed judicial panels created for Kosovo and East Timor are examples.\textsuperscript{181}

There is a fourth internationalised court form; one that is created under national law as a result of negotiations with the UN and pursuant to which an Agreement may exist to regulate UN participation in and international elements of the court. Williams cited the Extraordinary Chambers in the Courts of Cambodia (ECCC) as an example.\textsuperscript{182}

I accept William’s categorisation of the ECCC as an internationalised court for reasons I will discuss in Chapter Four. However, in the following section I discuss the expressivism of courts belonging to the post-ad hoc Tribunal generation, some of which were referred to generically as hybrids in the literature.

\textsuperscript{179} Williams above n 1, 253-300.
\textsuperscript{180} Ibid 283.
\textsuperscript{181} Ibid.
\textsuperscript{182} Ibid.
In the wake of mass atrocities, internationalised courts were created under the mandates of UN Transitional Authorities in Kosovo and East Timor. In both cases the capacity of each State to fairly and credibly prosecute international crimes and other crimes was severely limited or proved impossible due to overwhelming violence within the respective communities, and the destruction or corruption of their justice systems.\(^{183}\)

1 \textit{East Timor}

East Timor received international support in a drive towards independence from the Indonesian occupying power, and its struggle for justice for international crimes committed in 1999. In addition to sending a security force to restore peace in East Timor, in 1999, the Security Council, established a United Nations Transitional Administration in East Timor (UNTAET) with a wide mandate to exercise ‘overall authority’ in the territory.\(^{184}\) This included exercise of ‘all legislative and executive authority, including administration of the judiciary.’\(^{185}\)

While Indonesia asserted jurisdiction over the serious violations of human rights and international humanitarian law committed by Indonesian armed forces and police before and after the internationally assisted referendum of August 1999, the trials convened by the Indonesian Ad-Hoc Human Rights Court were criticised as not being conducted in good faith.\(^{186}\) However, UNTAET passed regulations which made provision for the prosecution of individuals accused of having committed ‘serious crimes’ through dedicated judicial

\(^{183}\) Higgonet above n 166, 372-384; Dickenson above n 106, 296.


panels within the Dili District Court, constituted formally as the Special Panels for Serious Crimes (SPSC).\textsuperscript{187}

The SPSC operated within the domestic legal system to prosecute international crimes, as well as some domestic crimes (murder, sexual offences and torture) committed in East Timor or in other territory if committed against East Timorese citizens, during the period 1 January to 25 October 1999.\textsuperscript{188} The Panels were of mixed composition, consisting of East Timorese and international judges, with the latter in the majority. A Serious Crimes Unit comprised largely of international staff provided support to the SPSC.\textsuperscript{189} A truth and reconciliation commission operated in tandem with the SPSC.\textsuperscript{190}

The personal jurisdiction of the SPSC was not limited to high status individuals, but most of those indicted were lower-level perpetrators charged with single offences unconnected to political violence.\textsuperscript{191} A lack of ownership and cooperation from both the UN and the local government in securing the arrest of high-level accused persons undermined the legitimacy of the SPSC. Of particular significance was the lack of cooperation to secure the arrest of General Wiranto, who had commanded the Indonesian military at the time of the 1999 violence, together with failure to bring almost 200 indicted Indonesian army officers to trial.\textsuperscript{192}

The UNTAET mandate was terminated following East Timor’s independence in May 2002, and the SPSC function was transferred to the Timorese Department of Justice. While the successor UN Mission, the United Nations Mission in Support of East Timor (UNMISET) became responsible for implementing a completion strategy for outstanding cases, its mission was short-lived. The Security Council announced the closure of UNMISET on 20 May 2005, and the work of the Panels was suspended. The political decision to terminate the mission

\textsuperscript{187} UNTAET Regulation 2000/11; UNTAET Reg. 2000/15.
\textsuperscript{188} UNTAET Reg. 2000/15, 5 July 2000 ss 4-6, 7, 10-21.
\textsuperscript{189} UNTAET Regulation 2000/16 ss 1-2.
\textsuperscript{190} UNTAET Reg. 2000/15 s 2.5.
\textsuperscript{191} Williams above n 1, 97.
which supported the work of the SPSC left the domestic legal system without the capacity to handle the outstanding serious crimes cases. The price of premature closure was to be paid by the East Timorese people, who were ultimately deprived of both proper justice as well as any engagement with due process through either a staged completion process, or the kind of outreach programs that were developed to run with other international tribunals.

Following the recurrence of political violence in East Timor in April and May 2006 the Security Council authorised a further UN assistance mission to the fledgling state. A Serious Crimes Investigation Team (SCIT) was established to assist the national investigation authorities with outstanding cases of human rights violations committed in Timor-Leste in 1999. However, this too was a short-term mission. Other assistance to strengthen East Timor’s judicial capacity came through United Nations Development Program funded projects. These resulted in the creation in 2010 of a special mixed judicial panel to reactivate cases initiated by the SPCS. A number of successful prosecutions were achieved.

While those trials represented the end to impunity for some perpetrators of international crimes, UN acquiescence to the Indonesian government’s preferences and its piecemeal approach to post-conflict justice had a largely expressive outcome. A Commission of Truth and Friendship (CTF) was established as an alternative to prosecutions under a 2008 bilateral agreement between the governments of Indonesia and East Timor. The final report of the Commission simply emphasised the institutional responsibility of the Indonesian military, police and government. Thereafter, in expressive tones, the Indonesian government

193 Williams above n 1, 97.
194 Cohen above n 192, 25.
195 Williams above n 1, 99.
196 Ibid 100.
197 Ibid.
declared the commitments of both Indonesia and East Timor to ‘collective reparation, institutional reformation and reinforcing the culture of human rights.’

2 Kosovo

In 1999, Kosovo was placed under UN transitional administration following civil war between Serbia and the majority Kosovo Albanian population. The Security Council passed Resolution 1244 mandating the United Nations Interim Administration in Kosovo (UNMIK) under which the people of Kosovo were to ‘enjoy substantial autonomy in the Federal Republic of Yugoslavia.’ UNMIK was vested with ‘all legislative and executive authority with respect to Kosovo, including the administration of the judiciary.’

As the displaced population began to return to Kosovo, the North Atlantic Treaty Kosovo Force (KFOR) stationed in Kosovo detained individuals suspected of violations of human rights and international humanitarian law. UNMIK established an emergency justice system before establishing a permanent judicial system. However, newly appointed national judges seemed unable to remain impartial and independent, and lacked the necessary skills to adjudicate such complex trials. Moreover, Serbian legal professionals and judges refused to participate which created the perception of bias towards Serb defendants.

The ICTY had jurisdiction to try perpetrators of crimes during the Kosovo conflict but at that stage, under its completion strategy, the Tribunal was only trying those who had committed the worst crimes on a wide scale. UNMIK therefore instituted specially constituted hybrid judicial panels within Kosovar courts by a series Regulations.

199 Williams above n 1, 100 citing Republic of Indonesia, Ministry Foreign Affairs, ‘Commission of Truth and Friendship (CTF) Indonesia-Timor Leste’ (7 July 2010). <www.deplu.go.id/Pages/IssueDisplay.aspx?IDP+4&l=en>
201 UNMIK Regulation 1999/1, s1.1.
202 Williams above n 1, 83.
203 Cryer above n 21, 155.
204 UNMIK Regulations 2000/6, 2000/34, 2000/64.
The judicial panels developed out of the International Judges and Prosecutors Programme (IJPP) which provided for the appointment of international officers on a case-by-case basis and without creation of a permanent internationalised court. The allocation of cases under the IJPP was within the discretion of the international administration and for the purpose of ensuring the independence and impartiality of the judiciary and broader administration of justice.

In their early years, the judicial panels were the answer to legitimacy crises following serious missteps in implementing the justice mandate. The initial UNMIK decision was to apply the law proclaimed by the Serbs after their revocation of Kosovo Albanian autonomy. However, this was rejected by local lawyers and judges who refused to apply that law on the grounds that it was unlawful and discriminatory. UNMIK Regulation 24 overturned the decision and decreed the applicable law as that of 22 March 1989, the day prior to the Serbian revocation. Subsequent failure to explain the rationale for the judicial panels to the local population added to the tainted perceptions of the neutrality of the foreign initiative.

The panels were an awkward experiment in internationalised justice in a volatile context. Their subject matter jurisdiction was not limited to the core international crimes of genocide, crimes against humanity and war crimes. Neither was the temporal jurisdiction restricted to the period of the conflict. This meant that contemporary crimes were adjudicated including those involving inter-ethnic violence in March 2004. As organised crime is a particular problem in the region, terrorism and human trafficking cases were similarly brought before the panels. However, support for the work of the panels increased over time, despite

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205 Williams above n 1, 84.
206 Ibid 85.
207 Higgonet above n 166, 383.
208 Ramji-Nogales above n 108, 35.
209 Williams above n 1, 87.
mislavings about their capacity to make sufficient progress towards ending the impunity of known perpetrators in Kosovo.\textsuperscript{212}

By 2003, the Provisional Criminal Code and Provisional Criminal Procedure Code of Kosovo were promulgated by the Special Representative of the Secretary-General for Kosovo.\textsuperscript{213} The Code of Criminal Procedure reflects the civil law approach to criminal process, affording participatory rights to victims beyond that of witness.\textsuperscript{214} Victims may participate as civil parties, referred to as ‘injured parties’ with respect to serious crimes.\textsuperscript{215} An injured party enjoys rights under the Code including: the right to raise facts and propose evidence bearing on the offence or establishment of her property claim;\textsuperscript{216} apply to the prosecutor to collect pre-trial evidence and exercise appeal rights thereto;\textsuperscript{217} propose evidence at trial; question the defendant and witnesses, access the case file and make written submissions.\textsuperscript{218} An injured party is entitled to legal representation and such representative has a duty to safeguard her rights and integrity during proceedings.\textsuperscript{219}

McGonigle Lehy noted that available records in 2008 suggested that ‘the number of victims as injured parties participating in war crimes or related cases, is relatively low.’\textsuperscript{220} However, the Humanitarian Law Center, a non-governmental human rights organisation based in Belgrade and Kosovo, is actively monitoring trials and filing compensation lawsuits for victims.\textsuperscript{221} The Center’s website provides the details of successful recent actions for compensation in national courts, suggesting there is increasing participation and representation of victims in those courts.\textsuperscript{222}

\begin{footnotesize}
\textsuperscript{212} Higonnet above n 166, 383.
\textsuperscript{213} Williams above n 1, 87.
\textsuperscript{214} McGonigle Lehy above n 34, 157.
\textsuperscript{215} Provisional Kosovo Criminal Code art 78.[PCPCK]
\textsuperscript{216} PCPCK art 80.
\textsuperscript{217} PCPCK art 239.
\textsuperscript{218} PCPCK arts 61, 80 (3), (4).
\textsuperscript{219} PCPCK art 81 (4).
\textsuperscript{220} McGonigle Leyh above n 34, 158.
\textsuperscript{221} Ibid.
\textsuperscript{222} See for example Compensation to Five Kosovar Albanians for Torture and Unlawful Detention Humanitarian Law Center (30 April 2013) <http://hlc-rd.org/?=22889&lang=de>
\end{footnotesize}
The latest chapter in the life of the judicial panels flows from Kosovo’s declaration of independence from Serbia on 17 February 2008. Kosovo’s move to self-determination is supervised by the international community pursuant to the Comprehensive Proposal for the Kosovo Status Settlement prepared by the Secretary-General’s Special Envoy in 2007. The Settlement Plan includes a European Union Rule of Law Mission (EULEX) to Kosovo and continued NATO force deployment. Russia questioned the legality of the mission in the Security Council and Serbia refused to recognise EULEX authority in Serb-controlled territories. Other EU member states, such as Spain, were reluctant to support EULEX in light of the uncertainties regarding the legality of its mandate.

In July 2010, an advisory opinion of the International Court of Justice (ICJ) confirmed Kosovo’s declaration of independence to be ‘in accordance with international law.’ In addition, the limits of the EULEX mandate and its connections with UNMIK were settled. EULEX, while operating under Resolution 1244 is limited to technical support. It monitors and mentors Kosovo authorities in rule of law promotion, specifically with respect to policing, the judiciary and customs. Responsibility for the judicial panels now falls to EULEX, while UNMIK has transferred its judicial functions and caseload to the new mission. Thus, while reporting to the UN Security Council, EULEX is an expressive regional commitment under European foreign and defence policy, yet with strong backing from the United States, which agreed to cover 25 per cent of the operating costs, and provided a number of police officers, judges and prosecutors.

Analysis of the UN Mission and the recent regional EU mission in Kosovo demonstrate a surplus of expressive values. Included are the criminal law’s traditional moral condemnatory messages and punishment of perpetrators, plus broader rule of law and democratic

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225 Ibid.
228 de Wet above n 224, 83.
state-building goals. A trend towards enabling national expertise and institutions in accord with pre-ordained methodologies is evident. However, little emerges in the literature about the participation of victims in the internationalised trial processes or consultation with national constituencies on the design of institutions.

Expressive action underpins the internationalised criminal justice institutions in both East Timor and Kosovo. In East Timor, UN acquiescence towards an unrepentant Indonesia produced ad hoc and unrepresentative expressive justice, with little scope for communicative processes. In Kosovo, the judicial panels represented traditional expressive justice process with internationality guaranteeing fair trial procedure. The EULEX, on the other hand, promotes the expressive goals of state-building through development of local judicial capacity. However, more communicative legal procedure in national courts which include victim representation may over time reduce the expressive surplus of the internationalised trials and programs. I develop this idea in Chapter Six.

B Hybrid Courts

The trend towards nationalising the prosecution of violations of international humanitarian law gained momentum by the creation of alternative court forms generically described as hybrid courts. These were the Special Court for Sierra Leone (SCSL), the Extraordinary Chambers in the Courts of Cambodia, and the Special Tribunal for Lebanon (STL). Hybridity had expressive dimensions as the following discussion of the SCSL and the SLT illustrates. The formation of the ECCC is discussed in Chapter Three.

1 The Special Court for Sierra Leone

The creation of the Special Court for Sierra Leone was informed by negotiations underway at the time for a hybrid international tribunal for Cambodia. The two national contexts have parallels in terms of the complexities arising from situations of intractable civil war and

229 Higgonet above n 166, 381.
long periods of impunity for political leaders. \(^{231}\) However, the negotiations for creation of the SCSL can be distinguished from those of the ECCC by strong domestic political will in favour of such a tribunal and support from key Security Council Members in the formation and operation of the Court.\(^{232}\)

a) Political Action Creating the SCSL

In June 2000, the President of Sierra Leone sent a request to the Security Council seeking creation of an international tribunal to prosecute members of the insurgent Revolutionary United Front (RUF) for commission of crimes against the Sierra Leonian people, and for taking United Nations peacekeepers as hostages.\(^{233}\) This followed the resumption of hostilities in Sierra Leone despite a UN negotiated peace agreement, the 1999 Lome Accord.\(^{234}\) In response, the Security Council adopted resolution 1315, pursuant to which the Secretary-General negotiated an agreement with the government of Sierra Leone to establish a special court with jurisdiction over the international crimes of genocide, crimes against humanity and other serious violations of international humanitarian law, and to which no amnesty would apply.\(^{235}\) The resolution recognised the importance of a credible system of justice and accountability for international crimes committed ‘to end impunity ...and [to] contribute to the process of national reconciliation and the maintenance and restoration of peace.’\(^{236}\) The Council’s broad statement of purpose reflected the Court’s concurrent operation with the Truth and Reconciliation Commission provided for under the Lome Accord.\(^{237}\)

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\(^{231}\) Ibid.

\(^{232}\) Cohen above n 192, 25.


\(^{235}\) Schabas above n 85, 36; See Lome Accord art xxvi.


\(^{237}\) Schabas above n 85, 36. The TRC was established in July 2002.
An agreement between the United Nations and the Government of Sierra Leone provided the framework for a treaty-based hybrid court.\textsuperscript{238} National legislation gave effect to the Court’s statute and enabled the creation of the Court within Sierra Leone.\textsuperscript{239} Though the SCSL is located in Freetown, Sierra Leone, it operates independently of the national court system.\textsuperscript{240} The Court has concurrent jurisdiction with the national courts but has primacy over crimes in its jurisdiction and may issue binding orders to the national government.\textsuperscript{241} The judiciary is comprised of national and international judges, with a majority of international judges.\textsuperscript{242} Other units of the Court are staffed by both international and national personnel.\textsuperscript{243}

The applicable law of the SCSL combines national and international law. The Court was guided by the jurisprudence of the ICTY and ICTR, and decisions of the Supreme Court of Sierra Leone.\textsuperscript{244} The SCSL has narrower jurisdiction than that of the ICTY or ICTR. Article 1 (1) of the SCSL Statute grants jurisdiction over persons ‘who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law’ committed in Sierra Leone from 30 November 1996, thus eliminating the pursuit of low or mid-level perpetrators.\textsuperscript{245}

With a narrower jurisdiction and a temporary mandate, the new hybrid court represented a more cost and time-effective justice mechanism than the ad hoc Tribunals.\textsuperscript{246} The SCSL budget was made up of voluntary contributions from supporting States rather than being

\begin{itemize}
\item \textsuperscript{238} Agreement between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court for Sierra Leone (16 January 2002).
\item \textsuperscript{239} Statute of the Special Court of Sierra Leone attached to the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court for Sierra Leone UN Doc /2002/246 (2002); Special Court Agreement (Ratification) Act 2002 Supplement to the Sierra Leone Gazette vol. CXXX. No. II (7 March 2002).
\item \textsuperscript{240} Article 2 (establishes separate legal personality); Article 8 provides for inviolability of premises; Article 9 affords immunity as to funds, assets and property; Article 13 provides for immunity of international and national staff.
\item \textsuperscript{241} Statute of the Special Court of Sierra Leone Jan 16, 2002, 2178 UNTS 145 art 8 (2) [SCSL Statute]
\item \textsuperscript{242} SCSL Statute art 12.
\item \textsuperscript{243} Article 1 of the SCSL Statute grants jurisdiction over crimes against humanity, violations of common Article 3 of the Geneva Conventions and other violations of international humanitarian law, including intentional attacks on civilians or humanitarian personnel, and the abduction and forced recruitment of children under the age of 15.
\item \textsuperscript{244} SCSL Statute art 20.
\item \textsuperscript{245} SCSL Statute art 1 (1).
\item \textsuperscript{246} Cohen above n 192, 12.
\end{itemize}
drawn from general UN funds. This amounted to approximately one quarter of the budget for the ICTY. Nevertheless, the SCSL was provided with purpose-built modern infrastructure, including court chambers with state-of-the-art facilities, and a detention centre. While the SCSL was not created by Chapter VII power, it was clear that some members of the Security Council wanted the Tribunal to succeed. Actions by the United Kingdom and the United States in putting in place the necessary management committee structures, funding arrangements and experienced personnel ensured the institution operated viably and efficiently.

Importantly, extensive efforts were made from the beginning by SCSL Prosecutor David Crane of the United States and Registrar Robin Vincent of the United Kingdom, to enter into dialogue with civil society groups and the wider population on the work of the tribunal. This increased local support of the Court and resulted in the initiation of local programs designed to promote the rule of law within the wider society. Administration of Court processes was also enhanced by innovations, including a defence support unit to provide support to defence counsel in the way support is normally given to prosecution offices.

Ultimately, the viability of the hybrid institutional form was quickly established as the SCSL proceeded to prosecute and convict eleven indictees by 2011. For security reasons, the trial of Charles Taylor was removed to the ICC before being completed at the Special Tribunal.

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247 Schabas above n 85, 37.
249 Cohen above n 192, 10-11.
250 Ibid 25.
251 Ibid.
254 Ibid 103.
for Lebanon (STL), where he was convicted on multiple counts of international and national crimes in 2012.255

b) Expressive vs Communicative Dimensions of the SCSL

The SCSL procedural framework was modelled on that of the ad hoc Tribunals. Therefore, victims held participation rights as witnesses called by the parties, or could have the prosecution submit impact statements on their behalf.256 Victim reparations were not dealt with by the Court but were left to the national courts. McGonigle Leyh recorded criticism based on accounts of ‘prosecutorial insensitivity’ to victims within a prosecution narrative providing a ‘politically skewed reading of the conflict,’ but noted that co-existence of the Sierra Leone Truth and Reconciliation Commission (SLTRC) with the SCSL provided an avenue for victims to share their experiences in narrative form.257

There was tension between the SCSL and the SLTRC due to perceived overlap in the functions of the separate institutions, and competition for shared financial and staff resources.258 However, the practical difficulties were offset by the fact that the SLTRC was able to investigate events outside the Court’s temporal jurisdiction, and the scope for victim inclusion and creation of a broader historical record. In any case, the period of simultaneous operation ended by the time the SCSL trials began in June 2004.259

In all, the SCSL presented a new expressive form combining international and national criminal justice in situ. While the Court focussed on producing convictions, its outreach efforts towards the local community addressed the problem of the remoteness of trial outcomes if divorced from the social context of the crimes. This suggested a communicative dynamic to the hybrid court form which was enhanced by the co-existence of the SLTRC. Dialogue between victims and perpetrators not possible within the adversarial procedure of

255 Prosecutor v Charles Ghankay Taylor (Judgment) (Special Court for Sierra Leone, Trial Chamber II, Case No SCSL-03-01-T, 18 May 2012).
256 McGonigle Leyh above n 34, 149.
257 Ibid 150-151.
258 Ibid 151.
259 Ibid.
the trials therefore expanded the character of transitional justice in Sierra Leone beyond the
dominance of the expressivism of conviction and punishment.

2 The Special Tribunal for Lebanon

a) Political Action Creating the Court

Political tensions were running high in Lebanon as the May 2005 elections approached. Prime Minister Rafiq Hariri, who had close ties with Western powers (US, France) and Saudia Arabia, was expected to lead the opposition party to victory in the election. However, on 14 February 2005, he and 22 other people were killed when his motorcade was bombed in central Beirut. Mass demonstrations followed with demands for the investigation of the attack through an international tribunal and withdrawal of Syrian troops from Lebanon. The sustained protests and international pressure brought the withdrawal of Syrian forces in April 2005 after 35 years of occupation of Lebanese territory.\(^{260}\)

Within a day of the assassination of Hariri, the Security Council requested the Secretary-General ‘to follow closely the situation in Lebanon and to report urgently on the circumstances, causes and consequences of this terrorist act.’\(^{261}\) The quick labelling of the assassination as a ‘terrorist act’ preceded the fact finding mission to Lebanon in February 2005.\(^{262}\)

In December 2005 the Lebanese government requested UN assistance to establish a tribunal of international character to try the alleged perpetrators of the assassination of Hariri in February, and a number of purportedly related terrorist acts.\(^{263}\) Pursuant to Security Council Resolution 1644, an Agreement between the UN and the government of Lebanon for creation of a tribunal modelled on that of the SCSL was signed by the parties on 23 January and 6

\(^{260}\) Williams above n 1, 73. UNSC Resolution 1599 had already been adopted calling for ‘the withdrawal of foreign forces from Lebanon and for strict respect for the sovereignty, territorial integrity, unity and political independence of Lebanon.’ UN Doc S/2004/1559 (2 September 2004) [1-2].


\(^{262}\) Williams above n 1, 73.

February 2007 respectively. However events transpired in Lebanon which prevented ratification of the enabling legislation by the parliament. In response to the national impasse, the Security Council passed Resolution 1757 under Chapter VII power in view of the continuing threat to international peace and security posed by the assassination of Hariri. This made way for formal establishment of the STL as a hybrid court in The Hague by 11 June 2007 if the STL Agreement remained unratified before then, which it did.

International criminal justice may have reached its expressive nadir in the creation of the Special Tribunal for Lebanon (STL). Security Council deliberations on Resolution 1757 reveal that rather than international peace and security criteria shaping the creation of international criminal courts, the expressive value of international criminal justice may now be informing interpretations of international peace and security. Instead of sovereignty defences being raised against Security Council action, the Resolution was carried based on threats to Lebanese sovereignty and democracy by alleged Syrian interference in national governance. Despite five abstentions on the Council vote, international criminal justice as an instrument in the hands of the Security Council may have evolved to become a logic in its own right. Burgis-Kasthala argued that the scope of the international action in fact eroded the sovereignty of Lebanon by internationalising a domestic crime. Removal of the case from Lebanese jurisdiction and territory allowed the construction of a narrative based on the ‘apolitical nature of an international criminal justice mechanism.’

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264 The Agreement is annexed to the resolution and is referred within it as the ‘annexed document.’ Negotiation of an agreement to Establish a Special Tribunal for Lebanon was recommended by the UN Secretary-General in Report of the Secretary-General pursuant to paragraph 6 of resolution 1644 (2005) para 5, U.N.Doc. S/2006/176 (21 March 2006).
266 Williams above n 1, 76-77.
268 Ibid 494-495.
269 Ibid 485.
271 Ibid 510.
politically divided transitional context of Lebanon, this had the effect of both understating and overstating the transnational dimensions of the expressive action.272

b) Expressive vs Communicative Dimensions of the STL

The hybrid character of the STL derives from the mixed composition of the Trial Chambers. There is a pre-trial process involving one international judge and three Trial Chamber judges, two of whom are international and one Lebanese. In the Appeal Chamber there are five judges, three being international and two Lebanese. The Prosecutor is an international appointee.273

In contrast to other hybrid tribunals, the subject matter jurisdiction of the STL is limited to domestic crimes under the Lebanese Criminal Code relating to terrorism. These are ‘acts of terrorism,’ ‘offences against life and personal integrity,’ ‘illicit associations and failure to report crimes and offences.’274 In an interlocutory decision, the Appeal Chamber ruled that, in construing the Lebanese law the Court was entitled to take account of the international treaties and customary law that bind Lebanon. The Court will also have regard to the relevant international rules on terrorism in view of the gravity and transnational dimension of the facts at issue before the STL, which the Security Council considered grave enough to justify establishment of the Court.275 The STL Statute excludes jurisdiction over genocide, crimes against humanity and war crimes. However, the forms of participation in an organised crime under Article 3 of the Statute derive from international law. This includes the ‘common purpose doctrine’ developed by the ICTY.276 Thus, excision of the trial from its national context invested the STL with the expressivism of international criminal justice.

272 Ibid 512-516.
There were some concessions to the applicable national law, such as the possibility of holding trials *in absentia*, subject to safeguards protecting the rights of the accused.\(^{277}\) In addition, the application of Lebanese law activated some aspects of criminal procedure in the Romano-Germanic civil law tradition; for instance there is a Pre-Trial judge, who, while not an investigative judge, may issue investigative orders as part of the pre-trial administration process.\(^{278}\) Other procedural features characteristic of inquisitorial trials include scope for judges to control proceedings, question witnesses first, and access certain documents ahead of the trial.\(^{279}\)

However, in the area of victim participation, the STL Rules of Evidence and Procedure (STL REP) do not grant victims the civil party status available under Lebanese criminal procedure. An arguably international criminal procedural approach to victim participation was applied. This approach made provision for approved victims to have their personal views and concerns presented at stages of proceedings determined appropriate by the Court and in a manner not prejudicial to the accused’s fair trial rights.\(^{280}\) Victims were granted a broad range of procedural rights to be exercised largely through legal representatives.\(^{281}\) However, the STL REP made a distinction between the concept of ‘victim’ and the definition of a ‘victim participating in proceedings.’ Only the latter may avail themselves of participation rights subject to having been granted leave by the Pre-Trial judge to present their views and concerns within proceedings, and only ‘after an indictment has been confirmed.’\(^{282}\) Moreover, participation rights do not extend to indirect victims of crimes or to organisations or institutions.\(^{283}\) Victims are also unable to claim reparations through STL process.\(^{284}\) Instead, reparations may be claimed through national proceedings at later stages. Reining in the victim voice in proceedings may make for more expeditious retributive trials, but the

\(^{277}\) Aptel above n 273, 1121; See SLT Statute art 22 (2), (3).
\(^{278}\) McGonigle above n 34, 161.
\(^{279}\) Ibid.
\(^{280}\) STL Statute art 17.
\(^{281}\) McGonigle above n 34, 161.
\(^{283}\) McGonigle Lehy above n 34, 162.
\(^{284}\) Ibid 162.
restrictive approach to victim participation limits the discourse that may surface through victim statements to that which is exclusively evidentiary.

Thus, the STL is a ‘very particular rendering of transitional justice for Lebanese society.’

It is centred on one assassination in a society in which others have occurred with impunity in Lebanon’s transitional history since 1991. The international action creating the Tribunal sent the message that the force of international criminal enforcement offers hope for Lebanese society, but without social engagement through trial procedure. Silencing significant voices that may communicate across social divides is out of step with the purpose of transitional justice. Framing transitional justice in this way highlights the dominance of the expressive and the minimisation of the communicative in international criminal processes.

C. The Iraqi High Tribunal

In 2003, in the circumstances of the occupation of Iraq by the United States, France, China and Russia considered the occupation to be unlawful. The three States indicated their intention to veto Security Council action to create an international tribunal to prosecute the crimes of the regime of Saddam Hussein. The Iraqi High Tribunal (IHT) was subsequently created by decree of the Coalition Provisional Authority (CPA) as a national court with the assistance of the United States. The United States President attached expressive ideals to the Tribunal. President Bush stated that the Tribunal would permit Iraq to assume responsibility for trials of the former regime’s operatives with CPA assistance, help Iraq build local legal capacity and the rule of law and importantly, send the message that systematic abuse of the civilian population was intolerable. However, reminiscent of the Tokyo IMT, the IHT was also expressive of unilateral political action.

285 Burgis-Kasthala above n 270, 516.
286 Ibid 502.
287 Williams above n 1, 114.
V CONCLUSION

The complexity of expressivism is evident in the development of the transitional trial. Expressivism is manifestly positive and negative in political actions creating institutions to prosecute international crimes. The Allied Powers’ actions in creating the international military tribunals brought the first cracks in the otherwise impenetrable edifice of national jurisdiction over such crimes. When the ad hoc Tribunals began enforcing international humanitarian law an expressive deterrence vehicle was created. As the courts operated, the contours of universal norms were refined by expressive judicial analysis.

However, the political contingencies of creating transitional courts mean that the enforcement of international criminal law is selective and equivocal. Not all situations of international crime will be addressed and institutional legitimacy may be compromised by the bias of victors’ justice or unilateral state action on grounds of political expediency, as the IMTFE, the IHT and perhaps the STL’s particular rendering of trial justice illustrate. As the abrupt end to the East Timor Special Panels demonstrated, the expressivism of transitional trials is also vulnerable to the withdrawal of international political support to sustain prosecutions in contexts where impunity has gone unchecked. Of great significance at the internationalised ECCC was its politicised form and the threat to the Court’s legitimacy flowing from the risk of executive interference by the Cambodian government.

The governing instruments of transitional courts are expressive of the global norm of accountability. However, the procedural regimes of individual courts may also undermine the legitimacy of the courts. At the ad hoc Tribunals, the adversarial procedure limited dialogue that may have enhanced the justice process and undermined the authority of the courts in the eyes of the affected communities. Adversarial trial procedure in international courts, even if adapted to incorporate some inquisitorial procedural elements, largely silences those granted participation rights under the Court Statutes. While the grant of victim participation rights under the ICC and STL Statutes was an advance on the rights of victims at the ad hoc Tribunals, in practice the two newer courts emphasised the evidentiary value of victim participation and limited victim inclusion in proceedings on the grounds of
expedience. Thus, the expressivism of the international criminal trial operates from a limited and ambiguous theoretical basis.

The emergence of the hybrid and internationalised court offered the potential for evaluation of the transitional trial on the basis of communication with the affected communities. The SCSL widened the ambit of its justice process to include assistance to the relevant society towards reconciliation through extensive outreach programs. Whether the communicative shortcomings of adversarial procedure identified in this chapter may be reduced by adopting alternative trial procedure is an open question. The ECCC incorporated inquisitorial trial procedure which theoretically, may admit broader dialogue in trials than adversarial procedure. I explore this in more detail in Chapters 4-6 as I examine the Court’s inquisitorial procedure and trial proceedings. As a prelude to this, in the next chapter, I discuss the historical and political factors affecting the Agreement between the UN and the Cambodian government to create the ECCC. Those factors also shaped the Court’s form and procedure.
CHAPTER THREE
THE CREATION OF THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

I INTRODUCTION

The transitional courts and tribunals discussed in the last chapter exhibited an expressive surplus as a consequence of the dominance of the international in terms of their composition, applicable law and procedure. This chapter introduces the Extraordinary Chambers in the Courts of Cambodia (ECCC), an internationalised court established to try leaders and those most responsible for crimes of mass atrocity under the government of Democratic Kampuchea, known as the Khmer Rouge regime, which ruled Cambodia from 17 April 1975 to 7 January 1979.

The chapter explores the background to the creation of the ECCC. I investigate how Cambodia’s political culture influenced the negotiations for creation of the ECCC and the form the Court ultimately acquired. After Cambodia secured independence from France in 1953, a complex mix of national and geopolitical factors determined the course its national governments would take. Those factors compromised law and justice in Cambodia and preserved a place in Cambodian society for the Khmer Rouge long after the demise of the government of Democratic Kampuchea. The longevity of the Khmer Rouge shaped the negotiations for the Agreement between the Royal Government of Cambodia and the United Nations to create the ECCC. The Cambodian government’s insistence upon locating the ECCC in Cambodia within the national court system, and majority control of the operations of the Court produced an idiosyncratic and controversial Agreement.

I argue that the assertion of sovereignty by Cambodia over the prosecution of Khmer Rouge crimes challenged the expressivism of internationally controlled transitional trials. However, the risk taken by UN in supporting the unorthodox court was one that may have shifted the theoretical balance of the transitional trial from the expressive to the communicative.
From their ancient origins as an animistic, subsistence society, the Khmer people of Cambodia endured many political transformations. The language of the Khmer peasant, which belongs to the family of languages known as Mon-Khmer of Southeast Asia, survived as the national tongue. Cambodia’s predominantly rural majority accommodated each political transformation due to an abiding cultural acceptance of subordination in exchange for protection from governing elites so that crops could be harvested and family ties maintained. The continuity of kinship ties and connection to the land, even if subject to the exigencies of patron-client relationships, sustained a sense of Khmer identity despite the fall of the Angkorean Empire, loss of Cambodian territory to Thailand and Vietnam, and subjection to French colonial power (1864–1954).

The presence of a righteous ruler at the apex of a moral hierarchy underpinned the Cambodian conception of social order, albeit subject to cyclical change under Buddhist philosophy. However, Cambodia’s culture and traditions masked fear of territorial encroachment—the possibility of imminent extinction, and the sense of racial superiority. A long line of despotic rulers capitalised on these factors for political gain.

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2 Ibid 3, 171-173.
3 Patron-client groupings and customs were characteristic of the hierarchical political cultures of the Hinduised kingdoms of Southeast Asia. Within such cultures ‘neither equality of opportunity nor equality of attainment represented predominant social values or expected outcomes for the majority of citizens.’ Through patron-client groupings wealth was redistributed and ‘patrons were expected to lead, teach, educate, and provide for their clients.’ Karl D. Jackson, ‘Introduction: The Khmer Rouge in Context’ Jackson Karl D. (ed), *Cambodia 1975-1978: Rendezvous with Death* (Princeton University, 1986) 3, 5. In addition, ‘politics in the society was largely a competition, not between ideologies, but among patron-client groupings, each of which was bound together by the sinews of personal reciprocity.’ Ibid 5. Ledgerwood noted that in Cambodian villages from Buddhist times ‘the basis for the patron’s power is at least in part a moral authority …often understood in Buddhist terms. … Bonds within the communities became ‘moral responsibilities and obligations rather than mere economic exchanges’ [and] ‘reciprocity between patrons and clients [constitute] key social bonds that create community.’ Judy Ledgerwood and John Vijghen, ‘Decision-Making in Rural Villages’ Judy Ledgerwood (ed), *Cambodia Emerges from the Past: Eight Essays* (Center for Southeast Asian Studies, Northern Illinois University, 2002) 109, 115.
4 Judy Ledgerwood, ‘Ritual in 1990 Cambodian Political Theatre’ Anne Hansen and Judy Ledgerwood (eds), *At the Edge of the Forest: Essays on Cambodia, History and Narrative in Honor of David Chandler* (Southeast Asia Program, Cornell University, 2008) 195, 197.
5 Elizabeth Becker, *When the War was Over: the Voices of Cambodia’s Revolution and its People* (Simon & Schuster, 1986) 16.
In the 20th century Cambodia’s feudal hierarchies were challenged by militant nationalist movements to oust the French colonial power, and the rise of communism in Southeast Asia. In Cambodia, the nationalist Khmer Issarak movement against French rule gradually became allied to the insurgent Viet Minh communist resistance in Vietnam during the First Indochina War (1946–1954). In 1951, the Khmer People’s Revolutionary Party (KPRP) was formed under the sponsorship of the Vietnamese communist movement. The KPRP eventually gained the ascendancy over the more democratic Issarak nationalists.

Against the background of war between France and Vietnam and the anti-royalist sentiment of the communists, the Cambodian monarch, King Norodom Sihanouk, negotiated partial independence from France in October 1953. In 1954 at the Geneva Conference, following the defeat of France by the Viet Minh forces, Cambodia secured full independence under the monarch.

However, the end of French colonial rule in Indochina was followed by the Vietnam War (1960–1975) which enmeshed Cambodia in a geopolitical web of conflict. The war to remove the French colonial power and to end United States intervention in Vietnam had united traditional regional enemies. However, it also froze long-standing hostility over territorial claims between China and Vietnam, and Cambodia and Vietnam. These complicated the intense national political rivalries within Cambodia after independence and led to armed struggle against the Cambodian government, and eventual civil war.

A Royalist Rule and Realpolitik

In 1955, prior to the national election, Sihanouk abdicated and began his personal political crusade. His movement, known as the Sangkum Reastr Niyum (Popular Socialist

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7 Chandler above n 1, 222.
8 Chandler above n 1, 227.
9 Kiernan above n 5, xxi.
Community), stood for royalist, Buddhist socialism without class conflict.\textsuperscript{11} Francophile in orientation, Sihanouk placed himself in the middle of the pluralist political spectrum introduced by the French between the radical pro-communist Krom Pracheachon Party, whom he dubbed the red Khmer (Khmer Rouges) and the Democrats (blue Khmer). He saw himself as the white Khmer; his party was conservative and aligned with the ancient Khmer respect for royalty.\textsuperscript{12}

Sihanouk modernised the Cambodian economy, building a commercial sector comprised largely of Chinese businesses and established a trade-based market economy from the capital, Phnom Penh. For the first time an urban Khmer population developed.\textsuperscript{13} With foreign aid from France, the United States and the Sino-Soviet power block, he invested extensively in educational infrastructure, hospitals, public transportation and the arts. He was extremely popular among the Cambodian peasantry who saw him not only as royalty but as the personification of Cambodia itself.\textsuperscript{14} Sihanouk was criticised by his political opponents for condoning inequity and corruption throughout what became effective monopoly rule for fifteen years after independence. His populist movement overcame opposition by intimidation, violence and propaganda. Gottesman argued that Sihanouk’s style of government and campaigning became the model for the national political power struggles that followed the Cambodian revolution of 1975–1979.\textsuperscript{15} However, Sihanouk could not control the external events that embroiled Cambodia in the Vietnam War as Cold War tensions played out in Southeast Asia.

While Sihanouk initially asserted Cambodian neutrality in the Vietnam War, he subsequently allowed North Vietnam to establish bases in Cambodia to feed supply lines to their troops in South Vietnam.\textsuperscript{16} From 1965, after American troops landed in South Vietnam, Cambodia was destabilised by intense aerial bombardment in the region of the border with South

\textsuperscript{11} Michael Vickery, Cambodia 1975-1982 (South End Press, 1984) 22.
\textsuperscript{12} Chandler above n 1, 240; Vickery above n 10, 22.
\textsuperscript{13} Vickery above n 10, 18.
\textsuperscript{14} Gottesman, Evan, Cambodia after the Khmer Rouge: Inside the Politics of Nation Building (Yale University Press, 2003) 18.
\textsuperscript{15} Ibid.
Vietnam. As North Vietnamese National Liberation Front (NLF) troops sought refuge and supplies direct from Cambodian peasants, government tax revenues and exports were affected.17 In 1967, the Cambodian government faced a serious peasant revolt, known as the Samlaut Uprising, against action to control the price of rice in Battambang. The riots were attributed to local communist dissidents and spread to other villages. Sihanouk, already cracking down on suspected communist opposition in Phnom Penh, was then perceived as vulnerable to a communist threat by some government members.18

Further destabilisation occurred from 18 March 1969 as a result of the massive United States B52 bombing campaign (code named ‘Menu’) of bases established in Cambodia by North Vietnam.19 The bombing of Cambodia continued until August 1973, inflicting great loss of life conservatively estimated at 600,000 and producing refugee contingents in multiples of that figure to urban centres, particularly Phnom Penh.20

Sihanouk’s alignment with the North Vietnamese blocked the Sino-Cambodian commercial sector from the South East Asian economic boom.21 Although Sihanouk renewed diplomatic relations with the United States in 1969, the Phnom Penh commercial elite resolved to move against him as the economy weakened, social unrest increased and corruption in government ranks grew. On 17 March 1970, Sihanouk was ousted in a ‘bloodless coup’ led by his Prime Minister Lon Nol, who then formed a new government, the Khmer Republic.22 The United States supported the Lon Nol regime and they became allies in an offensive to remove Vietnamese forces and citizens from Cambodia.23 Sihanouk in turn made an alliance with the

17 Ibid.
18 Ibid 82.
21 Chandler above n 16, 87.
22 Ibid 84.
23 Buckley above n 20, 637.
growing communist Khmer Rouge insurgency in Cambodia and secured support from North Vietnam and China.\textsuperscript{24}

**B The Rise of the Khmer Rouge**

The Khmer Rouge were urban Cambodian communists influenced by the ideas of an elite group of Khmer students who had studied in France during the 1950s, where they participated in a Marxist Study Circle, in Paris. The faction included Saloth Sar, who became known as Pol Pot, Ieng Sary, Khieu Thirith and Khieu Samphan. They were acquainted with the French Communist Party and adhered to a mix of radical political theory derived from the work of Fanon, Amin, Stalin, Marx and Mao.\textsuperscript{25} On their return to Cambodia this elite group became teachers in formal positions, but also informally through public discussion groups and seminars reminiscent of their Paris experience.\textsuperscript{26} Their intellectual approach attracted monks, students, schoolteachers and members of the new class of urban workers to an ideology which condemned Sihanouk’s feudalist autocracy as in league with foreign capitalist elites.\textsuperscript{27} In this way they offered an indigenous revolutionary path distinct from the militaristic Vietnamese approach that had dominated Cambodian communism.

By 1966, the new communist faction wrested the party from Vietnamese influence and changed its name to the Communist Party of Kampuchea (CPK). Following the Samlaut uprising the CPK leadership fled the capital as Sihanouk crushed their urban networks.\textsuperscript{28} From that time Pol Pot, Ieng Sary, Khieu Samphan and other party members moved to the

\textsuperscript{24} Ibid.
\textsuperscript{26} *Saloth Sar* taught French, history, geography and civics at a private college, Chamraon Vichea (‘Progressive Knowledge’) in Phnom Penh after marrying Khieu Ponnary, sister of Khieu Thirith in 1956. See Chandler above n 15, 52. Khieu Samphan, known as professor of political economics, taught at a private college, the Kamputh Bot, and was editor of the *Observateur*, a review espousing progressive political views. See Ponchaud, Francois, *Cambodia: Year Zero* (Reinhart and Winston, 1978) 159; Ieng Sary married Khieu Thirith in 1953. On his return to Cambodia in 1957 he became a teacher of history and geography at Kampuchea Bot High school until 1963. Thirith taught English literature at the Norodom Lycée. Khieu Ponnary taught Cambodian literature at the Lycée Sisowath.
\textsuperscript{27} Ibid above n 16, 83.
\textsuperscript{28} Ibid 84.
North eastern provinces of Cambodia, adopting a policy of armed struggle against the Phnom Penh government.\textsuperscript{29}

The provinces were populated by animistic tribal peoples and Buddhist peasants already opposed to the government’s programs of roads, rubber plantations and timber harvesting in their area, and so were initially receptive to the new revolutionaries.\textsuperscript{30} However, moving from village to village, the Khmer Rouge terrorised inhabitants by killing up to 10 people per village, purging commune or village chiefs, and appointing revolutionary leaders to take their place. The murderous tactics used in the provinces became the hallmark of the Khmer Rouge during the decades that followed.\textsuperscript{31}

Pol Pot and Ieng Sary drew up a plan for the zoning of the country into administrative and military sectors under the revolutionary government they envisioned. By 1970, their growing insurgent forces, from bases in the northeast and northwest, occupied or controlled nearly a fifth of Cambodian territory, albeit without military support from the North Vietnamese, who viewed the Khmer communist role solely as maintaining supply lines through Cambodia to their forces in South Vietnam.\textsuperscript{32}

Ultimately, the CPK path to power was fostered by large swathes of village populations swelling their ranks as the Vietnam War spilled over into Cambodia. Kiernan has chronicled the flood of Khmer and Vietnamese refugees fleeing South Vietnam into Cambodia as the United States intervention escalated the Vietnam War.\textsuperscript{33} In May 1970, United States troops invaded Cambodia in pursuit of Vietnamese communist forces as the bombing of the countryside continued.\textsuperscript{34} The devastation, dislocation and massive loss of Cambodian civilian lives made surviving villagers easy prey for the CPK, whose propaganda condemned the United States imperialists and the government for what was happening. Many were recruited

\textsuperscript{31} Ibid.
\textsuperscript{32} Chandler above n 16, 86-88.
\textsuperscript{33} Kiernan above n 6, 350-371.
\textsuperscript{34} Shawcross above n 19, 128-149; 280-299.
to CPK ranks and indoctrinated in its network of training camps. Radicalised youths became the CPK’s agents of social change under a totalitarian ideology.\textsuperscript{35} From 1974, refugees fleeing the southeast of Cambodia into Vietnam and other areas spoke of the climate of fear engendered by the growing rule by terror at the hands of fanatical youths. There were also numerous media reports of Khmer Rouge brutality in other parts of the country including reports of executions for infringement of ‘reconstructing’ processes in the camps.\textsuperscript{36}

The CPK also profited militarily from corruption among Lon Nol’s army officers who used their positions to amass wealth by devising schemes to sell American armament.\textsuperscript{37} This included funnelling ammunition to CPK forces which grew in strength as a result. Ammunition was vital because the North Vietnamese communists remained unwilling to arm their Cambodian comrades. By 1974, with increased military power the Khmer Rouge abandoned the fiction of a united national front with the exiled Sihanouk. They accused him of ‘living too long in comfort in Peking and of supporting the hated Vietnamese.’\textsuperscript{38}

In April 1975, the Khmer Rouge army of 60,000 easily defeated Lon Nol’s forces from whom American military assistance had by then been totally withdrawn. With the foreign forces evacuated, the Khmer Rouge filled the power vacuum in Cambodia. After taking Phnom Penh on 17 April 1975 they began to implement their revolutionary agenda for Cambodia.\textsuperscript{39}

\textbf{C Cambodia under Democratic Kampuchea}

Suspicion of Vietnamese intentions towards Cambodia as the Vietnam War ended informed Khmer Rouge policies from the outset. The country was blockaded from all foreign influence, except that of Khmer Rouge allies, China and North Korea. The CPK declared a national policy of complete independence and self-reliance.\textsuperscript{40} An offer of reparations from the United

\textsuperscript{35} Etcheson above n 30, 321.
\textsuperscript{36} Shawcross above n 19, 321-322.
\textsuperscript{37} Chandler above n 1, 252; Shawcross above n 19, 318.
\textsuperscript{38} Shawcross above n 19, 321.
\textsuperscript{39} Group of Experts Report above n 29, [14].
States and international aid in the wake of the massive carnage wrought by years of extensive bombing and civil war was refused.\textsuperscript{41} Instead, the Khmer Rouge relied on the rhetoric of moral purity to distinguish themselves from their predecessors and justify radical political action to deconstruct Cambodian society. Proclamations through radio broadcasts announced the new government’s plans to restore the true national spirit and identity of Cambodians by clearing the society of the corruption of the Lon Nol regime and the decadence of American imperialism.\textsuperscript{42}

In the week following the seizure of Phnom Penh, the new government forced two to three million people from the cities and towns into the countryside to live and work in regional collectives. Many thousands died from lack of food, water and medical assistance during forced marches to CPK-controlled administrative or functional units.\textsuperscript{43}

Forced labour and inhumane living conditions characterised life in the cooperatives. Under armed supervision, people were also forced to work on large-scale infrastructure construction projects in work teams for long hours and with meagre food rations. Communal life was highly regulated. Marriages required CPK approval and existing families were broken up. Children were separated from their parents and taught that their first allegiance was to the party apparatus known as ‘Angkar.’\textsuperscript{44} Proclamations of the CPK assigned mystical status to Angkar as the all-knowing and supreme Organisation which was transforming Cambodian society.\textsuperscript{45}

Khmer Rouge cadres in the cooperatives re-educated new party members and were responsible for purifying party ranks of potential traitors. Quinn concluded from accounts of those with direct experience of the camp leaders, referred to as chlorbs (those who ensure security), that Pol Pot and CPK leaders relied on the youngest and least literate elements of

\textsuperscript{41} Ibid 45.
\textsuperscript{42} Alexander Hinton, ‘Songs at the Edge of Democratic Kampuchea’ in Anne Hansen, and Judy Ledgerwood, (eds), At The Edge of the Forest: Essays on Cambodia, History and Narrative in Honor of David Chandler (SEAP, Cornell University 2008) 71, 78.
\textsuperscript{43} Group of Exports Report above n 29, [17].
\textsuperscript{44} Hinton above n 42, 79.
\textsuperscript{45} Ibid.
Cambodian society to implement their revolutionary agenda. Incapable of discussion with their older and more educated charges, with little stake in the old society and shaped themselves by strict indoctrination in the pre-revolutionary years, the chlorbs used terror, violence and death to satisfy their superiors who had given them status and power in the new Kampuchea. However, the local cadres were unable to meet Angkar’s unrealistic demands of rapidly increasing rice production. Fearful of incurring the wrath of the Party, they deprived inmates of the collectives of sufficient rations. Upon investigation of the production levels and the conditions of the collectives, the CPK, unwilling to concede flawed policies and expectations, blamed apparent failings on sabotage by class enemies. The leadership became increasingly convinced that subversives were plotting overthrow of the regime and began purging party ranks.

Apart from the deaths of hundreds of thousands caused by the privations of communal rural life, the regime targeted for elimination certain groups classed as enemies of the revolution: officials of the former regime, the Khmer Republic; ethnic minorities, including Cham Muslims; ethnic Chinese and Vietnamese; teachers; students; and the educated. Also targeted were religious leaders and organised religion was banned. Buddhism in particular was condemned for having mystified and exploited the poor.

In addition, the existing legal system modelled on the civil law system of France was completely dismantled. Courthouses, the law school, and other legal institutions were either vandalised or converted to the new government’s uses. The Cambodian legal profession became a prime target for elimination as representatives of the old regime. Of the 400–600 legal professionals estimated to have been in Cambodia prior to the Khmer Rouge assuming power, as few as 12 were alive and still in Cambodia by January 1979. In April 1976, a new

47 Hinton above n 42, 85.
49 Ibid.
50 Kathryn E Neilson, ‘They Killed All the Lawyers: Rebuilding the Judicial System in Cambodia’ (Centre for Asia Pacific Studies, University of Victoria, British Columbia Occasional Paper No.13 Oct. 1996) 1.
constitution and organs of state were announced as the country was renamed Democratic Kampuchea. However, there is no evidence that any judges held office or that a legal system existed in Cambodia from April 1975 to January 1979. Under the administration of Party committees, CPK directives from Phnom Penh became the nation’s laws.

Extensive purging of Party ranks and committees began in March 1976 and continued at an accelerated rate throughout 1977 and 1978. Suspects were accused of being agents of the CIA, KGB or of Vietnam, and were then transferred to interrogation facilities located throughout the country. The largest and most important of these, because of its close association with the Central Committee of the CPK, was the Tuol Sleng complex in Phnom Penh, designated S-21. Up to 14,000 people were incarcerated at S-21, a former school building. S-21 was portrayed by the CPK as purifying the society through incarceration, interrogation, and extraction of confessions from the dangerous ‘microbes’ undermining the revolution. Execution was implicit following arrest, the all-knowing Angkar having already determined the guilt of detainees. Only seven people survived incarceration at S-21, due to skills they possessed which were deemed useful to the Party by the Director of the institution, Kaing Guek Eav (alias Duch).

Records of confessions systematically extracted from prisoners were structured to confirm plots and treachery within CPK ranks and to explain away economic failings as the famine affecting the population deepened. Chandler’s analysis of the surviving records of S-21 confirmed the brutal nature of interrogation techniques and the fear, confusion and disorientation suffered by prisoners as they were forced through violence to inhabit a ‘liminal space’ where they were regarded as less than human.

51 Report of the Group of Experts above n 29, [16].
53 Ibid 97.
54 Ibid 96.
55 Hinton above n 42, 87.
There was also wholesale purging of party ranks in particular sectors or military divisions.\textsuperscript{57} One attempted purge from May to September of 1978 led to a prolonged insurrection against government forces in the eastern zone. Government forces were suspected of killing at least 100,000 people in the region, including village dwellers and their families.\textsuperscript{58}

In 1999, the UN appointed a Group of Experts to examine the pattern of human rights abuses under the government of Democratic Kampuchea. From the available evidence, the Group concluded that Cambodia’s indigenous communist revolution of 1975–1979 had resulted in the deaths of 20 per cent of the April 1975 population, or an estimated 1.7 million people, from execution, starvation, overwork or disease.\textsuperscript{59} Records from the network of interrogation centres and excavation of multiple ‘killing fields’ throughout the country, provided ample testimony to the relentless brutality of the regime in its uncompromising drive to secure ‘ideological purity and internal security.’\textsuperscript{60} While the rhetoric of the CPK was not out of step with other revolutionary cliques of the period, what distinguished the Khmer Rouge regime was the merciless literalism with which its revolution was implemented in the face of the enormous deprivation it imposed on the Cambodian population.\textsuperscript{61}

D  \textit{Defeat of Democratic Kampuchea}

Throughout the regime Democratic Kampuchea received unconditional military and technical support from China. The Chinese leadership viewed Cambodia as an important hedge against the risk of Vietnamese advance in the region backed by the Soviet Union. While Maoist ideology informed CPK policy, the leadership refused advice from the Chinese to moderate domestic programs. In foreign policy too, the CPK vehemently asserted independence from other communist powers.\textsuperscript{62}

\textsuperscript{57} Group of Experts Report above n 29, [29].
\textsuperscript{58} Ibid [30].
\textsuperscript{59} Ibid [35]; Other sources put the total figure at as many as two million people nearly one third of the Cambodian population of 7.3 to 7.9 million in April 1975. See Buckley above n 19, 641.
\textsuperscript{60} Jackson above n 2, 3.
\textsuperscript{61} Jackson above n 40, 44-45.
\textsuperscript{62} John D. Ciorciari, ‘China and the Pol Pot Regime’ (23 May 2013) 6-7 <http://ssrn.com/abstract+2269301>
From its first days in power in 1975 the Khmer Rouge pressed their claims against Vietnam for control of Cambodian islands, and disputed the delineation of Cambodia’s border with Vietnam under agreements made between Sihanouk and the Vietnamese in 1967.\(^{63}\) Incursions into Vietnam met with retaliation by Vietnamese troops.\(^{64}\) Attempts to negotiate a settlement failed. In September 1977, Democratic Kampuchea initiated fresh attacks on villages in which hundreds of Vietnamese were killed.\(^{65}\) Vietnam responded by sending troops into Cambodia in December 1977 and progressively built up forces along the Cambodian border.\(^{66}\) This prompted purges of the CPK eastern zone leaders, leading to an uprising in May 1978. Some of the Khmer Rouge leaders fled to Vietnam and formed the Kampuchean United Front for National Salvation, later referred to as the Salvation Front.\(^{67}\)

In December 1978, Vietnam launched a full scale war on Cambodia and advanced towards the capital. On 6 January 1979, Vietnamese troops supported by the Cambodian dissidents took Phnom Penh.\(^{68}\) As Democratic Kampuchea collapsed, surviving Khmer Rouge leaders and cadres fled the capital with many relocating to the northwest border areas between Cambodia and Thailand.\(^{69}\)

### III CAMBODIA AFTER THE KHMER ROUGE REGIME

Vietnam promptly installed a new government in Cambodia, the People’s Republic of Kampuchea (PRK). The PRK was composed of Cambodian leaders of the Salvation Front which had formed on 2 December 1978 to overthrow the Khmer Rouge regime. It included Heng Samrin, who became Head of State, Chea Sim as Minister of the Interior and Hun Sen, as Foreign Minister. Also included were Cambodian communists who had stayed in Hanoi.

\(^{63}\) Jackson above n 40, 40-41; Chanda above n 10, 9-20.
\(^{64}\) Ibid. Jackson added that Vietnamese troops resisted attempts by both Lon Nol and Khmer Rouge troops to reassert sovereignty in eastern Cambodia prior to 1975. The CPK feared that Cambodia would be colonised by Vietnam after the United States withdrew from Indochina.
\(^{65}\) Group of Experts Report above n 29, [37].
\(^{66}\) Ibid; Chanda above n 10, 6.
\(^{68}\) Ibid 12.
\(^{69}\) Group of Experts Report above n 29, [38].
after the division of Vietnam in 1954, other Khmer Rouge dissidents, members of Cambodian ethnic minorities and individual Cambodians without communist connections.

The new government promptly signed a treaty of friendship with Vietnam. In the years directly following the overthrow of the Khmer Rouge, the intellectual and professional vacuum in Phnom Penh was filled by Vietnamese experts, as well as advisors from the Soviet Union, Eastern Europe and Cuba.

A Geopolitics and Khmer Rouge Longevity

Vietnamese influence in Cambodia stirred Cold War tensions. This ultimately ensured a role for the Khmer Rouge in Cambodia’s future and isolated the Cambodian population from Western support for the next two decades. A few days before the Vietnamese invasion, Pol Pot, who was Chairman of the CPK Central Committee and Prime Minister of Democratic Kampuchea, sent Sihanouk to New York to make the case for recognition of Democratic Kampuchea before the United Nations. In September 1979, eight months after the Heng Samrin government was installed, the Credentials Committee of the General Assembly voted in favour of Democratic Kampuchea over the PRK submission. The General Assembly vote on the issue produced a majority of 71 in favour of Democratic Kampuchea, with 35 against and 34 abstentions. While India warned that recognition of a phantom regime would undermine UN credibility, there was no reference to genocidal evidence against the Khmer Rouge throughout the process. The voting outcome reflected a new united front within the Assembly between China, the United States and ASEAN countries against Vietnamese ambition to create an Indochinese Federation and perceived Soviet hegemony in Southeast

70 Ibid.
71 Fawthrop above n 67, 184.
72 After the Vietnamese invasion Sihanouk, once again in exile (this time in North Korea), lobbied member states to leave the Cambodian seat in the UN vacant on the basis of the Khmer Rouge’s genocidal reign, but this fell largely on deaf ears. See “Open Letter to Member States of the UN From Prince Norodom Sihanouk”, from Pyongyang September 1979 reproduced in Fawthrop and Jarvis at page 28 (from Peter Schier and Manola Oum-Schier, Prince Sihanouk on Cambodia: Interviews and Talks with Prince Norodom Sihanouk (Institut fur Asienkunde, 2nd ed.1985) 75-80.
74 Fawthrop above n 67, 28-33.
Asia. Thus, although the remnant Khmer Rouge remained in exile, no longer exercised significant control over Cambodian territory or commanded political or administrative authority and were still committed to the continuation of a criminal agenda, the General Assembly granted recognition to Democratic Kampuchea.

The forces of *realpolitik* therefore secured a diplomatic advantage for the Khmer Rouge whose militancy continued from the refugee camps near the Thailand border among the very people they had terrorised under their regime. In the camps the Khmer Rouge mixed with troops of Sihanouk’s royalist National Army and Lon Nol’s Khmer People’s National Liberation Front (KPLNF). In 1982, the Khmer Rouge National Army of Democratic Kampuchea joined forces with its former enemies by forming the Coalition Government of Democratic Kampuchea (CGDK) to remove the Vietnamese from Cambodia. The CGDK served several purposes for its chief architects China, Thailand, Singapore and the United States. First, it linked former king Sihanouk once again to the Khmer Rouge and created a non-communist faction against the purportedly expansionist Vietnam. This shifted international focus away from past Khmer Rouge crimes. Second, it permitted the external powers to funnel humanitarian and non-lethal military aid to the Khmer Rouge’s coalition partners from the refugee camps to service opposition forces against the new government in Phnom Penh. International assistance was given through the United Nations Border Relief Operations rather than the body normally equipped to distribute aid to refugees, the Office of the United Nations High Commissioner for Refugees. This placed the Khmer Rouge in a position to control distribution of aid as the lawful representative of the Kampuchean nation from 1979 to 1981 and the CGDK from 1982. The non-recognition of the PRK by the international community meant Cambodia was deprived of Western economic aid and isolated once more from the non-communist world.

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75 Gottesman above n 14, 43.  
76 Fawthrop above n 67, 32.  
77 Gottesman above n 14, 41.  
78 Fawthrop above n 67, 69.  
79 Ibid 39.  
80 Gottesman above n 14, xiv.
From 1979 to 1989 China supported the Khmer Rouge guerrilla war against the PRK politically and militarily.\textsuperscript{81} For their part, the United States also provided the Khmer Rouge and other resistance forces with substantial aid in order to destabilise the Vietnamese-dominated government, thus making it possible for the guerrilla movement to gain strength throughout the 1980s.\textsuperscript{82} At the same time, ASEAN member countries in the General Assembly railed against Vietnamese occupation of Cambodia, while repeated appeals from the Phnom Penh government to bring the Khmer Rouge to trial went unheeded.\textsuperscript{83}

**B  The People’s Revolutionary Tribunal**

The founding document of the Salvation Front declared that ‘all reactionary ringleaders, who stubbornly oppose the people and owe a blood-debt to them, should be sternly punished,’ but offered clemency towards those willing to repent and help reconstruct the society.\textsuperscript{84} In 1979, amidst the social upheaval following the Khmer Rouge regime, the new government of Cambodia established the People’s Revolutionary Tribunal. The level of organisation required to hold trials for Khmer Rouge leaders while the country was in ruins indicated the level of priority attached to them.\textsuperscript{85}

A pre-trial investigation began in January 1979 from a legal unit comprised of lawyers who survived the Khmer Rouge regime. A legal delegation was sent from Vietnam to advise on the projected trials. In July, the PRK passed Decree Law No 1 to establish the People’s Revolutionary Tribunal to try Pol Pot and Ieng Sary for genocide.\textsuperscript{86} The trial procedure that emerged was a blend of the civil law system criminal procedure inherited by Cambodia from

\begin{small}
\textsuperscript{81} Buckley above n 20, 645.
\textsuperscript{82} US military support of Khmer Rouge and allied war efforts were financed at $17-32 million per year. See Buckley above n 20, 646.
\textsuperscript{83} Fawthrop above n 67, 82-3.
\textsuperscript{84} \textit{Declaration establishing the Kampuchean United Front for National Salvation} [Salvation Front] (2 December 1978) [8] cited in Fawthrop at page 40.
\textsuperscript{85} Fawthrop above n 67, 40.
\textsuperscript{86} \textit{Decree Law No.1: Establishment of the People’s Revolutionary Tribunal at Phnom Penh to Try the Pol Pot-Ieng Sary Clique for the Crime of Genocide} reproduced in Howard J De Nike, John Quigley & Kenneth J. Robinson (eds), \textit{Genocide in Cambodia: Documents of the Trial of Pol Pot and Ieng Sary} (University of Philadelphia Press, 2000).
\end{small}
the French, overlaid with the element of the pre-determined verdict of the Soviet model applied by the Vietnamese.\(^87\)

The degree of selectivity in prosecutions was expressive of political intent. Limiting the number of indictees to 2 senior leaders allowed the new regime to distinguish the top Khmer Rouge leadership from the thousands of lower-level cadres whom the government sought to co-opt to the new state apparatus.\(^88\) Restricting the Tribunal’s jurisdiction to the crime of genocide had particular expressive value. On the eve of the trial, the Presiding Judge Cheo Chenda spelled out the objective of the charges:

> Trying the Pol Pot-Ieng Sary clique for the crime of genocide will on the one hand expose all the criminal acts that they have committed and mobilise the Kampuchean people more actively to defend and build up the people’s power, and on the other hand, show the peoples of the world the face of the criminals who are posing as the representatives of the people of Kampuchea.\(^89\)

The apparent pre-determined outcome of the trial was aided by the weakness of the defence counsel who instigated virtually no cross-examination of witnesses and made no effort to refute the individual responsibility of those accused. Instead they supported the prosecution’s case which laid the blame for Khmer Rouge atrocities on Chinese influence. The prosecution argued that through a ‘thick network of advisers’ China gave encouragement to the Khmer Rouge ‘to carry out a savage genocidal policy against our people…[and a] war of aggression against Vietnam.’\(^90\)

Pol Pot and Ieng Sary were convicted of genocide \textit{in absentia} and sentenced to death. The western media paid little attention to the trials or their outcome. Because of their perceived political purposes they were dismissed internationally as mere show trials.\(^91\) There was also

\(^{87}\) Fawthrop above n 67, 47.
\(^{88}\) Gottesman above n 14, 61.
\(^{89}\) Fawthrop above n 67, 44.
\(^{91}\) Fawthrop above n 67, 47.
criticism of the trial stemming from unfamiliarity with the civil law procedure by those acquainted with common law criminal procedure; for instance, the brevity of the trial which was held from 15–19 August 1979 seemed inappropriate, even though it followed an extensive pre-trial investigation over several months.\textsuperscript{92}

However, the trials produced a substantial body of reliable evidence. In addition, the proceedings in inquisitorial mode had communicative elements. The trials were held in an auditorium which was filled to overflowing. Victims of the crimes were entitled to join the criminal proceedings as civil parties and to be represented by legal counsel. Witnesses provided graphic details of what they had seen and experienced during the regime. The audience was keen to both listen during the proceedings, and afterwards to talk openly together about what they had suffered at the hands of the Khmer Rouge. The proceedings were broadcast by loudspeakers attached to the building and throughout Cambodia via radio. The weekly newspaper, \textit{Kampuchea}, provided reports and photographs of the emotionally charged trial.

The proceedings were controlled by a presiding Cambodian judge and 10 lay people’s ‘assessors,’ the latter adding to the representative nature of the proceedings. Foreign observers and selected international organisations were invited to attend.\textsuperscript{93} John Quigley, a United States lawyer, was engaged to provide international legal opinion on the extent to which genocide had been proven with reference to the 1948 Genocide Convention.

In the year 2000, Quigley and De Nike assembled the Tribunal documents and provided commentary on the proceedings which they viewed as a clear effort to mount the first prosecution of genocide, albeit in idiosyncratic style.\textsuperscript{94} While the context of opposition from the CGDK resistance and international rejection of the Vietnamese government imported unapologetic political purpose to the proceedings, the Tribunal’s founders expressed the hope


\textsuperscript{93} Fawthrop above n 67, 43-45.

\textsuperscript{94} Howard J. De Nike, John Quigley and Kenneth J. Robinson (eds), \textit{Genocide in Cambodia: Documents of the Trial of Pol Pot and Ieng Sary} (2000).
that it constituted a tribunal of ‘mankind’s conscience.’ Today the trials are recognised, at least, as an accountability or truth-seeking mechanism which provided a substantial evidentiary base from which the ECCC could operate thirty years later.

C Law, Justice and Civil War 1979–1989

The new government established courts in Cambodia from 1980, but they functioned largely to uphold the policies of state without means of appeal, and with the executive branch of government empowered to review verdicts and sentences. In 1985, the People’s Supreme Court was established, but the judiciary, subject to executive control routinely consulted with the Ministry of Justice in the performance of its functions.

As the PRK fought the civil war against the CGDK, the country was regulated largely by national security laws. This enhanced the power of the police and the military over civilians and other legal authorities, including the Ministry of Justice itself which became subservient to the Ministry of the Interior and the Military. Citizens had no reason to expect that the justice system would uphold their individual rights or check the exercise of power of the security forces. They relied on traditional local dispute resolution mechanisms through village or district officials and submitted to the inequities inherent in patronage systems.

Heder recorded that in 1981 as the civil war in Cambodia continued, the PRK called for accountability for a broader base of leaders of the Khmer Rouge for crimes of the Democratic Kampuchea era before an international Tribunal in the mode the Nuremburg IMT. In 1988, Hun Sen wrote to the United Nations Secretary-General identifying a list of Khmer Rouge leaders who should be brought to trial for genocide. The list included Pol Pot and Ieng Sary, whose 1979 convictions remained unenforced, top level CPK leaders Nuon Chea, Ta Mok,

95 Fawthrop above n 67, 51 citing President Heng Samrin at the close of the trials.
97 Neilson above n 50, 2.
98 Ibid 3.
99 Ibid 4; Gottesman above n 14, 244-245.
100 Ibid.
101 Steve Heder, ‘Review of the Negotiations Leading to the Establishment of the Personal Jurisdiction of the Extraordinary Chambers in the Courts of Cambodia’ Cambodia Tribunal Monitor (1 August 2011) 1, 4.
Son Sen, Khieu Samphan, and less senior CPK members, Sàm Bît and Meas Mut.\textsuperscript{102} While the first request was likely to fall on deaf international ears, the second was made at a time when Hun Sen might have expected a more favourable response in the context of easing Cold War tensions. In addition, change to the power balance in Cambodia was on the horizon as the dissolution of the Soviet Union and the end of the Warsaw Pact brought an end to Soviet aid for their long-standing ally Vietnam, and consequently the PRK in Cambodia. As the Cambodian government had not subdued the militancy of the Khmer Rouge, whose leadership still controlled troops and Cambodian territory, the prospect of further political instability loomed.\textsuperscript{103}

In April 1989, the Vietnamese government announced that it would withdraw its troops from Cambodia by the following September.\textsuperscript{104} As the Vietnamese prepared to withdraw from Cambodia a new Constitution was enacted to facilitate greater Cambodian self-rule under the newly created State of Cambodia (SOC), with Hun Sen as Prime Minister.\textsuperscript{105}

\section*{D Peace Negotiations and UNTAC}

In July 1989, France and Indonesia convened the Paris Peace Conference to negotiate a settlement to the Cambodian civil war.\textsuperscript{106} The Conference included the five permanent members of the UN Security Council, the six ASEAN states, foreign ministers of other interested states, including Australia, two members of the International Control Commission (India and Canada), the chair of the non-aligned movement (Zimbabwe) and representatives of all four Cambodian warring factions.\textsuperscript{107} Hun Sen attended the Conference armed with his list of eight CPK leaders liable for prosecution, expecting trials of Khmer Rouge suspects to form part of the peace settlement. The negotiations stalled over a proposal for a quadripartite

\begin{flushright}
\textsuperscript{102}Ibid.
\textsuperscript{103}Findlay, Trevor, \textit{The Legacy and Lessons of UNTAC} (1995) 4; Gottesman, above n 13, 302.
\textsuperscript{104}Ibid 5.
\textsuperscript{105}Gottesman above n 14, 303-302.
\textsuperscript{106}The war was also known as the Third Indochina War. See Chanda above n 9, 7.
\textsuperscript{107}The six ASEAN states were Brunei, Indonesia, Malaysia, the Philippines, Singapore and Thailand. See Findlay above n 103, 5.
\end{flushright}
power sharing arrangement. Hun Sen rejected any notion of power-sharing with the remnant Khmer Rouge faction.\textsuperscript{108}

As the Conference adjourned, diplomatic efforts by Australia, Japan, Indonesia, France and other states of the permanent five members of the Security Council brought a peace proposal which included the creation of a transitional authority to temporarily administer Cambodia prior to holding a national election. Meanwhile, in Cambodia the Khmer Rouge forces remained militant. Their ambush of several trains which resulted in the deaths of dozens of civilians and security guards came to world attention. In July 1990, the United States announced it would no longer continue to support the CGDK as the legitimate representative of Cambodia in the General Assembly. Thereafter, the Assembly declared the Cambodian seat temporarily vacated.\textsuperscript{109}

By August 1990, a framework for settlement document had been formulated by the five permanent members of the Security Council.\textsuperscript{110} As negotiations resumed, the Khmer Rouge, represented at that time as the Partie of Democratic Kampuchea (PDK), remained entitled to a place at the negotiating table and to share power within a new government. Throughout the peace process, Khmer Rouge responsibility for international crimes was repeatedly sidelined either in preference for the view that a new national government should deal with it, or the belief that the peace process itself would foster national reconciliation.\textsuperscript{111} In light of the precedent of exclusion of former Nazi leaders from the peace process after the Second World War, it should not have been inappropriate to exclude the Khmer Rouge from the negotiations, but human rights was not a determinant in the composition of parties deemed fit to represent the future of Cambodia. Although the Paris Peace Agreements, signed on 23 October 1991 contained a framework for human rights in Cambodia, they only obliquely referred in the Preamble to the atrocities committed under the government of Democratic

\textsuperscript{108} Ibid.
\textsuperscript{109} Fawthrop above n 67, 93-94.
\textsuperscript{111} Findlay above n 103, 6.
Kampuchea. The Agreements recognised the need for measures to ensure the ‘non-return to the policies and practices of the past’ but contained no sanctions, penalties, exclusions or reference to genocide in the final text. The Agreements are thus expressive by omission, and reflect the drafters’ support for Chinese interests over and against compliance with the Genocide Convention. They ensured ongoing Khmer Rouge impunity, and as Hun Sen protested during the negotiations, effectively provided the Khmer Rouge with reward for their atrocities.

The Cambodian factions accepted the draft Agreements under sustained international pressure. Fawthrop concluded that Hun Sen and the State of Cambodia delegates had little option but to accept the peace terms imposed by the other states. After two decades of war and a genocidal regime, and without military and economic support from former allies, the SOC went along with a deal that would at least usher in a new era of peace, aid and development once the UN-organised election had taken place.

In 1992, the United Nations Transitional Authority in Cambodia (UNTAC) was established to administer a ‘comprehensive, just and durable political settlement.’ This included holding elections to form a new government and drafting a Constitution. However, UNTAC’s broad mandate was only partially realised. The PDK reneged on its commitments under the Agreements, claiming that Vietnamese forces had not been completely withdrawn from Cambodia, and resumed its policy of armed struggle. UN peacekeepers came under fire, territory under UN control was seized and civilians, particularly ethnic Vietnamese were

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113 Fawthrop above n 67, 100.
114 Fawthrop above n 67, 89-100.
116 Findlay above n 103, 7-8.
117 Fawthrop above n 67, 100.
118 Ibid.
targeted for attack.\textsuperscript{120} Despite violence between factions throughout the election campaign, and an estimated 100 deaths at the hands of the PDK, more than 4.2 million Cambodians (or 90 percent of the electorate) voted in the May 1993 election.\textsuperscript{121}

The royalist National United Front for an Independent, Neutral, Peaceful and Cooperative Cambodia (FUNCINPEC) led by Prince Norodom Rannaridh, secured a majority in the election.\textsuperscript{122} However, post-election disputation between the political parties resulted in threats of secession, a constitutional coup by Sihanouk and a military coup by Hun Sen, leader of the Cambodian People’s Party (CPP).\textsuperscript{123} Ultimately, the volatility was subdued by formation of a coalition government, the Royal Government of Cambodia (RGC). The coalition comprised FUNCINPEC and the CPP, with the Prince and Hun Sen as first and second Prime Ministers, and with Sihanouk returned as Cambodia’s constitutional monarch.

The Constitution established a pluralist constitutional monarchy, the Kingdom of Cambodia, an independent judiciary and a framework for the protection of human rights in Cambodia.\textsuperscript{124} With the new Constitution in place, UNTAC was dismantled and Cambodia’s sovereignty restored.\textsuperscript{125} Apart from a UN Military Liaison Team and personnel to handle residual non-military matters, by the end of 1993, UNTAC had withdrawn from Cambodia.\textsuperscript{126}

The United Nations High Commissioner for Human Rights established a UN Field Office for Human Rights in Cambodia.\textsuperscript{127} Subsequently, Justice Michael Kirby was appointed UN Special Representative of the Secretary-General on the situation of human rights in Cambodia. While the Special Representative established a formal human rights presence in

\textsuperscript{121} Buckley above n 20, 643.
\textsuperscript{122} \textit{Front Uni National pour un Cambodge Indépendent, Neutre, Pacific et Coopératif}. See Heder above n 101, 5.
\textsuperscript{123} Zasloff above n 120,165-189.
\textsuperscript{125} Findlay above n 103, 97.
\textsuperscript{126} Ibid 98 per UN Security Council Resolution 880, UN Doc. S/RES/880 4 Nov 1993. The team stayed until 15 May 1994 and were replaced by a group of three military advisers from Belgium, France and Malaysia.
\textsuperscript{127} Zasloff above n 120, 165-189.
Cambodia, Kirby’s mandate was forward-looking only. He reported to the United Nations High Commissioner for Human Rights and the General Assembly on the state of human rights in Cambodia from 1994–1996. While Kirby’s reports provided extensive analysis of the contemporary human rights situation in Cambodia and advocated reform of the legal system, prisons and courts, they did not address the crimes of the Khmer Rouge era.

The Paris Peace Agreements envisioned a system of liberal democracy for Cambodia with a Constitution enshrining human rights consistent with international instruments and the establishment of an independent judiciary empowered to enforce those rights. However, successive Special Representatives on human rights in Cambodia and the UN Group of Experts sent to Cambodia in 1998 reported the absence of a trained, fair and impartial judiciary, inadequate legal infrastructure and the politicisation of legal process in the country. Charlesworth argued that Cambodia adopted the practice of human rights ritualism. This involves states becoming parties to human rights treaties ostensibly to gain international approval, while resisting participation in the human rights system through unwillingness to implement treaty commitments domestically, and genuinely meet international reporting requirements. Furthermore, in Cambodia, the international community may have ‘tacitly endorsed this ritualism’ by adopting a largely educative approach to human rights in the face of the government’s reluctance to uphold human rights claims.

However, impetus for creating a human rights culture in Cambodia came from a burgeoning civil society that emerged after the peace settlement as the country opened up and

129 Fawthrop above n 67,108.
130 Neilson above n 50, 5.
131 Group of Expert Report above n 29 [126-130].
international NGOs were permitted to operate in the country. At the same time, a social movement begun by the Cambodian refugee diaspora and a coalition of NGOs which opposed the United States support of the CGDK alliance throughout the 1980s began to affect a change in foreign policy towards the impunity of the Khmer Rouge. The Campaign to Oppose the Return of the Khmer Rouge (CORKK) lobbied the Congress and the State Department from 1991 to introduce the Cambodian Genocide Justice Bill to support efforts to bring Khmer Rouge members to justice. The Bill was passed by the Congress on 1 April 1994 and signed in May by President Clinton. It directed the State Department to engage researchers to investigate and document the alleged crimes of Khmer Rouge. Lawyers were commissioned to investigate the culpability of the Khmer Rouge for war crimes, genocide and crimes against humanity. Yale University’s Cambodian Genocide Program (CGP) secured the public tender contract for research, documentation and training, and the Documentation Center of Cambodia (DC-Cam) was established as the Program’s office in Phnom Penh. By 1997, DC-Cam had amassed and organised tens of thousands of documents, photographs and maps pertaining to the Khmer Rouge period. These included S-21 records, the court documents of the 1979 national trial, reports of interviews with witnesses, and evidence of the location of over five hundred killing sites in 20 Cambodian provinces. DC-Cam also disseminated information about the regime throughout the country and ran education programs for victims of the Khmer Rouge as the prospect of trials became real.

IV POLITICS AND THE CREATION OF THE ECCC

A The Political Currency of Impunity

Change in the geopolitical tide towards an end to the impunity of the Khmer Rouge met with the strong cross currents of national politics. The new government still had the remnant Khmer Rouge leadership and their troops to deal with. In June 1994, in the context of

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133 Fawthrop above n 67, 109.
135 Ibid 111-112.
continuing militancy by the PDK, Co-Prime Minister Hun Sen called for trials of those responsible for the ‘genocidal crimes of the Khmer Rouge.’ In July 1994, the Cambodian National Assembly passed legislation outlaws the Khmer Rouge revolutionary organisation and military forces. Article 3 of the Law made leaders and members of the organisation and its military forces of the Democratic Kampuchea Group subject to the criminal law for secessionist activities, armed combat and destructive acts against the government or public authorities. The Law provided a six month amnesty permitting surrender to the government before 7 January 1995. While Article 6 of the legislation provided that amnesty did not apply to Khmer Rouge leaders, Article 7 declared that the King, under the Constitution, could grant partial or full amnesty or pardon. The amnesty deadline was extended in January 1995 for an indefinite period as the government declared that soldiers and ordinary citizens subject to Khmer Rouge control would escape prosecution if they came over to the government side. Defections in the thousands were added to those who had already defected in 1994. From April 1996 division commanders of Khmer Rouge strongholds along with their troops went over to the government.

The success of the government’s renewed defection strategy hastened the implosion of the Khmer Rouge leadership, which was already withering on the vine due to internal ructions. Throughout 1995 and early 1996, the government asserted that the top leadership remained liable to be tried before an international tribunal. Early in 1996, Hun Sen repeatedly urged officials of Yale University’s Cambodian Genocide Project to draft a law for the Cambodian parliament requesting the international community to form an international tribunal to try the Khmer Rouge. Hun Sen made clear that if the international community did not act on the request the Cambodian government would convene a domestic court for senior Khmer Rouge leaders.

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136 Heder above n 101, 8.
139 By the end of 1996...almost 18,000 of the Government’s troops were Khmer Rouge defectors. This included mid-level Khmer Rouge, Sàm Bît, Meas Mut and Sou Mêt. See Heder above n 101, 9, 12.
140 Etcheson above n 30, 134-135.
However, the draft law was shelved when the government negotiated an amnesty with Ieng Sary in August 1996. Ieng Sary, formerly Deputy Prime Minister and Foreign Minister of Democratic Kampuchea, remained the mouthpiece of Democratic Kampuchea abroad and a leader of the CGDK. He was the ‘exclusive interlocutor with the Chinese regarding military and financial assistance to Democratic Kampuchea in exile.’141 In the 1990s, he fell out with Son Sen, a senior Khmer Rouge military leader, over military tactics and with Pol Pot over who should replace Pol Pot as leader should he die. Khmer Rouge troops loyal to Sary defected in the thousands to the government. In September 1996, Sary was granted a royal pardon for his 1979 conviction before the People’s Revolutionary Tribunal.142

B \textit{Drama and the Death of an Old Actor}

By June 1997, amidst the government’s efforts to secure further defections, Pol Pot suspected Son Sen of being in league with Hun Sen. When Son Sen failed to attend a meeting with himself, Noun Chea and Ta Mok, Pol Pot reportedly ordered Son Sen’s execution along with his wife and children.143 Ta Mok and his troops then seized control of Pol Pot’s base at Anlong Veng. Pol Pot fled north with Noun Chea and Khieu Samphan toward the Thai border. However, Pol Pot capitulated to Ta Mok a few days later and by apparent agreement presented himself before a ‘rally of the masses’ at Anlong Veng where he was publicly denounced as a traitor. Ta Mok assumed the leadership of the remnant Khmer Rouge forces and kept Pol Pot in custody. Then, in March 1998 Ta Mok came under attack in Anlong Veng from forces associated with another defecting senior ex-CPK cadre, Ke Puak. Ta Mok fled

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\textbf{142} Etcheson above n 30, 130.
\textbf{143} Heder above n 101, 13; Nuon Chea was not part of the Paris Marxist Circle, but became involved in revolutionary activities on his return to Cambodia after living in Thailand where he joined the Thai Communist Party. He became a member of the Central Committee of Democratic Kampuchea and was active in promoting the government in exile at international conferences during 1981. Khieu Samphan went to France to study in 1953, and in 1957 completed a doctoral thesis entitled ‘Cambodia’s Economy and Industrial Development.’ He was President of the Presidium of Democratic Kampuchea, and from 1979-1986 represented Democratic Kampuchea at diplomatic missions and UN and other international meetings. He was present as President of the PDK at the signing of the Paris Peace Agreement in 1991. See Extraordinary Chambers on the Courts of Cambodia, Office of the Co-Investigating Judges, Closing Order Case file No – 002/19-09-2007- ECCC-OCIJ (15 September 2010) [1577-1604].
\end{flushright}
to Thailand where he was placed under Thai military house arrest along with Nuon Chea and Khieu Samphan.\footnote{Heder above n 101, 13 -14.}

While these events were occurring, the United States explored ways to apprehend Pol Pot in order to remove him to another country as a preliminary measure to trials before an UN-approved judicial institution.\footnote{David Scheffer, \textit{All the Missing Souls: A Personal History of the War Crimes Tribunals} (Princeton University, 2011) 346.} However, in April 1998 Pol Pot died mysteriously at Anlong Veng.\footnote{Fawthrop above n 67, 122-3.} While Pol Pot was seventy-three years old, known to be in ill health and needing the use of oxygen equipment, no autopsy was carried out by the Thai military authorities who controlled access across the border to his place of death. Fawthrop recorded that in 2002 General Surayud, the Thai commanding officer, admitted that Pol Pot had not died of natural causes.\footnote{Ibid.} Scheffer described this period as one where events had spiralled out of control and that the opportunity to ascertain what had been done with Pol Pot’s body was lost.\footnote{Scheffer above n 145, 361.} Seeking to keep the prospect of international trials for Khmer Rouge leaders alive, the United States pressed Hun Sen to locate and capture Ta Mok and the remaining leadership.\footnote{Ibid 370-371.}

C \textit{The International Players}

The national political machinations prompted by the amnesty for Ieng Sary brought the first formal UN engagement on the impunity of the Khmer Rouge with the Cambodian government.\footnote{Heder above n 101, 12.} On 21 June 1997, at the instigation of the UN Secretary-General’s Special Representative for Human Rights in Cambodia, Thomas Hammarberg, a joint request for assistance from the UN to Cambodia to prosecute those responsible for genocide and crimes against humanity during the Khmer Rouge regime was signed by Cambodia’s Co-Prime  

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\footnote{Heder above n 101, 13 -14.}
\footnote{David Scheffer, \textit{All the Missing Souls: A Personal History of the War Crimes Tribunals} (Princeton University, 2011) 346.}
\footnote{Fawthrop above n 67, 122-3.}
\footnote{Ibid.}
\footnote{Scheffer above n 145, 361.}
\footnote{Ibid 370-371.}
\footnote{Heder above n 101, 12.}
Ministers, Hun Sen and Prince Norodom Ranariddh. In response to Cambodia’s letter, the UN General Assembly requested the Secretary-General’s examination of the request including the appointment of ‘a group of experts to evaluate evidence and propose measures’ to address the impunity of the Khmer Rouge.

The request from Cambodia was sent at a time when a common position against Khmer Rouge leaders may have preserved the existing delicate balance of power within the fragile coalition government. However, the defections strategy had political currency within the political parties to the Coalition. In July 1997, after FUNCINPEC recruited Khmer Rouge defectors to its ranks, Hun Sen staged a violent coup to head off the threat posed by his political opponent’s actions as the 1998 national elections approached. After the July 1998 national elections, FUNCINPEC once again entered a governing coalition with the CPP, but as the junior partner with a reduced share of seats in the Cambodian National Assembly.

Most of the remaining lower-level Khmer Rouge cadre surrendered to the government between May and December of 1998. On 25 December, Nuon Chea and Khieu Samphan were surrendered to the Phnom government by Thailand. Neither Noun Chea nor Khieu Samphan was arrested, and both were publicly welcomed backed to Cambodian society by Prime Minister Hun Sen who proclaimed that Cambodia should now ‘dig a hole and bury the

152 UNGA Res 52/135 UN Doc. A/RES.52/135 (27 February 1998) [16].
154 Zasloff above n 120, 262-263; Etcheson, above n 30, 145-46.
155 Etcheson, above n 30, 152; Suzannah Linton, Reconciliation in Cambodia (Documentation Center of Cambodia, 2004) 84-85.
156 Fawthrop above n 67, 134.
past’ for the sake of peace and national reconciliation. Hun Sen added later that while this did not rule out holding trials for Khmer Rouge leaders, their nature was not yet settled.

V NEgotiating A TRIBUNAL TO PROSECUTE THE KHMER ROUGE

The Group of Experts Report provided a basis from which the UN was prepared to negotiate with the Cambodian government on the creation of a justice mechanism to address the crimes of the Khmer Rouge. The UN negotiators were the Secretary-General, Kofi Annan and his legal counsel led by Hans Corell. On the Cambodian side was Prime Minister Hun Sen, Sok An, Chairman of Cambodia’s Council of Ministers and Senior legal advisor to the Prime Minister, as well as Om Yentieng, advisor to Hun Sen. The Unites States remained in communication with the Cambodian government as negotiations proceeded, and provided diplomatic consultants to work with the negotiating teams. David Scheffer, United States Ambassador for War Crimes within the Clinton administration, and Senator John Kerry played important roles in resolving impasses between the negotiators over the four years following the release of the Group of Experts Report.

The Group of Exports Report took seven months to complete and was delivered to the Secretary-General on 22 February 1999. It recommended the creation of an international tribunal modelled on the ad hoc Tribunals to try Khmer Rouge officials for international crimes committed from 17 April 1975 and 6 January 1979. The proposed court would be located near, but not in Cambodia. The possibility of domestic trials was ruled out because of Cambodia’s lack of adequate legal infrastructure, a qualified legal profession and a ‘culture of respect for an independent criminal justice system.’ The Report also cited a

159 Senator Kerry was Chairman of the East Asian Subcommittee of the Senate Foreign Relations Committee. See Scheffer above n 145, 370-400.
160 Group of Experts Report above n 29, [219].
161 Ibid [171].
162 Ibid [127-129].
lack of confidence among the population concerning local judicial process for Khmer Rouge leaders.163

A Expressive Negotiating Positions

The Cambodian government rejected the report’s recommendation for an international tribunal and claimed China would veto a Security Council resolution proposed to create such an institution.164 Hun Sen asserted that more comprehensive justice was due to the Cambodian people and called for the investigation of crimes over an expanded period, 1970–1998.165 He also began discussing the possibility of creating a form of truth and reconciliation commission as an alternative to internationally assisted trials.166 The government then arrested Ta Mok and switched its position again. Hun Sen declared that a domestic trial for Ta Mok alone would be held as representative of the entire Khmer Rouge movement.167 Ta Mok was the expressive capital the government needed at that stage. He was the major remaining symbol of the Khmer Rouge era who was also capable of mobilising troops and stirring up old regime sympathisers against the government. Scheffer observed that Hun Sen’s preferences were first, for the ‘fading away’ of the Khmer Rouge leaders now that their troops were being ‘neutralised’ and second, a trial or justice mechanism he could control. 168

Defending the Cambodian position for national trials, Hun Sen cited Cambodia’s sovereign legal obligation under the Genocide Convention to try the international crime within its jurisdiction. He reminded the Secretary-General of the UN’s long-term recognition of the Khmer Rouge and the inclusion of their representatives as equals at the Paris Peace meetings

163 Ibid [134].
165 Scheffer above n 145 382.
166 Etcheson above n 157, 8.
167 Ibid. Note Ta Mok was a military commander described as the ‘hammer’ of the CPK Central Committee. He was also known as the ‘butcher’ for his role in overseeing mass killings of the regime. See Scheffer above n 145, 349.
168 Scheffer above n145, 370.
of 1989–1991. The Cambodian position was also justified by reference to the national process of reconciliation made possible by surrender to the government of senior Khmer Rouge leaders and the integration of lower-level cadre into society. The possibility of the prosecution of Khmer Rouge leaders could sow confusion and panic among other cadre, threatening peace and stability in Cambodia.

In April 1999, when Kerry was in Phnom Penh he introduced the idea of a ‘mixed tribunal’ comprised of national and international judges to the negotiations. Details as to the inclusion of international judges and prosecutors could be decided by negotiation. The Cambodian government was amenable to the proposal.

In early May 1999 Kaing Guek Eav alias Duch, former Director of S-21, emerged from hiding to speak to foreign journalists. On May 9, he was imprisoned with Ta Mok and subsequently charged under Article 3 of the 1994 Law outlawing the Democratic Kampuchea group. With two former Khmer Rouge leaders under arrest in Cambodia the government’s position strengthened.

B Toughing it Out

Thomas Hammarberg shifted his support from the Group of Expert’s recommendation to support for a mixed tribunal created under Cambodian law. In August 1999, a UN draft proposal for a mixed tribunal comprised of a majority of international judges and an international prosecutor was rejected by Hun Sen. At a meeting between Hun Sen and Kofi Annan in September in New York, Cambodia’s position was clear. The UN could provide a legal team to participate in Cambodian trials or withdraw from the negotiations. Scheffer’s mediation at this point produced a draft proposal for a tribunal created under Cambodian law,

169 Etcheson above n 157, 10.
170 Ibid; Linton above n 155, 82-87.
172 Scheffer above n 145, 383.
173 Ibid.
174 Ibid 387.
175 Ibid 386.
but of ‘international character’ by virtue of foreign participation with respect to judges and prosecutors, and due process standards characteristic of international trials. To resolve the disagreement over the Cambodian judicial majority, Scheffer advocated that judicial decisions be subject to the affirmative vote of at least one international judge of the bench, or a supermajority. The innovation was designed to provide a minimum degree of ‘international oversight’ in the decision-making of the judges while retaining the Cambodian majority.\textsuperscript{176}

In December 1999, the UN General Assembly urged Cambodia to accept a tribunal governed by international standards of justice and due process of law.\textsuperscript{177} When the negotiations resumed in the year 2000 there were other differences between the negotiators. These included the relevant definition of genocide and the legal status of Ieng Sary’s amnesty. The UN also wanted assurances from the government that Khmer Rouge leaders would be arrested and surrendered to the proposed tribunal.\textsuperscript{178}

The negotiations stalled again when in 2001 the Cambodian Law enabling creation of the tribunal within Cambodia was passed without the procedural guarantees sought by the UN.\textsuperscript{179} In February 2002, Hans Corell broke off negotiations citing continuing concerns over the independence, impartiality and objectivity of the tribunal envisaged by Cambodia.\textsuperscript{180} However, the action was considered premature by some UN member states.\textsuperscript{181} The UN General Assembly requested the resumption of talks with the Cambodian government and establishment of a tribunal in accordance with international standards followed.\textsuperscript{182}

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\textsuperscript{176} Ibid 387.
\textsuperscript{177} UNGA. Resolution 54/171, UN Doc A/RES/54/171 (17 December 1999) [11].
\textsuperscript{178} Scheffer above n 145, 394.
\textsuperscript{179} Law on the Establishment of the Extraordinary Chambers in the Courts in Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea Reach Kram No. NS/RKM/0801/12 (2 January 2001).
\textsuperscript{180} Donovan above n 171, 564.
\textsuperscript{181} Scheffer above n 145, 402.
\textsuperscript{182} UNGA Resolution 57/228 Khmer Rouge Trials UN Doc. A/RES/57/228 (27 February 2003).
\end{flushright}
Renewed negotiations in early 2003 produced an Agreement for an internationalised tribunal as a special court within the Cambodian court system.\(^{183}\) The Agreement cemented the compromises struck between the parties. These were reflected in the applicable law, composition, judicial decision-making scheme and sharing of prosecutorial and investigative functions between national and international court actors. Provision in the Agreement was also made for dispute resolution between the national and international prosecutors and the investigating judges before a Pre-Trial Chamber.\(^{184}\) The Agreement and subsequently, the Cambodian enabling law incorporated procedural standards consistent with Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights.\(^{185}\) The Agreement provided that the scope of the pardon granted Ieng Sary was a matter for the new Tribunal.\(^{186}\)

At the instigation of the United States, creation of the ECCC by the Security Council was mooted, but was opposed by China, Russia and France on the ground that in the absence of a threat to international peace and security, the proposed tribunal was not a justifiable enforcement measure under Chapter VII of the UN Charter.\(^{187}\) The ECCC does not, therefore, have the same legal basis as the Special Court for Sierra Leone or the Special Tribunal for Lebanon. The General Assembly initiated the negotiation process, approved the terms of the Agreement, and confirmed UN support of the Court.\(^{188}\) However, while the General Assembly can create subsidiary organs pursuant to its functions, it lacks the enforcement power of the Security Council and cannot compel a state to establish a court.\(^{189}\) It can recommend, but not compel a state to do so. Thus, with the consent of the Cambodian

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\(^{184}\) ECCC Agreement Art. 7


\(^{186}\) ECCC Agreement Art. 11 (2)

\(^{187}\) Scheffer above n 145, 367.

\(^{188}\) The UN General Assembly passed Resolution 57/228B of 13 May 2003 approving the draft Agreement between the UN and the Cambodian government.

National Assembly, the enabling legislation became the constitutive instrument creating the ECCC. The Agreement provides a legal basis for a regime of cooperation between the UN and Cambodia.

C Protest, Cynicism and Optimism

The Agreement has been described as a less than perfect but reasonable outcome in the face of the ‘insularity’ of the government of Cambodia and the ‘stubborn priorities’ of the UN negotiators. The UN Secretary-General highlighted ongoing serious concern with the ‘precarious’ state of the judiciary in Cambodia, recalling findings of the UN Special Representative to Cambodia and the General Assembly on problems related to rule of law observance and the independence of the judiciary in Cambodia. Luftglass argued that the Agreement ought to be abandoned in the interests of international law enforcement and Cambodian stability. Other scepticism centred on the Agreement’s lack of guarantees as to prosecutorial, investigative and judicial independence, ill-defined applicable law and unclear investigative and decision-making procedure. Linton outlined the systemic problems of Cambodia’s legal system, and warned that affording a high profile to ECCC trials would not guarantee judicial independence and impartiality. Human rights groups criticised the provision for two co-prosecutors as opposed to a single international prosecutor. They argued that it raised the same issue of potential executive interference, lack of

191 ECCC Agreement art 1.
192 Scheffer above n 145, 343.
professionalism and corruption that occurred routinely in the work of the Cambodian judiciary.197

Others supported the Agreement because of the perceived potential benefits to Cambodia of properly conducted trials and not as a backward-looking exercise but a future-oriented process which might transform the existing culture of impunity.198 Lieberman, while acknowledging some substantive and procedural flaws in the Tribunal’s design, viewed them as remediable through legal strategy and measures the international community could take to influence the proper carriage of trials.199 Horsington also maintained that many of the concerns raised were manageable and argued that the hybrid operation of the ECCC may accommodate Cambodian sovereignty while increasing the legitimacy of the Court in the eyes of the Cambodian people. This might also force members of the government with links to the Khmer Rouge to confront the truth of the atrocities as they were revealed.200 She also identified the ECCC’s potential to deliver legal capacity-building and other benefits which would not accrue in either a purely international or domestic tribunal.201

As for the national government, Ratner concluded that ultimately the benefits to Cambodia of cooperation in international justice for genocide were assessed in terms of increased foreign aid and credibility in regional fora and the UN General Assembly.202 Hun Sen shrewdly judged the level of international interest in creating the ECCC, and achieved important foreign policy goals through the negotiation process including:

reconciliation with China (which, due to its long support for the Khmer Rouge, clearly endorsed Hun Sen’s delaying tactics), control of Cambodia’s UN seat, and membership of ASEAN – without having to compromise significantly on the trial issue.

201 Ibid.
202 Ratner above n 151, 216.
[Furthermore,] to assuage a few states like Japan and the United States, [Hun Sen] participated in the talks with the UN and reached agreement with it.\(^{203}\)

While such gains may have accrued to the Cambodian government, the ultimate form of the ECCC reflects Khmer Rouge longevity and the struggle for power between contending political elites.\(^{204}\) However, this is not the whole story. In the Cambodian negotiating team were Sok An and Om Yentieng who, along with citizens from almost all strata of Cambodian society were victims of the Khmer Rouge regime and sought an end to the impunity of its key leaders.\(^{205}\) Both men hid their identities and professional backgrounds from the Khmer Rouge during the regime, witnessed the death of their children or other relatives by Khmer Rouge cadres, and watched as people were traumatised into submission during the revolution. As Scheffer worked with the men on the shape of the proposed tribunal in private during the negotiations period, he asked Om Yentieng how they sustained hope during those years. Yentieng laughed and replied: ‘There was no hope. Hope had died. The task was to live each day to survive to the next day.’\(^{206}\)

D After the Storm

In the first quarter of 2004 further work through a UN technical assessment team and Cambodian officials brought consensus around amendments to the Cambodian law so that it conformed to the main Agreement.\(^{207}\) The Cambodian National Assembly ratified the Agreement on 4 October 2004 and promulgated amendments to the 2001 Cambodian law to ensure consistency between the two instruments.\(^{208}\) The Secretary-General’s progress report to the General Assembly reiterated the ECCC’s anticipated contribution to national

\(^{203}\) Ibid 216.
\(^{204}\) Linton above n 155, 84.
\(^{205}\) Scheffer above n 145, 390.
\(^{206}\) Ibid.
\(^{208}\) Ratification in the National Assembly was delayed until 4 October 2004 because of a year-long deadlock over formation of the government following the 2003 elections. The amendments were promulgated on 27 October 2004.
\(^{208}\) Scheffer above n 145, 403.
reconciliation and sought to mobilise the resources needed for [inter alia] the special training of judges, outreach and media activities.\footnote{Report of the Secretary-General on Khmer Rouge Trials A/59/432 (12 October 2004) [22], [31].} Implementation of the Agreement was delayed while pledges for the funding of the tribunal were secured. On 29 April 2005 the Agreement entered into force. Following the swearing-in of the Cambodian and international judges, co-prosecutors and co-investigating judges in July 2006, the investigation phase of the first ECCC trial began.\footnote{Scheffer above n 145, 404.} By June 2007, the ECCC rules of evidence and procedure, known as the Internal Rules were adopted.\footnote{Internal Rules (Extraordinary Chambers in the Courts of Cambodia) (adopted 12 June 2007) [ECCC Internal Rules].}

Former Khmer Rouge leaders Ke Pauk and Ta Mok died before the ECCC became operational in 2007.\footnote{Ke Pauk was Deputy Chief of General Staff, Revolutionary Army of Democratic Kampuchea and Commander in Chief of the Central Zone armed forces. Ta Mok died in custody in July 2006. Scheffer above n 145, 405.} Comrade Duch remained in custody in the Cambodian Military Court from May 1999 until his indictment by the ECCC. His trial, referred to as Case 001 commenced in February 2009. The ECCC Trial Chamber found Duch guilty of war crimes and crimes against humanity, and imposed a sentence of 35 years imprisonment.\footnote{Co-Prosecutors v Kaing Guek Eav alias Duch (Judgement) (Extraordinary Chambers on the Courts of Cambodia, Trial Chamber Case File /Dossier No.001/18-07-2007, 26 July 2010) [214-216].} On 3 February 2012, the ECCC Supreme Court Chamber increased the sentence to life imprisonment, bringing the first trial to completion.\footnote{Kaing Guek Eav alias Duch, (Appeal Judgement) (Extraordinary Chambers on the Courts of Cambodia, Supreme Court Chamber, ECCC-Case File No 001/18-07-2007, 3 February 2012) [382].}

Between September and November 2007, the Cambodian government arrested Khieu Samphan, Nuon Chea, Ieng Sary and Ieng Thirith and delivered them to the ECCC detention facility.\footnote{Scheffer above n 145, 405.} On 15 September 2010, all four were indicted under the Closing Order of the Co-Investigating judges for genocide (against the Muslim Cham and the Vietnamese), crimes against humanity and grave breaches of the 1949 Geneva Conventions during the Khmer Rouge regime. The Open Society Justice Initiative which monitored the ECCC proceedings reported that the initial hearing of 27–30 June 2011 generated enormous public interest
locally and internationally. The ‘huge symbolic and legal significance’ of bringing the surviving leaders of the Khmer Rouge to trial 30 years after their regime could not be overstated, and the hearing provided the opportunity for the public to see the four accused persons who were all before the court.216

Their trial, known as Case 002 began in January 2011 as a joint trial. The Closing Order addressed a diverse range of charges and amassed evidence of multiple crimes sites throughout the territory of Democratic Kampuchea.217 However, the case was severed by order of the Trial Chamber into a series of separate trials each targeting segments of the indictment. The intervention was in the interests of justice, including safeguarding the interests of victims in achieving meaningful and timely justice, and the right of all the accused to an expeditious trial.218 The frailty of the elderly accused who were all experiencing various ailments as the trial proceeded also justified the severance order.219

The severance order produced Case 002/01, the first severed mini-trial limited to addressing alleged crimes related to the forced movement of the population from Phnom Penh in April 1975 and later from other regions, together with the Khmer Republic soldier killings at the execution site, Tuol Po Chey. In November 2011, Ieng Thirith was found unfit to stand trial due to the onset of advanced dementia. The Trial Chamber ordered the severance of the charges against her from the Indictment.220 The proceedings against Ieng Sary were terminated on 14 March 2013 following his death.221

216 Open Society Justice Initiative, Recent Developments at the Extraordinary Chambers in the Courts of Cambodia (February 2012) 15.
218 Co-Prosecutors v Nuon Chea (Decision on Severance of Case 002 Following Supreme Court Chamber Decision of 8 February 2013) Extraordinary Chambers on the Courts of Cambodia, Trial Chamber, Case file No – 002/19-09-2007- ECCC/TC (26 April 2013) [5-8].
219 Co-Prosecutors v Nuon Chea (Decision on Severance of Case 002 Following Supreme Court Chamber Decision of 8 February 2013) Extraordinary Chambers on the Courts of Cambodia, Trial Chamber, Case file No – 002/19-09-2007- ECCC/TC (26 April 2-13) [13].
On August 7, 2014 the Trial Chamber found Nuon Chea and Khieu Samphan guilty of the crimes against humanity of extermination (encompassing murder), persecution on political grounds, and other inhumane acts (comprising forced transfer, enforced disappearances and attacks against human dignity). They were both sentenced to life imprisonment.222

Case 002/02 began in October 2014 as the second mini-trial trial. Khieu Samphan and Nuon Chea face separated additional charges with respect to multiple crimes sites. The indictment includes charges of genocide against the Cham and Vietnamese communities, forced marriages and rape (nationwide), internal purging in Khmer Rouge security centres, worksites and cooperatives, as well as alleged crimes against certain Buddhists.223

While Cases 001 and 002 proceeded with the cooperation of the national government and with considerable harmony between international judicial and professional officers of the Court, the same cannot be said of the investigation phase of Cases 003 and 004. Both investigations sought to widen the net of prosecutions beyond the five initial suspects surrendered by the government, to another cluster of former Khmer Rouge members of senior or middle rank. In 2009, as the government made known its opposition to the initiation of the new investigations by the international prosecutor, the national prosecutor and the national co-investigating judge withdrew cooperation with their international counterparts, leading to a stalemate in the work of the respective offices.224 Two international co-investigating judges resigned on the basis of perceived political interference in their work. The morale of international staff flagged as the UN failed to affect any change to the pattern of obstruction that emerged.225 It seemed as though the UN negotiators’ and the ECCC Agreement’s critics’

225 Cambodia: Civil Society Expresses Concern over Recent Developments in the Extraordinary Chambers in the Courts of Cambodia and Urges the International Community to Speak Out Asian Human Rights Commission (20 May 2011); Mark Ellis, Safeguarding Judicial Independence (International Bar Association, September 2011) 1-30.
worst fears had been realised. For its part, the government raised the argument that new investigations would stir up civil strife among sectors still loyal to the Khmer Rouge.226

VI CONCLUSION

Given the UN’s effective protection of the Khmer Rouge during the civil war period, it is not surprising that the Cambodian government resisted international control of the ECCC. However, the ultimate form of the ECCC reflected both Khmer Rouge longevity and the struggle for political power within Cambodia.

Independence brought fierce political rivalry between Cambodian political parties, and armed conflict in Cambodia for more than two decades. Amidst war to end colonialism in Indochina, the Khmer Rouge, fearing Vietnamese territorial encroachment, broke with its former comrades in arms to bring radical communist revolution to Cambodia. Their deconstruction of the society under the invisible, all-knowing organisation, Angkar, disconnected individuals, families and communities from their traditional social underpinnings. After the Khmer Rouge regime was ousted in 1979, a proxy war in Cambodia instigated by foreign powers from 1979–1989 inhibited any true reconciliation or open public discourse on the Khmer Rouge era. The Khmer Rouge were able to re-group during this time and for another decade influenced the Cambodian political agenda. The Khmer Rouge era was erased from school curricula and forgetting the past became the political mantra of reconciliation for a society deprived of voice, rights and memory. The long-term impunity of the Khmer Rouge entrenched a culture of impunity in Cambodia. If there was no justice for genocide, citizens could have no confidence in the national justice system’s capacity to address ordinary crimes. However, hope returned for many as civil society groups and the UN began to represent the justice interests of Cambodians in the years following the UNTAC mission.

The UN sought creation of a model court in Cambodia, but the Cambodian government would not permit international control of the ECCC. While the ECCC’s ultimate form was unorthodox, the international side negotiated procedural safeguards to counter threats to legitimate due process in the Cambodian court. In proceeding with the negotiations, the UN risked its own reputation in supporting a Court that could be viewed as expressive in the negative. However, the dominance of the national in the Court’s composition, law and procedure produced a platform for the suppressed voice of the Cambodian community, which was aided by the international presence. In the next chapter, I examine features of the controversial Court that enhanced the ECCC’S communicative value rather than its expressive value.
CHAPTER FOUR
INQUISITORIAL CRIMINAL PROCEDURE AT THE ECCC

I  INTRODUCTION

In Chapter Three, I discussed the risk assumed by the UN in agreeing to the reduction of international control over the ECCC under the Cambodian law enabling its creation within the existing court system of Cambodia. This chapter discusses the fusion of Cambodian inquisitorial criminal procedure with elements of international criminal procedure to support the ECCC’s internationally assisted trials.

Controversy, missteps and delays formed part of the implementation phases of all of the Courts described in Chapter Two. The ECCC had the additional challenge of instituting credible criminal procedure within a national legal system and administrative structure known for manipulated justice processes and outcomes. In these conditions, the ECCC judiciary began the delicate task of drafting the Court’s rules of evidence and procedure, known as the Internal Rules.

The ECCC Internal Rules instituted inquisitorial criminal procedure based on Cambodian law, but incorporating international standards of due process. The rules also gave effect to the intricate compromises contained in the Agreement between Cambodia and the UN discussed in Chapter Three. In this chapter, I examine the legal framework of the ECCC and the procedural scheme implemented by the Internal Rules. I discuss the role-sharing among senior court actors, the incorporation of the civil party action within the criminal proceedings, the supermajority formulae in judicial decision-making, and the judiciary’s recognition of the ECCC’s reconciliatory purpose during the early stages of Cases 001 and 002. My analysis reveals the potential of these procedural features to produce representative and discursive trials. While the Court encountered difficulties in implementing victim participation rights, and the Cambodian government opposed the opening of investigations into Cases 003 and 004, the procedural regime proved sufficient to support the first internationalised trials of former Khmer Rouge leaders. The chapter highlights elements of the ECCC’s structure and
procedure that may be instrumental in producing not only expressive but communicative trials.

II LEGAL FRAMEWORK OF THE ECCC

The legal framework includes the Cambodian enabling law and the ECCC procedural rules, known as the ECCC Internal Rules. In Chapter Two, I noted that the ECCC from its inception was described as a hybrid court not unlike the SCSL.\textsuperscript{1} However, closer analysis of the ECCC’s founding instruments suggested categorisation of the ECCC as an ‘internationalised’ court, being one derived from national law but with international elements underpinned by a bilateral agreement.\textsuperscript{2}

The scope for, and nature of representation at the ECCC flows from the legal framework agreed to between the UN and the Royal Government of Cambodia (RGC). The Cambodian government succeeded in securing a majority of national judges in all Chambers: the Pre-Trial and Trial Chambers; and the Supreme Court acting as the court of appeal. The roles of investigating judge, prosecutor and defence counsel are shared equally between Cambodian and international officers. Senior administrative roles are similarly shared except that there is a Cambodian Director of the Office of Administration appointed by the RGC and an international Deputy Director appointed by the UN Secretary-General.\textsuperscript{3} The extent of role-sharing at senior levels at the ECCC exceeds that of all other UN supported Courts.


Unlike the circumstances surrounding creation of the SCSL by treaty described in Chapter Two, the Cambodian government insisted on national ownership of the ECCC and adopted a law to enable its creation within the national legal system.\footnote{Acquaviva above n 2 130.} This was an assertion of Cambodian sovereignty and exercise of the national duty to investigate and prosecute serious violations of human rights and international humanitarian law within sovereign territory.\footnote{Williams above n 2, 293.} The national enabling law is the constitutive instrument creating the ECCC.\footnote{Ibid 295.} Concomitantly, the Agreement between the UN and the Cambodian government constitutes an international treaty pursuant to which the 2004 amendments to the initial Cambodian law (ECCC Law) were passed to reflect the international elements insisted upon by the UN during the negotiations.\footnote{Law on the Establishment of the Extraordinary Chambers in the Courts in Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea Reach Kram No. NS/RKM/0801/12 including amendments promulgated 27 October 2004 available at http://eccc.gove.kh/english [ECCC Law] Secretary-General’s Report on the Khmer Rouge Trials 31 March 2003 UN Doc A/57/769 [10]. See also Ernestine E. Meijer, ‘The Extraordinary Chambers in the Courts of Cambodia for Prosecuting Crimes Committed by the Khmer Rouge: Jurisdiction, Organization, and Procedure of an Internationalized National Tribunal’ in Cesare P.R. Romano, Andre Nollkaemper & Jann K. Kleffner (eds), Internationalized Criminal Courts and Tribunals: Sierra Leone, East Timor, Kosovo and Cambodia (Oxford University Press, 2003) 207, 209-210.} A hierarchy of authority between the Agreement and the ECCC Law was suggested by the Secretary-General following the final negotiations based on the Agreement’s operation by law within Cambodia, and the government’s obligation to ensure that the national law conformed to the Agreement.\footnote{ECCC Agreement art 2 (3).} The Agreement provides that where amendments to the ECCC Law are ‘deemed necessary, such amendments shall always be preceded by consultations between the parties.’\footnote{Acquaviva above n 2, 131.} Of prime concern to the UN is maintenance of the fine-tuning of the Agreement to ensure that the ECCC functions in accordance with international standards of due process with the awareness that the institution will be evaluated internationally on that basis.\footnote{10}
The two instruments may be read together as providing the governing framework of a joint venture, each having a specific purpose. The ECCC Law is the Court’s working instrument establishing Cambodian ownership of the Court. The Agreement has the specific purpose of regulating cooperation between the UN and the Royal Government of Cambodia (RGC) in bringing suspects before the ECCC to be prosecuted for serious violations of Cambodian penal law, international humanitarian law, custom and international conventions recognised by Cambodia, that were committed during the period 17 April 1975 to 6 January 1979. Cohen took the view that the ECCC was created by the Agreement but noted from an interview with Michelle Lee, the international Deputy Director of Administration at the ECCC, that there was wide acceptance of Cambodian ownership from the UN side of the court administration ‘which views its role as in essence, one of support for the process in accordance with international standards.’

Reflecting the tense negotiations and doubts of the UN as to the Cambodian government’s intentions, Article 28 of the Agreement provides for UN withdrawal of cooperation in the venture ‘should the RGC change the structure or organisation of the ECCC or otherwise cause them to function in a manner that does not conform to the terms of the Agreement.’ The provision appears to provide the UN with an exit strategy should the Cambodian government act in bad faith. In practice the provision is largely expressive in light of the complex political and economic factors involved in withdrawing from or withholding support for a Court of such costly and diplomatic proportions.

B Jurisdiction

1 Temporal Jurisdiction

Consistent with practice in other internationalised courts, the temporal jurisdiction of the ECCC covers a limited period: 17 April 1975 to 6 January 1979. While the Cambodian

11 Williams, above n 2, 295.
12 ECCC Agreement art 1.
13 Cohen above n 1, 27 from notes on Cohen’s interview with Michelle Lee on 30 May 2006.
14 Williams above n 2, 297.
conflict began before, and continued after this period, the limitation is explicable, at least in part, by a pragmatic concern not to overburden the ECCC and the desire to permit the Court’s prompt and cost-effective functioning.\textsuperscript{15} It was foreseeable however, that a more expansive view of the conflict encompassing larger regional conflict supporting geopolitical interests beyond the Khmer Rouge regime itself would engage the defence. A challenge to the legitimacy of the proceedings could come by means of the ‘rupture defence.’ Developed by Jacques Verges in the war crimes trial of Klaus Barbie in France, the controversial defence strategy was designed to attack the legitimacy of the prosecuting authorities by suggesting they do not bring the proceedings with entirely clean hands.\textsuperscript{16} Though unlikely to induce an acquittal, the defence could undermine the work of the Court to some degree by affecting public opinion.\textsuperscript{17} While use of the strategy arguably amplifies the risk taken by the UN in supporting the creation of the Court, challenges to jurisdiction are not uncommon in international criminal proceedings.\textsuperscript{18} Moreover, at the ECCC, the Defence counsel are subject to judicial control under inquisitorial proceedings based around a case file prepared by the Co-Investigating judges.\textsuperscript{19} Discussion of relevant contextual matters raised in the file may be admitted by the judges in the interest of testing the evidence in order to establish the essential truth concerning the crimes. Such discussion may enhance the communicative value of the proceedings within Cambodia by shedding light on the period surrounding the Khmer Rouge regime.

2 \textit{Subject Matter Jurisdiction}

The ECCC is empowered to try alleged perpetrators of both national and international crimes during the designated period. The ECCC Law lists the crimes of homicide, torture and religious persecution as the relevant domestic crimes under the 1956 Penal Code of

\textsuperscript{15} Meijer above n 8, 212.
\textsuperscript{16} \textit{Federation Nationale des Deportes et Internes Resistantes et Patriotes v Barbie} (1985) 78 ILR 125.  
\textsuperscript{17} Robert Cryer, \textit{Prosecuting International Crimes} (Cambridge University Press, 2005) 202; Other tactics may also be engaged such as the Case 002/02 defence team of Khieu Samphan’s boycott of the trial proceedings until the Trial Chamber addresses their allegations of bias on the part of several of its judges. \textit{Khmer Defense Teams a no Show at Meeting to End Boycott} Cambodia Daily 22 October 2014.  
\textsuperscript{18} For example, there were challenges to the jurisdiction of the ICTY and the SCSL.  
\textsuperscript{19} Acquaviva above n 2, 143-144.
Cambodia.\textsuperscript{20} The Code is applicable national law as it remained in force ‘following the promulgation of both the Constitution of the Khmer Republic on May 1972 and the Constitution of Democratic Kampuchea on 5 January 1976.’\textsuperscript{21}

As to international crimes, the relevant sources of law include ‘customary and conventional international law and the general principles of law recognised by the community of nations.’\textsuperscript{22} Accordingly, the core international crimes of genocide, crimes against humanity and grave breaches of the Geneva Conventions of 12 August 1949 come within the jurisdiction of the ECCC.\textsuperscript{23} In addition, the ECCC may prosecute suspects most responsible for the destruction of cultural property during an armed conflict under the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and crimes against internationally protected person under the 1961 Vienna Convention on Diplomatic Relations.\textsuperscript{24}

By the enforcement of Cambodian and international law, the ECCC aims to end impunity for some domestic crimes and fulfil its primary obligation to enforce human rights and international humanitarian law through the internationally approved Court, and before the Cambodian people. This represents at least partial fulfilment of the Office of the High Commissioner for Human Rights in Cambodia’s objective of furthering the rule of law in Cambodia, the slow progress towards which is recorded in Reports of the Office and those of the Secretary-General’s Special Representatives.\textsuperscript{25} In addition, application of domestic

\textsuperscript{20} ECCC Law Article 3 new, the relevant provisions of the 1956 Penal Code are cited as Homicide (arts. 501, 503-508), Torture (art 500), Religious persecution (arts 209-210).
\textsuperscript{21} Co-Prosecutors v Kaing Guek Eav alias Duch, (Judgement) (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case File No 001/18-07-2007, 26 July 2010) [29].
\textsuperscript{22} Co-Prosecutors v Kaing Guek Eav alias Duch, (Judgement) (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case File No 001/18-07-2007, 26 July 2010) [30]. See Article15 (2) of the 1966 International Covenant on Civil and Political Rights 999 UNTS 172 (signed by Cambodia on 17 October 1980 and acceded to on 26 May 1992) See also Statute of the International Court of Justice art 38 (1).
\textsuperscript{23} ECCC Law arts 1, 4-6.
\textsuperscript{25} See Advisory Services and Technical Cooperation in the Field of Human Rights: Report of the Special Representative of the Secretary-General for Human Rights in Cambodia, Yash Ghai UN Doc. E/CN.4/2006/110 (24 January 2006); Role and Achievements of the Office of the United Nations High
law by the ECCC not only activates accountability for criminal violations but a remedy and reparations for victims, which is discussed further below.\textsuperscript{26}

3 \textit{Personal Jurisdiction}

More politically contentious than either temporal or subject matter jurisdiction is the personal jurisdiction of the ECCC. The ECCC Law and the Agreement limit ECCC prosecutions to ‘senior leaders’ of Democratic Kampuchea and those ‘most responsible’ for violations of Cambodian penal law, international humanitarian law and custom and international conventions recognised by Cambodia during the period of temporal jurisdiction.\textsuperscript{27} Neither the Agreement nor the ECCC Law define ‘senior leaders’ or ‘those most responsible.’ However, as an international treaty, the Agreement is subject to the Vienna Convention on the Law of Treaties. As such, under Article 31 (1) the ordinary meaning of these terms used in the Agreement interpreted in ‘good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose’ guide the determination of ECCC jurisdiction over suspects.\textsuperscript{28} Furthermore, as the ECCC Law is integrally linked to the Agreement, in accordance with Article 31 (2) of the VCLT, it constitutes ‘an instrument which was made by one or more parties in connection with the treaty.’ As each instrument uses the same terminology, according to the rules of interpretation, the ordinary meaning of the terms used in context with reference to the object and purpose of the relevant instruments indicate that two categories of suspects fall within the jurisdiction of the Court: senior leaders of Democratic Kampuchea, and those most responsible for the commission of offences within the jurisdiction of the ECCC. Moreover,
recourse to the drafting history of the instrument as a supplementary means of interpretation may be had under Article 32 in the case of ambiguity of terms.29

The 1998 UN Group of Experts Report first addressed the issue thus:

The Group does not believe that the term ‘leaders’ should be equated with all persons at the senior levels of Government of DK or even of the CPK. The list of top governmental and party officials may not correspond with the list of persons most responsible for serious violations of human rights in that certain top governmental leaders may have been removed from knowledge and decision-making; and others not in the chart of senior leaders may have played a significant role in the atrocities. This seems especially true with respect to certain leaders at the zonal level, as well as officials of torture and interrogation centres such as Tuol Sleng.30

The first batch of ECCC indictees reflected the dual categories envisaged by the Group of Experts. Four indictees can be categorised as senior leaders of Democratic Kampuchea having held ministerial positions — Nuon Chea, Ieng Sary, Ieng Thirith, or a leading role within the CPK — Khieu Samphan. A fifth former Khmer Rouge member however, falls within the second category. While not a member of the Ministry or the CPK Central Committee, Kaing Guek Eav (alias Duch) was directly responsible to the Central Committee and controlled the administration of the Tuol Sleng interrogation centre which implemented the CPK policy of ‘smashing’ (or destroying) enemies of the regime.31 In the first trial, known as Case 001 or the Duch trial, the Trial Chamber confirmed the ECCC’s personal jurisdiction as confined to those two categories and prosecuted the accused as someone ‘most responsible for the most serious violations of human rights during the rule of Democratic Kampuchea.’32

29 Steve Heder, ‘A Review of the Negotiations Leading to the Establishment of the Personal Jurisdiction of the Extraordinary Chambers in the Courts of Cambodia’ Cambodia Tribunal Monitor (1 August 2011) 1, 1-2.
31 Kaing Guek Eav alias Duch (Closing Order) (Extraordinary Chambers in the Courts of Cambodia, Office of the Co-Investigating Judges, Criminal Case File No.002/14-08-2006; Investigation No 001/18-07-2007-ECCC-OCII, 8 August 2008) [31-33].
32 Co-Prosecutors v Kaing Guek Eav (alias Duch) (Judgement) (Extraordinary Chambers on the Courts of Cambodia, Trial Chamber Case File 001/18-07-2007/ECCC/TC, 26 July 2010) [25].
Scholarly analyses of the negotiating history of the ECCC’s personal jurisdiction also confirmed the intention of drafters to identify two categories of suspects.33 Separate analyses were published in the context of doubt cast on the reading of Article 1 as a result of the Appeal by Duch from his conviction in the first trial, and in the wake of delays in the investigation of Cases 003 and 004 due to perceived political interference by the Cambodian government.34

Reviewing the history of the ECCC’s personal jurisdiction, Steve Heder recorded Prime Minister Hun Sen’s public statements on those within Khmer Rouge ranks who were targeted for prosecution. Heder’s study revealed that Hun Sen’s preference was for prosecutions of former Khmer Rouge leaders to the mid-tier level provided those who overthrew the Regime were excluded from the net.35

David Scheffer stated that during the ECCC negotiations ‘no concession was given that would permit interpretation of the language of ECCC personal jurisdiction to a pool of only five suspects.’36 He concluded further that:

There is no plausible way to interpret the personal jurisdiction language of the ECCC to narrow the field of suspects only [Scheffer’s emphasis] to senior Khmer Rouge leaders who also were most responsible for the atrocity crimes of the Pol Pot regime. Duch’s appeal challenging his designation within the personal jurisdiction is clearly refuted by the legislative history of the ECCC Law, by a common sense grammatical reading of the text, and by clear expressions of intent by the Cambodian Government and UN negotiators prior to enactment of that Law.37

The Cambodian government’s opposition to continuing the investigation of Cases 003 and 004 highlights the political sensitivity around widening the net of prosecutions at the ECCC.38 Cases 003 and 004 target an additional five suspects who held political and military

33 David Scheffer, ‘Negotiating History of the ECCC’s Personal Jurisdiction’ Cambodia Tribunal Monitor (22 May 2011) 1, 11.
34 Heder above n 29, 1.
36 Scheffer above n 33, 10.
37 Ibid 10-11.
38 Open Society Justice Initiative, The Future of Cases 003/004 at the Extraordinary Chambers in the Courts of Cambodia (OSJI, October 2012), 16.
authority within the CPK or had zone responsibility at detention facilities. This happened in Case 002 when Cambodian officials refused to comply with summonses to appear as witnesses in contravention of the duty of the government to cooperate with the ECCC. This kind of problem is not unique to the ECCC. As discussed in Chapter Two, the ICTY in its early years faced difficulties in securing the cooperation of Balkans states in the arrest of suspects.

The Open Society Justice Initiative and others criticised the UN for continuing to support the Court in these circumstances and asserted in expressive tones that it was weakening ‘the UN brand’ in the realm of internationalised accountability. However, the UN did not exercise its right to withdraw cooperation from the tribunal as a whole, or in relation to Cases 003 and 004 under Article 28 of the Agreement. Instead, the UN deployed new personnel to the Office of the Co-Investigating Judges to ‘continue pursuing the critical task of Khmer Rouge regime accountability’ generally, while remaining invested in the completion of the less controversial Case 002. The political storm surrounding the opening of Cases 003 and 004 deflected attention from the significant gains of the ECCC in establishing the Court and implementing an innovative scheme of criminal procedure under its Internal Rules, although this too was not without controversy.

C The ECCC Internal Rules

Had the ECCC been an international court, or a hybrid tribunal such as the SCSL, its rules of procedure might have been modelled on those of the ICTY or the ICC. If it had been a hybrid court such as the SCSL, the institution might have been mandated to adopt the procedure of

42 Deployment of International Co-investigating Judge Extraordinary Chambers in the Courts of Cambodia, News (30 July 2012).
one of the ad hoc Tribunals and adapt those rules to the local context as necessary. Such an approach would have activated the procedural regimes that have been developed to address the requirements of prosecutions for international crimes in adversarial mode. International control of the proceedings of the ad hoc Tribunals and the subsequent transplantation of like procedure in successive transitional courts avoided the procedural complexities of an in situ court like the ECCC, which engaged inquisitorial procedure supplemented by adversarial rules applicable to mass crimes.

The ECCC Law and Agreement instituted an essentially national court, albeit with international elements, whose procedure was to be in accordance with Cambodian law primarily. This meant that the ECCC Internal Rules had to incorporate the rules of inquisitorial criminal procedure applicable in Cambodian courts, but that those rules were revised where necessary to enable the prosecution of mass crimes. The revisions and adaptations brought elements of international adversarial procedure to bear in otherwise national proceedings.

The process of giving effect to Cambodian law and international criminal procedural standards in the Internal Rules revived the tension inherent in the negotiations for the ECCC Agreement. As the national and international members of the Court negotiated the rules in plenary sessions, a major source of contention was the international view that international rules would need to apply in many cases in contrast to the position of the national judges that Cambodian law must prevail.43

As transitional courts operate further revisions may become necessary. The change to the applicable law at the Kosovo courts is an example of international officials erring and making necessary adjustments in order fulfil their mandate over time. At the ECCC, changes to the procedure were not always welcomed by the common law trained legal counsel who were

43 John D. Ciorciari and Anne Heindel, Hybrid Justice: The Extraordinary Chambers in the Courts of Cambodia (University of Michigan Press, 2014) 64.
already wrestling with the challenges of the hybrid legal procedure. Some commentators also criticised the Court’s interpretation of its procedural mandate.

1 Drafting the Internal Rules

The initial draft of the Internal Rules was prepared by the Committee on the Rules of Procedure, which was established in July 2006. Comprised of five judges (three Cambodian and two international) the Committee circulated the draft to the larger ECCC judicial body, the Co-Prosecutors and other senior court officers as well as interested organisations and individuals. The Court invited responses to the draft and various national and international non-governmental organisations made submissions on it. Over the following ten months the draft was discussed in plenary meetings comprised of the larger body of ECCC judges. These sessions were closed to the public. At the November 2006 plenary meeting there was significant disagreement between the judges on how Cambodian law and international standards were to be integrated, the nature of victims’ rights and the operation of the ECCC within the Cambodian court structure.44 From January 2007, a newly constituted Rules Committee worked intensively to resolve the disagreements. By March 2007, the major impasses had been largely addressed and redrafting of the Rules ensued.

However, disagreement remained between the Cambodian and international judges over the issue of access to international defence counsel for accused persons.45 There were indications of government pressure on the Cambodian judges, through the Bar Association of the Kingdom of Cambodia (BAKC) to limit international defence counsel activity to assistance to Cambodian lawyers outside the Court.46 The international judges on the other hand argued that international defence counsel must be able to represent accused persons in Court to meet international fair trial standards.47 The compromise reached under what became Internal Rule

46 Ciocriăi above n 43, 65; See also Human Rights Watch, Government Interferes in Khmer Rouge Tribunal – Donors Should Recognize How Government Tactics Threaten Entire Process (5 December 2006).
47 Open Society Justice Initiative, Political Interference at the Extraordinary Chambers in the Courts of Cambodia, (July 2010) 9, f.n. 24.
22 was that international lawyers could fully participate as defence counsel provided they acted alongside a Cambodian lawyer, and went through a registration process with the BAKC. Finalisation of the Internal Rules was further complicated by the late demand of the BAKC for registration fees for international counsel at ten times the normal rate. The final compromise of a flat registration fee of US$500 for all international counsel appearing before the ECCC cleared the way for implementation of the Internal Rules. Ultimately, the resultant procedural rules were a mix of pragmatism and idealism to guide judicial navigation of the ‘complex compromises’ contained in the ECCC Law and Agreement.49

2 Legality of the Internal Rules

The Rules were adopted on 12 June 2007 and were subsequently issued in Khmer, French and English, the official languages of the Court.50 Ultimately, the Internal Rules, pursuant to Articles 20, 23 and 33 new of the ECCC Law and Article 12 (1) of the Agreement have the stated purposes of consolidating multiple sources of Cambodian procedural law, resolving uncertainties or ambiguities as to their application and where necessary, incorporating international standards to ensure procedure not inconsistent with international fair trials.51 However, the Rules were criticised by international legal counsel as unwieldy and their legality was challenged by a number of scholars.

In 2008, the Noun Chea defence team argued that the ECCC as a Cambodian court must follow the national criminal procedure with divergence from the Cambodian rules only allowable on case-by-case basis. The team argued that the Court’s departure from such practice was thus ultra vires Article 12 (1) of the Agreement. The apparent literalist approach to statutory interpretation seemed to ignore the well documented reality that Cambodian

49 Acquaviva above n 2, 130.
50 ‘Decrease of DK tribunal registration fee for foreign layers welcome’ <http://www.people.com.cn/200705/01/eng20070501_371114.html>
criminal proceedings are often brief and do not adhere to even fundamental fair trial standards at national or international levels. There was also a challenge by the ECCC Defence Support Section on the scope of ECCC appeals rights. They argued that the ECCC rules departed too sharply from Cambodian procedure in the interest of expedient proceedings. O’Neill and Sluiter added that the relevant Cambodian provisions were compliant with international human rights law, and that the ECCC rules on appeals were not necessarily consistent with the practice of international criminal tribunals. In 2011, Starygin concluded that the ECCC, pursuant to the ECCC Law and Agreement, had failed to engage adequately with existing Cambodian law and procedure with a view to adopting rules of sufficient certainty and which were consistent with international standards. He claimed, for example, that the role assigned to victims as civil parties under the Rules of ‘supporting the prosecution,’ constituted an ‘extra-statutory means to supplant rules established by Cambodian procedure.’ Starygin noted that this was because the 2007 Cambodian Code of Criminal Procedure does not require civil parties to the criminal proceedings to ‘support the prosecution’ in pursuit of their civil action, and that the requirement does not exist at the international level. Moreover, the provision was partly responsible for inordinate delays in the proceedings. The criticism seemed to overlook the possibility of the drafters’ intent to align victim participation with the primary purpose of prosecution, which (as discussed in Chapter Two) the relevant international proceedings at the International Criminal Court and the Special Tribunal for Lebanon also seek to do albeit under different statutory provisions.

It should also be noted that the new Cambodian Code of Criminal Procedure was not adopted until August 2007. While the Code attempts to streamline and harmonise the multiple sources of Cambodian procedural law existing at the time the Rules were drafted, it was based on French law, which itself has since been ‘modified to address European Court of Human Rights criticisms and perceived weaknesses in the [French] system.’ As former Co-

52 Ciorciari above n 43, 63.
54 Starygin above n 44, 25.
55 Ibid 37.
56 Ciorciari above n 43, 63.
Investigating Judge Lemonde has noted ‘I regret that the French experts [advising the Cambodian government] gave Cambodia a tool that was obsolete before it was even used.’\textsuperscript{57}

The question of what constitutes ‘international standards’ may remain an open question or at least subject to considerable qualification given the political contingencies of the creation of transitional courts, and the lack of settled international practice in various areas such as appeals and sentencing. Furthermore, as discussed in Chapter Two, other UN supported courts (with international judicial majorities) made miscalculations in their formation stages and had to adapt procedurally to their contexts as they operated. Criticisms of the ECCC as being out of step with so-called international standards need to be considered in this light.

3 Procedural Changes in Case 002/01

As Case 002 began, the Court was criticised for making changes to the rules autonomously and in way inconsistent with international practice. Some international legal counsel critical of the Court’s hybrid criminal procedure, had already argued that marrying the two legal cultures coherently was difficult and produced unnecessary delay.\textsuperscript{58} Following the Trial Chamber decision to split Case 002 into at least two mini trials, the Co-Prosecution objected to the Court’s severance order which was made with little consultation with the parties. Arguing that the order was not representative of the crimes of the accused, who may not live to stand trial for the outstanding crimes, including genocide, the prosecution requested reconsideration of the order.\textsuperscript{59} Although the Supreme Court Chamber overturned the severance order, Case 002/01 was concluded largely in accordance with the original order in the interest of expedient proceedings.\textsuperscript{60}

\textsuperscript{57} Ibid citing comments of Lemonde at the conference ‘The Contribution of Criminal Proceedings before the ECCC to Cambodian Law’ Royal University of Law and Economics, Phnom Penh, 4 December 2012.
\textsuperscript{58} Ciorciari above n 43, 60.
\textsuperscript{59} Co-Prosecutors’ Request for Reconsideration of the Terms of the Trial Chamber’s Severance Order Pursuant to Internal Rule 89ter Extraordinary Chambers in the Courts of Cambodia (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case No. 002/19/09-2007 ECCC-TC, 3 October 2011) [3].
\textsuperscript{60} Ciorciari above n 43, 160.
More relevant to the argument of this thesis, in Case 002/01, the Trial Chamber altered the mode of questioning of witnesses. In Case 001, according to civil law procedure, the judges led the questioning of witnesses and examination by the other parties ensued, producing the discursive proceedings discussed in Chapters Five and Six. In Case 002/01, the inquisitorial judges continued to call the witnesses but designated the questioning to one of the parties in the interest of expedience. The judges retained control of the proceedings and the topics witnesses would be questioned on, but the parties had little opportunity to establish why witnesses were called and what they might contribute to the proceedings. They complained of being disadvantaged by the new procedure. The Co-Prosecution, for instance, retained the burden of proof but had no control over the direction of the proceedings. They also found themselves leading the questioning of witnesses they may not have wished to call. On the other hand, some procedural changes, such as the revised reparations provisions discussed later in this and later chapters had communication enhancing effects.

4 The Internal Rules and Other Sources of Law

The Pre-Trial Chamber articulated a hierarchy of sources to be consulted on questions of procedure. The Internal Rules are consulted first, then the Cambodian criminal procedural law. Where a gap or uncertainty remains regarding the applicable procedure, the ECCC looks to established international criminal procedure. On substantive issues, the Court first consults the ECCC law, then the Agreement and lastly international criminal law precedent.

A notable example of the ECCC’s engagement with sources of law at domestic and international levels was the case challenging the continuing pre-trial detention of the Accused in Case 001, Kaing Guek Eav (alias Duch). While noting the ECCC’s existence within the

61 Ibid 161-162.
62 Co-Prosecutors v Nuon Chea, (Decision on Nuon Chea’s Appeal Against Order Refusing Request for Annulment) (Extraordinary Chambers on the Courts of Cambodia, Pre-Trial Chamber, Case No. 002/19-09-2007-ECCC/OCIJ (PTC06), 26 August 2008) [12 -14].
Cambodian court structure, the Trial Chamber distinguished the ECCC as a ‘separately constituted, independent and internationalised court.’ As such the ECCC law obligated the Court to apply Cambodian procedural rules but also to ‘determine their conformity with international standards prescribed by human rights conventions and followed by international criminal courts.’ Moreover, the Court noted that the ECCC must take account of Article 31 of the Constitution of the Kingdom of Cambodia which states:


Articulation of this obligation of the Court in the Trial Chamber activated a legal requirement not hitherto routinely observed by the Cambodian judiciary. Furthermore, the Court pronounced upon the legality of the accused’s prior detention over an eight-year period by the Cambodian Military Court, finding that Duch’s prior detention had been in breach of Cambodian law and contravened ‘his internationally recognised right to a trial within a reasonable time and detention in accordance with the law.’ The Court then turned its attention to the legality of his continued detention by the ECCC based on international case law in light of the circumstances of previous violations of his rights. The Court concluded, on the authority of the ICC case, Prosecutor v Lubanga, that the previous violations of Duch’s rights were not so egregious as to preclude or restrain the exercise of ECCC

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64 Co-Prosecutors v Kaing Guek Eav (alias Duch) (Decision on Request for Release) (Extraordinary Chambers on the Courts of Cambodia, Trial Chamber, Case File No. 001/18-07-2007-ECCC/TC -E39/5, 15 June 2009) [10].
65 Co-Prosecutors v Kaing Guek Eav (alias Duch) (Decision on Request for Release) (Extraordinary Chambers on the Courts of Cambodia, Trial Chamber, Case File No. 001/18-07-2007-ECCC/TC -E39/5, 15 June 2009) [15]; Williams disputed the Chamber’s categorisation of the ECCC arguing that ‘the fact that the ECCC is a stand-alone institution does not change its legal basis which remains Cambodian law. See Williams above n 2, 299.
67 Co-Prosecutors v Kaing Guek Eav alias Duch (Decision on Request for Release) (Extraordinary Chambers on the Courts of Cambodia, Trial Chamber, Case File No. 001/18-07-2007-ECCC/TC -(E39/5 15 June 2009) [21].
jurisdiction. Following the ICTR authority, *Prosecutor v Barayagwiza*, the court held that in the event of Duch’s conviction, he would be entitled at the sentencing stage, not only to credit for time already spent in detention, but also to a reduction in sentence as a result of previous violations to his rights.69

While Cambodian criminal procedural law grants rights to prisoners in pre-trial detention, in practice such rights are frequently violated and subject to unprincipled practice by prosecutors and courts.70 The reasoned decision of the ECCC reinforced the rights of accused persons against unwarranted and excessive detention and provided the Cambodian judiciary and national lawyers with a body of experience and precedent uncharacteristic of Cambodian domestic criminal justice practice.

III IMPLEMENTING THE CRIMINAL PROCEDURE

One legacy of French colonial rule in Cambodia was a legal system based on Western European civil law system. Cambodian criminal procedure is therefore inquisitorial in nature as opposed to the adversarial mode characteristic of the Anglo-American common law world.71 With the exception of the Special Tribunal for Lebanon, international tribunals have applied predominantly adversarial trial procedure. The adversarial approach adopted by the creators of the International Military Tribunal at Nuremburg was similarly adopted under United States leadership following the Dayton Accords in the Balkans by the ICTY. This saw the new system of international criminal justice founded on that state’s principles of adversarial procedure. However, judges from civil law countries who have outnumbered those of common law jurisdictions at the ad hoc Tribunals put the case for more inquisitorial

68 *Judgment on the Appeal of Mr Thomas Lubanga Dyilo against the Decision on the Defence Challenge to Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006* (International Criminal Court, Appeals Chamber, Case No. ICC-01/04-01/06 -OA4, 14 December 2006) [29-35].
69 *Prosecutor v Barayagwiza (Appeal Judgement)* (International Criminal tribunal for Rwanda, Appeals Chamber Case No. ICTR-97-19 3 November 1999) [85]; *Co-Prosecutors v Kaing Guek Eav (alias Duch) (Decision on Request for Release)* (Extraordinary Chambers on the Courts of Cambodia, Trial Chamber Case File No 001/18-07-2007-ECCC/TC-E39/5 15 June 2009) [35].
elements in proceedings to offset the delay inherent in adversarial international trials and to provide more expeditious hearings.\textsuperscript{72} Vogler described the emergence of a two-dimensional approach to international criminal procedure which attempted to preserve the purest elements of both procedural systems.\textsuperscript{73} The ECCC contributes to this debate by adding inquisitorial procedure with international elements in a way that is responsive to local law and conditions.

\textbf{A Shared Prosecutions: National and International}

At the ECCC the prosecutorial role is subordinate to that of the Co-Investigating Judge.\textsuperscript{74} This represents a departure from international trial practice, including the International Criminal Court (ICC), where the Prosecutor has full control of investigations.\textsuperscript{75} Prospective prosecutions engage a two-stage investigative process. The first stage is the initiation of a prosecution by the Co-Prosecutors, one Cambodian and one international, at his or her initiative, or on the basis of a complaint received to determine whether there is evidence that crimes within the jurisdiction of the ECCC have been committed, and to identify suspects and potential witnesses.\textsuperscript{76} The sharing of the prosecutorial function combines the national co-prosecutor’s knowledge of Cambodia, competence to assess local evidence and ability to communicate with witnesses, with the international co-prosecutor’s knowledge and skills in applying international investigative standards.

Following preliminary investigations, if the Co-Prosecutors have reason to believe that crimes within the jurisdiction of the ECCC have been committed, they may forward an Introductory Submission to the Co-Investigating judges requesting a judicial investigation.\textsuperscript{77} Should the case proceed to trial the Co-Prosecutors bear the burden of proving the guilt of

\textsuperscript{73} Ibid 107.
\textsuperscript{74} ECCC Law Article 23 new.
\textsuperscript{76} ECCC Internal Rules (Rev 8) r 49 (1), (2), 50 (1).
\textsuperscript{77} ECCC Internal Rules (Rev 8) r 53 (1).
the Accused ‘beyond reasonable doubt.’\textsuperscript*78 In Cases 001 and 002 the sharing of roles at the investigation stage proceeded without significant difficulties.

At trial, the teaming of the national with the international prosecutor engaged local knowledge of the Cambodian community in relation to Khmer Rouge impunity, with expertise in prosecuting international crimes. In Case 001, National Co-Prosecutor Chea Leang opened the prosecution case. Her remarks captured the historic nature and solemnity of the trial. Here was a Cambodian lawyer, in a Cambodian Court declaring that the time for justice had come, albeit over 31 years after the overthrow of Democratic Kampuchea.\textsuperscript*79 She declared that for all of this time victims of the Khmer Rouge had demanded justice, accountability and answers to questions as to the fate of their lost family members and friends. Until now the government and the international community had failed them. The Court would, however, help end their suffering and establish how victimisation on a massive scale had occurred in Cambodia. ‘History demands it’ and the purpose of the tribunal was to establish the truth surrounding Duch’s crimes so that such atrocities will never be repeated. Chea Leang sought to dispel myths concerning the Khmer Rouge and the version of history concerning them that many Cambodians had grown up with, noting that some still view the Khmer Rouge has having the ‘best of intentions.’\textsuperscript*80

She spoke of peasants being inspired by Sihanouk to rise up against Lon Nol and to join the Khmer Rouge, thus swelling their ranks in a time of political flux in Cambodia. The Court was shown a film archive documenting the forced removal of hundreds of thousands of people from Phnom Penh, many of whom died of exposure or starvation during the journey.\textsuperscript*81

\textsuperscript*78 ECCC Internal Rules (Rev 8) 87 (1).
\textsuperscript*80 Transcript of Trial Proceedings - Kaing Guek Eav Duch’ (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case File No. 001/18-07-2007/TC, Day 2, 31 March 2009) 2-5.
\textsuperscript*81 Transcript of Trial Proceedings - Kaing Guek Eav Duch’ (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case File No. 001/18-07-2007/TC, Day 2, 31 March 2009) 4.
Chea Leang recounted that others were mercilessly purged as perceived enemies of the Khmer Rouge who claimed ‘to keep you is no gain, to kill you is no loss.’ She explained the purpose of Khmer Rouge security centres throughout the countryside, and cited evidence from the DC-Cam archive of the existence of 380 mass graves linked to the centres. She then outlined the conditions under which detainees were held at S-21.

Following Chea Leang’s opening statement, the international Co-Prosecutor Robert Petit, argued the limits of Duch’s confessions and acceptance of responsibility. While Petit acknowledged the benefits of Duch’s cooperation with the Court as corroborating important evidence, he highlighted the gulf between Duch’s present contrition and his past commitment to the Khmer Rouge revolutionary agenda. Petit described Duch’s dedication and efficiency as Director of S-21 and argued that he exercised direct and independent control over the functioning of the institution, which was a major engine of the CPK’s criminal machinery. As Director, Duch had a close connection to the CPK Standing Committee and knew of the importance of CPK’s policy of smashing enemies of the regime through the S-21 apparatus he administered. Petit argued that this justified the mode of liability of joint criminal enterprise, in addition to the forms of responsibility specified in the Closing Order: commission, ordering, command responsibility, planning, instigation, aiding and abetting.

Bringing the skills of an international prosecutor to bear in the case, Petit argued that while guilt had been admitted, there was scope for further exploration of the facts in order to establish the truth. Thus, the Co-Prosecution partnership broadened the representative nature of the proceedings of the ECCC through knowledge of the local context of the crimes and international prosecutorial experience.

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The Internal Rules anticipate the possibility of disagreement between the Co-Prosecutors and make provision for review of the matter by the Pre-Trial Chamber (PTC). There is no appeal from decisions of the PTC. In December 2008, the international prosecutor, Robert Petit, filed a disagreement between himself and the Cambodian prosecutor concerning the charging and judicial investigation of five new suspects whom he considered fell within the personal jurisdiction of the ECCC, and whose prosecution would lead to a more comprehensive accounting of Khmer Rouge crimes.

However, the Cambodian Co-Prosecutor argued that new prosecutions should not be activated on the basis of several factors: Cambodia’s political instability and need for national reconciliation; the spirit of the ECCC Agreement and Law, the temporary nature of the Tribunal and its limited budget. Prioritising the trials in progress of the five defendants already in detention was to be preferred, she contended, in light of the small number of trials envisioned in the founding documents.

In reaching a decision on the disagreement, the PTC failed to achieve the necessary supermajority, with the result that pursuant to Internal Rule 71 (4) the action of the international prosecutor by default was executable. This meant that the international Prosecutor could forward ‘new Introductory Submission to the Co-Investigating Judges with a request to open judicial investigations.’

B Shared Investigations

The role of the Co-Investigating Judge is shared equally between a Cambodian and an international judge. Together they have a duty to conduct separate impartial and independent

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87 ECCC Internal Rules (Ver 8) r 71.
88 ECCC Agreement art 7 (4).
90 ‘Statement of the Co-Prosecutors’ (Extraordinary Chambers in the Courts of Cambodia, Office of the Co-Prosecutors, 5 January 2009).
91 Consideration of the Pre-Trial Chamber Regarding the Disagreement Between the Co-Prosecutors pursuant to Internal Rule 71 (Extraordinary Chambers in the Courts of Cambodia, Pre-Trial Chamber, 001/18-11-ECCC/PTC 18 August 2009) [45].
investigations, ensuring the protection of the rights of the accused.\textsuperscript{92} Not bound by the Co-Prosecutors’ submissions, the Co-Investigating Judges conclude an investigation by issuing a Closing Order which either indicts a charged person and sends him/her to trial, or dismisses the case.\textsuperscript{93}

In inquisitorial proceedings the Investigating Judge may arrange site visits as investigative action to ‘ascertain the truth’ as to the allegations.\textsuperscript{94} Confrontations may also be arranged between witnesses, civil parties and the charged person.\textsuperscript{95} The pre-trial investigation of the trial of Kaing Guek Eav \textit{alias} Duch included a visit to the former S-21 site, also known as the Toul Sleng prison and now the Cambodian Genocide Museum in Phnom Penh. They also arranged a re-enactment of alleged events at the Choeung Ek execution site on the outskirts of Phnom Penh. The Co-Investigating Judges took Kaing Guek Eav, his legal counsel and surviving detainees of the detention centre, two of whom were civil parties to the criminal action, to the S-21 prison site. Duch wept as he went with the Co-Investigating Judges through the former detention centre. He answered some questions put to him by the civil parties and publicly apologised to the S-21 victims.\textsuperscript{96} The Choeung Ek visit was public and media coverage was permitted.\textsuperscript{97} Duch cried openly and apologised to victims as he watched re-enactments of Khmer Rouge soldiers executing S-21 detainees, including babies by slamming them against a tree.\textsuperscript{98} While this was a staged event, it revealed the opening of dialogue around the crimes from the investigative stage.

At any time during an investigation, the Co-Prosecutors, a charged person or civil party (discussed below), may participate by requesting investigative actions they consider useful

\textsuperscript{92} ECCC Internal Rules (Rev 8) r 55 (5).
\textsuperscript{93} ECCC Internal Rules (Rev 8) r 67 (1).
\textsuperscript{94} ECCC Internal Rules (Rev 8) r 55 (5).
\textsuperscript{96} Permissible under ECCC Internal Rules (Rev 8) r 58 (5).
\textsuperscript{97} ECCC Internal Rules (Rev 8) r 56 (2) (b); See \textit{Duch to Re-enact his Crimes} Phnom Penh Post (22 February 2008).
for the conduct of the investigation. The Co-Prosecutors and the lawyers for the other parties also have a right to consult the original case file, subject to reasonable limitations, to ensure the continuity of the proceedings. When the Co-Investigating Judges conclude an investigation the dossier they have compiled is forwarded to the Co-Prosecutors, who prepare final submissions. Although the work of the Co-Investigating Judges in Cases 001 and 002 proceeded on a cooperative basis to the final submission stage, this was not so for the judicial investigations of Cases 003 and 004. The progress of those investigations and the arrest of the relevant suspects was stymied by political opposition to the prosecution of additional Khmer Rouge members, and obfuscation in the Office of the Co-Investigating judges.

In April 2011, Case 003 was closed by the Co-Investigating judges. The public outcry against the closure reflected the social significance the ECCC had acquired. Numerous civil society groups released a collective press release expressing concern at the closure of the investigation which they viewed as obstructing justice and hindering the people’s right to know the facts of the Khmer Rouge regime. Although the case was reopened and remained on foot along with Case 004, in the early months of 2014, there were still no arrests of suspects. While this exposes the fault-line of the cooperative regime, the public response to the attempted closure and the UN’s decision not to withdraw from the joint venture suggests commitment to what the ECCC may achieve despite the government’s attempts to block some of its processes.

99 ECCC Internal Rules (Rev 8) r 55 (10).
100 ECCC Internal Rules (Rev 8) r 55 (11).
101 ECCC Internal Rules (Rev 8) r 66 (5).
105 ‘Statement by the Co-Investigating Judges Regarding Case 003’ (Extraordinary Chambers in the Courts of Cambodia, Office of the Co-Investigating Judges, 28 February 2013).
The ECCC Law established the Court within the existing Cambodian court structure of three Chambers. The Pre-Trial Chamber (PTC) consists of three Cambodian judges and two international judges responsible for the settlement of disagreements between the Co-Investigating judges and Co-Prosecutors. In the Trial Chamber there are a majority of three Cambodian judges and two international judges. The Supreme Court Chamber which serves as the Appeal Chamber has seven judges; four Cambodian and three international. The ratio of national to international judges reflects the UN compromise over the Cambodian government’s insistence on majority control of the trials.

1 The Judiciary

All judges are appointed by the Cambodian Supreme Court of the Magistracy; the national judges according to existing Cambodian procedure, and the foreign judges from a list of nominations by the UN Secretary-General. The selection of Cambodian judges from the existing domestic pool inevitably risked engagement of some judges with incomplete qualifications and/or histories of judicial bias. Indeed, the ECCC had some early judicial conduct challenges to face. These included allegations of judicial bias and executive interference along with corruption among Court officials and government employees. Exposure by court monitors of malpractice induced censure through the national and international media, and in January 2008, the introduction of ECCC’s Code of Judicial Ethics. While the adequacy of such measures is open to question, they nevertheless

106 ECCC Law art 2 new, art 47 bis new. Simultaneously, Article 31 of the Agreement provides ‘the present Agreement shall apply as law within the Kingdom of Cambodia following its ratification in accordance with the relevant provisions of the internal law of the Kingdom of Cambodia regarding competence to conclude treaties.’
107 ECCC Agreement art 7.
108 ECCC Agreement art 3.
109 ECCC Law art 11 New
110 Ellis above n 41, 21.
111 Code of Judicial Ethics of the Extraordinary Chambers in the Courts of Cambodia <http:www.eccc.gov.kh/sites/default/files/legal-documents/Code_of_judicial_ENG.pdf at date>; An Independent Counsellor was also designated to address concerns surrounding the adequacy of anti-corruption measures in human resources administration; See also Ellis above n 41, 33-34.
represent ECCC responsiveness to charges of impropriety, and recognition that Court officers are not above the law and international standards of fair trial process.

The ECCC measures also signal that the government is restrained from taking charge of politically sensitive cases as it reportedly does in domestic cases, while publicly raising judicial independence as the imperative of fair prosecutions.112 Where the measures adopted by the ECCC fall short of international expectations, it should be remembered that their target is national judicial competence, which has been undermined by governmental interference. The ECCC creates the opportunity for both training and correction in criminal process with international assistance as investment in Cambodia’s future governance. As the Special Rapporteur noted, there is an expectation that the ECCC operating within the Cambodian legal system will function as a ‘model Court,’ enabling the sharing of good practices within the wider judiciary in order to gradually lift standards which have hitherto been hampered by inadequate training in fundamental principles of natural justice, the rule of law and proper standards of fair trial practice.113

2 Decision-making by Supermajority or Default

The Cambodian majority in the Chambers is offset by the operation of a ‘supermajority’ in judicial decision-making to inhibit control of processes in compliance with executive dictates.114 The ECCC Law and the ECCC Agreement provide that unanimous decisions are to be attempted in all Chambers, but where this is not possible, a majority decision must include the affirmative vote of at least one international judge.115 The requirement is the drafters’ attempt to counteract the possibility of executive interference or decisions inconsistent with international standards. However, where a supermajority is not achieved,

112 Surya P. Subedi, Report of the Special Rapporteur on the Situation of Human Rights in Cambodia. UN Doc A/HRC/15/46 (16 September 2010) [45].
113 Ibid [59].
115 ECCC Law art 14; ECCC Agreement art 4.
the decision simply reflects the views of the majority and the minority without legal force.\textsuperscript{116} This creates the possibility of a prosecution failing by virtue of the Cambodian judges’ refusal to convict a defendant because of judicial bias or political interference. It also risks the outcome of what could be perceived as an UN-sponsored mock trial.\textsuperscript{117} However, such an outcome will also record judicial practice which represents Cambodian legal culture to its own detriment before the Cambodian people generally, and the victims of the Khmer Rouge in particular.

Focus on the potential of stalemate arising from a failed supermajority also distracts public attention from the positive element of the supermajority. The mechanism provides inherent scope for expanded communication between national and international judges. While there may be pressure on the international judges to persuade at least one national judge to adjudicate according to international legal precedent or principle, there is also scope for greater local wisdom and understanding to infuse judgements as the judges communicate with each other. This is explored further in Chapter Eight.

The supermajority operated unimpeded and without controversy across the spectrum of judicial decision-making in all Chambers in Case 001 and Case 002/01 to the trial judgement stage in 2014. Only in the Pre-Trial Chamber decision-making in Case 003 was vulnerability to executive interference clearly exhibited.

Thus, while the composition of the judiciary and shared prosecutorial and investigative functions were the result of fraught negotiations between the UN and the Cambodian government, they bring to ECCC proceedings the benefits of local knowledge combined with international expertise. The communications integral to teamwork therefore underpin the investigation and prosecution of crimes. This may enhance the representation of national and international interests throughout the trials.

\textsuperscript{116} ECCC Agreement art 4; ECCC Law art 14.
\textsuperscript{117} Meijer above n 8, 220.
Almost every civil law jurisdiction makes provision for victims of crimes to join a civil claim to the criminal prosecution, or to initiate private prosecutions. The civil party action recognises the accused person as answerable to both the individual harmed and the public law. Lapie attributed the justification of the civil party action in France to the Frankish idea of monetary compensation as the first attempt at modifying the *lex talionis*, the law of retaliation. Historically, the action merged the reformative and deterrent aims of punishment for crime with the idea of moral reparations designed to restore matters to conditions prior to the commission of the crime. The notion of criminal justice as punitive and restorative is thus embedded through an action retaining civil character before the criminal tribunal within a common process. The Tribunal however, gives judgement on two separate actions: civil and criminal. In practice the civil petition may alert the prosecution to commission of a criminal offence, provide valuable evidence for the trial and permit a degree of relief to victims by means of participation and reparation.

The civil party action recognises certain victim participation rights to trial proceedings, including the pre-trial phase. These are generally available as an incident of the victim’s claim for compensation. While the rights of civil parties vary between civil law jurisdictions, they may include: the right to be heard in court without taking an oath, to examine the dossier or case file, to make requests for certain investigations (although limited to their civil claim), to be represented by counsel, to put questions to witnesses, to lead and challenge evidence and to make closing arguments. However, the civil claim is subordinate to the purpose of the criminal proceedings. In complex trials, or those where civil claims would delay or

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119 Ibid.
121 Ibid 34.
122 Ibid 36.
123 McGonigle Leyh above n 118, 80.
overburden the court, victims may be required to make their claim through a separate civil case.\textsuperscript{124}

The civil party action of France should be distinguished from the status of victims in criminal proceedings as subsidiary or auxiliary prosecutors, or private prosecutors. Auxiliary prosecutors are used in Germany although on a limited basis. Where the state has decided not to prosecute, a victim may nevertheless force a prosecution, usually by securing the permission of the court, and the public prosecutor who is then required to take over the case alongside the auxiliary prosecutor and their legal counsel. The auxiliary prosecutor’s participation rights are not limited to her/his compensation claim and he/she will not be obliged to pay the costs of the accused in the event of an acquittal.\textsuperscript{125}

The auxiliary prosecutor may also be referred to as a private prosecutor. Private prosecutions are common to both civil law and common law jurisdictions. In Germany, private prosecutions are begun where a victim’s counsel prompts investigations by the police or the judicial magistrate, and charges are brought as of right by victims who are also entitled to conduct a prosecution. The private prosecution was recognised under the English common law. Some state courts of the United States also permit a private individual or their family to act as a prosecutor subject to the discretion of the trial judge.\textsuperscript{126}

1 \textit{Designing the ECCC Victim Participation scheme}

As a protectorate of France, Cambodian criminal procedure made provision for civil action in criminal proceedings.\textsuperscript{127} However, the ECCC’s founding documents contained no requirement for inclusion of the civil party action within the Court’s criminal proceedings. It fell to the drafters of the ECCC Internal Rules to determine the scheme of rights for victims before the ECCC. Based on the ECCC’s existence within the Cambodian court structure, the

\textsuperscript{124} Ibid 80-81.
\textsuperscript{125} Ibid 82.
\textsuperscript{126} Ibid 83 McGonigle cites New York State and West Virginia as examples.
\textsuperscript{127} \textit{Criminal Procedure Code of the Kingdom of Cambodia} 2007 arts 2, 5, 13.
Court’s Rules Committee incorporated the civil party action, but by virtue of the ECCC’s special character limited compensation to collective and moral awards.128

Under the ECCC victim participation scheme, a victim of a crime coming within the jurisdiction of the ECCC may apply to join a case under investigation by the Co-Investigating Judges or proceeding before the Trial Chamber as a civil party, provided he or she can demonstrate that they have suffered injury (physical, material or psychological) as a direct consequence of such crime.129 The ECCC Internal Rules do not limit civil parties to residents or nationals of Cambodia which allows for the participation of members of the Cambodian diaspora.130

As a civil party, a victim is permitted to participate in ECCC criminal proceedings by support of the prosecution and may seek collective and moral reparations.131 Under the original version of the Internal Rules, the civil petitioner’s party status attracted procedural rights similar, though not identical to those of the charged person during the investigation, or the accused at trial.132

Victims may be called as witnesses, and also participate as complainants by lodging information or a written complaint with the Co-Prosecutors through the Victims Support Section alleging crimes within the jurisdiction of the ECCC.133 This may not only provide evidence for ongoing investigations, but lead to the initiation of new investigations.

2 Admitting Civil Parties to ECCC Trials

The initial version of the ECCC Internal Rules adopted in June 2007 specified only that there must be sufficient information to allow the verification of the civil party applicant’s claim as

129 ECCC Internal Rules (Rev 8) r 23 (1).
130 ECCC Internal Rules (Rev 8) r 23 (2).
131 ECCC Internal Rules (Rev 8) r 23 bis (1).
132 ECCC Internal Rules (adopted 12 June 2007) r 23 (6).
133 ECCC Internal Rules (Rev 8) Rule 12 1(a).
to injury, or ‘evidence tending to show the guilt of an alleged perpetrator was to be attached to applications.’\textsuperscript{134} While the ECCC Internal Rules made provision for a Victims Unit to assist victims in lodging complaints and submitting civil party applications, due to funding problems, the Unit did not come into existence until the middle of 2008, two years after the Court began its operations.\textsuperscript{135} In the interim the ECCC authorised the Offices of the Co-Prosecutors and the Co-Investigating judges to process victim applications.\textsuperscript{136} In the absence of a fully resourced Victims Unit, Cambodian non-governmental organisations with very little guidance or assistance from the Court, worked with victims on a wide scale in almost every aspect of the civil party application and submission process; from educating potential applicants to helping them complete the necessary admission forms, to following up the progress of applications.\textsuperscript{137} By the time the Unit opened its doors more than 500 victim complaints and civil party applications for Cases 001 and 002 had been received by the Court, largely as the result of the groundwork performed by Cambodian civil society organisations.\textsuperscript{138}

In vetting the applications the Co-Investigating judges applied a \textit{prima facie} standard of review by assessing applications as more likely to be true than not.\textsuperscript{139} The applications were assessed on the same basis when sent to the Trial Chamber.\textsuperscript{140} However, at the initial hearing of Case 001 the Trial Chamber added the requirement of proof of identity of applicants, the sufficiency of which would be assessed by the Court on a case by case basis. As the trial commenced 93 civil party applications were approved, activating all civil party rights to participation in the trial process. The civil parties were organised into four groups, each represented at trial by teams of national and international legal counsel. Towards the end of the trial, a defence challenge to the sufficiency of evidence of 24 civil party applications

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{134} ECCC Internal Rules (adopted 12 June 2007) r 23 (6).
\item\textsuperscript{135} ECCC Internal Rules (adopted 12 June 2007) art 12 (2) (c), (d).
\item\textsuperscript{136} ‘Practice Direction 001’ Extraordinary Chambers in the Courts of Cambodia, (5 October 2007); See James P. Bair, ‘From the Numbers who Died to Those who Survived: Victim Participation in the Extraordinary Chambers in the Courts of Cambodia’ 31 (2009) \textit{University of Hawaii Law Review} 507, 531, 538.
\item\textsuperscript{137} Eric Stover, ‘Confronting Duch: Civil Party Participation in Case 001 at the Extraordinary Chambers in the Courts of Cambodia’ (2011) 93 \textit{International Review of the Red Cross} 1, 14.
\item\textsuperscript{138} UN-Backed Tribunal Processing over 500 Complaints UN News Centre (7 February 2008) <http://www.un.org/apps/news/story.asp?NewsID=25544&Cr+cambodia&Crl1>
\item\textsuperscript{139} McGonigle Leyh 118, 182.
\item\textsuperscript{140} Ibid.
\end{enumerate}
\end{footnotesize}
resulted in lengthy debates on the issue. The challenge was attributable at least in part to the ECCC’s lack of preparedness to accommodate the large number of victims who sought inclusion in the trials, and inadequate vetting of civil party applications. Concerned at the delay the issue was causing, the Court decided both matters should be resolved at the point of the trial judgment. This left the rights of the 24 civil parties intact for the remainder of the trial.

3 Civil Parties and Reconciliation

While a number of population surveys revealed strong support for trials of the Khmer Rouge in the years before formation of the ECCC, they did not examine how victims would engage with the proposed court beyond witnessing retributive process. The availability of the civil party action in ECCC proceedings brought victims forward as representatives of a previously hidden constituency. The victim constituency came from within and beyond Cambodia. It included members of the Cambodian diaspora who became refugees as a result of Khmer Rouge policies, Cambodian survivors still living within the country, and family members of Cambodians and foreigners who died at the hands of the Khmer Rouge.

In March 2008, the PTC linked civil party inclusion in trial proceedings with the ECCC’s ‘stated pursuit of national reconciliation.’ In a decision on the right of legally represented civil parties to participate in provisional detention appeals, the PTC ruled that civil parties

141 Youk Chhang, Sad Situation for Civil Parties Phnom Penh Post (1 October 2009) <http://www.phnompenhpost.com/national/sad-situation-civil-parties>
143 Co-Prosecutors v Nuon Chea (Decision on Civil Party Participation in Provisional Detention Appeals) (Extraordinary Chambers in the Courts of Cambodia, Pre-Trial Chamber, Case No 002/19-09-2007-ECCC/OCIJ (PTC01) 20 March 2008) [37-40] citing United Nations General Assembly Resolution 57/228 and the ECCC Internal Rules, Preamble.
could participate in all criminal proceedings, except for those from which they were explicitly excluded. The Chamber also cited the relevant international standards on victim participation in criminal proceedings and examined the practices of other international criminal tribunals. The PTC found that the ECCC victim inclusion scheme was not modelled on the ‘prescriptive procedure’ adopted by the ICC. Rather, ECCC proceedings were to be ‘fair and adversarial and preserve a balance between the rights of parties.’ Where the balance is in jeopardy the Chamber is empowered take action to restore it, and did so in the circumstances of the case by permitting the accused to make written submissions in response to oral submissions delivered without notice. Thus, the PTC enforced the international legal obligation to provide those who claim to be victims of human rights or international humanitarian law violations with equal access to justice. The expressive action affirmed the civil party’s right to be heard in proceedings and simultaneously expanded the discourse of the trial.

However, though the Internal Rules offered potentially broad participatory rights to victims from the pre-trial stage, it became clear that the ECCC would not permit civil parties to control or disrupt the proceedings. The civil party right to address the court directly could only be exercised sparingly following amendments to the Internal Rules specifying that legally represented civil parties were required to make oral submissions to the Court through their lawyers. More broadly, the Internal Rules required that ECCC proceedings be conducted ‘within a reasonable time.’ Ultimately, this determined the nature and extent of civil party participation at the ECCC. I discuss in Chapter Six how the Trial Chamber’s

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146 McGonigle Leyh above n 118, 191 discussing civil party Theary Seng’s statements and conduct in the Pre-Trial Chamber as she sought the right to address the Court directly and without legal counsel.
147 ECCC Internal Rules (Rev 8) r 23 ter.
148 ECCC Internal Rules (Rev 8) r 21 (4).
approach to civil party participation nonetheless fostered dialogue in the proceedings between victims and other trial actors.

4 Modifying the Victims’ Participation Scheme

With over 4000 civil party applications received as the trial in Case 002 approached, the Court introduced measures to ‘streamline’ civil party participation in trial proceedings.\textsuperscript{149} Pursuant to amendments to the Internal Rules, civil party participation during trials became collective. Legal representation of civil parties was also modified by the appointment Co-Lead lawyers who were authorised to manage the overall, strategy, advocacy and interests of the body of civil parties as a single group.\textsuperscript{150}

At the pre-trial stage, however, individual civil party participation is possible. At any time during an investigation the civil party may ‘request the Co-Investigating Judges to interview him/her, question witnesses, go to a site, order expertise or collect other evidence on his/her behalf.’\textsuperscript{151} Thus, even with the modifications to victim participation scheme, the grant of procedural rights to victims of the Khmer Rouge exceeded the provisions of all other international courts, including the ICC.

5 Reparations

The ECCC may award reparations to civil parties if the accused is convicted.\textsuperscript{152} Collective and moral reparations may be awarded to acknowledge the harm suffered by civil parties and provide benefits which address them.\textsuperscript{153}

\textsuperscript{149} 7th Plenary Session Concludes Extraordinary Chambers in the Courts of Cambodia, Press Release (9 February 2010).
\textsuperscript{150} ECCC Internal Rules (Rev 8) r 12 ter, 23 (3).
\textsuperscript{151} ECCC Internal Rules (Rev 8) r 59 (5).
\textsuperscript{152} ECCC Internal Rules (Rev 8) r 23 quinques.
\textsuperscript{153} ECCC Internal Rules (Rev 8) r 23 quinques (1).
Reparations may not be monetary payments and there is no ECCC trust fund to finance awards made by the Court.\textsuperscript{154} Initially, reparations could only be drawn against the assets of the accused. The limited scope for redress to victims probably resulted from a balancing of factors including the potential number of civil parties, the period that has elapsed since commission of the crimes, the diversity of needs among victims and the Court’s capacity to provide workable forms of reparation.\textsuperscript{155} However, the reparations provisions of the initial version of the Internal Rules were amended in 2010. The Court may now:

recognise that a specific project sought by the [Civil Party] Lead Co-Lawyers’ appropriately gives effect to [an] award and may be implemented. Such project shall have been designed or identified in cooperation with the Victims Support Section and have secured sufficient external funding.\textsuperscript{156}

The revision of the scheme to collective participation rather than individual party status for civil parties was accompanied by changes to the Victims Support Section (VSS) powers. Changes to Internal Rules permitted the VSS to develop and implement ‘non-judicial programs and measures addressing the broader interests of victims.’\textsuperscript{157} Such measures where appropriate may be ‘developed and implemented in collaboration with governmental and non-governmental organisations.’\textsuperscript{158} The expansion of the VSS mandate was intended to offset the new restrictions on civil party rights and to extend the legacy of the ECCC.\textsuperscript{159} The provision for ‘non-judicial measures’ promised initiatives designed to serve a broader range of victims’ interests, including those not directly connected with cases being heard at the ECCC.\textsuperscript{160} The VSS, with funding from the UN Trust Fund to End Violence against Women, quickly began a collaborative project with local society organisations to promote gender

\begin{footnotesize}
\textsuperscript{154} ECCC Internal Rules (Rev 8) r 23 quinquies (1).
\textsuperscript{155} Acquaviva above n 2, 141.
\textsuperscript{156} ECCC Internal Rules (Rev 8) r 23 quinquies (3) (b).
\textsuperscript{157} ECCC Internal Rules (Rev 5) rule 12 (bis) 3.
\textsuperscript{158} ECCC Internal Rules (Rev 5) rule 12 (bis) 3.
\textsuperscript{159} Ciorciari above n 43, 227.
\textsuperscript{160} ECCC Internal Rules (rev 5) rule 12 (bis) 3; See Open Society Justice Initiative, Recent Developments at the Extraordinary Chambers in the Courts of Cambodia (OSJI, 26 March 2010) 1, 26.
\end{footnotesize}
equality and improve access to justice for female victims of gender-based violence during the Khmer Rouge regime.\footnote{161}

The limited scope for reparations in Case 001 now stands in contrast to the Court’s capacity to offer more tangible reparations that may result in communication and collaboration with victim of crimes and their supporters. In Case 002/01 the VSS worked with the co-lead lawyers of the civil parties in identifying reparations projects that the ECCC might endorse, and securing funding for projects from external donors in advance of the trial judgement.\footnote{162} The Trial Chamber’s endorsement in the trial judgement of all but one of the 13 proposed projects was for the purpose of demonstrating ‘solidarity’ with the civil parties of the case and other victims who may benefit from implementation of the approved projects.\footnote{163}

E Other ECCC Inquisitorial Elements

In general, inquisitorial trial proceedings are more expeditious because the evidence has already been assembled in a case file prepared by judicial officers following an extensive judicial investigation of the alleged criminal matter. In addition, procedural motions known to delay adversarial trials are addressed at pre-trial hearings. At the ECCC with both the indictment and the case file before them, the trial judges have knowledge of the general form and direction of the case. While the accused and all other parties have access to the case file, the trial begins and proceeds under the tight control of the trial judges who are vested with considerable discretion in the management of the proceedings.\footnote{164} This includes scope for consideration of issues before it in light of the ECCC’s purpose of assisting reconciliation in Cambodia.\footnote{165}

\footnote{161}{Rong Chhorng, \textit{Conflict’s Female Victims Far From Forgotten} Phnom Penh Post (6 June 2012).

162\ ECCC Internal Rules (Rev 8) r 23 quinquies (3) (b).

163\ \textit{Co-Prosecutors v Nuon Chea and Khieu Samphan (Judgement)} (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case File No 002/19-09-2007/ECCC/TC, 7 August 2014) [1152-1160].

164\ Acquaviva above n 2,144.

165\ ECCC Agreement Preamble.}
The President of the Trial Chamber must inform the accused of his or her procedural rights and thereafter conduct the hearing.\textsuperscript{166} The Trial Chamber hears the civil parties, witnesses and experts in the order it considers useful.\textsuperscript{167}

1 Participatory Procedure

At both the investigation stage and during the trial, the accused has the right of input into the processes whether or not their legal counsel is present.\textsuperscript{168} At the investigation stage, this may include requesting the Co-Investigating judges to take certain actions during the investigation.\textsuperscript{169} The accused at trial may question witnesses through the President of the Chamber.\textsuperscript{170} At the end of the trial the accused may also make a final statement. In these circumstances, counsel can be seen to assist rather than represent the client, who can influence the progress and end result of the case.\textsuperscript{171}

While the proceedings at trial are controlled by the judges, they are also dynamic by virtue of the participation of the complete range of trial actors. Judges lead the examination of witnesses who may also be examined by the prosecution, defence and civil party lawyers. All parties may make written submissions and put before the Court probative material which will be added to the case file.\textsuperscript{172} The Chamber may in the course of the trial order new investigations to be carried out under conditions applicable at the pre-trial stage.\textsuperscript{173} At the end of the hearings closing statements may be made not only by the prosecution and the defence, but by civil party lawyers and the accused.

The narrative testimony of witnesses and the scope for engagement between trial actors within proceedings raised the prospect of expanded dialogue within ECCC trial proceedings. The trials’ discursive potential also flowed from the likelihood of ECCC judges applying, in

\textsuperscript{166} ECC\textsuperscript{2} Internal Rules (Rev 8) r 90 (1).
\textsuperscript{167} ECC\textsuperscript{2} Internal Rules (Rev 8) r 91 (1).
\textsuperscript{168} Acquaviva above n 2,139.
\textsuperscript{169} ECC\textsuperscript{2} Internal Rules (Rev 8) r 58 (6).
\textsuperscript{170} ECC\textsuperscript{2} Internal Rule (Rev 8) rs 83 (2), 91 (2), 94.
\textsuperscript{171} Acquaviva above n 2, 139.
\textsuperscript{172} ECC\textsuperscript{2} Internal (Rev 8) r 92.
\textsuperscript{173} ECC\textsuperscript{2} Internal Rules (Rev 8) r 93.
Osiel’s terms, a broader ‘procedural brush’ as they were empowered to take account of how the trials might contribute to reconciliation and justice.\textsuperscript{174}

2 \textit{Representative Processes}

Mégret’s analysis of the hybrid international transitional trial highlighted the model’s potential for greater representation of constituencies affected by the crimes it prosecutes.\textsuperscript{175} The representational function of the trial is observed by shifting focus from the outcomes of trials to their procedure.\textsuperscript{176} Focus on the proceedings of the ECCC from the investigative stage reveals an expanded range of voices in trial proceedings and scope for communication between international and national trial actors as they engage at all phases of the trials.

The ECCC’s inquisitorial procedure and idiosyncratic features introduced communicative elements uncharacteristic of transitional trials. The incorporation of the civil party action pursuant to Cambodian criminal procedure, and the ECCC’s adherence to developments in human rights law, opened the ECCC trials to victim participation to an unprecedented extent. While the inclusion of victims as civil parties in the trial proceedings may lengthen the inherently complex trials and present certain procedural difficulties for the Court, their presence and legal representation marks the end of the silence imposed upon them since the end of the Khmer Rouge regime. The incorporation of international procedural rules and exchange of professional practice styles flowing from the sharing of roles between national and international actors suggests representation in more than expressive ways. Dialogue between national and international professionals promised to enhance the communicative value of the trials by blending local knowledge with international standards.

Thus, when trial process is viewed in terms of its representativeness, due process in transitional trial procedure may be ‘less a matter of imposing a ready-made model… than it is of re-interrogating the tradition of due process in light of the particular exigencies’ of the


\textsuperscript{176} Ibid.
transitional context. For this reason the prospect of political interference which hovered over the progress of the Case 003 investigation ought not to deflect attention from the ECCC’s ‘peculiar adaptation’ to produce trial procedure that is ‘deeply in tune with its [local] environment.’

IV CONCLUSION

Although national inquisitorial proceedings are arguably more expeditious than adversarial trials, it will not necessarily be so in cases involving the prosecution of international crimes. For this reason, as the ECCC quickly found, victim participation in trials must be limited. However, this does not mean victim participation cannot be representative.

The network of civil society groups supporting the ECCC in the interest of justice and reconciliation brought rapid uptake of victim participation in ECCC proceedings, which expanded the representative nature of the proceedings. Furthermore, the communicative potential of the ECCC’s criminal procedure heightened the sociological value of its trials. While the ECCC wrestled with the complexities of victim inclusion in trial proceedings, it was guided by the Court’s reconciliatory purpose along with its retributive objectives.

The furore surrounding suspected political interference in the investigation of Cases 003 and 004 diverted public attention from the substantial success of the ECCC in operationalising two internationalised transitional trials. Even if viewed only in expressive terms, I suggest that the background of political opposition to further investigations highlighted the importance of the process the Court had embarked upon. The successful launch of the ECCC trials engaging its novel procedure also demonstrated that internationalised criminal proceedings need not be based on the adversarial procedural model. The opening of dialogue on Khmer Rouge crimes during the investigation phase and the dialogic potential of

178 Ibid.
inquisitorial proceedings introduced in this chapter point to the communicative value of the trials. The nature of the trial dialogue in Case 001 is the subject of the next chapter.
CHAPTER FIVE
TRIAL DIALOGUE IN CASE 001

I INTRODUCTION

In Chapter Four, I noted the potential of the ECCC’s inquisitorial criminal procedure to produce expanded trial dialogue in trial proceedings. In this chapter I begin to examine the dialogue of the ECCC’s first trial, the trial of Kaing Guek Eav (alias) Duch, known as Case 001.

Exploring Osiel’s conception of the transitional trial as a creative site wherein opposing accounts of the past are mediated by flexible application of procedural rules, the chapter examines how the dialogue flowed in the internationalised trial in inquisitorial mode. While the proceedings revolved around the Court’s primary objective of establishing the individual guilt of the accused, my focus on the trial proceedings is to examine the extent to which the trial dialogue enhanced either the expressive or communicative value of the trial.

I begin with a discussion of the accused from the case file prepared by the Co-Investigating judges. I outline how the Court engaged with the accused as he gave his evidence, and set out the accounts of the past provided by the Co-Prosecution and Co-Defence counsel. I then explore how the accused engaged with the Court through the exercise of his participatory rights. The nature of the dialogue that emerged as the trial judges and other court actors examined witness testimony is then examined. Sample exchanges between the judges and the accused, the accused and witnesses, and witnesses and counsel are used to illustrate the discussion that opened up within the trial proceedings.

I argue that the exercise of participatory rights by the accused controlled by the trial judges expanded the frame of the trial and provided space for reflection on the context and causes of the crimes in a way not normally seen in the transitional trial. The Court’s expansive engagement with witness testimony moved the proceedings beyond the expressivism of due process to reveal the communicative value of the trial in its social context.
As discussed in Chapter Four, ECCC trials begin after an extensive pre-trial investigation led by the Co-Investigating judges who produce the Closing Order indicting the accused. For his role in the security apparatus of Democratic Kampuchea Kaing Guek Eav alias (Duch) was indicted for planning, instigating, ordering, committing, aiding or abetting crimes against humanity and grave breaches of the Geneva Conventions of 1949. In the alternative his responsibility for the crimes operated by way of superior responsibility. Certain conduct found to constitute the domestic offences of homicide and torture under the 1956 Cambodian Penal Code were accorded the highest available legal classification and were subsumed under the aforementioned international crimes.¹

Duch was transferred to the ECCC from the Military Prison in Phnom Penh on 30 March 2007. The Closing Order provided a profile of the life of the accused and outlined the ECCC’s dealings with him prior to the commencement of his trial. The investigation included a summary of facts pertaining to the historical and political context of the crimes, the role of the accused in implementing CPK policy, an outline of the legal characterisation of the alleged crimes and a psychological assessment of the accused. As noted in Chapter Four, the investigation also involved visits to the scenes of the crimes, and re-enactments in the presence of the accused, his counsel and victims of the crimes.

The Closing Order also formed the Case File from which the Trial Chamber examined the case against the accused. The investigation thus initiated dialogue around the crimes of the Khmer Rouge period and laid the foundation for further discussion at trial.

A Profile of the Accused

The Closing Order chronicled Duch’s personal, political and professional evolution leading to his role as Chairman of S-21 during the Khmer Rouge regime. S-21 was the code name of

¹ Closing Order Indicting Kaing Guek Eav alias Duch (Extraordinary Chambers in the Courts of Cambodia, Office of the Co-Investigating Judges Office, (Case File No. 001/18-07-2007- ECCC-OCIJ, 8 August 2008) [Closing Order] [152].
the headquarters of santebal, the CPK’s security police or special branch. It was a secret interrogation centre and detention complex in Phnom Penh operating within a former high school. The institution included a neighbouring a facility known as S-24 at Prey Sâr, where prisoners were also detained and rice was farmed to supply S-21 needs. Large pits dug at Choeung Ek to the south of Phnom Penh supported S-21’s system of executions.

Duch was born on 17 November 1942 in the Cambodian village of Peovveuy in Kompong Thom province. He was the eldest child of poor peasants of Chinese origin. He was a small child and suffered from illnesses which he described as ‘caused by poverty and living in the countryside.’ Aged nine years when he began his schooling, he was a good pupil. After, successfully finishing his junior and high school studies Duch completed the national Baccauléate examinations in 1964 at the Lycée Sisowath in Phnom Penh. Duch was both fearful and enthralled by his teachers. He traced his later political activism to several of his teachers who condemned political corruption and social injustice. Duch’s sense of social injustice seemed to have been sharpened by the impoverished circumstances of his family and their suffering at the hands of a usurious relative. When he joined the Khmer Rouge Duch adopted his revolutionary name. He explained to the psychology experts who assessed his personality at the pre-trial stage, that Duch means ‘student who stands straight when a teacher asks him to stand.’

In 1964, Duch moved to Phnom Penh where he studied for a teaching certificate at the Institut de Pédagogie. The director of the Institut was Son Sen, a French-educated mathematician who soon fled the capital to join the CPK. Son Sen became a member of the CPK Central Committee and in 1975 was Duch’s immediate superior at S-21. At the Institut, Duch also met Chhay Kim Hour, a professor and head of a communist cell in Phnom Penh. Chhay Kim

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2 Santebal is a compound word combining santisuk (security) and norkobal (police). David Chandler, Voices from S-21: Terror and History in Pol Pot’s Secret Prison (University of California Press, 1999) 3.
3 Closing Order [20], [112].
4 Closing Order [163].
5 Closing Order [163-164].
6 Closing Order [164].
7 Duch is also the name of the sculptor of the Great Buddha of the Pagoda of Povveuy in Siem Reap. Transcript of Trial Proceedings - Kaing Guek Eav ‘Duch’ (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case File No. 001/18-07-2007/TC, Day 67, 31 August 2009), 19.
Hour introduced Duch to the CPK and was a mentor to him. 8 While the two were close cadre during those years, when the CPK came to power Chhay Kim Hour was purged at S-21 which was then under Duch’s administration.9

In 1965, Duch was appointed to the position of mathematics teacher at the junior high school of Skoun. His students described him as a sincere, devoted man, always seeking to help the impoverished.10 While teaching he became increasingly engaged in the communist underground movement against the Sihanouk government. On 5 January 1968, Duch was arrested and sentenced to 20 years imprisonment for breach of state security. He was released from prison after the 18 March 1970 coup d’état by General Lon Nol against Sihanouk and thereafter resumed his activities as a member of the CPK.11

The Khmer Rouge policy of purging perceived enemies began long before the CPK came to power. In 1971, Duch was assigned to supervise a Khmer Rouge prison camp code-named M-13, where he implemented the CPK policy of executing detainees deemed enemies of the revolution. Duch told the Co-Investigating judges in his defence, that he had not joined the CPK to commit crimes but to liberate his people. He claimed that when he was ‘forced to supervise M-13, [he] became both an actor in criminal acts and also a hostage to the regime.’12 Duch said it became clear to him that those who served the interests of their own people and not the CPK could be detained as opponents of the Party. This, he explained made him increasingly fearful for his life. The fear continued after he was appointed by Son Sen first as Deputy, and then Chairman of S-21 in 1975. Son Sen became Minister for Defence of Democratic Kampuchea and was responsible for general state security.

In 1979, in the days following the Vietnamese defeat of the Khmer Rouge, two photo-journalists stumbled on the vacated S-21 facility. In addition to the bodies of recently killed prisoners and instruments of torture, they found thousands of documents, photographs and

9 Ibid 56.
10 Closing Order [163-164].
11 *Co-Prosecutors v Kaing Guek Eav (alias) Duch (Judgement)* (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case File No. 001/18-2007/ ECCC TC 26 July 2010) [112].
12 Closing Order [169].

178
notebooks detailing how the institution had been administered. Duch confirmed that the primary role of S-21 was the elimination of enemies of the regime and that this extended to their family members. In addition to executing prisoners already condemned as traitors, S-21 had the overriding purpose of extracting confessions to justify arrests and to uncover further networks of enemies perceived by the CPK leadership as ‘boring from within.’ Duch was responsible for the content of detainee confessions which were extracted by force in the form of political biographies. These formed a major part of the documentary evidence of Duch’s crimes.

After the Vietnamese took Phnom Penh in January 1979, Duch fled the capital. By December he had joined Khmer Rouge cadre in Samlaut where he resumed teaching. In October 1986, he was once again with Son Sen who sent him to China to teach Khmer to Chinese students. He remained there for two years and assumed the name Hang Pin. The Closing Order did not record when he returned to Cambodia. However, it noted that in 1992 Pol Pot assigned him to an economic post in a village in the far North West province of Banteay Manchey. Thereafter, he lost contact with the dispersing Khmer Rouge in the context of the progressive rupture within the leadership group and the ensuing defections to the Cambodian government. Duch became a school teacher again, as well as a trader in rice and breeder of pigs.

In November 1995, Duch’s wife was killed in a mysterious burglary at his home in which she was bayoneted, while he was only slightly injured. Duch suspected an assassination plot by Pol Pot. It was after her death that he began to attend meetings of the Evangelist Church of Battambang and his apparent conversion to Christianity ensued. He also had his children baptised. He returned to live in Samlaut in 1996, but the population was evacuated across the Thai border in the wake of Khmer Rouge hostilities against the Phnom Penh government. In July 1997, he began to work for the American Refugee Committee (ARC), an NGO operating

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13 Chandler above n 2, 3.  
14 Closing Order [34, [37].  
15 Closing Order [43].  
16 Closing Order [43].  
17 Closing Order [166].  
18 Closing Order [166].
in the Ban Ma Muang refugee camp. An ARC doctor recommended Duch, known by him as Hang Pin, for a vacancy for a community health worker. This was based on Duch’s background as a teacher and his fluency in French, Khmer and Thai. Duch embraced his new humanitarian role and became well known in the camp, particularly when he acted to stem a typhoid outbreak which could have taken many lives.\(^1\)

In late 1998, as Khmer Rouge combat activities subsided Duch returned to Cambodia with other refugees. Dunlop recorded that Duch told his ARC supervisor, Tess Prombouth, that ‘when I go back I really don’t know what will happen with my life.’\(^2\) In April 1999, journalists Nic Dunlop and Nate Thayer found Duch in Samlaut. When Duch recognised Nate Thayer as the journalist who had interviewed Pol Pot he said ‘it is God’s will that you are here… now my future is in God hands.’ Apparently resigned to his fate, Duch began to talk about his life with the Khmer Rouge. He said, ‘I have done very bad things …now it is time for \textit{les représailles} (the consequences) of my actions.’\(^3\) Soon after the interview, Dunlop heard that Duch had ‘given himself up to the Cambodian authorities.’\(^4\)

The Closing order recorded that throughout the investigation Duch recognised his responsibility for the crimes committed at S-21 under his command.\(^5\) To the Co-Investigating Judges, Duch explained that he was bound to speak out about the Khmer Rouge years in 1999 ‘because it was impossible not to tell the truth about S-21 after he heard that Pol Pot denied its existence and claimed that it was an invention of the Vietnamese.’\(^6\) The Closing Order also records that Duch repeatedly expressed remorse to the victims of S-21 and their families, as well as to the S-21 staff who were under his control. He stated that none of his staff were volunteers, or proud of what they had done, but rather were terrorised and constantly in fear for their lives.\(^7\) Duch cooperated in the judicial investigation and neither attempted to implicate anyone who was under his command, nor blame the senior leadership

\(^1\) Dunlop above n 8, 256.  
\(^2\) Ibid.  
\(^3\) Ibid 272.  
\(^4\) Ibid 278.  
\(^5\) Closing Order [167].  
\(^6\) Closing Order [167].  
\(^7\) Closing Order [168].
of the CPK alone in order to exonerate himself.\textsuperscript{26} When presented with inconsistencies in his testimony before the Co-Investigating Judges, he indicated that they resulted from ‘fear and embarrassment’ at being reminded of an ‘extremely painful history of crime.’\textsuperscript{27}

The psychological examination of Duch commissioned by the Co-Investigating Judges was conducted by an international expert specialising in Geopolitical Clinical Psychology and a Cambodian psychiatrist. The Closing order cites their conclusion that Duch presented no psychopathology and that he was responsible for all his acts. While noting that Duch had developed powerful defence mechanisms and that there were remnants of the Khmer Rouge ‘fabrication’ processes in his language, thinking and behaviour, the experts perceived positive psychological progress despite a past pattern of ‘disempathy.’\textsuperscript{28} As to whether his expressions of regret regarding his crimes were sincere or circumstantial, they concluded that the ‘answer lies beyond the two propositions.’ Their opinion was that ‘Christianity, the West and the realm of international justice symbolised a new form of protection (also undeniably the most effective), because he suffered from insecurity.’\textsuperscript{29}

The Closing Order thus introduced the case against Duch. It provided a sketch of the life of a Khmer Rouge perpetrator before, during and after the regime. It also made clear the role of S-21 within Democratic Kampuchea, and presented a picture of Cambodia over at least four decades in continuous political turmoil.

With a factual record before them, the ECCC judges began the process of testing the evidence on the Case File at trial. This included calling for additional evidence as they examined the accused and other witnesses. In the next section I discuss how the Court engaged with the accused and how he engaged with the Court, and the evidence of witnesses.\textsuperscript{30}

\textsuperscript{26} Closing Order [168].
\textsuperscript{27} Closing Order [168].
\textsuperscript{28} Also referred to as ‘alexithymia’ to describe the inability to feel and express emotions. I discuss this further at page 194.
\textsuperscript{29} Closing Order [171].
\textsuperscript{30} In Chapter Seven I discuss the Court’s analysis of Duch’s culpability for each of his crimes.
Duch’s trial commenced on 30 March 2009 following an initial hearing in February. The trial ran for 22 weeks (77 sitting days). There were 38 witnesses of fact and 8 expert witnesses. In addition, 22 civil parties made statements in support of claims for reparations. Following the formal opening of the trial by President Nil Nonn, two Cambodian court officers read the Co-Investigating judges’ factual analysis of the case and the indictment. The proceedings were observed by a packed public gallery seating 500 and broadcast to national and global television audiences. The transcript of the proceedings formally recorded the reopening of a traumatic period in Cambodian history and represented the first official step towards social engagement with it.

Although Duch assumed responsibility for the crimes with which he was charged, he faced a full trial. This was because unlike that of other international courts, the governing law of the ECCC made no provision for the acceptance of a guilty plea. Duch chose to testify in his own trial even though as the accused he had a right not to be compelled to do so. The benefit of his testimony towards findings of the truth relevant to crimes committed during the Khmer Rouge regime was acknowledged by the Trial Chamber in its Judgement as extending to assisting national reconciliation, one of the stated goals of the ECCC.

As noted in Chapter Four, all parties had access to the Case File and rights to participate in the proceedings. The accused could participate either directly by way of reply following witness testimony, through legal counsel or invitation from the Court. The Court’s task of

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32 Transcript of Trial Proceedings - Kaing Guet Eav ‘Duch’ (Extraordinary Chambers in the Courts of Cambodia, Case File No 001/18-07-2007/TC 1000H), Trial Day 1, 30 March 2009).
33 Co-Prosecutors v Kaing Guet Eav alias Duch (Trial Judgment) (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber Case File No. 001/18-07-2007, 26 July 2010) [48].
35 Co-Prosecutors v Kaing Guet Eav (alias) Duch (Judgement) (Chambers in the Courts of Cambodia, Trial Chamber, Case File No. 001/18-2007/ ECCC TC, 26 July 2010) [609].
36 I discuss the exercise of the civil parties’ participation rights in Chapter Six.
establishing individual criminal responsibility for Duch’s acts beyond reasonable doubt involved historical contextualisation of his conduct during the regime, as well as character analysis before and during the proceedings. Duch was an active player in his own defence as he exercised his inquisitorial procedural rights throughout the trial. In the next section I describe how he engaged with the Court in both its narrow task of prosecution and broader purpose of assisting reconciliation. His willingness to cooperate in the investigation and trial proceedings, together with his readiness to exercise his participation rights brought added dialogic dimensions to the proceedings.

1 Duch and CPK Policy

The coercive nature of CPK policy before the establishment of S-21 was revealed by the Court’s examination of Duch on his work as supervisor of the M-13 detention centre. Critically, Duch’s testimony confirmed that the regime’s policy of eliminating perceived enemies, known as ‘smashing,’ was introduced at M-13 under his leadership. At M-13, Duch worked under the direction of Vorn Vet from July 1971 to mid-1973, and subsequently under Son Sen until January 1975. In August 1975, Son Sen initiated the establishment of S-21 and appointed Duch as deputy-in-charge of the interrogation unit. Duch testified that he neither sought this position or his subsequent promotion to Chairman. In fact, he wanted to work in the Ministry of Industry but his request was refused. Duch declared that he did not ‘dare’ contest the new appointment on the grounds of duty to the Party.37

The Court sought clarification from Duch on the CPK policy of eliminating enemies. The policy of ‘smashing’ was sanctioned by Article 10 (Chapter 7) of the 1976 Constitution of Democratic Kampuchea. Under the heading ‘Justice,’ the Constitution stated that ‘violations of the laws…including dangerous activities in opposition to the people’s State must be condemned to the highest degree.’38 Duch described the policy as total, being applicable to

37 Co-Prosecutors v Kaing Guek Eav (alias) Duch (Judgement) (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case File No. 001/18-2007/ ECCC TC, 26 July 2010) [122].
38 Co-Prosecutors v Kaing Guek Eav (alias) Duch (Judgement) (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case File No. 001/18-2007/ ECCC TC, 26 July 2010) [99].
‘S-21… the entire party, the military, the State authority in the bases, [and] the Police Offices throughout the country.’

Duch testified that to ‘smash’ meant more than to kill:

To ‘smash’ […] means to arrest secretly […, to interrogate] with torture employed, and then [to execute] secretly without the knowledge of the [detainees’] family members. [It also means that] the person was not to be released […] so if he is smashed […] this did not go through the judicial process because there was no law, no court, the Standing Committee [of the CPK] controlled all governmental powers.

Moreover, ‘smashing’ involved not merely physically smashing but breaking psychologically. Under Duch’s supervision S-21 was designed for the dehumanisation and psychological debasement of those detained there.

As to his responsibility as a superior officer, Duch testified that as Chairman of S-21 from March 1976 to 6 January 1979 all his subordinates reported directly to him and that he in turn reported directly to the CPK Standing Committee (a Sub-Committee of the Party’s Central Committee and the highest authority in Democratic Kampuchea). During the trial Duch confirmed this reporting process by reference to documents tabled in Court that contained detainee confessions he had personally annotated. These he forwarded to Son Sen as his immediate superior, until Son Sen was replaced by Nuon Chea. Other annotated confessional documents revealed that Son Sen had sent those documents to Pol Pot or other Standing Committee Members. Duch also confessed that he met his superiors ‘quite often’ further to S-21 business. He emphasised the vertical nature of the communication structure imposed by the CPK to maintain secrecy and control of information. Horizontal communications with officers heading the Revolutionary Army of Kampuchea (RAK) units for instance, even if

39 Co-Prosecutors v Kaing Guek Eav (alias) Duch (Judgement) (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case File No. 001/18-2007/ ECCC TC, 26 July 2010) [100].
40 Co-Prosecutors v Kaing Guek Eav (alias) Duch (Judgement) (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case File No. 001/18-2007/ ECCC TC, 26 July 2010) [100].
41 Co-Prosecutors v Kaing Guek Eav (alias) Duch (Judgement) (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case File No. 001/18-2007/ ECCC TC, 26 July 2010) [100].
42 Staggs Kelsall above n 31, 13.
43 Ibid.
addressed directly to him were delivered through Son Sen as the senior leader of both the military forces and S-21.44

S-21 was organised along hierarchical lines and Duch devised a reporting system at ‘all levels to ensure that his orders were carried out immediately and precisely.’45 Duch personally trained a team of interrogators to use physical and psychological violence to secure the confessions of detainees.46 Because detainees were considered guilty by virtue of their arrests and presence at S-21, the contents of confessions generally followed a standard formula. The interrogators were instructed by Duch to establish links with the CPK’s enemies and to force detainees to confess to association with the CIA, the KGB and/or Vietnamese agents.47

Duch and other witnesses explained the nature of torture techniques used at S-21 to secure confessions.48 The Court also established the gruesome conditions under which prisoners were held and that inhumane practices including the draining of blood from detainees, and the subjection of some to medical experimentation occurred at S-21.49 Duch and witnesses Him Huy and Prak Khorn all testified to the incidence of rape though noted that the practice was not widespread.50 Duch acknowledged the inhumane conditions in which detainees were held and recognised that excesses perpetrated by his staff went unchecked.51

The Court also clarified the demographics of S-21 detainees. Witnesses confirmed Duch’s evidence of 48 prisoners from 11 countries other than Cambodia.52 In addition, the detainee

44 Laura MacDonald, ‘Duch and Expert Disagree on Khmer Rouge Communication Structure, But Disagree Regarding Responsibility’ Cambodia Tribunal Monitor (7 May 2009) 1, 2.
45 Co-Prosecutors v Kaing Guek Eav (alias) Duch (Judgement) (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case File No. 001/18-2007/ ECCC TC, 26 July 2010) [144].
46 Co-Prosecutors v Kaing Guek Eav (alias) Duch (Judgement) (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case File No. 001/18-2007/ ECCC TC, 26 July 2010) [164].
47 Co-Prosecutors v Kaing Guek Eav (alias) Duch (Judgement) (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case File No. 001/18-2007/ ECCC TC, 26 July 2010) [155].
48 Co-Prosecutors v Kaing Guek Eav (alias) Duch (Judgement) (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case File No. 001/18-2007/ ECCC TC, 26 July 2010) [244-247].
49 Co-Prosecutors v Kaing Guek Eav (alias) Duch (Judgement) (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case File No. 001001/18-2007/ ECCC TC, 26 July 2010) [273-275].
50 Co-Prosecutors v Kaing Guek Eav (alias) Duch (Judgement) (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case File No. 001/18-2007/ ECCC TC, 26 July 2010) [155].
51 Co-Prosecutors v Kaing Guek Eav (alias) Duch (Judgement) (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case File No. 001/18-2007/ ECCC TC, 26 July 2010) [246-247].
52 Staggs Kelsall above n 31, 15.
population consisted of former Lon Nol soldiers, members of the Khmer Rouge military forces and high and low-ranking Khmer Rouge cadre, as well their family members, including children. At least, 12,273 individuals appeared on the revised S-21 prisoner list, although the Court concluded that this was a minimum figure, and that the loss of records and the practice of not registering children meant that the actual number of detainees was likely to have been considerably greater.53

The vast majority of witnesses of fact as to what happened at S-21 under Duch’s leadership were former employees of the institution. Many of Duch’s former interrogators affirmed his testimony that he was not present or had taken part in interrogations.54 However, they explained that they were fully aware he was the commander of the facility and that he trained the interrogators.55

Detainees of the re-education facility, S-24 also lived in inhumane conditions and faced the likelihood of execution. Duch testified that ‘S-24 detainees were seldom released and that all were generally destined for execution regardless of their classification.’56

2 The Co-Prosecution Voice

The Co-Prosecutors dismissed Duch’s expressions of remorse and his opinion of himself as a mere cog in the Khmer Rouge criminal machine.57 National Co-Prosecutor, Chea Leang, highlighted the close connection of the S-21 complex with the CPK Central Committee and its distinctiveness from the other security centres for that reason. International Co-Prosecutor, William Smith, painted Duch as the efficient head of the famous torture centre whose diligence ‘encouraged’ the senior leadership of Democratic Kampuchea to arrest, detain and smash more than 12,000 detainees. Duch, he argued, along with his mentor and

53 Co-Prosecutors v Kaing Guek Eav alias Duch (Judgement) (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case File No. 001/18-2007/ ECCC TC, 26 July 2010) [141-142].
54 Staggs Kelsall above n 31, 14.
55 Ibid 15: Co-Prosecutors v Kaing Guek Eav alias Duch (Judgement) (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case File No. 001/18-2007/ ECCC TC, 26 July 2010) [132, f.n.224].
56 Co-Prosecutors v Kaing Guek Eav (alias) Duch (Judgement) (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case File No. 001/18-2007/ ECCC TC, 26 July 2010) [198].
57 Staggs Kelsall above n 31, 16.
superior Son Sen waged a misguided crusade sacrificing their hearts, souls and humanity in
the process.\textsuperscript{58} Smith grounded his argument for a forty year sentence in the expressivism of
criminal punishment. While acknowledging Duch’s remorse and cooperation with the Court
he argued that a long sentence would send the message that the ECCC was punishing the
accused justly, and deterring the repetition of the grave crimes committed.\textsuperscript{59}

3 \hspace{1cm} \textit{The Co-Defence Response}

In his closing statement, Duch’s International Defence counsel, François Roux, highlighted
his client’s assumption of responsibility for his crimes, expressions of remorse and repeated
apologies to victims.\textsuperscript{60} He reminded the Court that Duch was asked directly if he admitted
implementing CPK policy at S-21, to which he replied ‘yes, I admit it completely.’\textsuperscript{61}
Furthermore, his shame and remorse was ongoing. Roux recalled that Duch had
acknowledged before the Court that he even betrayed his friends and that what he did at S-
21 ‘transcends cowardice.’\textsuperscript{62} Duch’s crime was ultimately the ‘crime of obedience’ which he
associated with a culture of submission to masters.\textsuperscript{63} Roux maintained that Duch was himself
a victim of a totalitarian regime leadership who fundamentally sought their own protection.\textsuperscript{64}
He asserted that Duch could not be portrayed as the conventional monster perpetrator of
atrocity crimes to be condemned in expressive terms, because international courts since the
Nuremberg era recognised the contribution to reconciliation to be made by defendants who
accept responsibility for their crimes and assist the truth-finding process through their
cooperation with the relevant court. This had significance in communities for both victims

\textsuperscript{58} Ibid.
\textsuperscript{59} Transcript of Trial Proceedings - Kaing Guek Eav ‘Duch’ (Extraordinary Chambers in the Courts of
\textsuperscript{60} Transcript of Trial Proceedings - Kaing Guek Eav ‘Duch’ (Extraordinary Chambers in the Courts of
\textsuperscript{61} Transcript of Trial Proceedings - Kaing Guek Eav ‘Duch’ (Extraordinary Chambers in the Courts of
\textsuperscript{62} Transcript of Trial Proceedings - Kaing Guek Eav ‘Duch’ (Extraordinary Chambers in the Courts of
\textsuperscript{63} Transcript of Trial Proceedings - Kaing Guek Eav ‘Duch’ (Extraordinary Chambers in the Courts of
Cambodia, Trial Chamber, Case File No. 001/18-07-2007/TC, Day 76, 26 November 2009) 17; David
Scheffer, ‘The Crime of Obedience’ Cambodia Tribunal Monitor (26 November 200) 1, 5.
\textsuperscript{64} Transcript of Trial Proceedings - Kaing Guek Eav ‘Duch’ (Extraordinary Chambers in the Courts of
Cambodia, Trial Chamber, Case File No. 001/18-07-2007/TC, Day 76, 26 November 2009) 42.
and other former perpetrators. In addition, the nature of Duch’s participation in the proceedings had brought moments of truth more frequently associated with the work of truth commissions.

Duch’s national Co-Defence counsel, Kar Savuth, argued that an acquittal was in order because his client was not in fact one of the senior leaders of the Khmer Rouge and therefore not properly subject to the ECCC’s personal jurisdiction. Duch was only one of the 196 prison chiefs within the Santebal. Savuth cautioned the Court against making Duch a ‘scapegoat’ for a great number of perpetrators some of whom had committed more egregious crimes than he had. The reason for the apparent change of plea and the disagreement with Roux disclosed in Kar Savuth’s closing statement is discussed later in this chapter and in Chapter Eight.

C The Participation of the Accused at Trial

Duch took an active part in the proceedings. He was fully apprised of the documents in the case file and displayed an excellent memory of events. More than once he resolved apparent inconsistencies in S-21 documents, explained their annotations and verified signatures. When testimony was confusing or erroneous he availed himself of opportunities to address the Court to resolve the issues. An example of this was his response to the testimony of a civil party who told the court he had used an alias during the Khmer Rouge period and escaped from the Choeung Ek killing site. Referring to documents that showed that the named prisoner was detained at S-21 much earlier than the witness had stated, and that the prisoner was in fact killed, Duch declared that the witness could not be who he

\* Transcription of Trial Proceedings - Kaing Guek Eav ‘Duch’ (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case File No. 001/18-07-2007/TC, Day 76, 26 November 2009) 11-15. Roux cited his experience as counsel in the Prosecutor v Obrenović at the ICTY where Obrenović accepted responsibility as Commander of troops for persecution of the Muslim community at Srebrenica. See Prosecutor v Obrenović (Sentencing Judgement) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber 1, Case No. ICTY- IT-02-60/2-S, 10 December 2003) [144-157].


claimed to be. Though participation of this kind clearly aided the truth-finding process, after several instances in which Duch appeared to slip into the role of teacher and controller of matters in dispute, the Court admonished him, reminding him that the role of analysing evidence lay with the judges. Duch also made use of his right of reply to witness testimony. In the next section I discuss how his exercise of this right together with judicial discretion in the management of proceedings gave the proceedings a discursive tenor.

III TRIAL DIALOGUE AND WITNESS TESTIMONY

In addition to the evidence of the accused, the Trial Chamber relied on the evidence of other eye and expert witnesses to establish proof of the elements of the crimes. The search for the truth in the inquisitorial proceedings traversed historical, psychological or social issues to reveal the context and unearth causes of the crimes. Some of the matters raised tapped into live social debates, while others influenced the Court in its assessment of Duch’s character and culpability. The Court’s engagement with the evidence of some of the witnesses produced wide ranging, nuanced and philosophical dialogue. A sample of trial dialogue resulting from witness testimony follows.

A Mam Nai

In contrast to a tightly controlled adversarial process where the defendant generally speaks through defence counsel unless actually testifying, Duch’s active engagement with the evidence provided dramatic and sometimes moving moments in the trial. An example was Duch’s response to the testimony of Mam Nai, a witness called to give evidence on the functioning of S-21 and executions at Choeung Ek.

ECCC Mam Nai was 76 years old at the time he gave evidence his evidence. Mam Nai was at M-13 with Duch and was one of his four senior interrogators at S-21. In February 2008, Mam Nai took part in the re-enactment at Choeung Ek, and the visit to S-21 organised by the

68 Open Society Justice Initiative, Recent Developments at the Extraordinary Chambers in the Courts of Cambodia (OSJI, August 2009) 1, 16.
69 Ibid.
Co-Investigating judges. He stated then that he used whips and electric wire in his interrogation of detainees and made entries in a 300 page notebook, which included his dictations of lectures given by Duch to S-21 staff. At trial however, Mam Nai testified that he had no knowledge of how the interrogation unit was operated, how many staff worked within it and what torture methods were used. He said he interrogated 20 to 30 Vietnamese combatants and 1 or 2 civilian spies. Mam Nai conceded that he had been responsible for interrogating all the Vietnamese prisoners because of his language skills. However, he refused to confirm that he had interrogated prisoners on a list presented to him by to International Prosecutor William Smith, which documented the presence of 122 Vietnamese combatants and 144 Vietnamese spies at S-21. Mam Nai’s evasiveness slowed the proceedings and frustrated the Co-Prosecution.

In his examination of Mam Nai, François Roux asked the witness for his perspective on the government of Democratic Kampuchea. Mam Nai seemed to recall aspects of the Regime fondly, stating that though conditions in Cambodia were difficult particularly because of food shortages, the Khmer Rouge ethic of independence and self-mastery were positive features. He also said he simply did not know how many people died under the Khmer Rouge. Roux then thanked the Prosecutors for providing such a witness.

After listening all day to Mam Nai’s testimony, Duch exercised his right of reply in emphatic fashion. He made a passionate plea to Mam Nai to fully testify to the events of the period in which they both participated as fellow revolutionaries. The plea consisted of a request to reform personally in view of the fact that over a million people died as a result of CPK policy and to ‘tell the truth’ for the sake of the particular victims involved and for the sake of

70 Laura MacDonald, ‘After Two Days of Questionable Witness Testimony, Duch Lectured His Former Subordinate: “Just Tell the Truth”’ Cambodia Tribunal Monitor (15 July 2009) 1, 1.
humanity. Duch re-iterated that just as they had re-constructed themselves for the cause of communism, they must now change for humanitarian reasons.\textsuperscript{73}

Duch reminded Mam Nai that the wife and daughter of Professor Phung Ton, the respected Law Professor and Dean of the University of Phnom Penh, who was interrogated at S-21, were present as civil parties and sought answers regarding the fate of their loved one. Duch told Mam Nai that he had accepted responsibility for the crimes at S-21 and said he wanted him to do the same, adding ‘don’t be afraid of death - just tell the truth.’\textsuperscript{74}

Immediately following Duch’s exchange with Mam Nai, civil party lawyer, Silke Studinsky, having previously failed to elicit information for her clients on the whereabouts of Phung Ton’s remains, asked the Chamber to allow the witness an additional opportunity to address the issue.\textsuperscript{75} The exchanges broke down Mam Nai’s resistance. ‘I wish to express my regrets to the family of Professor Ton’ he declared.\textsuperscript{76} As he sobbed, the witness said:

\begin{quote}
I was enormously remorseful because my brothers and my parents suffered and died under the regime. My wife died. I think that it was a chaotic situation and that we can only be filled with regret. It’s the only thing we can do. Now, I try to find solace by thinking about my karma; I turn to my religious faith. Of course I had many regrets and I believe that through this court, the family of Professor Ton is now aware of my feelings.\textsuperscript{77}
\end{quote}

Presiding Judge Nil Non then pressed Mam Nai for further details on the Professor’s treatment at S-21, but the witness said he could recall nothing else.

\begin{flushleft}
\textsuperscript{73} Transcript of Trial Proceedings – Kaing Guek Eav ‘Duch’ (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case File No. 001/18-07-2007- ECCC/TC, Day 45, 15 July 2009) 64.
\textsuperscript{74} Transcript of Trial Proceedings – Kaing Guek Eav ‘Duch’ (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case File No. 001/18-07-2007- ECCC/TC, Day 45, 15 July 2009) 65-66; MacDonald above n 69, 3.
\textsuperscript{75} Transcript of Trial Proceedings – Kaing Guek Eav ‘Duch’ (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case File No. 001/18-07-2007- ECCC/TC, Day 45, 15 July 2009) 66.
\textsuperscript{76} MacDonald above n 70, 3.
\end{flushleft}
Duch spoke firmly to his former colleague and with an authority that astounded those observing the proceedings. The exchange between perpetrator and perpetrator introduced dialogue arguably more akin to restorative than retributive criminal process. In his closing arguments Francois Roux, reminded the Court ‘at times we had the impression [that] … we were taking part in a truth and reconciliation commission in this courtroom.’ It was certainly a moment when the judges engaged their inquisitorial discretion to allow the drama to play out within the parameters of legal procedure. The rare form of trial dialogue allowed the perspectives of two Khmer Rouge perpetrators to be heard and reflected upon by the trial’s public. I discuss other examples of Duch’s exercise of his right of reply in Chapter Six.

B  François Bizot at M-13

Although the charges against Duch did not extend to his management of the M-13, the Court called former staff of the centre as well as Professor François Bizot to testify on issues related to the functioning of the detention centre. In 1971, while researching Cambodian Buddhism with two Khmer assistants, Bizot was arrested as a CIA spy by Khmer Rouge cadre and detained for three months at M-13. Bizot’s book, entitled The Gate, published in 2000 told the story of Bizot’s detention at M-13 and its enduring effect on him. At the ECCC, Bizot described the privations of life in the camp, the shackling of prisoners and the ‘terrifying atmosphere of fear and death’ that pervaded the camp. As Duch interrogated Bizot on a weekly basis over at least two months, a strained form of friendship or ‘familiarity’ developed between the two men. Ultimately, Duch engineered Bizot’s release when convinced of the prisoner’s innocence, but not before securing approval from his superiors. Bizot remarked that in the climate of constant terror, torture and death, Duch exhibited fear and suffering as

he worked. Bizot explained that even as his transport out of M-13 was arranged, Duch feared an ambush by Ta Mok who had not agreed to let Bizot live, while Vorn Vet had supported Duch’s recommendation for release.83

Before Bizot was set free Duch admitted to him that he beat prisoners to obtain confessions, not because he wanted to, but out of a sense duty to Angkar. Bizot was suddenly struck by the tragedy and terror of Duch’s predicament and the humanity behind his work of writing up reports on people destined for execution.84 Bizot’s testimony lent support to the defence theory of Duch as a young Khmer Rouge cadre being both a ‘vector of state-institutionalised mass killing’ and a dedicated revolutionary who had accepted the legitimacy of crime in the revolutionary cause.85 The duality of Duch’s existence and his inability to ‘step back or out’ of the regime he had committed himself to left a permanent imprint on Bizot’s life, which he seemed compelled to communicate in court through his narrative testimony.86 Under examination, Bizot explained that the view he had formed of Duch was part of a process of ‘understanding the drama that took place in the forests of Cambodia’ as well as in other national contexts, including those of more recent origin.87 I discuss this further in Chapter Eight.

C David Chandler on the CPK in history

David Chandler was a US diplomat in the 1960s and later became Professor of History at Monash University. The Court called him to elaborate on details in his book *Voices from S-21: Terror and History in Pol Pot’s Secret Prison* which was published 1999. The work provides his analysis of documents and publications retrieved from the S-21 complex,
including over 1000 confessions of S-21 prisoners, together with records of interviews with several surviving detainees and security guards. In the course of his testimony, the Court asked Chandler to provide broad retrospective analysis of the CPK’s policy and Duch’s role as Chairman of S-21 as revealed in the institution’s archive. Chandler was examined first by Judges Cartwright and Lavergne, followed by the Co-Prosecution, civil party lawyers and the Co-Defence counsel. The Accused then exercised his right of reply. Some of the questions put to the witness and excerpts of his answers are reproduced in summary below to illustrate the breadth and nature of the dialogue that ensued.

1  

S-21 - The ‘total institution’

In his book Chandler described S-21 as a ‘total institution.’ Judge Cartwright asked Chandler to elaborate on his intention in using that description. Chandler explained that he drew the phrase from the American sociologist, Erving Goffman who had applied the term total institution to boarding schools, convents, monasteries and military units. Such places were ‘sealed environments’ in which rules were made from inside the institutions with little or no connection to the larger society. Chandler concluded S-21 was such an institution. In the case of S-21 no information got out of the institution except to the senior leaders of Democratic Kampuchea.\(^8^8\) What happened at S-21 was known only to those who worked or were imprisoned there, and a few CPK members at the Party centre.\(^8^9\) Chandler testified that this was consistent with the policy of secrecy which the leadership viewed as essential to the survival of the regime.\(^9^0\) To the leadership there could be no security without secrecy. This was reflected in the regime’s choice of the words ‘secret’ and ‘open’ in CPK documents rather than legal or illegal.\(^9^1\)

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89 Chandler above n 2, 7.
91 Chandler above n 2, 16.
Secrecy was also fundamental to the Khmer Rouge victory over the enemy.\textsuperscript{92} Defending the Party’s centre was all-important. In his book, Chandler concluded that for the CPK, the leadership had to be defended at all costs. Chandler cited Nuon Chea’s statement that the movement could afford to lose 200–300 cadres but could not lose 2 or 3 leaders because the Party would not survive if there was damage at its centre.\textsuperscript{93} In addition, a policy of continuous ‘sweeping and cleaning’ was necessary to ensure the safety of the Party leadership as well as preserve the purity of the revolution.\textsuperscript{94} Judge Cartwright asked Chandler about the CPK’s preoccupation with enemies of the regime and its increasing concern with purging enemies from within its own ranks. Chandler testified that the CPK Central Committee’s approach to its enemies could be summarised as ‘locate, question and destroy.’\textsuperscript{95} To this end, S-21 was an interrogation and torture facility and not a prison operating according to law.\textsuperscript{96} He described S-21 as the ‘ante-room to death’ that is, a waiting room for the fate of a forceful and violent death for all held there.\textsuperscript{97} Confirming Duch’s testimony, he concluded that the former S-21 Chairman had no role in arresting detainees, rather he was responsible for locating networks of other perceived ‘traitors’ through confessions extracted from detainees already determined as guilty by the leadership.\textsuperscript{98} Duch’s chief responsibility was to ‘validate the verdict by extracting full confessions.’\textsuperscript{99}

Judge Cartwright questioned Chandler on a CPK document that Duch had discussed as significant in confirming the nature of the phase of CPK purging of those perceived as enemies within its ranks.\textsuperscript{100} Chandler said the document was discovered by chance in 1980 and was the closest thing we have to a ‘smoking gun authorising the smashing of enemies’

\textsuperscript{92} Ibid.
\textsuperscript{93} Ibid.
\textsuperscript{94} Ibid 41.
\textsuperscript{95} Transcript of Trial Proceedings - Kaing Guek Eav ‘Duch’ (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case File No. 001/18-07-2007/TC, Day 55, 6 August 2009) 12.
\textsuperscript{96} Chandler above n 2, 15.
\textsuperscript{97} Transcript of Trial Proceedings - ‘Duch’ (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case File No. 001/18-07-2007/TC, Day 55, 6 August 2009) 12.
\textsuperscript{98} Transcript of Trial Proceedings - Kaing Guek Eav ‘Duch’ (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case File No. 001/18-07-2007/TC, Day 55, 6 August 2009) 12.
\textsuperscript{99} Transcript of Trial Proceedings - ‘Duch’ (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case File No. 001/18-07-2007/TC, Day 55, 6 August 2009) 27.
\textsuperscript{100} The document was titled ‘Decisions of the Central Committee Regarding a Number of Matters’ and dated 30 March 1976. It was cited at page 51 of Chandler’s book.
by the top echelon of the CPK hierarchy by way of a directive to all to security centres and CPK units throughout the country. It was following the issue of the directive in the latter part of 1976, that the CPK began the purging of the ‘internal enemy,’ party members and high-ranking Khmer Rouge.\(^{101}\) This included some its senior leaders such as Vorn Vet, Duch’s superior at M-13.

Confessions to affiliation with external enemies including the CIA or the KGB were routinely extracted. Chandler testified that it was clear that the interrogators knew little of those organisations, but that the acronyms became catchphrases for the CPK’s enemies. Vietnamese identity or connection was similarly condemnatory.\(^{102}\) He noted further that the Vietnamese were automatically considered outside the human race and that female Vietnamese were particularly vulnerable to sexual violence by the Khmer Rouge as a result of this.\(^{103}\)

2 \textit{Duch’s character and conduct at S-21}\(^{104}\)

Judge Cartwright questioned Chandler on Duch’s character as revealed through the documentary evidence of his work at S-21 and his interviews with former S-21 staff. Chandler testified that Duch worked hard to control every aspect of the S-21 operation. He planned the interrogation methodology and was a proud and enthusiastic administrator who kept meticulous records, ‘ferreting out problems and driving himself and his subordinates hard,’ frightening them in the process. As a mathematician he enjoyed drawing ‘rationally pleasing models’ and drew plans of this kind for S-21.\(^{104}\) In answer to civil party lawyer Trusses Napprous, Chandler testified that Duch, throughout his life was not concerned only with satisfying his superiors, but also sought to excel in everything he did so that he could be

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\(^{103}\) Transcript of Trial Proceedings - Kaing Guek Eav ‘Duch’ (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case File No. 001/18-07-2007/TC, Day 55, 6 August 2009) 85; and see Chandler above n 2, 38.

\(^{104}\) Transcript of Trial Proceedings - Kaing Guek Eav ‘Duch’ (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case File No. 001/18-07-2007/TC, Day 55, 6 August 2009) 11.
proud of himself.\textsuperscript{105} While Duch was a dedicated revolutionary who would not deviate from the Party line, he became disillusioned as the internal purges eliminated some of his former mentors, the paranoia of the leadership knew no bounds and their decision-making became increasingly arbitrary.\textsuperscript{106}

When asked what the purpose of the large S-21 archive was, Chandler suggested several possible reasons. Chandler posited that Duch kept records in such precise detail to demonstrate that the CPK leadership’s suspicions were justified—uncovering ‘strings of traitors, Vietnamese agents and so forth.’ Duch may have wanted to demonstrate to the leadership his professionalism and that S-21 was an efficient, responsible and productive unit in a country in otherwise total chaos. However, Chandler speculated that Duch may also have wished his records to be a significant historical source in the event that Democratic Kampuchea successfully held on to power over the longer term.\textsuperscript{107}

3 \textbf{S-21 and dehumanisation}

Judge Lavergne questioned Chandler on his description of the S-21 universe as being ‘completely inhuman, dehumanised.’ Chandler received the question as a philosophical one. He said the lives of S-21 employees were certainly restricted by virtue of the tightly controlled institution. However, the detainees were the subject of dehumanisation, being deprived of respect physically, mentally and psychologically from the moment they arrived at S-21. Judge Lavergne then asked Chandler to consider whether an atmosphere of cynicism or paranoia pervaded the S-21 administration particularly with respect to the authenticity of confessions. In response, Chandler said that while the accused knew that confessions were

\begin{footnotes}
\item[105] Transcript of Trial Proceedings - Kaing Guek Eav ‘Duch’ (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case File No. 001/18-07-2007/TC, Day 55, 6 August 2009) 70.
\end{footnotes}
not authentic, he let the whole machinery of producing fabricated confessions ‘run on’ knowing that his life would be in danger if he resisted the leadership’s policy.\textsuperscript{108}

Chandler was pressed by civil party lawyer Trusses Napprous on the dehumanisation of defenceless detainees by their gaolers in history. Chandler replied that the behaviour of S-21 personnel was not unprecedented. He recounted other moments in history where the dehumanisation of perceived enemies occurred with the permission of authorities, citing the massacres in Indonesia in 1965, the Nazi concentration camps and the gaols of South America in the 1970s.\textsuperscript{109} Chandler added:

\begin{quote}
[De-humanising behaviour] is a global phenomenon… Euphemistic terms such as body count, collateral damage and smash are used routinely to disguise the brutality of warfare. The word ‘kill’ is not used. … At S-21 when dehumanising practices became routine and the guards and interrogators were not punished, they did not exercise restraint and were able to operate with more and not less enthusiasm. It was the same among the Red Guard of the Cultural Revolution.\textsuperscript{110}
\end{quote}

François Roux raised with Chandler the analysis of S-21 in his book as a site giving rise to the ‘crime of obedience.’ Chandler explained that within S-21 and Democratic Kampuchea broadly, ‘the people who gave orders were accustomed to giving them and the people who received the orders were accustomed to obeying.’ Furthermore, in Cambodia there was little questioning of the commands of people in authority. The culture of obedience fed into the horror that was S-21 as it did in other contexts of mass atrocity.\textsuperscript{111}

Roux also asked for Chandler’s opinion on Duch’s admission of guilt? Chandler replied, ‘I was moved by his acceptance of responsibility for his crimes; it impressed me because Duch

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\textsuperscript{108} Transcript of Trial Proceedings - Kaing Guek Eav ‘Duch’ (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case File No. 001/18-07-2007/TC, Day 55, 6 August 2009) 73.
\textsuperscript{110} Transcript of Trial Proceedings - Kaing Guek Eav ‘Duch’ (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case File No. 001/18-07-2007/TC, Day 55, 6 August 2009) 73-74.
\textsuperscript{111} Transcript of Trial Proceedings - Kaing Guek Eav ‘Duch’ (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case File No. 001/18-07-2007/TC, Day 55, 6 August 2009) 118.
\end{flushleft}
is the only senior member of the CPK to have willingly confessed. History will be served by it.¹¹²

In his response to the wide-ranging testimony Duch praised Chandler for his virtue as a researcher. Interviewed by the press afterwards, Chandler described this as fawning praise in view of Chandler’s age, perceived seniority and the submissive culture he had described in Court.¹¹³

Chandler’s testimony and the Court’s engagement with his research shed light on the nature of the crimes committed at S-21 in a general historical sense as well as within the Cambodian context specifically. His reference to a culture of obedience in Cambodian society as it applied to Duch and others added a sociological dimension to the crimes. The issue resurfaced in the evidence of the psycho-political experts when they gave their testimony.

D     François Sironi-Guilbaud and Ka Sunbaunat

The psychological examination of Duch commissioned by the Co-Investigating judges addressed the political and cultural context of his life at the time of the facts at issue, and his current psychology. At trial the judges invited the experts to outline the findings of their initial report and provide an oral update, after having observed the accused during the trial proceedings.¹¹⁴

The experts were Dr François Sironi-Guilbaud a specialist in Geopolitical Clinical Psychology and Ka Sunbaunat, Professor of Psychiatry and Dean of the University of Health Services, Phnom Penh. Sironi-Guilbaud had extensive clinical experience in Paris working with both victims and perpetrators of war crimes. Ka Sunbaunat lived through the Khmer Rouge regime and worked with Cambodian and international NGOs on mental health issues

in Cambodia. He had treated other Khmer Rouge perpetrators and brought this experience to the proceedings as he fielded questions from the Court. Sironi-Guilbaud noted that Ka-Sunbaunat’s clinical experience as a psychiatrist and as a Khmer with knowledge of the political and cultural history of Cambodia was a necessary adjunct to the ‘western way of understanding political crime’ as they assessed Duch.115

Sironi-Guilbaud explained the clinical geopolitical approach used to assess Duch’s psychology. The analysis incorporated not merely an individual’s personal history, but the articulation within the person of collective social history having regard to political, economic and historical factors weighing on the personality of the subject. She cited by way of example, the weight of personal events in Duch’s life such as his family’s poverty and his father’s exploitation at the hands of a usurious uncle, as well as cultural and political factors which conditioned his life choices. The experts also highlighted the significance of teachers as mentors in Cambodian life. Ka Sunabunat explained that Cambodian children begin their education under the tutelage of monks who are afforded great respect. In Duch’s case, respect for his teachers was transferred to Son Sen the francophone intellectual and pedagogue. Duch came to view Son Sen as his master, and later, as his subordinate at S-21 sought recognition from him through his work at the institution.116

The expert’s initial psychological report was submitted to the Co-Investigating Judges on 31 March 2008. The report was based on 13 interviews with the accused, each of approximately three hours in length. There were three further interviews to update the experts’ assessment before they gave an oral report during the trial on 28 and 29 August 2009. Informing their report to the Court were video recordings of Duch’s presentation of a letter of excuse to victims, the re-enactments at S-21 and Choeung Ek, and Duch’s confrontations with witnesses, as well as other conduct by Duch during the proceedings that the experts had

observed. After the experts gave their report they answered questions from the bench, the Co-Prosecution and Co-Defence.

Sironi-Guilbaud reported that while Duch was highly intelligent with an excellent memory, he was influenced by the ideologies of his mentors in pursuit of a necessary personal ideal. This included not questioning the decision of the CPK’s leadership to execute a prisoner as an enemy of the regime who had been a former teacher and whom Duch admired for speaking out against corruption and social injustice. As a student, Duch discovered Stoicism, a doctrine that promoted indifference in the face of difficult personal emotions. His practice of stoicism and the development of certain defence mechanisms helped Duch function as the dedicated administrator of S-21 despite the presence within him of doubt and fear.

Judge Lavergne asked Sironi-Guilbaud to comment on the significance of the geopolitical psychological method of analysis to justice process for international crimes. Sironi-Guilbaud began by noting that the Co-Investigating Judges wanted Duch’s capacities such as his intelligence level and ability to exhibit empathy assessed in the interest of justice. She then explained that the methodology engaged avoided the bias of other psychological assessment methods which are limited to a person’s individual history without reference to the collective social history that affects a person. Sironi-Guilbaud noted that Duch’s personality and behaviour were shaped by the collectivist ideology of the Khmer Rouge. This involved suppression of his personal identity for the sake of complete identification with the collective. His personal psychological traits merged with his political conditioning. Always reasoning as a mathematician and dismissing what was not logical became a form of

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118 Transcript of Trial Proceedings - Kaing Guek Eav ‘Duch’ (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case File No. 001/18-07-2007/TC, Day 67, 31 August 2009) 44.
His obsessional tendencies derived from earlier life experiences of humiliation and
disappointment made him meticulous and a perfectionist in carrying out his duties. Attention
to detail and a rigid approach to his work provided a framework for his life in the context of
chaos. Significantly, Duch exhibited a disorder referred to as ‘alexithymia,’ the state where
the emotions of compassion and concern for the suffering of others are not expressed. This
stemmed from his family history, his culture and his encounter with communism. Ka
explained that in Cambodian society children were educated to maintain silence rather
express emotions openly so as not to reveal weaknesses. In addition, Duch had been very
attracted to Stoicism. Ultimately, the emotions he allowed himself to feel were those ‘that
corresponded to the communist ideal and what was expected of him by his society.’

However, while he obeyed the CPK leadership, their order to execute his former mentor Vorn
Vet in 1977 had a shattering effect on him. Vorn Vet had been a highly respected CPK leader
and he had to have him ‘smashed’ along with former friends and teachers. This undermined
his attachment to the Party and he began to expect that he too would be killed in due course.
In 1978, he despaired and fell into depression as the frame of his life disintegrated.

Francois Roux asked the experts to explain their use of the words ‘paranoid drift of the
regime’ in their report. Sironi-Guilbaud explained that Duch along with his countrymen had
to adapt to the traumatic change imposed on the society by the Khmer Rouge leadership’s

123 Transcript of Trial Proceedings - Kaing Guek Eav ‘Duch’ (Extraordinary Chambers in the Courts of
Cambodia, Trial Chamber, Case File No. 001/18-07-2007/TC, Day 67, 31 August 2009) 31, 44.
124 Transcript of Trial Proceedings - Kaing Guek Eav ‘Duch’ (Extraordinary Chambers in the Courts of
125 Transcript of Trial Proceedings - Kaing Guek Eav ‘Duch’ (Extraordinary Chambers in the Courts of
126 Transcript of Trial Proceedings - Kaing Guek Eav ‘Duch’ (Extraordinary Chambers in the Courts of
127 Transcript of Trial Proceedings - Kaing Guek Eav ‘Duch’ (Extraordinary Chambers in the Courts of
128 Transcript of Trial Proceedings - Kaing Guek Eav ‘Duch’ (Extraordinary Chambers in the Courts of
amplification of the presence of enemies as a manifestation of their own paranoia. Ka concurred:

During the regime, the whole population had to adapt psycho-politically. I remember when we were first sent to the so-called liberated zone it was clear that the Khmer Rouge inhabited a different mental world. They demanded that we be ever vigilant against pessimism and false notions of peace. They fostered a mindset of mistrust in everyone.

Generalising the psychological adjustment the society had to make to survive in this way communicated the regime’s impact on the society as a whole to the Court and the wider public viewing the proceedings. On the traumatic upheaval in the society as a result of the regime’s policies, Sironi-Guilbaud noted that adaptation took different forms depending on the position and personal psychology of the individual. Some, like Duch adapted by being zealous, until denial no longer protected him.

The International Co-Prosecutor, Ahmed asked Sironi-Guilbaud to comment on the kind of remorse they could expect from the accused. She replied that while Duch’s victims may expect that he would not appreciate what they had suffered, there was a perceptible ‘evolution in his awareness’ and that he was moving beyond the state of disempathy. Furthermore, the question of what he can do to repair the damage resulting from his crime is a very real one for him, which suggested development in his psychology. The expert noted that while Duch continued to exhibit traces of the Khmer Rouge shaping process and faced difficulties stepping out of his mathematical mindset, she noticed a developing awareness of the ‘other’, of the ‘victim’.

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131 Transcript of Trial Proceedings - Duch’ (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case File No. 001/18-07-2007/TC, Day 67, 31 August 2009) 19, 56.
Roux pressed the experts on the nature of the ‘process’ Duch had embarked upon and the role the justice proceedings had played in this. Sironi-Guilbaud replied that while the process includes inhibition as the subject faced difficulty dealing with new awareness:

[Duch’s] remorse at the Choeung Ek enactment, his response to the suffering of former S-21 detainee Bou Meng during the proceedings, and tears when speaking for his former teacher Phung Ton suggest internal change. Crying, for instance can reveal that [the defence mechanism] splitting is not watertight… 134

Ka added that publicly crying over his respected teacher sprang from something overwhelming within him which could not be suppressed.135 The experts also noted the effects of external factors affecting Duch’s development since his departure from the Khmer Rouge. In this regard, Duch’s new found Christian faith had proved therapeutic.136

Sironi-Guilbaud viewed Duch’s shifts from Buddhism to communism and subsequently to Christianity as in line with his quest to live according to an ideal involving transcendent beliefs, and in affiliation with groups. These were also logical choices for him. Communism appeared to resolve the social injustice he saw in Cambodia, but Christianity had defeated Communism in Poland.137 While it was logical to align himself with the stronger belief system she posited that the Christian emphasis on the value of the individual as opposed to the collective was the essential reason for his choice. But there was also the issue of rebirth through faith in Christ and forgiveness for sins in Christianity that were important elements of his thought processes in the 1990s.138

Ka Sunbaunat speaking in Buddhist terms thought that Duch’s conversion to Christianity stemmed from the belief that he would be released from the sins or bad ‘karma’ he had

acquired and would receive instead the forgiveness of God. However, as I noted in Chapter Three, Duch knew in 1999 that there would be consequences for his actions and said so to the journalists who found him in Samlaut at that time.

In her response to Roux’s question as to Duch’s sincerity in the process of psychological change, Sironi-Guilbaud noted that at no stage in the assessment process did they have a sense of Duch manipulating the circumstances he found himself in before the Court. Roux pressed her further on two points. First, what were Duch’s prospects as the author of collective violence of rehabilitation or re-humanisation? Sironi-Guilbaud replied that while rehabilitation was not always possible, in Duch’s case she believed it was. Second, was the re-humanisation of an executioner an important element in the lives of his/her victims? Sironi-Guilbaud answered by communicating her experience of working with the victims of international crimes:

There is a process to be gone through for victims which involves a lot of suffering. While I cannot speak for individual victims, from my twenty years of clinical practice treating migrants in Paris, I have observed that failure to bring perpetrators to trial and failure to recognise the plight of victims made their recovery more difficult. The collective process of acknowledgment of what happened in their country in the past is crucial.

The question and the expert’s response opened the dialogue to discussion of victims’ interests and the significance of the justice process for them. In a way uncharacteristic of international criminal proceedings, the exchange highlighted the importance of collective recognition of the past and its social impacts.

Thus, the psychological report and the Court’s engagement with the experts created space for reflection on Duch’s actions and the social effects of the Khmer Rouge regime. As the drama
of analysis played out over 2 days, the court became a forum for in-depth discussion of a perpetrator in his social context rather than a venue for the expressive display of due process.

E Chhim Sotheara

More expert testimony on factors going to the interests of victims was given by Dr Chhim Sotheara when he was called to give evidence in support of claims for victim reparations. In 2002, Chhim, a psychiatrist, became the Cambodian Director of the Transcultural Psychosocial Organization (TPO), an international organisation headquartered in Amsterdam. The organisation responds to the socio-psychological needs of Cambodians, particularly those traumatised by the Khmer Rouge regime. The TPO implemented specialised programs and disseminated information to assist victims of the regime. The Organisation also provided counselling services to support the accused and victims participating in ECCC proceedings whether as civil parties or witnesses.143

The reparations framework invited discourse on matters of current significance to Cambodia and its future development. The Trial Chamber gave Chhim a platform to raise such matters beginning with the incidence of post-traumatic stress disorder in Cambodia. Chhim described to the Court the high levels of (PTSD) in Cambodia as stemming from the time of the Khmer Rouge and the lack services in the country to assist people suffering from the condition. He attributed the high incidence in Cambodia of domestic violence and alcoholism to PTSD resulting from the regime.144

The Chamber President asked Chhim to outline the nature of the trauma suffered by victims of the Khmer Rouge regime. He replied that the regime’s destruction of the entire infrastructure and social fabric of Cambodian life had undermined every aspect of victims’

143 Christoph Sperfeldt, ‘From the Margins of Internationalised Criminal Justice: Lessons Learned at the Extraordinary Chambers in the Courts of Cambodia’ (2013) 11 Journal of International Criminal Justice 1111, 1120.
lives. Judge Lavergne asked Chhim whether participation in the trial proceedings might help victims overcome the trauma of the Khmer Rouge years. Chhim replied:

Many victims of the Khmer Rouge face daily challenges as a result of what they suffered under the regime. The opportunity to express their trauma helps, but does not heal completely. Victims participate in the proceedings to seek justice for themselves or their dead, and the truth to resolve some of their trauma. Knowing the truth, seeing fair justice process and receiving an apology from the perpetrator are important factors in their healing. But honesty from former Khmer Rouge leaders and their acceptance of responsibility is critical. Denial places an additional burden on victims and makes them ‘furious.’

Further questioning on the TPO’s current work with victims within their communities confirmed the importance of the ECCC to the long term process of reconciliation in Cambodia. Roux asked Chhim if he could tell the Court a little about the work his organisation was doing in what he described as small truth and reconciliation commissions throughout the country. Chhim said:

The TPO’s work to date has been with victims only. But in their communities victims go to the same pagoda and use the same community facilities as [former Khmer Rouge] perpetrators. It is difficult for them. But after these trials my organisation will try to initiate programs to reconcile victims and perpetrators in communities. The first step, is justice at the national level.

His testimony confirmed the significance of national justice process, but also illustrated how the TPO and other civil society groups supporting the work of the ECCC may operate as the necessary ‘critical yeast’ of a network of relationships connecting the work of the ECCC with on-the-ground peace building. I discuss in Chapter Eight how other civil society organisations collected evidence, conducted education programs on the purpose of the

ECCC, supported civil parties through the application process and helped fund their legal representation.¹⁴⁸

Under examination, Chhim’s testimony extended the trial dialogue to issues affecting social repair and reconciliation in Cambodia. The Khmer Rouge recruitment of children as enforcers of their policies has made the process of reconciliation in Cambodia more complex.¹⁴⁹ The matter was raised during the proceedings as a result of the Court’s engagement with the issue of the lower level perpetrator as also being a victim of the coercive regime. Co-Prosecutor Vincent De Wilde D’Estmael revisited the issue when he asked Chhim if he could comment on the victim/perpetrator relationship raised in the proceedings? Chhim replied:

Yes, I can answer this from my experience in treating former guards of S-21. The guards were generally aged around 12 or 13 years when they were made Khmer Rouge soldiers, but their removal from families, the surrender of their identities and indoctrination victimised them, as well as making them perpetrators of crimes.¹⁵⁰

The Cambodian government’s policy of integrating former Khmer Rouge cadre without reconciliatory processes designed to improve social relations by allowing perpetrators space to confess and explain their crimes within the communities they joined, reinforced the political nature of the reconciliation policy imposed.¹⁵¹ Chhim’s evidence therefore confirmed the levels of victimhood permeating Cambodian society which had not been systematically addressed.

¹⁴⁹ See discussion of the complexities of life as a result of the regime that continue for many Cambodians in Suzannah Linton, Reconciliation in Cambodia (2004) 75-88.
¹⁵¹ Linton above n 149, 75-78, 95.
Chhim was also questioned on the notion of forgiveness in Cambodian culture. While the expert commented that forgiveness is both individual and communal, he like Dr Sironi-Guilbaud highlighted the importance of the accountability process.

It is still too early to resolve the issue of forgiveness for the crimes. This may happen for some after the trials, but it is part of a long term process for each victim. The important thing is revelation of the truth as to the events of the regime which goes some way towards relieving the suffering of victims.152

Thus, the Court’s engagement with the expert expanded the trial narrative and opened up dialogue publicly on the complexities of perpetration, victimhood and reconciliation in Cambodia.

Duch’s Bid for Release

After cooperating with the Court throughout the proceedings, in the final hours of the trial Duch asked to be released. While he confirmed to the Court that he still accepted responsibility for this crimes he now sought release. Duch left the reasoning for his decision to his national Co-Defence counsel. Kar Savuth departed from Roux’s position and argued that Duch was wrongly indicted because he could not be considered one ‘most responsible’ since he was not part of the Khmer Rouge senior leadership. The request took the Court by surprise as it presented the legal impossibility of an accused who had pled guilty, but now sought acquittal. Duch’s request did not flow logically from the case his counsel had run. It may simply have been a statement of what he wanted or saw as justified at the conclusion of the trial having engaged with the evidence and participated in the dialogue of the trial. This might then be viewed as a rational request from one who genuinely viewed himself as someone also victimised by the Khmer Rouge. In his final words to the Court Duch said ‘I will leave it to the Court to decide. I would ask the Chamber to release me. I’m very grateful.’153 Indeed, it was left for the Court to ponder the meaning of the events in their

153 Transcript of Trial Proceedings - Kaing Guek Eav ‘Duch’ (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case File No. 001/18-07-2007/TC, Day 77, 27 November 2009) 59; Beth Van
judgement. Whatever, the motivation for his last minute plea it presented the Court with an additional communication from the accused to factor into their assessment of his character and culpability. I discuss how the Trial Chamber did this in their judgement in Chapter Seven.

IV CONCLUSION

As Mégret suggested a focus on the direct outcomes of transitional trials in the form of verdicts and sentences is to overlook significant communications of the trial proceedings. In the inquisitorial forum, the Court delved deeply into the psyche of Duch as alleged perpetrator and victim of mass atrocity crimes. The proceedings shed light on the nature of perpetration within a totalitarian regime, and its domino effects at different levels within the affected society. The judges’ broad-brush approach to establishing the veracity of the case against the accused revealed someone other than the archetypal monster perpetrator of international crimes. Analysis of Duch’s mental condition during the regime and the nature of his acceptance of responsibility for his crimes were important elements of the trial that became the subject of discussion in the interests of justice and society.

The importance of causal understanding of crime ought not to be underestimated in a society where discussion of social problems and collective memory has been suppressed. Within the controlled courtroom environment, the trial dialogue allowed factors within Cambodian history, culture and suffering to surface as relevant to causation and the consequences of Khmer Rouge crimes. The trial discussions may be at odds with some Cambodians’ interpretation of what happened in their country, but as Osiel suggested, trials provide space where dissension may be both made public and reflected upon with the possibility of the emergence of a discursive solidarity.

The Court’s flexible engagement with witness testimony permitted intermediaries to both represent the interests of victims of crimes, and discuss objectively the significance of national justice process to communities still affected by the Khmer Rouge years. Examination

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of Chhim’s testimony on the plight of Khmer child soldiers as the victim/perpetrators served this purpose.

As the trial proceedings revealed, the ongoing denials of the former Khmer Rouge leadership infuriate victims of their crimes. By exercising his participation rights in trial proceedings and engaging with other Court actors, Duch added another dimension to the proceedings as he intercepted Mam Nai’s denials. In the Durkheimian sense, Duch’s plea to Mam Nai shifted the trial discourse to the interests of Cambodian society and humanity at large. Here was a moment of high drama within the theatre of ideas for public reflection. Duch’s clear communication from the heart of the trial to national and international audiences affected by the crimes brought to the Court’s public something more than the expressivism of conviction and clinical due process. Thus, the proceedings revealed the social drama behind the crimes which may have exceeded the expressivism of establishing objective guilt. In the next chapter I explore how the dialogue of the trial expanded through victim story-telling.
CHAPTER SIX
THE VOICE OF THE VICTIM IN CASE 001

I INTRODUCTION

The trial dialogue around witness testimony within the inquisitorial procedural frame which was discussed in the last chapter was enlarged by the inclusion of the victim’s voice in the ECCC’s criminal proceedings. This chapter examines the voice of the Khmer Rouge victim in Case 001 in the context of the evolving role of the victim in transitional trials, the expressivism of criminal justice and the notion of the fair trial.

In Section II, I discuss the broad context in which the role of the victim in transitional trials has developed. I then examine the basis of fair trial principles in international trials and the arguments advanced for minimising victim participation in adversarial international criminal proceedings. Problems arising at the ECCC from victim participation in trial proceedings are then raised. I outline the Co-Defence assertion that the fair trial rights of the accused were affected by the civil parties’ participation and examine the Trial Chamber ruling on the right of civil parties to participate in proceedings dealing with the character of the accused.

In Section III, I introduce the scheme developed by the Trial Chamber Judges permitting 22 civil parties to address the Court in support of their claims for reparation. I analyse the statements of the victim-witnesses and civil parties for their contribution to the trial proceedings through their narrative testimony. As with the witness testimony discussed in Chapter Five, the trial forum under inquisitorial procedure evoked responses from the accused and other trial actors who engaged with their stories. As dialogue within the trial connected with wider social issues, the proceedings shifted from expressive to communicative mode. I argue that the scheme of victim inclusion adopted by the ECCC goes some way towards grounding a philosophy of the transitional trial beyond the limits of expressivism.
II  THE VICTIM AND TRANSITIONAL TRIALS

The role of the victim in the transitional trial may be conceived in expressive or communicative terms. Recalling the Argentinian transitional trial context, Osiel described the role of victims as witnesses in communicative terms. Quoting Vezzetti, who supported trials for the military juntas, Osiel argued that the criminal procedure of the Court permitted the victims of crimes as witnesses to not only testify before the Court, but implicitly communicate their experience to the larger community.¹ The Nuremberg trials, on the other hand, while admitting the testimony of a few Jewish victims and some graphic documentary films of the Nazi persecution of Jews in concentration camps and communities, on the whole, treated the Jews as victims in the abstract. The priority of those criminal proceedings was the ‘spectacle of legality’ as the Court exhibited proof of extreme crimes followed by judgement and punishment for Nazi perpetrators under the ‘neutral rule of law.’² Documentary evidence in very large part bolstered the expressive approach adopted by the Prosecution.

However, trials that are characterised by extensive victim testimonial evidence may be both expressive and communicative. The 1961 national trial of Adolf Eichmann in Israel for his role as an administrator of the Nazi ‘Final Solution’ is an example of this. The Prosecutor of the case aimed to educate both young Israelis, and the world at large on the enormity of the human and national catastrophe that was the Holocaust, through a ‘living record’ represented by the victim-witness.³ Conducted in this way the trial was also designed to justify the Israeli court’s right to prosecute, which had been questioned.⁴

The Eichmann trial was challenged by contemporary commentators on legitimacy grounds. Contemporary critics were dubious of the Court’s authority to exercise universal jurisdiction in the circumstances of the defendant having been kidnapped in order be present in court,

³ Ibid 106.
⁴ Ibid.
and concerned that prosecutions in peacetime for the international crimes of genocide and crimes against humanity involved application of law retroactively. There were also criticism as to the fairness of the trial due to the limited availability of defence witnesses and the independence and impartiality of the Israeli judges.\(^5\) However, in retrospect, and in view of modern international criminal law jurisprudence, the work of the Court has stood the test of time.\(^6\) Schabas argued that critics of the trial were too negative in their assessment and ‘possibly influenced by the famous, but harsh commentary of Hannah Arendt’ in her articles in the *New Yorker* at the time.\(^7\) Arendt, critical of the extent of the Court’s use of victim testimony, insisted that the Court’s primary purpose was to render justice to the accused as the protagonist in proceedings, and that even the noblest of other purposes could only detract from the ‘law’s main business’ of weighing the charges, rendering judgement and meting out punishment.\(^8\) Arendt’s conception of the trial reflected her acceptance of the formal authority of law and the expressivism of criminal procedure in a narrow sense.\(^9\)

In other post-war transitional trials, the inclusion of survivor testimony in proceedings did not jeopardise their legitimacy. Empirical research on the German war crimes trials of guards and officials of the Auschwitz concentration camp in the 1960s, and the Majdanek camp trials from 1975 to 1981, indicated that far from being regarded as illegitimate, the inquisitorial trials were socially transformative. Karstedt noted the significance of the visibility of victims in those trials compared to their relative absence at the Nuremburg trials. The later domestic trials through the agency of victim testimony revealed truths that could no longer be denied by the society. This produced a shift in public consciousness from collective amnesia in relation to the crimes of the Nazi era which reshaped the collective memory.\(^10\) The moral burden of response to the social and political messages of the trials was

\(^6\) Ibid 687.
\(^7\) Ibid 668.
taken up by the young and educated elites who catalysed social change. Noting the timing of the trials two and three decades after the war as determinative of their impact, she suggested that trials in societies traumatised by civil conflict have communicative dynamics beyond the expressivism of clinical fact-finding and the judgement of individuals.\textsuperscript{11}

A \textit{Fairness and Legitimacy in International Trials}

As discussed in Chapter Two, international trials have associated victim participation in proceedings with instrumental support of the prosecution and the expressivism of criminal justice. When victim participation in proceedings threatens the fairness of trials, the trials are construed as negatively expressive.

The fairness of the international trial is also connected to the legitimacy of the judicial institution. Because the international trial is politically contingent the fairness of the criminal proceedings and legitimacy of relevant court has been considered paramount. At Nuremburg, Chief Prosecutor Jackson, of the United States, knew that the legitimacy of the IMT proceedings turned on fair legal process in determining the guilt of the Nazi defendants. The expressive record of the proceedings would have had no credibility if the rights of the defendants to a fair trial were not respected.\textsuperscript{12} The notion of the fair trial is grounded in the epistemological basis of criminal law, and the justification for punishment premised on accurate and truthful fact-finding as to a defendant’s guilt.\textsuperscript{13} Whether within adversarial or inquisitorial trials the legitimacy of modern criminal justice relies upon the fair trial model.\textsuperscript{14} Respect for the rights of the accused also flows from international human rights instruments and the procedural principles of international criminal justice which emphasise (\textit{inter alia})

\begin{flushright}
\textsuperscript{11} Ibid 29-33.
\textsuperscript{14} Ibid 143-144.
\end{flushright}
the presumption of innocence, the right to fair hearing in full equality and the right to an expeditious trial.\textsuperscript{15}

As the institutions of the modern system of international criminal justice were developed the expressivism of strict due process standards overrode any other purpose trials might serve, including the communicative value of victim-witness testimony. Authority and legitimacy concerns failed to admit the findings of studies revealing the need to build trust in Courts among all participants in the proceedings and the communities they served.\textsuperscript{16}

1 \textit{Victim-Witness Testimony at the ad hoc Tribunals}

Dembour and Haslam’s analysis of the victim-witness at the ICTY revealed that Osiel’s vision of the communicative potential of victim-witness testimony did not play out at the ad hoc Tribunal. The ICTY adhered unreservedly to the strictures of adversarial criminal proceedings for the purpose of exhibiting fair and legitimate trials. Analysis of the trial proceedings in \textit{Prosecutor v Krstic} showed that far from providing victims with a platform from which to communicate their knowledge and experience of the crimes, the testimony demanded of them involved telling only that which related to proof of facts going to establish the guilt of the defendant.\textsuperscript{17} Instrumentalised for the purposes of the Prosecution, the victim voice at the ICTY was limited to that which was precise, quantifiable and structured within a dichotomy of truth or falsehood. Rendering facts and their context in narrative form or conveying deeper impressions or atmosphere fell outside the expressive framework the Court adopted, and as such, was irrelevant.\textsuperscript{18} Even as victims were invited by the Presiding judge, after giving their testimony, to make closing remarks, the judge’s platitudinous responses appeared disconnected from the pleas the witnesses made to the Court.\textsuperscript{19} In short, there was

\begin{flushleft}
\textsuperscript{15} Ibid 140.
\textsuperscript{18} Ibid 162-163.
\textsuperscript{19} Ibid 172-173.
\end{flushleft}
no broader engagement with the victim of international crimes than this. Stover’s analysis of
the victim-witness at the ICTY also highlighted the limited space afforded victims and
concluded that their treatment as victims of crime by the Court should be more respectful.20
As discussed in Chapter Two, victim-witnesses at the ICTR complained of being poorly
treated under a foreign procedural system.21

2 The Victim at the ICC

At the International Criminal Court (ICC) victims were assigned rights to participate in trial
proceedings not as parties, but as autonomous agents with a right to reparations in separate
proceedings. While this was based on the rights of victims of international crimes under
international law, the ICC Statute’s theoretical embrace of victim participation rights was a
product of the ‘constructive ambiguity of diplomatic negotiations.’22 It was left to the ICC
judges to construe the relationship between the rights of accused persons to a fair trial and
the rights of victims to participation in the essentially adversarial proceedings of the Court.
The system prescribed in the Statute was premised on the presentation of evidence in Court
and not pursuant to a pre-trial investigative process under inquisitorial conditions.23 Zappalà
argued that for the judges it was not a matter of balancing rights between victims and the
defendant, but ensuring that the rights of the defendant retained primacy. The possibility that
victim participation rights could result in unreasonable delay threatened both the fairness of
the proceedings and the legitimacy of the judicial institution. While victims as witnesses
provide first-hand knowledge of the crimes and can be useful to the Prosecution in conveying
to the affected communities how the crimes occurred, they could not assume the role
auxiliary prosecutors because that constituted a breach of the defendant’s right to equality in
relation to the prosecuting authority.24 Therefore, in the procedural system of the ICC, due

20 Eric Stover, ‘Witnesses and the Promise of Justice in the Hague’ in Eric Stover and Harvey M. Weinstein
(eds), My Neighbour, My Enemy: Justice and Community in the Aftermath of Mass Atrocity (Cambridge
21 Alison Des Forges & Timothy Longman, ‘Legal Responses to Genocide in Rwanda’ in Eric Stover and
Harvey M. Weinstein (eds), My Neighbour, Myself: Justice and Community in the Aftermath of Mass Atrocity
22 Zappalà, above n 13, 141.
23 Ibid.
24 Ibid 149, 163.
process principles and the fair trial rights of defendants override any competing right.\textsuperscript{25} The pedagogical value of ICC proceedings as the site of enforcement and interpretation of international norms justified this position.\textsuperscript{26} Thus, the dominance the ICC’s expressive goals engaging adversarial procedure, its remoteness from the communities affected by the crimes, and the limited victim participation rights reduced the communicative potential of its proceedings. As discussed in Chapter Two, consultations on reparations awards between officers of the Victims Trust Fund and victim representatives engages a degree of communicative action external to the proceedings.

3 \textit{Victim Participation at the ECCC}

In Chapter Four I discussed the ECCC’s procedural scheme of inclusion of the victim in trial proceedings through incorporation of the civil party action. Implementing the victim participation scheme involved the judiciary in the complex exercise of arbitrating between multiple priorities. In procedural terms, this included upholding the rights of the accused, civil parties and witnesses, while ensuring fair and expeditious procedure in accordance with international standards and securing ‘local legitimacy.’\textsuperscript{27} In this, establishing a record of the accused’s crimes involved both adherence to the rules of procedure and attending to the vulnerability of individual victims whose testimony of harrowing events formed part of the Court’s purpose of contribution to reconciliation.

As the trial began, adaptation of procedure by the ECCC to its context involved a struggle to give concrete effect to the principles and fundamental goals it pursued. In particular, issues of fairness had to be adjudicated as the civil parties through their legal counsel sought to express views and concerns during Case 001. Civil parties availed themselves of their rights to participation from the investigation stage. Having access to the case file, they exercised their right to submit requests for specific investigations potentially reshaping the prosecution case by adding information to the Introductory Submission provided to the Co-Investigating

\textsuperscript{25} Ibid 143-151.
\textsuperscript{26} Ibid 162-63.
\textsuperscript{27} Frédéric Mégret, ‘Beyond Fairness’: Understanding the Determinants of International Criminal Procedure’ (2009) \textit{14 UCLA Journal of International Law and Foreign Affairs} 37, 76.
 Judges. Civil parties also made written and oral interventions in Pre-Trial Chamber (PTC) proceedings and appealed against the Court’s decisions. In addition, as described in Chapter Four some civil parties questioned Duch in interviews and participated in the re-enactment of conditions at S-21 and the Choeung Ek killing field. Duch’s engagement with the civil parties became emblematic of the trial. However, the liberality of civil party rights under the Internal Rules evolved in the face of challenges by the Co-Prosecutors and the Co-Defence as the trial proceeded.

a) Civil Party Questioning of Witnesses

At Duch’s trial 90 civil parties were ultimately represented by 4 teams of civil party lawyers who questioned witnesses in concert with up to 5 judges, the Co-Prosecution and Co-Defence. While the civil party lawyers had a common goal, their questioning of witnesses was initially uncoordinated, repetitious and frequently strayed off topic. The Trial Chamber President confirmed that civil parties were entitled to pose questions to witnesses ‘in support of the prosecution’ as long as they were not repetitious, ‘longwinded,’ or irrelevant. The Court also imposed time limits on witness questioning by the counsel teams in the interests of fair and expeditious proceedings.

However, the Co-Defence pressed the court to consider the limits of civil party questioning on the basis that they ought not to be considered second (auxiliary) prosecutors and as such able to draw out inculpatory evidence from the accused, because that was the sole province of the Co-Prosecutor. The issue of the exclusivity of the role of the Co-Prosecutors was not specifically ruled on by the Trial Chamber at that stage, but it surfaced in rulings sought by

31 Staggs Kelsall above n 29, 32.
the civil party representatives on the rights of civil parties to make submissions on sentencing, and to question the accused or certain witnesses as to the accused’s character.

b) Limits on Civil Party Submissions on Sentencing

In response to the Co-Defence contention that civil parties had no part to play in sentencing process, two of the civil party groups, through their lawyers requested a Trial Chamber ruling on the matter. The Trial Chamber by majority (4-1) ruled that the civil party right to participate in proceedings in support of the prosecution stemmed from the right to reparations upon a conviction of the accused. It was not a right to be interpreted restrictively to confer a general right of equal participation with the Co-Prosecutors, whose role is to represent the community, not individual or sectional interests:

The Co-Prosecutors’ responsibility is to ensure an appropriate sentence and the civil parties’ is to seek reparations as provided in the Internal Rules. The Co-Prosecutors have no role in seeking reparation, and the civil parties have none in relation to sentencing. The latter is the preserve of the prosecution in the public interest and in the interests of justice.33

The majority ruling was a severe blow to the civil parties who were shocked and disappointed with the majority’s restrictive approach to their participation rights.34

c) Civil Parties and Character Evidence

In the same decision the Trial Chamber also ruled on the right of civil parties to give character evidence. The majority held that because such testimony was for the purpose of determining aggravating or mitigating circumstances in relation to any eventual sentence, and not related to reparation, this was the exclusive province of the Co-Prosecution.35 In a strong dissent

33 Decision on Civil Party Co-lawyers’ Joint Request for a Ruling on the Standing of Civil party Lawyers to make Submissions on Sentencing and Directions Concerning the Questioning of the Accused, Experts and witnesses Testifying on Character ’Duch’ (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case File, No. 001/18-07-2007- ECCC-TC, 9 October 2009) [42].
34 Michael Saliba, ‘Civil Party Participation at the ECCC: Overview’ Cambodia Tribunal Monitor (6 November 2009) 1, 4.
35 Decision on Civil Party Co-lawyers’ Joint Request for a Ruling on the Standing of Civil party Lawyers to make Submissions on Sentencing and Directions Concerning the Questioning of the Accused, Experts and
Judge Jean-Marc Lavergne disagreed with the majority between proceedings pertaining to guilt, and proceedings pertaining to sentence which had the effect of denying standing to victims to participate. The distinction was particularly important at the ECCC where trial and reparations proceedings are not separated.  

Judge Lavergne prefaced his findings by explaining the challenge facing the ECCC in maintaining a balance, on the one hand, between the requirement of fair and expeditious trial with respect for the rights of the accused, and on the other hand, the right of victims to participate in a trial which aims inter alia to contribute to the fight against impunity of the perpetrators of the most serious crimes. While he noted the need for some change stemming from the difficulties in implementing a civil party system not designed for the trial of mass atrocity crimes, and involving potentially large numbers of individual civil parties, he asked:

How far can one go without breaching the spirit of the law, or fundamentally distorting the meaning of the involvement of civil parties before the ECCC and the purpose of the trial as a whole, characterised by the coexistence of two interrelated actions, namely criminal and civil actions?

Excluding the civil parties from proceedings dealing with the character of the accused was not only at odds with Cambodian law and the ECCC Internal Rules but with the interest of justice. Lavergne argued that the interest of justice extends beyond establishing the objective culpability of the accused. All parties, including the civil parties, have an interest in understanding what motivated the relevant criminal conduct for the purpose of avoiding its...
The Judge referred to the expert testimony of Chhim Sotheara who described the plight of victims of the Khmer Rouge, and the high incidence of post-traumatic stress disorder in Cambodia as stemming from the time of the regime. Judge Lavergne argued that the inclusion of victim evidence in the interest of justice was particularly significant where justice had been delayed or crimes concealed. He noted that it was not only important for victims to contribute to trial process by putting questions and making comments, but that there should be debate within the ‘serenity of a court of justice’ which included civil parties sharing their knowledge of the accused.

Open informed debates also relieve the victims of some of their uncertainties and lack of knowledge of the accused. Earlier in the trial proceedings, the Court had recognised this by authorising civil parties to put questions to several expert witnesses called by the Co-Defence to testify on the practice of guilty pleas on the one hand, and the notion of forgiveness on the other. Continued participation in proceedings for the purpose of contribution to the Court’s knowledge of the accused and the gaining of victim knowledge is arguably crucial in the context of ECCC proceedings because of the trauma suffered by victims of the Khmer Rouge at the hands of the abstract organisational entity, Angkar. Excluding victims from debates on the character of the accused was thus inconsistent with the Court’s earlier practice of inclusion to further one of its fundamental goals of assisting reconciliation in Cambodia. Civil party participation in the Romano-Germanic tradition, encompassing the review of all

39 Decision on Civil Party Co-lawyers’ Joint Request for a Ruling on the Standing of Civil party Lawyers to make Submissions on Sentencing and Directions Concerning the Questioning of the Accused, Experts and witnesses Testifying on Character Duch’ (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case File No. 001/18-07-2007- ECCC/TC, 9 October 2009) Lavergne dissent [32].

40 Decision on Civil Party Co-lawyers’ Joint Request for a Ruling on the Standing of Civil party Lawyers to make Submissions on Sentencing and Directions Concerning the Questioning of the Accused, Experts and witnesses Testifying on Character Duch’ (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case File No. 001/18-07-2007- ECCC/TC, 9 October 2009) Lavergne dissent [28].

41Decision on Civil Party Co-lawyers’ Joint Request for a Ruling on the Standing of Civil party Lawyers to make Submissions on Sentencing and Directions Concerning the Questioning of the Accused, Experts and witnesses Testifying on Character Duch’ (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case File No. 001/18-07-2007- ECCC/TC, 9 October 2009) Lavergne dissent [30].
evidence including character evidence, was not considered a violation of the equality of arms principle or at odds with the notion of fair trial.42 Moreover,

in a difficult context in which the credibility of the Chambers is scrutinised and in which the administration of justice by the ECCC is supposed to serve as an example for the Cambodian Courts, it is important to be able to maintain public trust; a goal which would be more easily attained if the Chambers ensure respect for the rights of victims who have applied to be joined as civil parties.43

Lavergne’s acceptance of the victim perspective in trial proceedings as integral to inquisitorial justice in the transitional context, adds to the debate in the wider realm of international criminal justice on the inclusion of victim views and concerns at trial. His argument that the ECCC ensure respect for the rights of victims contrasts with Zappalà’s assertion of the primacy of the rights of the accused at the ICC at all costs. Notwithstanding the different procedural underpinnings of the ICC and the ECCC, Lavergne’s opinion invites reappraisal of the narrow rules-based conception of the administration of justice for expressive effect. His argument for wider discussion within substantive trial proceedings based on a broader view of criminal justice implicitly raised the value of communication through victim representation in trial proceedings as a crucial element in fair transitional trials.

III SURVIVOR STORY-TELLING AT THE ECCC

The Trial Chamber’s majority ruling meant that civil party representatives did not participate substantively in the examination of the accused’s character discussed in Chapter Five. However, the Court permitted extensive survivor story-telling as it examined the civil parties’ claim for reparations. In addition, the judges fostered open engagement with

42 Decision on Civil Party Co-lawyers’ Joint Request for a Ruling on the Standing of Civil party Lawyers to make Submissions on Sentencing and Directions Concerning the Questioning of the Accused, Experts and Witnesses Testifying on Character Duch’ (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case File No. 001/18-07-2007- ECCC/TCh, 9 October 2009) Lavergne dissent [33].

43 Decision on Civil Party Co-lawyers’ Joint Request for a Ruling on the Standing of Civil party Lawyers to make Submissions on Sentencing and Directions Concerning the Questioning of the Accused, Experts and Witnesses Testifying on Character Duch’ (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case File No. 001/18-07-2007- ECCC/TCh, 9 October 2009) Lavergne dissent [33].

223
victim-witnesses as they testified at other stages of the proceedings. In the following section I discuss the Court’s broad brush approach to survivor testimony and consider the extent to which the resultant proceedings were either expressive or communicative.

While each testimony was called for a legal purpose the Court exercised latitude in relation to each person in recognition of the stress of recalling painful memories, and the individual purpose each had for the difficult task of presenting in Court. Following their statements to the Court, the civil parties were invited to put their personal questions to the accused. The accused was entitled to respond to the witness or civil party. Samples of survivor stories are paraphrased below. They include the stories of victims testifying as either witnesses or civil parties. I begin by summarising the testimonies of direct victims of S-21: Vann Nath, Chum Mey, and Bou Meng. They are not included to suggest the therapeutic value to victims of their participation in proceedings, but to indicate what their presence and testimony added to the proceedings.

A Testimony of Direct Victims of S-21

Vann Nath, Chum Mey, and Bou Meng were the remaining survivors of the S-21 detention centre. As direct victims and eye witnesses, they were each called to give evidence on the functioning of S-21. Vann Nath testified as a victim-witness. Chum Mey and Bou Meng had civil party status. The President invited each survivor to speak of their lives before 17 April 1975 and of how they came to be held at S-21. Each testimony therefore took the form of a narrative which was subject to later examination by the Court. As examinations proceeded, each witness communicated their opinion on the past and their view of the Court’s role in addressing it. As was the case with eye and expert witnesses, the Judges, and at times Counsel also sought to draw larger meaning from the survivors’ experience beyond the purpose of objective proof of Duch’s culpability.

1 Vann Nath

Vann Nath was summoned as a witness by the Trial Chamber. He did not seek civil party status because of its essential connection with an award of reparations. He viewed any such
award as inadequate in the face of what he had lost and was opposed to the opportunism he
perceived in some civil party applicants. He also suffered from ill health and was afraid he
would not be able to attend regular hearings of the Court.

On 17 April 1975 Vann was a painter in Battambang when the Khmer Rouge came to
evacuate the city. He and his family relocated to O Mony Pir village where he and his family
worked in rice fields until he was arrested by Khmer Rouge cadres on 30 December 1977.
Accused of being a traitor to Angkar and the revolution, he was shackled, interrogated and
tortured on the pretext of being part of a treacherous network. On 7 January 1978 he was
loaded with other prisoners into a truck which took them S-21. Nath was initially bound in
leg-irons with other detainees at S-21, but one day he was taken to meet Duch. Duch gave
him a photo of Pol Pot and asked him to produce portraits of the leader. Nath was re-housed
with Bou Meng, also an artist, in an area of S-21 that became their studio.

In his testimony Vann Nath described the torture he directly observed at S-21 which he had
also captured in a painting. He conveyed the accounts of others who had been tortured
including a woman who said that she ‘lost her female character’ and those of male prisoners
who suffered water-boarding techniques. The Court viewed a series of 14 of his sketches
and paintings which captured his recollections of S-21. These included a painting of a thin,
sick young man whose hands and feet were tied to a pole which was being carried by 2

45 Ibid.
guards, aged around 15 or 16 years, to be loaded on a waiting truck. Vann also captured the shackling of prisoners en masse at S-21 and the torture of Bou Meng by 2 guards who took turns in beating him. The quietly spoken man’s descriptions and art gave powerful expression to the inhumane nature of the institution that had imprisoned him.

Vann was examined by the Chamber President, three of the other judges, three civil party lawyers, the Co-Prosecution, and Co-Defence. Most of the questioning concerned factual matters as to his arrest and detention. Some questioning was more expansive as the Court trawled beyond the facts. Judge Lavergne, for instance, asked the witness:

How have you dealt with the trauma of your experience at S-21, and why did you choose to testify to events at S-21 through paintings, as well as the book you wrote, and by your involvement in a documentary film?

The witness explained his determination from his days at S-21 that if he survived he would record the events so that the younger generation would know of the suffering and injustice the innocent held at S-21 had endured. He sought to educate the young so that such history would never be repeated. He explained further that as time passed he was challenged by children who had not been given any information by their parents about the acts of Khmer Rouge. He explained to them that their parents were perhaps so traumatised by those times that to recall the past would be painful for them.

When asked what he was expecting from the trial, Vann Nath replied that he never imagined a public trial would eventuate. It was a privilege to now be able to testify, and he hoped that

the trial would achieve tangible justice. At the end of his testimony he was asked what became of his family after he was taken from the Khmer Rouge collective they had been sent to. He responded that though his wife survived, his two young children did not.

2 Chum Mey

As a civil party, Chum Mey was not obliged to take an oath before testifying. While his testimony aided the prosecution case, questioning on the nature of his suffering also supported his claim for reparations. To establish their claim civil parties had to satisfy the Chamber of the existence of wrongdoing attributable to the accused which had a direct causal connection to the demonstrable injury they suffered personally.

The Judges questioned Chum Mey on the events leading to his detention at S-21 and the torture he endured. Chum Mey was evacuated from Phnom Penh in April 1975 but later answered a call from Angkar for mechanics. In 1978, he and several of his fellow workers were arrested and taken to S-21 where he was accused of being a CIA or KGB agent. He described the physical pain he suffered, and his anguish at the dehumanising conditions in which detainees were kept. He was tortured over 12 consecutive days and nights before he confessed and implicated others as traitors. At this the torture stopped. Like Vann Nath, Chum Mey escaped execution because of his occupational skills. He was sent to the S-21 workshop where he repaired typewriters and other machinery with several others who lived and worked there. As the Vietnamese approached on 7 January 1979 they were all ordered out of S-21 by the guards. After the group scattered Chum Mey managed to find his wife and

59 Co-Prosecutors v Kaing Guek Eav (alias) Duch (Judgement) Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case File No. 001/18-2007/ ECCC TC (26 July 2010) [637].
baby at Prey Sar, but in a gun battle with a Khmer Rouge band his wife was shot, and he was separated from his baby as he fled.\textsuperscript{61}

The judges asked Chum Mey to describe the long-term effects of his detention on his physical and mental health. While he was angry and depressed for a long time, the prospect of testifying before the Court and seeing justice done had relieved Chum Mey’s anxiety. His participation in the trial had given meaning to his life. In an interview before his testimony he asked, what would the point of my life have been if I died before the trial? To Chum Mey the trial ‘vindicated his survival.’\textsuperscript{62} He attended all the proceedings.\textsuperscript{63} In an interview with Eric Stover after he had given his statement in Court, he expressed satisfaction and relief at having been able to ‘tell the truth’ about events at S-21.\textsuperscript{64}

Chum Mey also communicated something common to all the civil parties, a need to confront Duch.\textsuperscript{65} During his testimony on his treatment at S-21 he repeatedly lashed out at Duch who was in sitting to the right of the witness stand with his Co-Defence Counsel. The Chamber President asked him to cease being abusive towards the accused. At the end of Chum Mey’s cross-examination he was given the opportunity he sought to put questions to the accused. His questions concerned the organisations which had been used to threaten him, the CIA, the KGB and Angkar. Who or what were they? Duch responded by describing the CIA and KGB as those perceived as opponents of the Central Committee of the Communist Party of Kampuchea (CPK). Angkar was simply the Standing Committee of the CPK and among that group Pol Pot was referred to as Angkar.\textsuperscript{66} The rare exchange between victim and perpetrator shifted the proceedings not only from the expressive to the communicative, but arguably in a tangible sense, towards restorative rather than retributive justice.

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\textsuperscript{61} Transcript of Trial Proceedings – Kaing Guek Eav ‘Duch’ (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case File No. 001/18-07-2007- ECCC/TC, Day 36, 30 June 2009) 51.
\textsuperscript{62} Mohan above n 44, 763.
\textsuperscript{63} Transcript of Trial Proceedings – Kaing Guek Eav ‘Duch’ (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case File No. 001/18-07-2007- ECCC/TC, Day 36, 30 June 2009) 35.
\textsuperscript{64} Stover above n 16, 19.
\textsuperscript{65} Ibid 39.
\textsuperscript{66} Transcript of Trial Proceedings – Kaing Guek Eav ‘Duch’ (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case File No. 001/18-07-2007- ECCC/TC, Day 36, 30 June 2009) 76.
\end{flushright}
Bou Meng was an artist and teacher who joined the CPK in 1971 when they were operating from jungle locations. There Bou Meng had drawn sketches of communist heroes: Karl Marx, Engels, Lenin and Mao Zhedong.\(^{67}\) However, by 1976 though he remained obedient to Angkar, he had lost faith in its purposes. He spoke of the hard physical labour he was assigned to perform and the regular disappearances of people he worked with. After being relocated for re-education at the Ta Lei Cooperative, he and his wife were taken to S-21.\(^{68}\) Although Bou Meng was severely tortured at S-21, he survived due to his skills as an artist. He, like Vann Nath was assigned to paint portraits of Pol Pot.

In contrast to Chum Mey, Bou Meng continued to live in despair and pain. He was overcome with emotion as he related his experience of S-21. As this happened the Cambodian President, addressing him Ta (uncle), spoke at length to him about the importance of composing himself in order to tell the Chamber and the public of what befell him at the hands of former comrades and the suffering he had endured since then.\(^{69}\) Both Bou Meng and his wife were orphans. They were separated when they arrived at S-21 and he never saw her again. When questioned about her, he said he heard that she had been sent to work in rice fields. One of the reasons he was testifying was to ask Duch what had happened to her. Duch was visibly moved by the anguish of Bou Meng and his weaker physical state attributed to the torture and hardship he had suffered.\(^{70}\) He had no precise information as to the fate of Bou Mengs’ wife, but suggested that Comrade Huy may have had some details. He said he

\(^{67}\) *Transcript of Trial Proceedings – Kaing Guek Eav ‘Duch’* (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case File No. 001/18-07-2007- ECCC/TC, Day 37, 1 July 2009) 57.

\(^{68}\) *Transcript of Trial Proceedings – Kaing Guek Eav ‘Duch’* (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case File No. 001/18-07-2007- ECCC/TC, Day 37, 1 July 2009) 59.


believed that she had been executed at Choeung Ek. He then asked Bou Meng to accept his deepest respect for her soul.\(^{71}\)

Before the trial, Bou Meng had no time for Duch’s due process rights, and the judgement of the Court seemed secondary to compensation for what he had suffered.\(^{72}\) After the trial however, he said that ‘testifying had helped release some of his anger.’\(^{73}\) The portrait of Bou Meng’s life conveyed through the Court’s engagement with him communicated something the proceedings did not otherwise focus on: the plight of a lower level Khmer Rouge cadre deeply damaged by his/her association with the regime. This added a further perspective on the crimes of the Khmer Rouge and their long-term effects on Cambodians still recovering from the regime.

B \hspace{1cm} \textbf{The Testimony of Indirect Victims of S-21}

Once their legal representatives established the necessary nexus with the crimes of the accused, civil parties who were indirectly injured through the loss of family members or those closely associated with their families made statements to the Court. Through subsequent examination by the Court, the extent of the human cost of the Khmer Rouge era came into focus. Duch’s engagement with those who sought to confront him was also revealing. He accepted the condemnation of those whose stories were verifiable and made some explicit apologies. Where their accounts raised doubts in his mind as to factual accuracy, he raised questions as to the authenticity of the claim. Though the Court had become familiar with this pattern in his behaviour, it was disconcerting to some of the civil parties.

1 \hspace{1cm} \textit{Bou Thon}

Bou Thon was called as a witness of fact on the functioning of S-24 where she had been detained. She was the wife of Phouk Hon who was detained at S-21. Though her story was

\(^{71}\)\textit{Transcript of Trial Proceedings – Kaing Guek Eav ‘Duch’} (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case File No. 001/18-07-2007- ECCC/TC, Day 37, 1 July 2009) 70.

\(^{72}\) Mohan above n 44, 764.

\(^{73}\) Stover above n 16, 28.
fragmented, Bou Thon’s tale of separation, loss and dehumanisation in Khmer Rouge camps conveyed the hardship and desperation many of Cambodians during and after those times. After the Khmer Rouge took power in Phnom Penh, Phouk Hon worked as a truck driver for the Ministry of Energy of Democratic Kampuchea. In 1976, Phouk Hon was taken to S-21 because the CPK leadership suspected him as being connected with Koy Thuon, whom they had determined to execute. At this time Bou Thon had given birth to her fourth child. The couple’s other three children had already been sent to a Khmer Rouge child minding centre, and she never saw them again. Bou Thon with her infant son worked in a Khmer Rouge collective before she was sent to S-24. Her youngest child died in her arms while she was on the run after the Vietnamese entered Phnom Penh in 1979.74

Cruvellier, observing her testimony reported:

Bou Thon talks and talks. But instead of making me drowsy, her story grips my attention. She uses fragments of dialogue and description to recreate the banality of camp life, and to evoke how the twin obsessions of hunger and interrogation hung over everything.75

Weeping, she declared ‘I want to be here so that justice is done for my husband and my children.’ She added, ‘why were my children executed? The depth of Bou Thon’s loss, and the hardship that she and so many like her endured under the regime resounded in the Court.

As Duch began to make his reply, Bou Thon began to cry again. This triggered sobbing from Duch, who readily confirmed the details of her story. He commended her for her courage in the face of such loss and reflected that a million other people similarly lost their families under the Khmer Rouge. He concluded as Bou Thon herself had, that her husband and children had died at Choeung Ek.76 As his emotion flowed Duch said:

74 Transcript of Trial Proceedings – Kaing Guek Eav ‘Duch’ (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case File No. 001/18-07-2007- ECCC/TC, Day 58, 12 August 2009) 3-16.
I want to be close to the Cambodian people, if they choose to condemn me, they can and I will accept it. I must accept it, no matter how heavy the sentence. I won’t use a bucket to hide an elephant. At the time we thought that the Yuon [Vietnamese] were invading Cambodia. Now, finally, before all of you and before the Cambodian people, I would like to share this pain from the bottom of his heart. I will accept this court’s judgment. I wish for the Cambodian people to condemn me as quickly as possible.\textsuperscript{77}

The intensity of the illiterate women’s account filled the Court, affected the defences of the accused and resonated in the transcript of the proceedings.

\section*{2

\textit{Antonya Tiulong}}

In the trial proceedings dealing with reparations Antonya Tiulong was asked by the President of the Trial Chamber to the describe nature of the harm she suffered as an indirect victim of crimes before the Court. Antonya gave an eloquent and impassioned account of the loss of her sister and brother-in-law to the Khmer Rouge. Her sister Raingsy’s admission that she was the daughter of Samdech Chakrey Nhoek Tiulong, a senior official of Sihanouk’s government sealed Raingsy’s fate of detention at S-21 for up to seven months before her death. As Phnom Penh was bombed in 1973 Raingsy and her husband sent their three children to France to join Antonya and her parents. Antonya described the suffering that the children and all the family experienced when the Khmer Rouge took Phnom Penh in 1975 and they had no word from Raingsy. She described her own attempts to impress upon the French government the need to take Cambodian refugees who were pouring into Thai camps.\textsuperscript{78} News of Raingsy’s detention at S-21 came through her cousins who joined their family as refugees in France in 1979.\textsuperscript{79} Antonya explained that although she tried desperately to trace what had happened to her sister, she and Raingsy’s children had to endure almost two decades of silence due to the secretive nature of the regime and the international communities’ failure to engage with Cambodia until the early 1990s. Only on her return to Cambodia in 1994 was

\textsuperscript{77} Cruvellier translation above n 75, 205-206; \textit{Transcript of Trial Proceedings – Kaing Guek Eav ‘Duch’} (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber File, No. 001/18-07-2007- ECCC/TC, Day 58, 12 August 2009) 47.


Antonya able to discover more. On a visit to the Tuol Sleng Museum (formerly the site of S-21) Antonya found Raingsy’s photo as a detainee.\textsuperscript{80} The story of her relentless search communicated to the Court the void created at the micro-level by national oppression, and inaction at the geopolitical level to press for Khmer Rouge accountability for their crimes.

Antonya, like other civil parties, clearly felt compelled to be her sister’s advocate, to declare who she was and how much her family missed her. She asked the Court to show photos of Raingsy on the projector to Duch. She requested the Court to impose a sentence commensurate with the gravity of his crimes. When she completed her statement the Chamber had no questions for her. International Co-Prosecutor De Wilde declared that her statement recorded so much suffering and was delivered with such dignity and courage that he was speechless.\textsuperscript{81}

Duch described her statement as a powerful testimony of a family’s suffering and a document of living history of value to researchers seeking to understand crimes of the Khmer Rouge.\textsuperscript{82} In answer to Antonya’s specific questions to him about Raingsy’s confession, Duch declared that the confession was obtained before he became Chairman of S-21. Therefore he had not overseen it or paid attention to it. He did however, know she had been detained. From other documents he had seen he concluded she had died of illness.\textsuperscript{83}

3 \textit{Hav Sophea}

Hav Sophea became a civil party as the daughter of a Khmer Rouge soldier who was arrested in January 1976 and was taken to S-21. She testified that she was born 21 days after his arrest and lived a life of poverty with her mother from that time. Not knowing why he was arrested her mother waited for her husband until 1991 when she learned he had been executed. In

\textsuperscript{80} Transcript of Trial Proceedings – Kaing Guek Eav ‘Duch’ (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case File No. 001/18-07-2007- ECCC/TC, Day 60, 18 August 2009) 21.
\textsuperscript{81} Transcript of Trial Proceedings – Kaing Guek Eav ‘Duch’ (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case File No. 001/18-07-2007- ECCC/TC, Day 60, 18 August 2009) 39.
\textsuperscript{82} Transcript of Trial Proceedings – Kaing Guek Eav ‘Duch’ (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case File No. 001/18-07-2007- ECCC/TC, Day 60, 18 August 2009) 40.
\textsuperscript{83} Transcript of Trial Proceedings – Kaing Guek Eav ‘Duch’ (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case File No. 001/18-07-2007- ECCC/TC, Day 60, 18 August 2009) 37.
2007, she visited the Toul Sleng Museum (formerly S-21) with her mother and found a photo of her father. She and her mother were deeply distressed to know that this was where her father had been sent. When they came to the place where the clothes of detainees were stored her mother wanted to search through them to find her husband’s clothes.\textsuperscript{84}

Sophea’s story captured the effects of the silence imposed on many Cambodian families under the regime and the lack of information available to them in its long aftermath. Hav Sophea asked Duch whether her father, Chen Sear was killed at S-21 or Choeung Ek. Duch confirmed that he had been executed but did not know at which site he had died. Duch reiterated his psychological and emotional responsibility for the barbaric acts committed at S-21 and accepted responsibility for the suffering of the civil parties. However, throughout the trial if documentary evidence did not support a civil party’s story, Duch was inclined to challenge it. In his final response to the Court, Duch seemed to cast doubt on whether Hav Sophea was actually the daughter of Chen Sear and suggested this was a matter for the Court to ascertain.\textsuperscript{85}

4 \hspace{1cm} \textit{Neth Phally}

Civil party, Neth Phally was a 52 year old farmer who spoke to the Court of his own and his family’s suffering as a result of the death of his brother at S-21. He asked Duch if he could explain what mistake his brother, who had been a Khmer Rouge soldier from the Eastern zone, had made that led to his arrest. Duch explained that the government of Democratic Kampuchea came to mistrust their soldiers from the Eastern zone. As a result there was mass purging of those troops with some being sent to S-21 for interrogation in order to trace other traitorous elements.\textsuperscript{86}

\textsuperscript{84} Transcript of Trial Proceedings – Kaing Guek Eav ‘Duch’ (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case File No. 001/18-07-2007- ECCC/TC, Day 60, 18 August 2009) 46-51.
\textsuperscript{85} Transcript of Trial Proceedings – Kaing Guek Eav ‘Duch’ (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case File No. 001/18-07-2007- ECCC/TC, Day 60, 18 August 2009) 58.
Another rare moment of communication unrelated to evidentiary processes ensued after Neth Phally had given his statement and had been examined by the Court. With the permission of the Presiding Judge, Phally produced an 8 by 11 inch photo of his brother as a young man. Looking at the photo he said:

It is like he is sitting next to me. I hope he is with me knowing that the accused is on trial... I believe my brother will be at peace, knowing that justice is done through this Court... I can never find your body... this photo represents your body.87

Phally then quietly paid homage to his brother. From the evidence he had surmised that his brother was blindfolded when taken to S-21, as well as when he was executed. He wanted Duch to see the photo of his brother, and his brother’s spirit to see the one responsible for his death. This small ritual was Phally’s way of freeing his brother from the state of limbo imposed on him by the lack of a respectful burial, a feeling common to many whose relatives are among the ‘disappeared.’88 President Nil Nonn asked that the photo be projected so that all the parties and the public could see it.89 The spontaneous gesture allowed the in-country Court to simply acknowledge the significance of the moment for Neth Phally without in any way undermining the legal process.

5 Robert Hamill

The testimony of indirect victims of the Khmer Rouge during the proceedings established the breadth and depth of the victim constituency. This was made clear by the statement of Robert Hamill on the circumstances and effects of the death of his brother Kerry at S-21. In 1978, Kerry Hamill, a New Zealand yachtsman moored his vessel in the vicinity of Koh Tang Island in Cambodian waters. The yacht was fired upon by a Khmer Rouge gunboat and Kerry and John Dewhurst, an Englishman, were taken to S-21.90 Both men made confessions and

88 Stover above n 16, 3, 17.
were executed according to the CPK policy of beating foreigners to death before burning their bodies to ashes.\textsuperscript{91} Civil party Robert Hamill described the content of his brother Kerry’s confessions as patently fictional and containing allusions to supposed CIA contacts such as Colonel Sanders of the fast-food Kentucky Fried Chicken fame. Other fictional references included one to a Captain Dodds, the surname being the name of one his friends from his hometown in New Zealand and a Major Rouse. There was also mention of his public speaking instructor, Mr S. Tarr. This Robert interpreted as a reference to their mother Esther. By this means, Robert concluded that Kerry sent a message of hope and love to his mother and had the last word over his captors.\textsuperscript{92}

When Kerry’s family had not heard from him for 14 months they feared he had drowned or met with a freak accident. Learning of his death by torture in the newspaper was devastating and paralysing for each of them. Eight months later one of his brothers committed suicide and the family seemed to progressively disintegrate. Suddenly the blanket of Khmer Rouge victimhood was spread to non-citizens of Cambodia. Robert laid bare the nature of their suffering. He said that when he contacted the sister of John Dewhurst she expressed feelings about the loss of her brother that captured his own toward Kerry. She said she could not say her brother’s name out loud:

\begin{quote}
When I first heard of my brother’s death, and for a long time, I felt that if it was possible to die of emotional pain, then I would. I could not see how my heart could continue to pump and my lungs to breath. The physical pain was so intense and that pain continues. For me, it is all to do with how they were killed. Torture, I believe is dehumanising, both for the person who suffers and for the person perpetrating it.\textsuperscript{93}
\end{quote}

Communicating the nature of victim suffering stemming from the nature of the crimes of torture followed by execution was something Robert sought not only for himself but for the

\begin{footnotes}
\textsuperscript{91} Transcript of Trial Proceedings – Kaing Guek Eav ‘Duch’ (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case File No. 001/18-07-2007- ECCC/TC, Day 59, 17 August 2009) 110.
\textsuperscript{92} Transcript of Trial Proceedings – Kaing Guek Eav ‘Duch’ (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case File No. 001/18-07-2007- ECCC/TC, Day 59, 17 August 2009) 85-86.
\textsuperscript{93} Transcript of Trial Proceedings – Kaing Guek Eav ‘Duch’ (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case File No. 001/18-07-2007- ECCC/TC, Day 59, 17 August 2009) 102-103.
\end{footnotes}
many Cambodian families unable to testify. However, Robert declared that it was now time to let go of his anger and suffering. Turning to Duch he said:

Today in this courtroom I am placing on you the crushing weight of all that emotion - the anger, the grief and the sorrow... It is you who should bear the burden. It is you who should suffer, not the families of the people you killed.94

In response, Duch acknowledged the suffering of the Hamill and Dewhurst families as well as the many Cambodian families who continued to suffer. He reiterated the responsibility he bears for commitment to a failed project which cost more than a million lives and continues to burden many. He declared that the remorse he feels was from his heart and that he accepted his responsibility willingly.95 These were highly charged communicative moments with restorative qualities within retributive proceedings as one victim representing a large constituency confronted a perpetrator of international crimes.

6 Chum Sirath

Chum Sirath was a 68 year old manager of an international technology company in Phnom Penh. He won a scholarship to study in France from 1960 to 1968 and returned to work there during the Khmer Rouge regime. Two of his 8 siblings, his sister-in-law and probably her infant child were detained at S-21.96 Like other civil parties, Chum Sirath sought more information about the fate of his family members than he had been able to trace from the available official records.

Sarith testified to the personal torment of having escaped the violence of the regime that had ravaged his family. His younger brother Narith was also offered a scholarship to study in France, but turned it down in order to support his family. Like Duch, Narith became a teacher

and opposed the social injustice of the Sihanouk regime. Duch had known Narith and his younger brother Sinaret during those years. In 1973, Narith joined the communist guerrilla movement, known as the maquis, when Lon Nol’s police force sought to suppress a revolt against perceived left-wing elements at the Institut de Pédagogie. From the research Sarith had conducted, he concluded that Narith opposed the CPK’s collectivisation policy. Because of the family connection it appeared that Sinaret and Narith’s wife and baby were arrested according to CPK policy. In his statement, Sirath was scathing of Duch for his failure to assist his brothers when they and other contemporaries of his were detained at s-21. Sirath also repeatedly impugned the sincerity of Duch’s statements of apology and expressions of remorse. The President of the Chamber urged him not to try to evoke a response from the accused and reminded him that it was for the Court to consider every aspect of the proceedings and evidence in its judgment. Nevertheless, formulating a kind of curse drawn partly from the biblical story of Cain and Abel, Sarith asserted that Duch would find nowhere to hide from the eyes of the souls of the dead of S-21.

In his response to Sirath’s story and criticisms, Duch acknowledged that he betrayed many of his friends who were detained at S-21. He re-iterated that having been arrested, S-21 inmates were regarded as the enemy under CPK policy. Duch said he avoided contact with those he knew because he could not bear to face them. He declared that his remorse was sincere and that he accepted the attacks of the civil parties.

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Sirath’s account of his brothers’ imprisonment revealed the social breakdown that occurred in Cambodia that led to their execution at an institution overseen by a former friend, who himself, could only survive by denial. The anomie of those times was exposed through profound exchanges between Sarith and Duch. Within a legal forum the Court did what justice it could through hearing an aggrieved citizen who sought some kind of explanation and perhaps even revenge of some kind.

C The Social Value of Victim Participation

Representative voices within transitional justice mechanisms may highlight the truth of past violence and expand the discourse surrounding it.\(^\text{103}\) The public nature of the ECCC proceedings and the space given to victims of crimes made possible wide transmission of what they communicated during the trial process. The narrative testimony of victims made clear the moral bankruptcy of the ideas of the architects of the regime that destroyed their society and subjected their policies to deeper public scrutiny. As the diverse group of victims participated in the trial forum, they enlarged the moral canvass of Khmer Rouge crimes for deliberation within and beyond the walls of the Court in the sense envisioned by Osiel, but with arguably broader effect by virtue of the trial dialogue accommodated under inquisitorial conditions.\(^\text{104}\)

The Cambodian government’s policy of co-optation and re-integration of former Khmer Rouge cadre without action to help people in communities reconcile meant that that many victims continued to live in close contact with their former tormentors, and that social relations were often constrained by fear and suspicion.\(^\text{105}\) The vicarious representation of victim interests by witnesses and the civil parties gave voice to the suppressed concerns of the vast unrepresented Cambodian survivor constituency. Foreigners and members of the


\(^{104}\) Osiel above n 1, 290-91.

\(^{105}\) Suzannah Linton, Reconciliation in Cambodia (Documentation Center of Cambodia, 2004) 111.
Cambodian diaspora who made statements describing the personal aftermath of the Regime revealed the magnitude of its effects beyond Cambodia’s borders.

In Case 002, although the remaining two defendants continued to deny legal responsibility for crimes committed under the government they led, as they listened to civil party statements, for the first time, they both publicly expressed regret for the suffering of those they faced at trial. Nuon Chea went so far as to say that he carries ‘moral responsibility’ for events that took place under the rule of Democratic Kampuchea and expressed condolences to the victims’ family members.\(^\text{106}\) This historic moment was made possible by the ECCC embrace of the civil party action and the platform it gave for victim voices. As discussed in Chapter Five, the denials of perpetrators increase the suffering of victims. Chhim Sotheara and Sironi-Guilbauds’ testimony confirmed that justice process at the national level aided survivor recovery and reconciliation. It is reasonable to conclude that trial process that facilitates relevant exchanges between victims and their perpetrators may also advance the process of social repair.

IV CONCLUSION

The role of the victim in transitional justice has evolved from ostensible exclusion at the IMTs at Nuremburg and Tokyo to instrumental support of the prosecution as victim-witness at the Ad hoc tribunals, and limited participation at the International Criminal Court, to the grant of more substantive rights in the criminal proceedings of the ECCC. Although the extent of the exercise of victims’ rights had to be managed throughout the proceedings, analysis of the victim contribution to the Duch trial suggests its contribution to justice rather than a reduction in the fairness of proceedings. In light of this, Judge Lavergne’s view of the transitional trial which valued victim inclusion in proceedings on grounds of fairness and in the interest of establishing the truth seems well founded. Without limiting the expressive value of the trial, Lavergne recognised the communicative value of the survivor voice in its

\(^\text{106}\) Co-Prosecutors v Nuon Chea (Transcript of Trial Proceedings) (Extraordinary Chambers in the Courts of Cambodia, Trial, Chamber, Case No 002/19-09-2007-ECCC/TC, Trial Day 186, 30 May 2013.) 84; And see ECCC Court Report (June 2013) 7.
local context for the purpose of justice and reconciliation. In his view, substantive victim participation and fair trial process are not mutually exclusive.

As survivors of the Khmer Rouge testified in narrative form, the spatial and temporal frame of the court room drama expanded. Victim testimony controlled by the mixed judiciary at the ECCC produced a forum for communication and debate on the human cost and broader social effects of Duch’s crimes. The trial dialogue under the ECCC’s inquisitorial procedure at times added restorative justice elements to the proceedings as victims confronted perpetrators within the sanctity of the Court. As the victim-witnesses and civil parties engaged with the Court they opened up discussion of the Khmer Rouge era and its legacy. Simultaneously, their stories of survival became a legacy of the controversial Court.

Moderated story-telling may pose a threat to adversarial process by diverting attention from the dual narratives developed by the prosecution and defence. However, a safe, legitimate forum for discussion of the past seems critical in a society where transparency in legal proceedings and public deliberation over human rights violations has been virtually non-existent. While victim-witnesses and civil parties were not entirely protected from instrumentalisation by other court actors, Stover’s research on civil parties who testified confirmed that they assumed the risks of re-victimisation as they presented in court and faced examination following their testimony. In doing so, the role played by victims at the ECCC overturned the notion of the victim in international proceedings as an instrument of the prosecution alone. In the controlled courtroom environment victim statements and their responses to examination went beyond confirming or disproving facts. Their presence expanded the representative and dialogic nature of the proceedings, which, as I discuss in the next chapter, also affected the process of judgement.
CHAPTER SEVEN
THE VOICE OF THE COURT IN JUDGEMENT

I INTRODUCTION

After the drama and dialogue of the trial proceedings, the Trial Chamber judges retired to prepare their judgement. This chapter examines the communicative and expressive aspects of the process of judgement at the ECCC in both the Trial Chamber and the Supreme Court Chamber.

Examining the process of judgement involves analysis of how the judiciary navigated the fault-lines of the trial, interpreted its narratives, and applied the relevant law. Drawing from Osiel’s view of transitional courts as capable of accommodating divergent views of past violence, in this chapter, I examine the ECCC’s judgements as sites where the social meaning of the trial was fleshed out within an internationalised legal frame. While the voice of the Court through its judgements is in a formal register it is nonetheless a response to the dialogue of trial proceedings. The judgements also reflect the multiple levels on which transitional trials play out: legal and political, doctrinal and historical.¹

The chapter examines the process of judgement at the ECCC by consideration of issues with social or political resonance in Cambodia, and to some extent in the international sphere. The chapter is structured around the grounds of appeal following the Trial Chamber finding of Duch’s guilt for grave breaches of the Geneva Conventions and crimes against humanity, and its order of a fixed-term sentence. In addressing the grounds of appeal, the ECCC Supreme Court Chamber (SCC) interrogated the personal jurisdiction of the ECCC, interpreted the relevant international norms and reviewed the sentence imposed by the Trial Chamber. The SCC also ruled on appeals against the Trial Chamber’s rejection of a number

¹ Mark Osiel, Mass Atrocity, Collective Memory and the Law (Transaction Publishers, 1997) 293.
of civil party applications and the Trial Chamber’s reparations award. In examining the Chamber’s juridical approach to the issues before them, I argue that the Judges’ decisions were to varying degrees both expressive and communicative.

II PERSONAL JURISDICTION

In Chapter Four, I discussed the Cambodian government’s opposition to the ECCC’s opening of the investigations into Cases 003 and 004. The cases concerned former Khmer Rouge officials suspected as some of those most responsible for crimes within the jurisdiction of the ECCC, but who were not senior leaders of the regime. The government’s resistance to expanding the net of prosecution highlighted the politically contentious nature of the ECCC’s personal jurisdiction. The issue of jurisdiction came into relief again as the Trial Chamber evaluated Duch’s categorisation by the Co-investigating judges as one ‘most responsible’ for crimes within the ECCCs jurisdiction.

A The Trial Chamber’s Decision

The Trial Chamber considered the ECCC’s personal jurisdiction from the language of the ECCC Law which provides:

The purpose of this law is to bring to trial senior leaders of Democratic Kampuchea and those most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognised by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979.2

The Chamber concluded that the phrasing ‘senior leaders of Democratic Kampuchea and those most responsible’ referred to two separate categories of suspects based on the 1998 Group of Experts Report. The Report recommended that,

any tribunal focus upon those persons most responsible for the most serious violations of human rights during the reign of Democratic Kampuchea. This would include senior

2 ECCC Law art 1.
leaders with responsibility over the abuses as well as those at lower levels who are directly implicated in the most serious atrocities.  

Referring to factors considered by the ICTY and the ICC Pre-Trial Chamber as grounding personal jurisdiction in similar circumstances, the Chamber found that Duch’s effective control of S-21 as Deputy and subsequently Chairman, together with the gravity of the offences committed there established ECCC jurisdiction over him as one of those most responsible for Khmer Rouge crimes during the period of temporal jurisdiction. The fact that other individuals may have had equivalent seniority within Democratic Kampuchea did not preclude the accused from being indicted as one of those ‘most responsible.’ This was sufficient to establish the jurisdiction of the ECCC without the necessity of examining whether the accused was also a senior leader of Democratic Kampuchea. The Trial Chamber rejected the belated Co-Defence submission on Duch’s request for acquittal.

B The Supreme Court’s Appraisal

Duch appealed the Trial Chamber decision in the Supreme Court Chamber. The accused claimed a jurisdictional error by the Trial Chamber on the grounds that he neither fitted the description of a ‘senior leader’ of Democratic Kampuchea, nor was one ‘most responsible’ for the crimes of that era. His appeal went to the heart of ECCC personal jurisdiction. If he was neither a ‘senior leader,’ nor one ‘most responsible,’ then the Trial Chamber had no jurisdiction over him, his sentence would be invalid and he could be immediately released.

The Co-Prosecutors and one civil party group also exercised their appeal rights on the issue of personal jurisdiction. The Co-Prosecutors argued that the appeal was untimely and failed

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4 Co-Prosecutors v Kaing Guek Eav alias Duch (Judgement) (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case File /Dossier No. 001/18-07-2007, 26 July 2010) [25].
5 Co-Prosecutors v Kaing Guek Eav alias Duch (Judgement) (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case File /Dossier No. 001/18-07-2007, 26 July 2010) [24].
6 Co-Prosecutors v Kaing Guek Eav alias Duch (Judgement) (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case File /Dossier No. 001/18-07-2007, 26 July 2010) [25].
7 Co-Prosecutors v Kaing Guek Eav alias Duch (Judgement) (Extraordinary Chambers in the Courts of Cambodia, Supreme Court Chamber, Case File /Dossier No. 001/18-07-2007, 26 July 2010) [23].
to meet minimum pleading standards. The civil parties submitted that Duch’s responsibility for M-13 equipped him for his S-21 role of master interrogator, and requested the Supreme Court Chamber to treat the appeal as both out of time and unfounded.

The Supreme Court addressed each allegation and interpreted the personal jurisdiction of the ECCC afresh. The judges saw their task as investigating whether the term ‘senior leaders of Democratic Kampuchea and those most responsible’ constituted a jurisdictional requirement to be evaluated by the ECCC, or a discretionary matter to guide the Co-Prosecutors and Co-Investigating Judges that is not subject to judicial review. The Chamber undertook the task in two stages. First, the Chamber examined the scope of the terminology by reviewing the history of the negotiations relating to the intended targets for prosecution before the ECCC. Second, the Chamber conducted its own evaluation of the terms in the context of the purposes of the ECCC.

1 Scope of the terminology ‘senior leaders’ and ‘most responsible’

The SCC began its analysis by establishing the certain targets of ECCC prosecution. From the initiation of negotiations for creation of the ECC, the historical record revealed the intention of the UN and the Cambodian government to focus finite resources on the criminal prosecution of certain surviving officials of the Khmer Rouge. The SCC then considered whether the term ‘senior leaders of Democratic Kampuchea and those who are most responsible’ referred to two categories of Khmer Rouge officials. The Judges referred to documents reflecting the drafting histories of the ECCC Agreement and the amendments to

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8 Kaing Guek Eav alias Duch (Appeal Judgement) (Extraordinary Chambers in the Courts of Cambodia, Supreme Court Chamber, Case File /Dossier No. 001/18-07-2007, Case File no 001/18-07-2007, 3 February 2012) [24].
9 Kaing Guek Eav alias Duch (Appeal Judgement) (Extraordinary Chambers in the Courts of Cambodia, Supreme Court Chamber, Case File /Dossier No. 001/18-07-2007, Case File no 001/18-07-2007, 3 February 2012) [25].
10 Kaing Guek Eav alias Duch (Appeal Judgement) (Extraordinary Chambers in the Courts of Cambodia, Supreme Court Chamber, Case File /Dossier No. 001/18-07-2007, Case File no 001/18-07-2007, 3 February 2012) [26].
11 Kaing Guek Eav alias Duch (Appeal Judgement) (Extraordinary Chambers in the Courts of Cambodia, Supreme Court Chamber, Case File /Dossier No. 001/18-07-2007, Case File no 001/18-07-2007, 3 February 2012) [52].
the 2001 ECCC Law. They noted that the Group of Experts believed that the term ‘leaders’ should not be equated with all persons at senior levels of the government of Democratic Kampuchea or the CPK because that would remove from the reach of prosecution those who may also have played a significant role in Khmer Rouge atrocities. In addition, some top leaders may not have had knowledge of, or have been party to decision-making with respect to atrocities, particularly at the zonal level or the detention centres.\footnote{12}

The SCC also cited H.E. Deputy Prime Minister Sok An in the Cambodian National Assembly in 2004

> Considering senior leaders, we refer to no more than 10 people, but we don’t specify that they be members of the Standing Committee. This is the task of the Co-Prosecutors […] However, there is still the second target. They are not the leaders, but they committed atrocious crimes. That’s why we use the term those most responsible. There is no specific amount of people to be indicted from the second group. Those committing atrocious crimes will possibly be indicted.\footnote{13}

The Court examined recent scholarship on the terminology used to describe ECCC personal jurisdiction.\footnote{14} Scheffer, who was involved in the ECCC negotiations as the U.S. Ambassador at Large for War Crimes Issues from 1997–2001, recalled that in January 2000 Duch was already in custody and was a ‘constant reference point for the negotiators as a likely defendant’ before the proposed tribunal, being one recognised not as a senior leader within Democratic Kampuchea, but one who was allegedly most responsible for serious violations. Scheffer also confirmed an apparent consensus that de-linking leadership identity from responsibility identity by the use of the disjunctive ‘or’ in the personal jurisdiction

\footnote{12} Group of Experts Report above n 3, [109].
terminology would have been unfair to senior leaders of Democratic Kampuchea who were not most responsible for atrocities.15

From the drafting history and analysis, the SCC concluded that the term ‘senior leaders of Democratic Kampuchea and those who were most responsible’ refers to two categories of Khmer Rouge officials that are not mutually exclusive.16 A ‘senior leader is not a suspect solely on the basis of his/her leadership,’ but both a senior leader and a non-senior leader may be one most responsible for crimes within the ECCC’s jurisdiction. Therefore, suspects targeted must be both Khmer Rouge officials and among the most responsible.17

The SCC then evaluated the terminology of ECCC jurisdiction. Using the guides to interpretation provided under both the Vienna Convention of the Law of Treaties and the ECCC Agreement, the SCC sought to establish whether the inclusion of the words ‘personal jurisdiction’ in Article 2 (1) of the Agreement mandated that the term ‘senior leaders of Democratic Kampuchea and those who were most responsible’ operated exclusively as an a legal requirement of the Trial Chamber’s jurisdiction over an accused.18

2 Interpreting the terminology

Article 2 (1) of the ECCC Agreement provides in part:

The present Agreement further recognises that the Extraordinary Chambers have personal jurisdiction over senior leaders of Democratic Kampuchea and those who were most responsible for the crimes referred to in Article 1 of the Agreement.19

15 Ibid 4-5.
16 Kaing Guek Eav alias Duch (Appeal Judgement) (Extraordinary Chambers in the Courts of Cambodia, Supreme Court Chamber, Case File /Dossier No. 001/18-07-2007, Case File No. 001/18-07-2007, 3 February 2012) [57].
17 Kaing Guek Eav alias Duch (Appeal Judgement) (Extraordinary Chambers in the Courts of Cambodia, Supreme Court Chamber, Case File /Dossier No. 001/18-07-2007, Case File No. 001/18-07-2007, 3 February 2012) [58].
18 Kaing Guek Eav alias Duch (Appeal Judgement) (Extraordinary Chambers in the Courts of Cambodia, Supreme Court Chamber, Case File /Dossier No. 001/18-07-2007, Case File No. 001/18-07-2007, 3 February 2012) [60].
19 Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea’ (signed 6 June
Neither the ECCC Agreement nor the ECCC Law defines either the terms ‘senior leaders’ or ‘those most responsible.’ While the ordinary meaning given to the terms used suggested the exclusive prerogative of the Trial Chamber as to ECCC personal jurisdiction, the SCC considered whether the language used was consistent with the object and purpose of the ECCC Agreement and whether such interpretation would lead to a ‘manifestly absurd or unreasonable result.’\textsuperscript{20} In this the Chamber drew upon the content of and circumstances surrounding creation of preliminary documents constituting the \textit{travaux préparatoires} to the Agreement, as well as international jurisprudence in other jurisdictions as legitimate sources of interpretive guidance.\textsuperscript{21}

The ECCC background and drafting history revealed that the shared characteristic of those who might be prosecuted by the ECCC is that a suspect must be a Khmer Rouge official. The SCC concluded the Trial Chamber is well suited to deciding a suspect’s status as a Khmer Rouge official as a factual matter. However, deciding whether suspects are ‘senior leaders’ or those ‘most responsible’ is the subject of investigative and prosecutorial discretion.\textsuperscript{22}

As to the term ‘senior leaders,’ the SCC reasoned that including former members of the CPK Central Committee and/or Standing Committee as comprising senior leaders within the terminology of personal jurisdiction would have created a jurisdictional requirement which could be determined as a matter of fact by the Trial Chamber.\textsuperscript{23} That the term is more flexible is indicated by the debates in the Cambodian National Assembly over the ECCC Agreement and the 2004 amendments to the ECCC Law.\textsuperscript{24}

\textsuperscript{21} Per VCLT Article 32 (b); ECCC Agreement article 12 (1).
\textsuperscript{22} Kaing Guek Eav alias Duch (Appeal Judgement) (Extraordinary Chambers in the Courts of Cambodia, Supreme Court Chamber, Case File /Dossier No. 001/18-07-2007, Case File No. 001/18-07-2007, 3 February 2012) [63-74].
\textsuperscript{23} Kaing Guek Eav alias Duch (Appeal Judgement) (Extraordinary Chambers in the Courts of Cambodia, Supreme Court Chamber, Case File /Dossier No. 001/18-07-2007, Case File No. 001/18-07-2007, 3 February 2012) [76].
\textsuperscript{24} The First Session of the Third Term of the Cambodian National Assembly, 4-5 October 2004, 23.
As to the term ‘those most responsible,’ the SCC first gave reasons why treating the term as a jurisdictional requirement of the ECCC would be inconsistent with the object and purpose of the ECCC Agreement and would lead to an unreasonable result. Apart from the inability of the Trial Chamber to rank the criminal responsibility of all Khmer Rouge officials by objective method, the accused’s effective submission that the Chamber should have embarked upon a relative assessment of his rank within Democratic Kampuchea, amounts indirectly to a defence of superior orders in contravention of Article 29 of the ECCC Law. Article 29 expressly confirms the international principle that superior orders do not constitute a defence to crimes prosecuted by the ECCC. Additionally, the SCC pointed to the inherent discretion contained within the terminology of ECCC personal jurisdiction in contrast to the clearly defined parameters of the Court’s temporal and subject matter jurisdictions.25

The SCC then found that the term ‘most responsible’ must be read with Articles 5 (3) and 6 (3) of the ECCC Agreement as a guide to the Co-Investigating Judges and the Co-Prosecutors respectively in exercising their independent discretion in investigating and prosecuting the most serious perpetrators of Khmer Rouge crimes. Revisiting the Group of Expert’s Report, the Court found that the scope of investigations should be no more than a guide for prosecutors and not form an element of personal jurisdiction. Further support for treating the term ‘most responsible’ as investigatory and prosecutorial policy was drawn from the Rules of Evidence and Procedure of the ad hoc Tribunals. Those Rules provide limited scope for judicial scrutiny of the indictments by the Prosecutor so as to concentrate scarce resources on trying the most serious cases falling within the relevant jurisdictions.26

Thus, while the SCC noted that the Trial Chamber must consider all legitimate challenges to jurisdiction, it concluded that it was not reasonable to interpret ‘most responsible’ in the

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26Kaing Guek Eav alias Duch (Appeal Judgement) (Extraordinary Chambers in the Courts of Cambodia, Supreme Court Chamber, Case File /Dossier No. 001/18-07-2007, Case File No. 001/18-07-2007, 3 February 2012) [69].
terminology of Article 2 (1) of the ECCC Agreement as a justiciable issue before the ECCC Trial Chamber. Rather, the terms operate exclusively as an investigative and prosecutorial policy to guide the independent discretion of the Co-Investigating Judges and Co-Prosecutors as to how to best target finite resources in order to achieve the purpose behind the establishment of the ECCC.

Citing jurisprudence from Special Court for Sierra Leone (SCSL) and its Statute in support, the SCC noted that SCSL had found that the only practical interpretation of the term ‘greatest responsibility’ within that Court’s governing statute is that it ‘guides the Prosecutor in the exercise of his prosecutorial discretion. Furthermore, in Prosecutor v Brima the SCSL Appeals Chamber stated:

In the opinion of the Appeals Chamber it is inconceivable that after a long and expensive trial the Trial Chamber could conclude that although the commission of serious crimes has been established beyond reasonable doubt against the accused, the indictment ought to be struck out on the ground that it has not been proved that the accused was one of those who bore greatest responsibility.

While the SCC emphasised the wide margin of discretion in the investigative and prosecutorial functions, it concurred with international jurisprudence in holding that the discretion is subject to judicial review by the Trial Chamber when exercised in bad faith or according to unsound professional judgement. With no suggestion of this in Case 001, the ground of the appeal of the Accused on personal jurisdiction was found to be untenable and consequently dismissed in entirety.
Duch’s final hour request for release brought the personal jurisdiction of the ECCC to centre-stage once more as it became the subject of further legal and historical scrutiny in the Supreme Court Chamber. From court documents and current academic discourse, the process of judgement by the SCC connected with the live debate surrounding the operation of the ECCC and conveyed to the Cambodian government the Court’s interpretation of the Agreement it had entered into to end the impunity of indictable Khmer Rouge officials. The Chamber’s engagement with the history of who the ECCC may prosecute was arguably communicative in its engagement with an issue of legal, social and political significance. It was also expressive in that the Supreme Court’s legal analysis provided an authoritative statement on the independence of those authorised to perform ECCC investigations and prosecutions. Executive interference in those functions is therefore contrary to principle, and the apparent original intent of the Cambodian side of the Court.

III NORMATIVE ANALYSES OF DUCH’S CRIMES

A In the Trial Chamber

As the first step in grounding the charges against Duch, the Trial Chamber examined the historical and political context of the crimes pursuant to the legality principle under international law.32 The legality principle stated within Article 15 (1) of the International Covenant on Civil and Political Rights (ICCPR) provides:

No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time it was committed.

The principle requires the offence with which an accused is charged to be ‘sufficiently foreseeable’ and the law providing for such liability to be ‘sufficiently accessible to the accused at the relevant time.’33 Preliminary issues for the Court therefore, were: whether

32 The principle of legality is a fundamental principle of criminal justice that prohibits persons from being convicted for acts which were not crimes under the relevant law at the time they were committed.
33 Co-Prosecutors v Kaing Guek Eav (alias) Duch (Judgement) (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case File No. 001/18-2007/ ECCC TC, 26 July 2010) [28].
crimes against humanity formed part of customary international law by 1975; and whether
grave breaches of the Geneva Conventions were crimes under national or international law
during the period 17 April 1975 to 6 January 1979.\(^{34}\)

Forms of individual responsibility must also conform to the legality principle.\(^{35}\) The Chamber
therefore considered the forms of responsibility provided under the ECCC Law that might
establish Duch’s individual criminal responsibility for crimes against humanity (Article 5)
and grave breaches of the Geneva Conventions (Article 6):

Any suspect who planned, instigated aided and abetted, or committed the crimes referred
to in Articles 5 [and] 6 are to be found individually responsible.\(^{36}\)

The Chamber then proceeded to establish that all the elements of the relevant offences were
proved.

1 Proving Grave Breaches of the Geneva Conventions

As Cambodia and Vietnam ratified the four Geneva Conventions of 1949 on 12 August 1949
and 8 December 1957 respectively, the Chamber confirmed that Cambodia was bound by the
conventions during the Khmer Rouge regime. This established ECCC jurisdiction to hear the
case against Duch as to breaches of Article 6 crimes, grave breaches of the Geneva
Conventions.\(^{37}\)

Proving that grave breaches of the Conventions had been committed required: a finding of
the existence of an international armed conflict; that there was nexus between the acts of
the accused and the armed conflict; that the accused had sufficient knowledge of the armed
conflict and that the victims of the crimes had ‘protected person’ status under the Geneva

\(^{34}\) Co-Prosecutors v Kaing Guek Eav (alias) Duch (Judgement) (Extraordinary Chambers in the Courts of
Cambodia, Trial Chamber, Case File No. 001/18-2007/ ECCC TC, 26 July 2010) [402].

\(^{35}\) Co-Prosecutors v Kaing Guek Eav (alias) Duch (Judgement) (Extraordinary Chambers in the Courts of
Cambodia, Trial Chamber, Case File No. 001/18-2007/ ECCC TC, 26 July 2010) [26].

\(^{36}\) ECCC Law art 29.

\(^{37}\) Co-Prosecutors v Kaing Guek Eav (alias) Duch (Judgement) (Extraordinary Chambers in the Courts of
Cambodia, Trial Chamber, Case File No. 001/18-2007/ ECCC TC, 26 July 2010) [404].

252
Conventions. Furthermore, the ECCC Law required that the acts be committed during the period of 17 April to 6 January 1979.\textsuperscript{38}

The Chamber traced Cambodia’s enmity with Vietnam to Vietnamese encroachment on Cambodian territory to the 15th century. There were subsequent disputes over demarcation of the Cambodian border under the French, particularly the maritime boundary known as the Brevié line, which was drawn in 1939.\textsuperscript{39} CPK resentment towards the Vietnamese was rooted in the non-recognition of Cambodian communist interests at the 1954 Geneva Conference, and was exacerbated by differences between the brother communists in their combined resistance to the United States backed Lon Nol regime in the early 1970s. The CPK refusal to enter peace talks with the United States and Vietnam from 1972–1973 precipitated the United States bombing campaign in Cambodia. Viewing the 1973 peace treaty between the Vietnam and the United States as Vietnamese betrayal, the CPK then attacked Vietnamese bases and a hospital within Cambodia, executing Vietnamese cadres. Further distrust and hostility stemmed from CPK fear that Vietnam intended to absorb and control Cambodia within a Vietnamese dominated Indochinese Federation. The Vietnamese on the other hand, feared domination through the Khmer Rouge ally, China. The toxic climate of mistrust fostered border clashes and progressively hostile attacks on each State’s interests from 30 April 1975.\textsuperscript{40}

The Chamber concluded that Duch’s acts were sufficiently related to the international conflict because they were the implementation of the policy of one of the parties to the war. Furthermore, Vietnamese prisoners of war and civilians as well as Cambodians perceived to

\textsuperscript{38} Article 6 of the ECCC Law requires that the acts be committed during the period of 17 April to 6 January 1979.

\textsuperscript{39} Co-Prosecutors v Kaing Guek Eav (alias) Duch (Judgement) (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case File No. 001/18-2007/ ECCC TC, 26 July 2010) [20].

\textsuperscript{40} Co-Prosecutors v Kaing Guek Eav (alias) Duch (Judgement) (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case File No. 001/18-2007/ ECCC TC, 26 July 2010) [21-26].
be Vietnamese, who were detained at S-21 were ‘protected persons’ within the meaning of the Geneva Conventions. 41

Finally, the particular grave breaches with which Duch was charged were examined. The Chamber found that Duch’s conduct towards protected persons amounted to the war crimes of wilful killing, torture or inhumane treatment, wilfully causing great suffering or serious injury to body or health, wilfully depriving a prisoner of war or civilian of the rights of fair trial and regular trial, and unlawful confinement of a civilian.42 The Court’s analysis was based on examination of Duch’s leadership of S-21 within the context of the Khmer Rouge seizure of Phnom Penh in 1975, and the implementation of their communist state policy. Simultaneously, the CPK, as the emanation of the new government of Cambodia engaged in armed hostilities with Vietnamese military forces until 6 January 1979.43

There was no appeal from the Chamber’s finding on the Article 6 charge. The Chamber’s historical contextualisation of the crimes established proof of culpability. It also created a new record of a turbulent period in Cambodian history from local and international sources which was tested through legal process. Thus, the judicial process consisted of expressive norm interpretation, and the creation of a judicial record synthesising the factual evidence and expert opinion presented at trial. The ECCC expanded the judgement’s communicative value by producing public copies for wide distribution throughout Cambodia.

2 Proving Crimes against Humanity Charges

To ensure that the legality requirement of the crimes against humanity charges had been met the Chamber had to establish the status of the crime during the period of the Court’s temporal jurisdiction. The first prosecution of crimes against humanity in 1945 under Article 6 (c) the

41 Co-Prosecutors v Kaing Guek Eav (alias) Duch (Judgement) (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case File No. 001/18-2007/ ECCC TC, 26 July 2010) [425-426].
42 Co-Prosecutors v Kaing Guek Eav (alias) Duch (Judgement) (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case File No. 001/18-2007/ ECCC TC, 26 July 2010) [431-469]
43 Co-Prosecutors v Kaing Guek Eav (alias) Duch (Judgement) (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case File No. 001/18-2007/ ECCC TC, 26 July 2010) [423].
IMT Charter required proof of a link with an armed conflict.\textsuperscript{44} While the Chamber noted that the ECCC Law does not require a link between crimes against humanity and armed conflict, it considered the legality of the link in 1975. Referring to the jurisprudence of international tribunals that have considered when such link may have been dropped under international customary law, the Chamber cited the ICTY Appeals Chamber finding that the link was not required even in 1945, being a jurisdictional issue only.\textsuperscript{45} In addition, the European Court of Human Rights found that a nexus may no longer have been relevant in 1956.\textsuperscript{46} The Trial Chamber also noted the finding in the Group of Experts Report that the bond between crimes against humanity and armed conflict appeared to have been severed by 1975.\textsuperscript{47} The Chamber concluded that the absence of any nexus with armed conflict within the Article 5 of the ECCC Law ‘comports with the customary definition of crimes against humanity during the period 1975–79.’\textsuperscript{48}

Offences listed under Article 5 of the ECCC Law only constitute crimes against humanity if the \textit{chapeau} or general elements are established. This involved establishing the existence of a widespread or systematic attack directed against any civilian population on national, political, ethnic, racial or religious grounds. There must also have been a nexus between the acts of the accused and the attack, and the accused must have had knowledge of the attack.\textsuperscript{49}

The Chamber concluded that the seizure of power by the CPK, the forcible transfer of residents of cities to the countryside, the imposition of forced labour in collectives under harsh conditions and the dismantling of social structures constituted an ‘attack.’ It was under

\textsuperscript{44} Charter of the International Military Tribunal at Nuremburg – Annex to the Agreement for the Prosecution of the Major War Criminals of the European Axis (‘London Agreement’ (8 August 1945) 82 UNTS 279 art 6 (c).
\textsuperscript{45} Prosecutor v Tadic (Appeal Judgment) (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case no ICTY-IT-94-1-, 15 July 1999) [249].
\textsuperscript{46} Korbley v Hungary (Judgment), (European Court of Human Rights, Grand Chamber, Case No. 9174/02, 19 September 2008) [82].
\textsuperscript{47} Co-Prosecutors v Kaing Guek Eav (alias Duch) (Judgement) (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case File No. 001/18-2007/ ECCC TC, 26 July 2010) [292].
\textsuperscript{48} Co-Prosecutors v Kaing Guek Eav (alias Duch) (Judgement) (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case File No. 001/18-2007/ ECCC TC, 26 July 2010) [292].
\textsuperscript{49} Co-Prosecutors v Kaing Guek Eav (alias Duch) (Judgement) (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case File No. 001/18-2007/ ECCC TC, 26 July 2010) [297].
the circumstances of such attack that S-21 was created.50 The Judges accepted the Co-
Investigating judges’ conclusion that the magnitude and number of the crimes committed at
S-21, together with the organised and prolonged character of the crimes met the requirement
of ‘scale and systematicity’ of the chapeau element.51 The systematic attack was mirrored in
the purging process at S-21 which made no distinction between civilians and military
personnel. All who were perceived as enemies of the regime were targeted and as result, the
attack was found to have been directed against a civilian population.52 Since there was no
‘common linking factor among those detained other than categorisation as ‘enemies,’ the
Chamber concluded that the attack was carried out at a minimum on political grounds.53

The Chamber was satisfied that the evidence established that S-21 was considered as ‘vital
to the achievement of the CPK’s political objectives’ including the ‘smashing’ of enemies.54
Duch’s awareness that S-21 was a site for the implementation of S-21 indicated to the Court
that the nexus between his acts and the attack was established. The Court also found that
Duch knew his acts contributed to the CPK attack.55

By majority the Trial Chamber found the accused criminally responsible for multiple
underlying acts constituting crimes against humanity: murder, extermination, enslavement,
imprisonment torture (including an instance of rape), persecution on political grounds and
other inhumane acts.56 Judge Cartwright dissented from the majority finding on the offence
of persecution. She argued that although Duch had implemented CPK policy

50 Co-Prosecutors v Kaing Guek Eav (alias) Duch (Judgement) (Extraordinary Chambers in the Courts of
Cambodia, Trial Chamber, Case File No. 001/18-2007/ ECCC TC, 26 July 2010) [320].
51 Co-Prosecutors v Kaing Guek Eav (alias) Duch (Judgement) (Extraordinary Chambers in the Courts of
Cambodia, Trial Chamber, Case File No. 001/18-2007/ ECCC TC, 26 July 2010) [321].
52 Co-Prosecutors v Kaing Guek Eav (alias) Duch (Judgement) (Extraordinary Chambers in the Courts of
Cambodia, Trial Chamber, Case File No. 001/18-2007/ ECCC TC, 26 July 2010) [325].
53 Co-Prosecutors v Kaing Guek Eav (alias) Duch (Judgement) Extraordinary Chambers in the Courts of
Cambodia, Trial Chamber, Case File No. 001/18-2007/ ECCC TC, 26 July 2010) [327].
54 Co-Prosecutors v Kaing Guek Eav (alias) Duch (Judgement) Extraordinary Chambers in the Courts of
Cambodia, Trial Chamber, Case File No. 001/18-2007/ ECCC TC, 26 July 2010) [328].
55 Co-Prosecutors v Kaing Guek Eav (alias) Duch (Judgement) Extraordinary Chambers in the Courts of
Cambodia, Trial Chamber, Case File No. 001/18-2007/ ECCC TC, 26 July 2010) [329].
56 Co-Prosecutors v Kaing Guek Eav (alias) Duch (Judgement) (Extraordinary Chambers in the Courts of
Cambodia, Trial Chamber, Case File No. 001/18-2007/ ECCC TC, 26 July 2010) [567].
unquestioningly, the evidence had not shown that he personally possessed the required discriminatory intent to support a conviction for persecution on political grounds.\textsuperscript{57}

Citing ICTY jurisprudence, the Chamber noted the risk of prejudice to an accused arising from multiple convictions.\textsuperscript{58} Therefore, the Chamber convicted Duch of persecution on political grounds as a crime against humanity (subsuming the other counts of the crime under the one head).\textsuperscript{59} As to other forms of responsibility the Chamber found that although Duch participated in at least some interrogations which included beatings or forms of torture, it was not satisfied that he committed these acts through physical perpetration or criminal omission.\textsuperscript{60} However, he was found guilty of participating, instigating, ordering and aiding and abetting the offences. In addition, the Chamber concluded he had participated in systemic joint criminal enterprise because he was aware of the criminal nature of the system and acted with intent to further its criminal purpose.\textsuperscript{61}

B \textit{In the Supreme Court}

The Co-Prosecutors appealed the Trial Chamber findings on the specific findings of enslavement, rape, torture and persecution as crimes against humanity. For the purpose of this chapter, I limit the following discussion to the SCC’s review of the Trial Chamber’s findings on the crime of persecution and the decision to subsume the other offences as crimes against humanity under that crime.

\textsuperscript{57} Co-Prosecutors v Kaing Guek Eav (alias) Duch (Judgement) (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case File No. 001/18-2007/ ECCC TC, 26 July 2010) [399]; Richard L Kilpatrick, ‘Prosecutor v Kaing Guek Eav alias Duch: In First Round of Proceedings, The Extraordinary Chambers in the Courts of Cambodia Convicts Former Chairman of Khmer Rouge Interrogation Center of Atrocity Crimes’ (2011) 19 \textit{Tulane Journal of International And Comparative Law} 660.

\textsuperscript{58} Co-Prosecutors v Kaing Guek Eav (alias) Duch (Judgement) (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case File No. 001/18-2007/ ECCC TC, 26 July 2010) [560]; Prosecutor v Prosecutor v Delalić, Mucić, Delić & Landžo (‘Celebici’) (Appeal Judgment) (International Criminal Tribunal for the Former Yugoslavia , Appeals Chamber, Case No. IT-96-21A, 20 February 2001) [412-413].

\textsuperscript{59} Co-Prosecutors v Kaing Guek Eav (alias) Duch (Judgement) (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case File No. 001/18-2007/ ECCC TC, 26 July 2010) [568].

\textsuperscript{60} Co-Prosecutors v Kaing Guek Eav (alias) Duch (Judgement) (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case File No. 001/18-2007/ ECCC TC, 26 July 2010) [483-486].

\textsuperscript{61} Co-Prosecutors v Kaing Guek Eav (alias) Duch (Judgement) (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case File No. 001/18-2007/ ECCC TC, 26 July 2010) [515-516].
On the question of subsumption, the SCC found that the Trial Chamber had rightly resorted to the *Celebici* test applied at the ICTY. The test is applied in cases where the same factual conduct satisfies the definitions of multiple statutory offences. A Trial Chamber may enter multiple convictions with respect to those offences, but only where the crimes are considered sufficiently distinct or possess ‘a materially distinct element’ not found in the other offences. On the other hand, where multiple crimes do not each have materially distinct elements, the crime with the materially distinct element as the more specific crime subsumes the other and only one conviction is entered.

The SCC found that the trial Chamber had erred in its application of the test. The Trial Chamber had placed emphasis on the factual circumstances surrounding the underlying conduct rather than each crime’s distinct elements. The SCC held that with respect to the crimes which were subsumed under persecution, each had at least one materially distinct element from persecution. Furthermore, none of the offences carry a requirement of specific discriminatory intent, an element of the crime of persecution. Subsuming the other crimes against humanity for which the accused was found responsible under the crime of persecution was therefore wrong in law. Consequently, the SCC ordered that separate convictions be entered for each of the other offences.

In addition, after reviewing the legal definition of the crime of persecution, the SCC overturned the Trial Chamber ruling that all detainees at S-21 had been targeted on political grounds and were therefore victims of persecution. The SCC concluded that while Duch strove to implement the CPK policy of purging those considered to be traitors and political enemies at S-21, as the revolution continued, individuals were arrested and executed indiscriminately without any rational or coherent justification on political grounds. Such

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63 *Kaing Guek Eav alias Duch* (Appeal Judgement) (Extraordinary Chambers in the Courts of Cambodia, Supreme Court Chamber, Case File No. 001/18-07-2007, 3 February 2012) [288].
64 *Kaing Guek Eav alias Duch* (Appeal Judgement) (Extraordinary Chambers in the Courts of Cambodia, Supreme Court Chamber, Case File No. 001/18-07-2007, 3 February 2012) [335].
65 *Kaing Guek Eav alias Duch* (Appeal Judgement) (Extraordinary Chambers in the Courts of Cambodia, Supreme Court Chamber, Case File No. 001/18-07-2007, 3 February 2012) [336].
action was not persecutory, but constituted a reign of terror where no discernible criteria applied to the targeting of victims. This resulted in the accused being responsible for the detention and execution of individuals who were not in fact political enemies. The criminal activity of the accused towards such persons did not proceed from discriminatory intent on political grounds, but merely from attempts to demonstrate loyalty and efficiency to the Party. Therefore, the SCC found the Trial Chamber had committed an error of law in categorising such conduct as persecution on political grounds.\textsuperscript{66}

On the issue of subsumption SCC’s normative analysis of the relevant law and the Trial Chamber’s reasoning reflected expressive due process through judicial review. Review of the incidence of persecution at S-21 also constituted expressive norm interpretation. However, it was also communicative in its recognition of the climate of terror and dysfunction that characterised the institution in the Cambodian context of mass atrocity.

IV SENTENCE

A The Trial Chamber Findings on Sentence

The Co-Prosecutors had submitted that the gravity of Duch’s crimes and various aggravating factors justified a life sentence. However, they added that conversion of the sentence to forty years would be an adequate remedy in view of the mitigating factors and the accused’s unlawful detention by the Cambodian military authorities. While the ECCC Agreement and the ECCC Law made provision for the maximum sentence of life imprisonment, they were silent as to the factors to be taken into account in sentencing. The Chamber ruled out reliance on Cambodian sentencing principles in light of uncertainties or complexity arising from their historical development since 1956. While noting the development of sentencing guidelines

\textsuperscript{66} Kaing Guek Eav alias Duch (Appeal Judgement) (Extraordinary Chambers in the Courts of Cambodia, Supreme Court Chamber, Case File No. 001/18-07-2007, 3 February 2012) [283].
among international tribunals, the Chamber found there was no ‘uniform approach to sentencing before these tribunals.’

Ultimately the sentencing regime adopted by the Trial Judgement presented a holistic and responsive approach to what was communicated at the trial, subject to relevant sentencing principles and factors. In expressive tones the Judges explained:

> While an obvious function of a sentence is to punish, its goal is not revenge. The sentence must be proportionate and individualised such that it reflects the culpability of the accused based on an objective, reasoned and measured analysis both of his or her conduct and its consequential harm.

The Chamber then noted that international jurisprudence had established that the gravity of the crimes was the litmus test for the appropriate sentence, with consideration of both the particular circumstances of the case and the ‘form and degree of the accused’s participation in the alleged crime.’ Duch’s crimes were of a particularly shocking and heinous character. He had managed and refined the S-21 system through which more than 12,000 people died. He worked ‘tirelessly to ensure that S-21 ran as efficiently as possible and did so out of unquestioning loyalty to his superiors and CPK ideology, and without regard to the humanity of the detainees he oversaw.’ The testimony of survivors of S-21 and the family members of victims at trial had confirmed the long-term physical and psychological harm flowing from the accused’s crimes.

At the time, as an intelligent and educated man, Duch fully understood the nature of his acts. Aggravating factors were the sheer number of victims and the cruelty with which the crimes were committed. In addition his exercise of power had a corrupting influence over the

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67 Co-Prosecutors v Kaing Guek Eav alias Duch (Judgement) (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case File /Dossier No. 001/18-07-2007, 26 July 2010) [576-578].
68 Co-Prosecutors v Kaing Guek Eav alias Duch (Judgement) (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case File /Dossier No. 001/18-07-2007, 26 July 2010) [580].
69 Co-Prosecutors v Kaing Guek Eav alias Duch (Judgement) (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case File /Dossier No. 001/18-07-2007, 26 July 2010) [582].
70 Co-Prosecutors v Kaing Guek Eav alias Duch (Judgement) (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case File /Dossier No. 001/18-07-2007, 26 July 2010) [597].
71 The Chamber cited the testimony of Robert Hamill, Hav Sophea, Neth Phally, Antonya Tioulong, Martine Lefeuvre and Ou Savith.
generally young S-21 staff as they were indoctrinated and trained to treat detainees inhumanely.\textsuperscript{72}

As to mitigating factors, the Judges rejected the Co-Defence submission that Duch followed his superior’s orders under duress. The extended period of time over which this occurred, the large number of victims and the diligence of the accused in his management of S-21 militated against such a finding. Nonetheless, the Judges attached weight, albeit ‘limited,’ to the ‘coercive climate of Democratic Kampuchea and [Duch’s] subordinate position within the CPK.’\textsuperscript{73}

Duch’s cooperation with the ECCC as a mitigating factor was never disputed. It had both facilitated the trial proceedings and assisted the Court’s contribution to national reconciliation.\textsuperscript{74} However, his apologies to victims and expressions of remorse throughout the proceedings while recognised as mitigating factors, were ‘undermined by his failure to offer a full and unequivocal admission of responsibility. His request for acquittal at the end of the trial diminished ‘the extent to which his remorse would otherwise mitigate his sentence.’\textsuperscript{75}

The Judges factored into their sentence Duch’s propensity for rehabilitation. In this they relied on the psychological report of experts Françoise Sironi-Guilbaud and Ka Sunbaunat, supplemented by their own observations of Duch throughout the trial proceedings. The numerous quotations from the report of the experts in the judgement suggested the Judges’ intention to widely communicate the analysis of the experts. The Chamber reiterated that the experts had drawn from their ‘clinical and scientific research, as well as on cultural, religious and social factors relevant to the accused, considered by them to be vital for a comprehensive

\textsuperscript{72} Co-Prosecutors v Kaing Guek Eav alias Duch (Judgement) (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case File /Dossier No. 001/18-07-2007, 26 July 2010) [602].
\textsuperscript{73} Co-Prosecutors v Kaing Guek Eav alias Duch (Judgement) (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case File /Dossier No. 001/18-07-2007, 26 July 2010) [608].
\textsuperscript{74} Co-Prosecutors v Kaing Guek Eav alias Duch (Judgement) (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case File /Dossier No. 001/18-07-2007, 26 July 2010) [609].
\textsuperscript{75} Co-Prosecutors v Kaing Guek Eav alias Duch (Judgement) (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case File /Dossier No. 001/18-07-2007, 26 July 2010) [610].
assessments of him. The Judges noted the experts’ description of Duch as a ‘dutiful person, readily influenced by [and] responding well to strong leadership,’ with a ‘need for affiliation, and for recognition and acknowledgment by his superiors.’ The Judges noted that during the proceedings Duch ‘appeared anxious to please the Chamber ‘as well as to appease the victims of his acts.’ The judgement also cited the experts’ observation that Duch’s experience of ‘successive and major assimilation of different cultural systems’ included his radical affiliation with communism which he described as a ‘complete social order.’

Marxist ideology satisfied his need for certainty and was subsequently replaced with an equally strong commitment to Christianity, described as a pragmatic and safe choice. In identifying with Marxism, the Accused showed zeal and ‘extreme allegiance,’ surpassing superiors’ expectations in order to suppress his increasing doubts regarding Angkar’s plans for ‘smashing’ enemies, and his own fears of imminent death.

The judgement also noted the experts observation of Duch’s lack of empathy, which they attributed in part to the ‘fabrication’ or conditioning process developed by the Khmer Rouge to eliminate emotions and to enhance self-control. They noted further:

The accused was able to construct powerful defence mechanisms insulating him from emotional reactions and inner conflicts created by his external reality: mechanisms which they described as ultimately enabling him to nurture his own family whilst overseeing the deaths of children at S-21.

Along with the experts the Chamber perceived and assessed positively, the Duch’s greater capacity for self-reflection regarding his life and actions as the investigation and trial

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76 Co-Prosecutors v Kaing Guek Eav alias Duch (Judgement) (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case File /Dossier No. 001/18-07-2007, 26 July 2010) [612].
77 Co-Prosecutors v Kaing Guek Eav alias Duch (Judgement) (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case File /Dossier No. 001/18-07-2007, 26 July 2010) [613].
78 Co-Prosecutors v Kaing Guek Eav alias Duch (Judgement) (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case File /Dossier No. 001/18-07-2007, 26 July 2010) [616].
79 Co-Prosecutors v Kaing Guek Eav alias Duch (Judgement) (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case File /Dossier No. 001/18-07-2007, 26 July 2010) [613].
80 Co-Prosecutors v Kaing Guek Eav alias Duch (Judgement) (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case File /Dossier No. 001/18-07-2007, 26 July 2010) [613].
81 Co-Prosecutors v Kaing Guek Eav alias Duch (Judgment) (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case File /Dossier No. 001/18-07-2007, 26 July 2010) [614].
82 Co-Prosecutors v Kaing Guek Eav alias Duch (Judgment) (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case File /Dossier No. 001/18-07-2007, 26 July 2010) [614].
The Judges accepted the experts’ evaluation of Duch’s rehabilitation and reintegration into society. Character evidence from two of Duch’s former students and Pastor Christopher Lapel persuaded the Chambers of his commitment to his studies, professional vocation, and political and religious beliefs. However, there were no factors in his private or professional life that excused his criminal conduct.

By majority, the Chamber decided upon a sentence of 35 years, (Judge Lavergne dissenting). The term however, was subject to a reduction of 5 years due to the violation of Duch’s rights during his detention by the Cambodian Military Court between 10 May 1999 and 30 July 2007, as discussed in Chapter Three. Furthermore, Duch was found to be entitled to credit for time spent in detention at both the Military Court and under the authority of the ECCC. Together the reduction in sentence and credit for time spent in detention reduced his overall sentence to 19 years.

B The Supreme Court Review

The Supreme Court as the ECCC court of appeal reviewed the Trial Chamber’s sentencing decision. In their appeal against the Trial Chamber sentence the Co-Prosecutors argued that the mitigating factors were afforded excessive weight. In examining each of the mitigating factors, the SCC concluded that the effect the mitigating factors had on the Trial Chamber’s determination of sentence constituted an error of law. Specifically, mitigation on account of the ‘coercive climate in DK’ was of minimal degree because Duch failed to provide

83 Co-Prosecutors v Kaing Guek Eav alias Duch (Judgment) (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case File /Dossier No.001/18-07-2007, 26 July 2010) [615].
84 Judge Lavergne argued for a 30 year sentence consistent with Cambodian sentencing law. Separate and Dissenting Opinion of Judge Jean-Marc Lavergne on Sentence (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case File /Dossier No.001/18-07-2007, 26 July 2010).
85 Co-Prosecutors v Kaing Guek Eav alias Duch (Judgment) (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case File /Dossier No.001/18-07-2007, 26 July 2010) [631].
86 Co-Prosecutor’s Appeal at [216] cited in Kaing Guek Eav alias Duch, (Appeal Judgement) (Extraordinary Chambers in the Courts of Cambodia, Supreme Court Chamber, Case File No 001/18-07-2007, 3 February 2012) [358].
87 Kaing Guek Eav alias Duch, (Appeal Judgement) (Extraordinary Chambers in the Courts of Cambodia, Supreme Court Chamber, Case File No. 001/18-07-2007, 3 February 2012) [363].
88 Co-Prosecutors v Kaing Guek Eav alias Duch (Judgment) (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case File No. 001/18-07-2007, 26 July 2010) [608].
evidence that he had no choice in committing the crimes for which he was accused, or that he was personally threatened, or that he attempted to ‘dissociate himself from his criminal conduct.’ 

Similarly, Duch’s subordinate position in the hierarchy of Democratic Kampuchea as a mitigating factor was dismissed by the SCC on the basis of his knowledge that the orders he was given were unlawful and were not accompanied by actual threats causing duress.

The Trial Chamber’s treatment of Duch’s cooperation as a mitigating factor because it ‘undoubtedly facilitated the proceedings… [and] assisted in the pursuit of national reconciliation’ was challenged by the Co-Prosecutors. They argued instead that the accused’s cooperation was ‘limited, scarcely facilitated the economy of proceedings, and ultimately proved incomplete, selective and opportunistic.’ Upon their own review of Duch’s conduct during the proceedings, the SCC ultimately agreed with the Co-prosecutors and declared that the Court was not satisfied that his ‘cooperation provided substantial information in terms of quantity and quality.’ Therefore, limited weight only could be attached to this factor.

The Accused’s expression of remorse and public apologies were also considered of limited weight. This was not because of Duch’s late request for acquittal, which he had made without denying the facts or his culpability. The SCC held instead that because Duch’s final statement placed emphasis on why he was outside ECCC personal jurisdiction, and not on his remorse for his actions, he had effectively given up his last opportunity to demonstrate the sincerity of his remorse. The final mitigating factor, rehabilitation was then examined. Considering

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89 Kaing Guek Eav alias Duch (Appeal Judgement) (Extraordinary Chambers in the Courts of Cambodia, Supreme Court Chamber, Case File No. 001/18-07-2007, 3 February 2012) [364].
90 Kaing Guek Eav alias Duch (Appeal Judgement) Extraordinary Chambers in the Courts of Cambodia, Supreme Court Chamber, Case File No. 001/18-07-2007, 3 February 2012 [365].
91 Prosecutor v Kaing Guek Eav alias Duch (Judgment) (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case File No. 001/18-07-2007, 26 July 2010) [609].
92 Kaing Guek Eav alias Duch (Appeal Judgement) (Extraordinary Chambers in the Courts of Cambodia, Supreme Court Chamber, Case File No. 001/18-07-2007, 3 February 2012) [367].
93 Kaing Guek Eav alias Duch (Appeal Judgement) (Extraordinary Chambers in the Courts of Cambodia, Supreme Court Chamber, Case File No. 001/18-07-2007, 3 February 2012) [368].
94 Kaing Guek Eav alias Duch (Appeal Judgement) (Extraordinary Chambers in the Courts of Cambodia, Supreme Court Chamber, Case File No. 001/18-07-2007, 3 February 2012) [369].
ICTY jurisprudence with respect to this factor, the SCC held that only limited weight should be attributed to it in determination of sentence.\(^95\)

The SCC declared that the mitigating impact of these factors which was limited at best, was in fact neutralised when weighed against the outstanding aggravating elements and exceptional magnitude of the crimes for which the accused was found responsible.\(^96\) The Trial Chamber had erred by attaching undue weight to mitigating circumstances and insufficient weight to the gravity of the crimes. Such an error was sufficient to invalidate the sentence pursuant to Internal Rule 104 (1) (a) and an abuse of the Trial Chamber’s discretion.\(^97\)

In substituting the sentence of life imprisonment based on the gravity of the crimes and the aggravating circumstances, the SCC reasoned that the high number of deaths for which the accused was found responsible and the extended period of time over which the crimes were committed undoubtedly placed his case among the gravest before international tribunals.\(^98\) While noting the Trial Chamber’s capacity for close examination of the accused during trial proceedings as integral to the exercise of its discretion in sentencing, the SCC invoked two of the general purposes of criminal punishment: retribution and deterrence, as particularly relevant in this case in light of the gravity of the crimes in question.\(^99\) As the Director of S-21, Duch had overseen a ‘factory of death,’ where the lives of more than 12,272 people, including women and children, were mercilessly terminated.\(^100\)

\(^{95}\) Kaing Guek Eav alias Duch (Appeal Judgement) (Extraordinary Chambers in the Courts of Cambodia, Supreme Court Chamber, Case File No. 001/18-07-2007, 3 February 2012) [370].

\(^{96}\) Kaing Guek Eav alias Duch (Appeal Judgement) (Extraordinary Chambers in the Courts of Cambodia, Supreme Court Chamber, Case File No. 001/18-07-2007, 3 February 2012) [371].

\(^{97}\) Kaing Guek Eav alias Duch (Appeal Judgement) (Extraordinary Chambers in the Courts of Cambodia, Supreme Court Chamber, Case File No. 001/18-07-2007, 3 February 2012) [373].

\(^{98}\) Kaing Guek Eav alias Duch (Appeal Judgement) (Extraordinary Chambers in the Courts of Cambodia, Supreme Court Chamber, Case File No. 001/18-07-2007, 3 February 2012) [376].

\(^{99}\) Kaing Guek Eav alias Duch (Appeal Judgement) (Extraordinary Chambers in the Courts of Cambodia, Supreme Court Chamber, Case File No. 001/18-07-2007, 3 February 2012) [379-380].

\(^{100}\) Kaing Guek Eav alias Duch (Appeal Judgement) (Extraordinary Chambers in the Courts of Cambodia, Supreme Court Chamber, Case File No. 001/18-07-2007, 3 February 2012) [380].
The crimes of the accused were described as deserving of the highest criminal penalty as a 'fair and adequate response to the outrage these crimes caused in victims, their families and relatives, the Cambodian people and all human beings.'\textsuperscript{101} Furthermore, the passing of more than 30 years since the commission of the crimes does not lessen the necessity of the highest punishment, given that the Cambodian people still struggle to overcome the tragedies resulting from crimes which remain an 'affront to all humanity.'\textsuperscript{102}

The imposition of a life sentence in this case also amounted to a statement that the passage of time neither eliminates impunity nor warrants undue leniency, and all the more so as numerous contemporary governments continue to violate the human rights of their constituent peoples.\textsuperscript{103}

Thus, the SCC by majority authoritatively disavowed Duch’s conduct and refused to acquiesce in any way in his crimes by entertaining less than the maximum sentence.\textsuperscript{104} The language of the judgement seemed designed as ritual performance of the process of punishment carrying ‘manifest moral significance.’\textsuperscript{105} Unleashing the full arsenal of expressive sentencing, the SCC enforced the relevant international norms with maximum effect.\textsuperscript{106} In Damaska’s terms, the Chamber’s reference to ongoing human rights violations in other countries invoked the socio-pedagogic value of sentencing as working towards the strengthening of the norm of accountability through consistent denunciation of inhumane

\begin{enumerate}
\item Kaing Guek Eav alias Duch (Appeal Judgement) (Extraordinary Chambers in the Courts of Cambodia, Supreme Court Chamber, Case File No. 001/18-07-2007, 3 February 2012) [380].
\item Kaing Guek Eav alias Duch (Appeal Judgement) (Extraordinary Chambers in the Courts of Cambodia, Supreme Court Chamber, Case File No. 001/18-07-2007, 3 February 2012) [381].
\item Kaing Guek Eav alias Duch (Appeal Judgement) (Extraordinary Chambers in the Courts of Cambodia, Supreme Court Chamber, Case File No. 001/18-07-2007, 3 February 2012) [382].
\item Ibid 89 -90.
\item Ibid.
\end{enumerate}
conduct. The SCC opted for a pedagogic approach to sentencing based on its expressive import which simultaneously reinforced the Court’s authority.

As the SCC delivered its judgment, DeFalco reported that the announcement of the life sentence was what the large audience assembled at the Court was waiting to hear. This contrasted with the disappointment expressed by some civil parties at the prospect of Duch serving only nineteen years of his sentence. However, as Osiel argued assessing the significance of trials of mass atrocity calls for interpretation beyond the curative or even symbolic meaning attached to punishment. I explore this further in Chapter Eight.

V SCC REVIEW OF THE REMEDY FOR UNLAWFUL DETENTION

Though not a ground of appeal, the SCC made an *ex proprio motu* decision on the Trial Chamber’s grant of a remedy to the accused for violation of his human rights while held in detention by the Cambodian Military Court between 10 May 1999 and 30 July 2009. Upon examination of relevant ICTR jurisprudence the SCC by a supermajority of judges declared:

> Violations of human rights must constitute either an abuse of process or be attributed to the Tribunal in order to grant the Accused a remedy, and that also such remedies have always been granted in connection with failures by the Prosecution or other organ of the Tribunal.

The majority determined that, while the Trial Chamber had enunciated the test, it had awarded the remedy based on a sole legal authority in which abuse of process had been established, whereas in the case of Kaing Guek Eav, neither abuse of process nor error attributable to the Tribunal was established. The majority concluded that this constituted

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108 Ibid 345.
109 Randle DeFalco, ‘Case 001 Appeal Judgement: Duch Sentenced to Life’ Cambodia Tribunal Monitor (4 or 5 February 2012) 1, 5.
111 *Kaing Guek Eav alias Duch, (Appeal Judgement)* (Extraordinary Chambers in the Courts of Cambodia, Supreme Court Chamber, Case File No. 001/18-07-2007, 3 February 2012) [398].
112 *Barayagwiza v Prosecutor (Appeal Judgment)* (International Criminal Tribunal for Rwanda, Appeals Chamber Case No. ICTR-97-19-AR72, 3 November 1999) [101].
an error of law which made void the five year reduction to sentence awarded by the Trial Chamber. However, two out the seven SCC judges dissented and held that the remedy had been properly granted.

While concurring with the majority that a life sentence was warranted, international judges Klonowiecka-Milart and Jayasinghe could not support the majority decision which denied a remedy for the severe violation of the accused’s fundamental rights occasioned by his pre-trial detention. The judges in the minority disagreed with the majority’s ‘mechanistic application’ of the ad hoc Tribunal’s jurisprudence to the circumstances of Duch’s detention because of differences between the ECCC and the ad hoc Tribunals, and the national systems which caused the violation of rights. The minority judges argued that the ICTY and the ICTR were established under the authority of the UN Security Council pursuant to Chapter VII of the UN Charter. There was no national legislation enacting the operation of the Tribunals and domestic rules of criminal law and procedure are inapplicable to those international courts. The ECCC, on the other hand, is an internationalised court which although applying international law for some purposes is a domestic court in key respects. Indeed the Cambodian Government insisted upon having a national court with international assistance almost to the point of ‘rupture.’ In view of the historical background to Duch’s detention by the Military Court from 1999, it was clear that the case brought against Duch by the ECCC was ‘functionally an extension of the charges originally brought by the domestic court.’

The clear nexus between the accused’s pre-trial detention for 8 years without any substantive

113 Kaing Guek Eav alias Duch (Appeal Judgement) (Extraordinary Chambers in the Courts of Cambodia, Supreme Court Chamber, Case File No. 001/18-07-2007, 3 February 2012) [399].
114 Kaing Guek Eav alias Duch (Appeal Judgement) (Extraordinary Chambers in the Courts of Cambodia, Supreme Court Chamber, Case File No. 001/18-07-2007, 3 February 2012) Part 1X Partially Dissenting Joint Opinion [1].
proceedings contrasted with the relatively brief periods of detention ruled on by the ad hoc Tribunals, which involved jurisdictionally distinct authorities.117

The minority highlighted the decisions of the UN Human Rights Committee and the European Court of Human Rights where the gravity of the deprivation of liberty without sufficient grounds has been found to be a violation of a fundamental right in cases involving far shorter periods of unlawful detention.118 The judges noted that the complexity of the case may dictate a lengthier period of detention, but that the authorities in Duch’s case exceeded statutory limits and failed to proceed expeditiously over the extremely long period of eight years.119 The minority agreed with the Trial Chamber that the ECCC is uniquely placed to grant a remedy to the accused that will not frustrate the mandate of the Court. Such remedy should be of a restorative nature to provide redress for excessive unlawful detention.120 Redress in the form of sentence reduction has been found to be an appropriate remedy in such cases.121 Consistent with the 2009 Cambodian Criminal Code and internationally recognised standards of fairness, the minority judges found that Duch’s life sentence should be commuted to a fixed term of 30 years.122

The split decision demonstrated the accommodation of disagreement between the judges through expressive due process. The debate itself communicated different visions of

119 Kaing Guek Eav alias Duch (Appeal Judgement) (Extraordinary Chambers in the Courts of Cambodia, Supreme Court Chamber, Case File No. 001/18-07-2007, 3 February 2012) (Part 1X Partially Dissenting Joint Opinion) [14].
120 Kaing Guek Eav alias Duch (Appeal Judgement) (Extraordinary Chambers in the Courts of Cambodia, Supreme Court Chamber, Case File No. 001/18-07-2007, 3 February 2012) (Part 1X Partially Dissenting Joint Opinion) [14].
121 Chraidi v Germany (Judgement) (European Court of Human Rights, Application No 65655/01, 26 October 2006) [24-25]; And see Report on the Effectiveness of National Remedies in Respect of Excessive Length of Proceedings, Study No. 316/2004, adopted by the European Commission for Democracy Through law, 69th Plenary Sess., (3 April 2007) [228] (‘taking into account the delays in the assessment of punishment must be considered an appropriate form of redress in criminal proceedings’).
transitional justice proceedings. The majority adopted a narrow rule-based position divorced from the local circumstances of Duch’s detention and the ECCC as a model court within Cambodia. The minority, on the other hand, addressed the particular circumstances of the ECCC’s creation and drew from a body of international precedent to assess the Trial Chamber’s substantive decision to enforce Duch’s human rights within the Cambodian justice system.

VI CIVIL PARTY APPLICATIONS

In Chapter Four, I discussed issues surrounding the ECCC’s management of the civil party application process and the Co-Defence challenge to the admissibility of 24 applications. The Trial Chamber deferred determination of the admissibility of the applications to the time of judgment. Subsequently, 2 civil party applicants withdrew their applications and 1 applicant abandoned his civil action, making the total number of admitted civil parties 90. The Trial Chamber’s final determination of the applications in its judgement is outlined below.

A Trial Chamber Determination

To substantiate claims for reparations the Chamber required each civil party to establish a causal connection between the criminal conduct of the accused and the injury they had suffered as a victim of his crimes. Direct victims, or survivors of S-21 and S-24 were required to provide evidence of their internment or placement at the security centre.

The Chamber described its two-tiered approach to determining eligibility for civil party status: first, the Chamber assessed the credibility of information supplied by applicants at first instance on a *prime facie* basis. This initial process was distinct from the Chamber’s subsequent determination of the merits of all civil party applications, taking account of all other evidence submitted in the course of the proceedings. In addition, indirect victims were required to substantiate their claims to injury based on kinship or ‘special bonds or affection,’

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123 *Co-Prosecutor v Kaing Guek Eav alias Duch (Judgment)* (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case File /Dossier No.001/18-07-2007, 26 July 2010) [640-641].
or dependence on a direct victim of S-21 or S-24. In this, the Chamber was persuaded by the evidence of expert witness Chhim Sotheara regarding the often attenuated nature of familial relationships within Cambodian culture.\textsuperscript{124}

At the judgement stage the Trial Chamber found that 24 civil party applicants failed to substantiate a link with Duch’s conduct at S-21 or S-24 and the harm they had suffered. Thereafter, 22 civil party applicants exercised their right of appeal to the Supreme Court against the rejection of their claims for reparations.

B  

\textit{Supreme Court Determination of Civil Party Appeals}

The appellants alleged errors of law by the Trial Chamber in determining the admissibility of their applications for civil party status. These were categorised by the SCC as error in the formulation of who is a victim before the ECCC, error in creating a two tiered admissibility review of civil party applications, and error in determining the standard of proof applicable to civil party applications.\textsuperscript{125}

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\textit{The Definition of Victim at the ECCC}

The appellants submitted that the test for admission as civil parties was too strict and outside the requirements of the Internal Rules. In addition, it was alleged that the Trial Chamber jeopardised the fairness of the proceedings because the requirement of the ‘special bonds of affection criterion’ was not foreseeable at the point of application, and that notice of the test was not provided by the Trial Chamber before judgment.\textsuperscript{126}

The SCC examined the requirement of injury in civil party claims under Article 13 the Cambodian Code of Criminal Procedure. The Chamber concluded that the meaning of injury

\textsuperscript{124} \textit{Co-Prosecutors v Kaing Guek Eav alias Duch (Judgment)} (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case File /Dossier No. 001/18-07-2007, 26 July 2010) [643].

\textsuperscript{125} \textit{Kaing Guek Eav alias Duch (Appeal Judgement)} (Extraordinary Chambers in the Courts of Cambodia, Supreme Court Chamber, Case File No. 001/18-07-2007, 3 February 2012) [406-502].

\textsuperscript{126} \textit{Kaing Guek Eav alias Duch (Appeal Judgement)} (Extraordinary Chambers in the Courts of Cambodia, Supreme Court Chamber, Case File No. 001/18-07-2007, 3 February 2012) [406].
with respect to indirect victims is ‘congruent with many plausible scenarios involving a wide range of persons,’ but ‘the actuality of injury must be established in each case.’ The SCC found that the Trial Chamber’s discretionary presumption that ‘special bonds of affection or dependence’ with the direct victim as a criterion for admissibility for civil parties as indirect victims was consistent with the notion of injury under Article 13. While the presumption took account of the attenuated nature of Cambodian familial relationships as described by expert Chhim Sotheara, only in exceptional circumstances will non-immediate family members be considered to have had special bonds of affection with or dependence on, direct victims. As to the narrowing of the scope of the presumption, the SCC found that this arose from the Trial Chamber’s discretion and not the parties’ right to benefit from it. Furthermore, the appellants’ rights were not affected by lack of notice as to the limitation because they had a continuing burden of proving their injury through the giving of evidence. Questioning of civil parties by judges throughout the proceedings on the nature of their suffering was evidence this.

2  Civil Party Application Process

The SCC reviewed the process of civil party application, including the letters of ‘interim recognition’ sent by the Greffier of the Co-Investigating judges Office to applicants, statements of Judge Lavergne to applicants at the Initial Hearing on 17 February 2009, and the Trial Chamber’s summary of the two-tiered approach to determining applications. The Chamber also reviewed the applicable Cambodian law and found it provided sufficient basis for the legality of the process adhered to by the ECCC. Specifically, ECCC Internal Rule 100 (1) reflects Article 355 of the 2007 Code of Criminal Procedure, which provides:

127 Kaing Guek Eav alias Duch (Appeal Judgement) (Extraordinary Chambers in the Courts of Cambodia, Supreme Court Chamber, Case File No. 001/18-07-2007, 3 February 2012) [417].
128 Kaing Guek Eav alias Duch (Appeal Judgement) (Extraordinary Chambers in the Courts of Cambodia, Supreme Court Chamber, Case File No. 001/18-07-2007, 3 February 2012) [449].
129 Kaing Guek Eav alias Duch (Appeal Judgement) (Extraordinary Chambers in the Courts of Cambodia, Supreme Court Chamber, Case File No. 001/18-07-2007, 3 February 2012) [450].
in the criminal judgement, the court [of first instance] shall also decide upon civil remedies. The court shall determine the admissibility of the civil party application and also decide on the claims on the civil party against the accused and civil defendants.\textsuperscript{130}

The SCC found that all civil party representatives, Cambodian and international, ought to have been familiar with Cambodian criminal procedure, which clearly empowered the trial court to finally determine the admissibility of civil party applications in the judgement. Thus, advance notice of the procedure and opportunity was available to the civil party appellants.\textsuperscript{131}

Finding the Trial Chamber was not in error as to procedure, the SCC also found that, whatever ambiguity may have arisen as to civil party standing before the ECCC, this did not prevent civil party appellants asserting their rights in trial proceedings.\textsuperscript{132} Nevertheless, the SCC recognised that there was a ‘fundamental misunderstanding between the Trial Chamber and the civil party appellants as to the merits and legal effect of the initial review of their applications.’\textsuperscript{133}

The SCC also conceded that the framework and the novel character of the ECCC victim participation scheme which made possible multiple civil parties to trials of mass crimes, conceivably lacked clarity as to the particulars of procedure. This may have been the source of confusion as to what was required of civil parties when submitting evidence in support of their application.\textsuperscript{134} Noting the ‘anguish’ caused by the unclear admission requirements, the SCC allowed the civil party appellants to submit further evidence of their eligibility during the appeal process. In light of the new evidence the Court received, the SCC found that 10 civil party applications which had been rejected by the Trial Chamber, were substantiated on appeal. They were therefore accepted by the SCC as civil parties and thus eligible for

\textsuperscript{130} \textit{Criminal Code of Procedure of the Kingdom of Cambodia 2007} art 355.

\textsuperscript{131} \textit{Kaing Guek Eav alias Duch (Appeal Judgement)} (Extraordinary Chambers in the Courts of Cambodia, Supreme Court Chamber, Case File No. 001/18-07-2007, 3 February 2012) [496].

\textsuperscript{132} \textit{Kaing Guek Eav alias Duch (Appeal Judgement)} (Extraordinary Chambers in the Courts of Cambodia, Supreme Court Chamber, Case File No. 001/18-07-2007, 3 February 2012) [500].

\textsuperscript{133} \textit{Kaing Guek Eav alias Duch (Appeal Judgement)} (Extraordinary Chambers in the Courts of Cambodia, Supreme Court Chamber, Case File No.0001/18-07-2007, 3 February 2012) [501].

\textsuperscript{134} \textit{Kaing Guek Eav alias Duch (Appeal Judgement)} (Extraordinary Chambers in the Courts of Cambodia, Supreme Court Chamber, Case File No. 001/18-07-2007, 3 February 2012) [501].
reparations. The Chamber also accepted a submission of one civil party that clerical error had led to the omission of her child’s name from the Trial Judgment.

3 Trial Chamber Error in Determining the Standard of Proof?

The SCC confirmed the Trial Chamber’s requirement that civil parties satisfy the Court of the injury they suffered personally as a direct consequence of the accused’s criminal conduct. As to the correct standard of proof at the reparation stage, the SCC held that the Trial Chamber’s application of the ‘more likely than not to be true’ or the ‘preponderance of evidence test’ was in accordance with international practice and the standard common to civil claims across the world. Furthermore, the Trial Chamber had shown ‘flexibility and broadly accepted any documentary evidence’ that directly or indirectly supported a claim in light of the difficulties involved in obtaining official information in Cambodia.

However, the SCC agreed with the civil party appellants that the Trial Chamber failed to clearly inform the appellants of the standard of proof applicable at the reparations stage. The lack of clarity as to which standard was to apply ‘caused confusion and frustration to civil party appellants’ when the judgement was handed down. Nevertheless, it was found that any prejudice suffered by the affected appellants was cured by the SCC’s acceptance of additional evidence in support of rejected claims.

135 Kaing Guek Eav alias Duch (Appeal Judgement) (Extraordinary Chambers in the Courts of Cambodia, Supreme Court Chamber, Case File No. 001/18-07-2007, 3 February 2012) [535-628].
136 Kaing Guek Eav alias Duch (Appeal Judgement) (Extraordinary Chambers in the Courts of Cambodia, Supreme Court Chamber, Case File No. 001/18-07-2007, 3 February 2012) [629].
137 Kaing Guek Eav alias Duch (Appeal Judgement) (Extraordinary Chambers in the Courts of Cambodia, Supreme Court Chamber, Case File No. 001/18-07-2007, 3 February 2012) [522].
138 Kaing Guek Eav alias Duch (Appeal Judgement) (Extraordinary Chambers in the Courts of Cambodia, Supreme Court Chamber, Case File No. 001/18-07-2007, 3 February 2012) [531].
139 Kaing Guek Eav alias Duch (Appeal Judgement) (Extraordinary Chambers in the Courts of Cambodia, Supreme Court Chamber, Case File No. 001/18-07-2007, 3 February 2012) [534].
140 Kaing Guek Eav alias Duch (Appeal Judgement) (Extraordinary Chambers in the Courts of Cambodia, Supreme Court Chamber, Case File No. 001/18-07-2007, 3 February 2012) [527].
141 Kaing Guek Eav alias Duch (Appeal Judgement) (Extraordinary Chambers in the Courts of Cambodia, Supreme Court Chamber, Case File No. 001/18-07-2007, 3 February 2012) [534].
The SCC’s review of the civil party admission process revealed the shortcomings in the
ECCC’s communications with victims and their representatives. The confusion sown by the
fledgling court could only be partially rectified by the SCC at the appeal stage. In the interim,
some applicants suffered a form of re-victimisation at the prospect of having their status as
civil parties taken from them. However, the take up rate of applications from the earliest
stages of the Court’s life with strong support from local and international civil society groups
indicated that much more was required of the in-country justice process than it was designed
to cater for. The strong demand for inclusion of victims of mass atrocity in the legal process
speaks of the need for planning on the part of future transitional courts to incorporate
infrastructure and personnel to serve the legitimate expectations of victims of crimes.

VII  REPARATIONS

A  Trial Chamber Ruling

Internal Rule 23 (11) and (12) govern the award of reparations to civil parties. Such awards
are against the accused and are moral and collective only in nature. 142 Civil party claims for
reparations against Duch included: compilation and publication of statements his statements
of apology; individual monetary awards or the establishment of a fund for victims’ needs,
requests for certain measures by the Cambodian government, requests for the construction of
pagodas and other memorials, requests to preserve the S-21 archives, Vann Nath’s paintings,
and the S-21 and S-24 sites, as well as requests for the provision of free medical care and
educational measures for victims. 143

Most of the claims were beyond the mandate of the Court because the ECCC Rules do not
allow for any monetary reparations, and requests involving the Cambodian government are
not within the jurisdiction of the Chamber. The fact that the accused was indigent, meant
that the reparations order was limited to the publication of statements of apology or
expressions of remorse as some satisfaction to victims, and as ‘the only tangible means by

142 ECCC Internal Rules 23 (11), (12).
143 Co-Prosecutors v Kaing Guek Eav alias Duch (Judgment) (Extraordinary Chambers in the Courts of
Cambodia, Trial Chamber, Case File No.001/18-07-2007, 26 July 2010) [667-674].

275
which Kaing Guek Eav could acknowledge his responsibility and the collective suffering of victims."144

B Supreme Court Review

The civil party appellants made extensive submissions to the SCC on the right to reparations under international law and requested orders for the enforcement of the reparations they had claimed. However, the SCC made no new reparations awards. Though recognising the right of victims of gross human rights violations to reparation, the Chamber re-iterated the constraints flowing from the ECCC reparations framework.145 The SCC expressed the view that although collective and moral reparations may not fully compensate the victims of human rights abuses physically or economically, other general purposes of reparations are fulfilled under the ECCC scheme. This includes the Court’s efforts to verify and disclose the truth surrounding the commission of the crimes in all of the Court’s units, and disseminate information on the trial proceedings to support the social quest for ‘historical truth.’146 In addition, the wide circulation of the court’s judgements may both promote ‘public and genuine discussion on the past,’ and help to reduce denial and distortions of the truth.147

Thus, the SCC limited itself to a didactic statement of the Court’s contribution to victims of the Khmer Rouge and Cambodia generally. However, in Case 002/01 more tangible reparations were endorsed by the Court following the amendments to the Internal rules which altered the victim participation scheme, and changed the powers of the Victims Support Section. I discuss the reparations award of this case in Chapter Eight.

144 Co-Prosecutors v Kaing Guek Eav alias Duch (Judgment) (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case File No.001/18-07-2007, 26 July 2010) [668].
145 Kaing Guek Eav alias Duch (Appeal Judgement) (Extraordinary Chambers in the Courts of Cambodia, Supreme Court Chamber, Case File No. 001/18-07-2007, 3 February 2012) [717].
146 Kaing Guek Eav alias Duch (Appeal Judgement) (Extraordinary Chambers in the Courts of Cambodia, Supreme Court Chamber, Case File No. 001/18-07-2007, 3 February 2012) [661].
147 Kaing Guek Eav alias Duch (Appeal Judgement) (Extraordinary Chambers in the Courts of Cambodia, Supreme Court Chamber, Case File No. 001/18-07-2007, 3 February 2012) [708-709].

276
VIII CONCLUSION

The judgements of the Court give expression to the formal outcome of the trial in language respecting law and legal conventions. However, the authors have also been the judicial audience of the proceedings and exercise their voice in response to the trial’s communications. The question is: who are judges addressing in the judgment? The expressivist may say the judges’ voices are to all the world as they enforce international criminal law and interpret international norms. From a communication perspective, the judicial voice may one of engagement with local concerns that have surfaced in trial proceedings. Of course, given the monumental nature of their task in trials of mass atrocity, judges may also see themselves as addressing a society’s future and speaking to history.

With the advantage of directly observing Duch throughout the proceedings, the Trial Chamber Judges in the process of judgement engaged with both the law and the dialogue of the trial. Their Judgement is a composite of these inputs. While the Trial Chamber’s determination of Duch’s guilt demonstrated the expressivism of norm interpretation and due process, the Judgement’s coverage of the history of armed conflict in Cambodia during the rule of Democratic Kampuchea was communicative in its detail.

The determination of sentence by the Trial Chamber attempted to synthesise elements inhering in Duch from his personal and social conditioning in Cambodia, as well as his psychological shaping by the coercive Khmer Rouge regime under paranoid leadership. The Judges’ attention to social and political factors affecting the accused, their direct observation of Duch and their analysis of the evidence perhaps reflected the inquisitorial trial’s emphasis on the search for a form of ontological truth as opposed to reasoning from the dualistic truth revealed in party-based proceedings. The court’s reliance on the evidence of the psychological experts’ report and the extensive references to its conclusions not only justified the fixed term sentence, but suggested the importance of conveying aspects of the analysis to the Court’s public. This, I suggest was indicative of a communicative approach to judgment.

The process of judgement in the Supreme Court largely reflected expressive due process, but had arguably communicative effects. Duch’s final hour request for acquittal brought the
personal jurisdiction of the ECCC to centre-stage of the court process, and became the subject of legal and historical scrutiny by the Supreme Court Chamber. The Chamber’s engagement with the history of who the ECCC may prosecute put the Cambodian Government’s protestations on the limits to possible Khmer Rouge convictions under a legal and historical microscope. The SCC provided a detailed response not only to Duch’s appeal, but the challenge to ECCC jurisdiction posed by the Government to the investigations in Cases 003 and 004.

The SCC’s retributive approach to sentencing based on the gravity of the crimes aligned with the expressivism of international criminal justice, particularly the international interest in ending impunity for mass atrocity crimes through deterrence of contemporary perpetrators. However, the split decision on the Trial Chamber’s grant of a remedy for the violation of Duch’s human rights when detained by the Cambodian Military Court reflected a plurality of views on the interpretation of standards of justice and fairness in the transitional context. The dissent arguably gave voice to one expression of what McEvoy described as a ‘thicker understanding’ of transitional justice process’ at the judicial level.148 The minority resisted automatic reliance on the precedents of the ICTR as inappropriate in the case of the ECCC given its predominantly national character. They called instead for a less mechanistic approach to sentencing which admitted the possibility of restorative remedies when the defendant has in fact suffered violation of his/her human rights. While the dissent was part of expressive due process, the minority opinion seemed in tune with the more communicative spirit of the ECCC which I have illustrated in previous chapters.

Finally, while the processes of judgement outlined in this chapter marked the conclusion of the ECCC’s first trial. The ECCC had proved its capacity to yield fair trial process when unimpeded by political interference. As Chhim Sotheara testified, for many Cambodians justice at the national level was the first step towards social repair and reconciliation.

Nevertheless, as I discuss in the next chapter, a concluded trial is the end of just one process in a sequence of transitional justice actions that individuals and societies broken by mass violence may participate in.
CHAPTER EIGHT
THE LEGACY OF THE DUCH TRIAL: A COMMUNICATIVE THEORY OF THE TRANSITIONAL TRIAL

I  INTRODUCTION

This study focused on transitional trial proceedings as a medium of communication through which a post-conflict society might grapple with its violent past. The substantial investment required to support the operation of transitional courts means that their legacy is highly significant. In this final chapter I consider the legacy of ECCC trial proceedings in its first trial from the perspective of the communication thesis I have proposed.

While the notion of transitional justice might be distilled to both individual and communal engagement with the past for the purpose of social repair in the aftermath of atrocity crimes, I have argued that internationally assisted transitional trials have been conducted from other bases. International trials have been lauded for their expressive value. The expressivism of transitional trials was tied to their legitimacy as impartial triers of fact as courts enforced international norms and modelled due process in societies transitioning to democratic governance.

In Chapter Two, I discussed the expressive surpluses of the internationalised courts created since the early 1990s and their corresponding communication deficits with respect to the societies they served. Shifting focus to communication within transitional trials speaks to the rupture that still affects the society, rather than bolstering the specific purposes of international criminal justice. This is because communication is not a one-sided instruction or message-sending process. Communication carries an intention to engage another with the possibility of response in some form. There is some conflation of expressivism with communication in the literature. Expressivists, for instance, argue that trials have a
pedagogical or educative function.\textsuperscript{1} While I acknowledge a degree of overlap in the nomenclature, expressive actions and statements do not equate with, and in fact may silence, dialogue which may be essential to societal reconstruction in the aftermath of atrocities. The distinction I have made is that communicative trials are concerned with the essence of exchanges between trial actors that move from the didactic to something revelatory or affirming for those taking part in the discussion, and for the society affected by the crimes.

The significance of dialogue on the past within transitioning societies has been identified in studies of the Balkans communities which were consistently critical of the non-inclusive and non-communicative approach of the ICTY towards them as primary stakeholders in the justice process. In Chapter Three, I described the isolation of the Cambodian people in the aftermath of the Khmer Rouge revolution and the significance of the establishment of a communication platform within ECCC trials to address, in some measure, the societal rupture caused by the Khmer Rouge in Cambodia.

Drawing from the work of Osiel and Mégret, my argument for a communicative theory of the transitional trial turns on the operation of two critical factors in trial process: representation and dialogue. The viability of a communicative theory applicable to the ECCC is made possible by the Court’s more representative structure and discursive trial procedure which includes the legitimate voice of the victim. My case study of the first trial at the ECCC suggested that inquisitorial procedure adapted to the conditions of the internationalised trial is a viable vehicle for the communicative trial. The mixed judiciary, the blend of the national with international personnel in the pre-trial investigation, prosecution and defence, and the embrace of the civil party action created a representative structure for the trial. The inquisitorial mode of the proceedings managed by judges attuned to the ECCC’s reconciliatory purpose admitted broader dialogue in trials than any other internationalised transitional court to date.

This chapter revisits aspects of the ECCC’s procedure to illustrate its communication dynamics. I situate my discussion of the ECCC’s inquisitorial proceedings within debates on the notion of the fair transitional trial and the role of the victim in internationalised proceedings. I discuss aspects of civil party participation, role-sharing between international and national court officers and civil society’s engagement with the ECCC as enhancing the communicative value of the Court’s first trial. I highlight manifestations of the elements of communication in proceedings: trial dialogue and representation, by summarising the debates that emerged during the trial on the topics of trauma and the victim/perpetrator relationship in Cambodia. I argue that while the Duch trial had an expressive legacy, the representative and dialogic nature of the trial proceedings presented a model of the communicative trial which did not erode the notion of the fair trial.

II COMMUNICATIVE DYNAMICS AT THE ECCC

In Chapter Two I discussed some of the practical problems facing transitional courts in the stages of formation and their early operation. The ICTY, for example, could not secure the arrests of high-level perpetrators for want of cooperation from national and regional authorities. Mistakes in the choice of the applicable law for the Kosovo hybrid panels caused friction with the local population until the necessary adjustments were made by the institution’s international representatives. From the time the ECCC Agreement was made commentators expressed doubts about the proposed institution’s capacity to conduct fair trials in view of the scope for national control of the Court. When the Court was established the merging of fragmented Cambodian criminal law and procedure with the necessary principles of international criminal trials produced an innovative body of rules and procedure for the ECCC, which raised expectations of unparalleled participatory proceedings. However, the drafters of the ECCC Internal Rules did not make provision for contingencies such as the extensive take up of the civil party action by the Cambodian victim constituency. Nor did the designers of the ECCC make adequate provision for financing the Court or staffing the Victims Unit to provide services to civil party applicants and vet applications. This left the Court in the position of resolving such matters as the first trial proceeded or, in the case of the disputed civil party applications, by ruling on them collectively at the stage of judgement. Although the lack of appropriate planning and financing of the ECCC dampened
expectations, the communicative potential of the Duch trial remained intact, and even as the complexities of the ECCC’s procedural scheme became apparent. Below I discuss the communicative attributes of civil party participation at the ECCC, role-sharing between national and international trial players, the nature of trial dialogue and representation, and the search for the truth through the process of judgement at the ECCC.

A Communicative Aspects of Civil Party Participation

In Chapter Six, I noted that the Trial Chamber judges progressively restricted the participation rights of civil parties during the proceedings as a result of poorly coordinated and repetitious questioning of witnesses by the four teams of civil party lawyers, resulting in delays. Of concern to Duch’s international Co-Defence lawyer was the prospect of multiple represented civil parties acting as auxiliary prosecutors in breach of the equality of arms principle. The Chamber’s response was to limit civil party participation rights so as to ensure that the accused faced only one prosecuting authority. This included their exclusion from making submissions on sentencing and the character of the accused. Better planning in advance of the trials would have permitted constructive participation which was at least generally representative for the civil parties rather than excluding them entirely from a process they might have legitimately contributed to.

As to the problem of delayed proceedings, civil party lawyer Alain Werner believed that the ECCC, as the first internationalised court to apply predominantly civil law, was in a position to show that the inquisitorial procedure could work in theory, with a degree of adaption depending on the number of accused and civil parties. Journalist and international tribunal monitor, Thierry Cruvellier, compared the poorly coordinated practice of civil party representation at the ECCC to the predicament of the victim at the ICTY:

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

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On civil party exclusion from sentencing and character proceedings, Judge Lavergne, dissenting from the majority ruling argued for the inclusion of civil parties on the grounds of concern for justice in the context of the transitional trial. Lavergne raised a duty in the court to civil parties particularly in the circumstances of delayed justice and in terms of what victims could add to the truth-finding process. Significantly, he highlighted the importance of debate within the ‘serenity of the court room’ to which civil parties could contribute substantively. His argument was grounded in the principles underlying the civil party action, a conception of justice beyond strictly retributive or expressive outcomes, and the ECCC’s stated purpose of assisting reconciliation in Cambodia. He acknowledged that the circumstances of trials for mass atrocity call for a wise approach to the principles at stake. However, he noted in particular that civil party participation in proceedings on the character of the accused was generally not considered a violation of the equality of arms principle or the notion of the fair trial within civil law system.

I discussed in Chapter One that there has been a degree of convergence between the adversarial and inquisitorial procedural forms in international courts, indicating that the traditions can be revised to accommodate the exigencies of the transitional context. In any case, reinvention at the domestic level proved possible, suggesting that the traditions are not as ‘monolithic’ as scholars and practitioners have presented them. In common law jurisdictions, the elevation of the rights of the accused to an unassailable principle with the

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4 Decision on Civil Party Co-lawyers’ Joint Request for a Ruling on the Standing of Civil party Lawyers to make Submissions on Sentencing and Directions Concerning the Questioning of the Accused, Experts and witnesses Testifying on Character (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case File No. 001/18-07-2007 ECCC-TC, 9 October 2009) Lavergne dissent [30].
5 Decision on Civil Party Co-lawyers’ Joint Request for a Ruling on the Standing of Civil Party Lawyers to make Submissions on Sentencing and Directions Concerning the Questioning of the Accused, Experts and Witnesses Testifying on Character (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case File No. 001/18-07-2007 ECCC-TC, 9 October 2009) Lavergne dissent [31].
role of victims in criminal proceedings limited to that of victim-witness, is not as legally pure as is sometimes suggested. As Stover pointed out, in nineteenth century England ‘the entire system of criminal law depended on prosecution by the individual and not the state.’ In most of the American colonies victims had central roles in the prosecution process and if they succeeded in their claim against the wrongdoer, stood to benefit financially or in a psychological sense. The antecedents in common law systems suggest an exaggerated emphasis on the primacy of the rights of the accused when substantive victim participation is excluded in international criminal proceedings, except as witness. This seems all the more so when the social value of inclusion is considered. Lavergne’s defence of civil party participation in proceedings (discussed in Chapter Six) adds to the debate around restricting the role of the victim in criminal proceedings and retaining predominantly adversarial procedural form in international trials. Resistance to what may be seen as longstanding European authoritarianism through the inquisitorial trial should be viewed against modern fair trial standards under civil law systems, and informed by the extraordinary nature of transitional contexts elucidated in part by Lavergne’s analysis.

The Lavergne dissent, while not divorced from the expressivism of criminal justice, connects with the social purpose of trials in contexts where the foundations of trust and community have been destroyed. The nuanced notion of justice he articulated, which included debate in the courtroom with a significant role for survivors of crimes, recognised the role of dialogic truth in engaging communally with past atrocities. As I noted in Chapter One, the dynamic of dialogue or communication in social recovery has been recognised in transitional justice literature and peace studies. Borrowing imagery from Lederach in his work in the area of peace building, the communicative theory I posit invites us to another country ‘whose geographies and realities’ show us what ‘destructive relationships produce and the legacies they leave.’ Nowhere was this more evident than in the statements made by the civil parties

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8 Ibid 24.
9 Richard Vogler, A World View of Criminal Justice (Ashgate, 2006), 159.
and victim-witnesses at trial. In Chapter Five, I discussed how the ECCC Trial Chamber in the course of deciding the matter of reparations instituted a forum for the hearing and examination of 22 civil party statements. Under the ECCC procedural rules this was not a separate process but a continuation of the trial proceedings.

The civil party statements in narrative form were subject to examination by the judges and other trial participants, including the accused. This part of the trial was not a clinical fact-finding exercise. The space created for survivor story-telling produced a forum traversing personal and social histories, giving concrete expression to the wide-ranging effects of the Khmer Rouge regime and the years of silence that followed its overthrow. The format adopted by the judges permitted the civil parties to put questions to the accused. In turn, the accused was able to exercise a general right of reply, as well as answer specific questions directed to him. Communication flowed from victim to the Court, victim to perpetrator, victim to lost family members, perpetrator to victim and from victims to the wider audience of the ECCC, including the vast victim constituency in and beyond Cambodia. The proceedings took on a restorative tenor as the proceedings mediated by the judges connected the civil parties to the accused. Something of the ritual value of the trial in Durkheimian terms emerged, not through the process of punishment, but rather through confrontation and dialogue.

Though the civil parties made up only a fraction of the Khmer Rouge victim constituency, they spoke as special representatives of those they knew who died at the hands of the regime, and vicariously for those not chosen to speak. The prosecution and defence were able to question the civil parties, but theirs was not a token presence or one harnessed solely for the purpose of the prosecution. In various ways, they added something approaching the sacred to the justice process as they represented family members destroyed by the regime. Neth Phally’s private ceremony to release his brother’s spirit at the end of his testimony in which the court acquiesced was perhaps the best example of this. The exchanges between the civil parties, the judges and other court actors expanded the discussion of the victim perspective on Duch’s crimes within the sanctity of a respectful court. During the forum there was no seizing of the trial platform by the accused or any other trial participant to propagate views
at odds with the international criminal justice project as predicted by Damaska.\footnote{Damaska above n 1, 346-47.} Even in Case 002 under the revised civil party representation scheme, and where the defendants remained defiant as to their legal responsibility, the engagement with civil parties’ testimonies in a similar forum was measured and polite. Nuon Chea, for instance, indicated in a response to civil party Yim Roumdoul, that he holds ‘moral responsibility’ for the events occurring during the regime and expressed his condolences to the victims suffering their effects.\footnote{Co-Prosecutors v Nuon Chea (Transcript of Trial Proceedings) (Extraordinary Chambers in the Courts of Cambodia, Trial, Chamber, Case No 002/19-09-2007-ECCC/TC, Trial Day 186, 30 May 2013.) 84; And see ECCC Court Report (June 2013) 7.}

Chapter Three discussed reasons for establishing a communicative platform within ECCC trial process by analysing the societal rupture caused by the crimes of the Khmer Rouge, and the national government’s policy of reconciliation by forgetting. That the ECCC managed to provide a platform of this kind within the society in which the crimes occurred, where their legacy continues, and despite shortcomings in ECCC planning and resourcing is not only an extraordinary achievement, but also showed the ECCC’s capacity to accommodate socially significant dialogue within the framework of prosecution.

B Civil Society Support and Communication

Civil party participation in the trial proceedings was made possible not only by the party status granted under the ECCC Internal Rules, but by the consistent support of civil society groups. A significant feature of the Cambodian transitional context was that civil society was comparatively well developed. In Chapter Three I discussed the development of a civil society sector in Cambodia following the 1990 peace accords as the government permitted international non-governmental organisations (NGOs) to work in the country. The NGOs became active supporters of trials for Khmer Rouge leaders. They collected evidence of the crimes of the regime, disseminated information and conducted education programs throughout the country. Local NGOs emerged to spread the word within regions where illiteracy levels were high. Justice and human rights conversation in communities was thus
catalysed through the agency of a growing civil society. I discussed in Chapter Four the readiness of Cambodian NGOs to make victims aware of their rights before the ECCC and to assist them in their thousands to apply for admission as civil parties or victim complainants. In the absence of sufficient funding for victims services and outreach at the ECCC, at least 15 civil society groups supported the Court in those areas.\textsuperscript{13} In fact, in view of the ECCC’s budgetary constraints in its early years, there was a conscious decision by ECCC staff to leave outreach work to NGOs to capitalise on their established networks and experience working in communities. The ECCC concentrated its efforts instead, at least until 2009, on public relations through its Public Affairs Section (PAS).\textsuperscript{14}

Although the informal outsourcing of victim support and information dissemination on the work of the ECCC was uncoordinated, the NGOs remained invested in assisting the trial process as pivotal to social development in Cambodia. Cambodian NGOs were particularly supportive of ECCC victim participation processes because they saw themselves as helping reduce the gap between the internationalised court and Cambodian society, thus assisting reconciliation.\textsuperscript{15} In Chapter One, I referred to Lederach’s web metaphor as applied to peace building in post-conflict societies. I suggested the metaphor’s applicability to the ECCC and its support base. Civil society groups actively connected victims of the Khmer Rouge to the work of the ECCC. To the web metaphor Lederach attached the notion of ‘critical yeast’ in bringing about social transformation in societies ruptured by violence. Using the function of yeast in bread-baking, he described how a small ingredient among multiple large ingredients may be the critical element that transforms the heavy dough into light edible bread. By voluntarily assuming roles not being undertaken by the Court, civil society groups were the yeast in Cambodia providing a body of social support to the ECCC.

The NGOs assumed multi-faceted roles. The Transcultural Psychosocial Organisation (TPO) for example, provided expert testimony on victim trauma, and under a memorandum of understanding with the ECCC, provided psychological support to approximately 90 civil

\textsuperscript{13} Ciorciari above n 2, 237.
\textsuperscript{14} Ibid 237-238.
\textsuperscript{15} Christoph Sperfeldt, ‘Cambodian Civil Society and the Khmer Rouge Tribunal’ (2012) 6 International Journal of Transitional Justice 150, 155.
parties and 22 witnesses during the Duch trial.\textsuperscript{16} This support combined with the Organisation’s work within Cambodian communities and that of other local NGOS arguably demonstrates the ‘critical yeast’ of a network of relationships connecting the work of the ECCC with on the ground reconciliation processes.\textsuperscript{17} Outside of the Court the TPO held events and participated in radio programs to raise awareness about post-traumatic stress affecting many Cambodians as a result of the Khmer Rouge regime, and the lack of mental health services in Cambodia.\textsuperscript{18}

NGOs initiated ‘village forums’ to both educate and foster dialogue within communities on issues surrounding the work of the ECCC. Local NGO, the Center for Social Development, for instance, held public forums on ‘justice and history’ and ‘reconciliation and healing’ which Court officials attended, and fielded questions from attendees. DC-Cam also ran village meetings and produced multi-media products to educate communities about the ECCC and promote dialogue on the Khmer Rouge era. The Khmer Institute for Democracy, and the Cambodian Human Rights Action Committee (ADHOC) were also long term purveyors of information about the work of the ECCC.\textsuperscript{19} Youth for Peace tailored some educational programs to particular communities, integrating Buddhist practices and ceremonies.\textsuperscript{20} In addition, NGOs not only assisted civil party applicants through all phases of the trial, but also helped fund their legal representation.\textsuperscript{21}

In their study of a series of conflict contexts within the ‘arc of instability’ surrounding Australia, Braithwaite and Nickson noted that ‘the most traumatised victims take longest to be ready to participate in transitional justice’ and that ‘it may take many years of traditional reconciliation work before perpetrators of the worst atrocities …can confess their crimes

\textsuperscript{16} Christoph Sperfeldt, ‘From the Margins of Internationalised Criminal Justice: Lessons Learned at the Extraordinary Chambers in the Courts of Cambodia’ (2013) 11 Journal of International Criminal Justice 1111, 1120.
\textsuperscript{17} Lederach above n 10, 91; See also John Braithwaite and Ray Nickson, ‘Timing, Truth, Reconciliation, and Justice after War’ 2012) 27 (Ohio Journal of Dispute Resolution 443, 456-457.
\textsuperscript{18} Ciorciari above n 2, 259.
\textsuperscript{19} Ibid 239-240.
\textsuperscript{20} Sperfeldt above n 15, 159.
without fear of revenge." They concluded that the timing and sequencing of follow up mechanisms ranging from national top-down initiatives to spontaneous local communal or spiritual rituals may constitute creative ways towards greater readiness for confession and/or forgiveness. They noted, however, that whatever justice mechanism is engaged first, whether it be through truth-telling, punitive justice process or reconciliatory local process, what matters is that ‘the flickering flame of reconciliation conversation’ is kept alive in order to weather the societal ‘long durée’ of recovery following mass atrocity. In Cambodia, civil society has fanned the flame from the time it was given voice and is poised to continue to speak to and for a society traumatised by its past.

Other transitional courts have been in significantly weaker positions with respect to grassroots connection to affected societies. I noted in Chapter Two that neither the ICTY nor the ICTR initiated outreach programs until several years after their creation, and by then the institutions had tarnished reputations within the respective local communities. The in-country Special Court for Sierra Leone (SCSL) promptly recognised the importance of establishing links with local communities, but did not have the level of established civil society support that the ECCC enjoyed and was hampered by the absence of mass media resources. Although the ECCC was buffeted by the threat of political interference and suffered from inadequate funding, it has been bolstered by a vibrant and creative civil society which is capable of building on the communications of trial process discussed later in this chapter.

The ECCC failed in its early years to engage directly with communities affected by the crimes. However, it succeeded in making the proceedings of its trials accessible to the Cambodian public and to the national and international media. This flowed from a policy promoting transparency in trial proceedings contained within the ECCC Law and the Internal Rules. The ECCC Law provided that trials should be open and public except where publicity may prejudice the interests of justice. The Internal Rules provide that the ECCC’s Office

22 Braithwaite above n 17, 443-444; 456-457.
24 Ciorciari above n 2, 234.
25 ECCC Law art 34 new.
of Administration ensure that the proceedings are publicly broadcast, except where a public hearing would threaten public order or violate protective measures sanctioned by the Court.26

As the Duch trial approached, the Public Affairs Section arranged for public visits to the Court and free public transport to the site. The ECCC has the largest viewing area of all the international transitional courts including the ICC. The SCSL viewing gallery seated around 20 people. During each day of the Duch trial, the viewing gallery and auditorium attached to the Trial Chamber, which seats up to 500 people, had a near to capacity audience.27

In 2008, before the Duch trial commenced, the University of California at Berkeley Human Rights Center conducted an independent population-based survey which reported that 39 percent of respondents had no knowledge of the ECCC. The Survey report indicated that 46 percent of respondents had limited knowledge of the ECCC.28 The data seemed to provide impetus to both ECCC and civil society outreach efforts.

The Court’s outreach through the visitation program was expanded to include an ECCC Study Tour. The one-day program brought students, teachers and villagers to the ECCC from all regions of Cambodia. The guided Tour included visiting the Trial Chamber, the Tuol Sleng Genocide Museum, and the Choeung Ek killing fields memorial site outside Phnom Penh. The program was designed to deepen the understanding of the broader population about the Khmer Rouge trials, as well as to ensure that rural dwellers who do not have the same level of access to media coverage of the trials were informed.29 From the start of Case 001 to the end of 2011, over 100,000 people visited the ECCC either to view the proceedings or as part of the Study Tour.30 On the day the Duch trial verdict was delivered an estimated 4000 people came to the ECCC. The rate of attendance of Case 002 from November 2011 to

26 ECCC Internal Rules (Rev 8) rules 77 (6); 79 (6) (b).
27 Ciorciari above 2, 240-241.
28 Phuong Pham, Patrick Vinck, Mychelle Balthazard, Hean Sokhom and Eric Stover, So We Will Never Forget: A Population-Based Survey on Attitudes about Social Reconstruction and the Extraordinary Chambers in the Courts of Cambodia (University of California, Berkeley, 2008) 36-37.
July 2013 was even greater.\textsuperscript{31} At the very least this suggested that the predominantly Cambodian attendees did not wish to remain remote from the proceedings and increasingly availed themselves of the opportunity to participate as observers of the proceedings.

In 2010, after the Duch trial, the Berkeley team conducted another population-based survey focused on perceptions of the ECCC. The survey found that overall awareness of the ECCC among respondents had increased. This time, only 25 per cent of respondents indicated they had no knowledge of the ECCC, compared to the 39 per cent of the 2008 survey. There was a similar increase in the number of people who could adequately describe the nature of the Court and correctly name those detained at the ECCC.\textsuperscript{32} The increase was attributable at least in part to the ECCC’s efforts to make the proceedings accessible to both the media and the public at large through the visitation program and live video feeds of the proceedings.\textsuperscript{33}

However, the accessibility of the proceedings was also enhanced by the use of television to broadcast developments at the Court and make the content of trial proceedings digestible for the wider Cambodian audience. The initiative here was taken by the Asian International Justice Initiative (AIJI), in partnership with a local film production enterprise, Khmer Mekong Films and the UC Berkeley’s War Studies Center. The joint venture also secured the support of the Cambodian Television Network (CTN) to broadcast the program as a public service. The program, entitled ‘Duch on Trial,’ ran as a weekly series in a talk-show format. The program included examination of complex trial issues with commentary provided by independent trial monitors. It was so popular that a new series on Case 002, entitled ‘Facing Justice’ was produced.\textsuperscript{34} In the 2010 Berkeley survey, nearly 25 per cent of respondents had watched ‘Duch on Trial.’\textsuperscript{35} Data on the reach and impact of the program

\textsuperscript{31} Ciorciari above n 2, 241.
\textsuperscript{32} Phuong Pham, Patrick Vinck, Mychelle Balthazard, Hean Sokhom, After the First Trial: A Population-Based Survey on Knowledge and Perception of Justice and the Extraordinary Chambers in the Courts of Cambodia (University of California, Berkeley, 2011) 21 [After the Frist Trial Survey].
\textsuperscript{33} Ciorciari above n 2, 242.
\textsuperscript{34} Christoph Sperfeldt, ‘Broadcasting Justice: Media Outreach at the Khmer Rouge Trials’ Asia Pacific Issues No. 15 (June 2014) 6-7.
\textsuperscript{35} After the First Trial Survey above n 32, 22.
analysed by the AIJI has suggested that the program’s format is not only more attractive to the Court’s broader public, but possibly more informative than news or live broadcasts.³⁶

The picture emerging as the trials proceeded was one of civil society anticipating and creatively supporting the work of the ECCC. NGOs both responded to the Court’s shortcomings and built upon its efforts to make the proceedings more accessible to Cambodians. This reflected an implied assumption by the NGOs that the ECCC trial proceedings had communicative value within the Cambodian community which perhaps exceeded their expressivism. With the Court’s national and international representatives, NGOs formed a network of relationships working towards justice and reconciliation in Cambodia.

C Role-Sharing between National and International Trial Actors

In Chapter Four I discussed the communicative potential of role-sharing between international and national judges and the similarly constituted teams of prosecution, defence and civil party lawyers. In this section I consider the communicative dynamics of this aspect of ECCC procedure. I include the international and national support teams of each of these arms of the Court.

Ciorciari reported from an interview with the former head of the ECCC Defence Support Section that national and international lawyers had exercised their respective skills and knowledge in a complementary fashion. The international practitioners had led the way in writing submissions, not normally a significant feature of Cambodian legal practice. This had the effect of developing the Cambodian professionals’ competence in legal drafting and argument. On the other hand the Cambodian lawyers were adept at interviewing witnesses and reviewing documents in the Khmer language. They also ably explained the social and

³⁶ Sperfeldt above n 34, 8.
historical context of matters before the Court to their international counterparts.\(^{37}\) Thus, communication between the national and international staff fuelled the collaboration.

At the judicial level, Trial Chamber President Nil Nonn has said that he had ‘appreciated learning from the reasoning culture of his international counterparts on the bench and would seek to raise the capacity of the Cambodian judges he trains in the future.’ If this occurs it will be significant information transfer to a system with negligible legal skills capacity.\(^{38}\) It is reasonable to conclude that this flowed from the communication and exchange of views between ECCC judges as they went about their judicial task.

Associated with this is the Court’s production of reasoned decisions which are made available on its website and which will help build a body of Cambodian legal precedent. Judicial practice in Cambodia has been reliant on oral tradition and judges’ prior experience. The judgments from the internationalised court demonstrate to local practitioners and the community how human rights and fair trial principles may be interpreted pursuant to the Cambodian Constitution under which they apply.\(^{39}\) An example was provided in the Trial Chamber’s and Supreme Court’s analyses of Duch’s civil rights during his period of detention. This engaged the judiciary in exchanges of views which were synthesised in the judgements.

Judicial management of proceedings involved articulation of fair trial concepts, including the presumption of innocence and the equality of arms, to local practitioners and the community at large in public proceedings. There was also the need to maintain civility and respect in the courtroom. Of course, there is overlap here between the expressivism of due process demonstration and communicative process dynamics, but perhaps there was a particular communicative element in authoritative pronouncements delivered by national President Nil Nonn as a role model for the Cambodian judiciary. The Cambodian judicial majority and the operation of the ECCC within the national court system arguably imported a strong local

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\(^{37}\) Ciorciari above n 2, 251.

\(^{38}\) Ibid 252-253.

\(^{39}\) Ibid 254.
communicative dynamic because whatever positive lessons are learned by the Cambodian side may be acted upon independently after the internationals depart. Reportedly, Co-Investigating Judge, You Bunleng, has already overseen changes at the Cambodian Court of Appeals that both modernise trial processes and ‘protect the rights of accused.’

Some communicative dimensions of role-sharing at the ECCC are less easily interpreted. The Co-Defence counsel partnership was communicative by reason of the professional differences between them and their opposing opinions on Duch’s culpability. Francois Roux, a civil legal system lawyer, framed Duch’s defence around his acceptance of responsibility for his crimes and penitence. This approach fell within the criteria for judicial assessment of crimes at the international level. Kar Savuth, who had been representing Duch since his detention in 1999, understood his client’s position from a perspective incorporating the political and cultural forces making him a mere cog in an unstoppable political machine. While at the end of the trial Duch left his fate in the hands of the Court, in his closing statement he revisited Khmer Rouge history and policy. This was perhaps an attempt to press his own case to the end himself. His request for release at that point was, for him presumably a logical conclusion notwithstanding his confessions. After the trial Duch dismissed Roux and engaged a Chinese lawyer for his appeal. The apparent split in Co-Defence opinion may well have been the result of a lack of careful deliberation between the two lawyers as they pursued the task of defending their client. However, the divide may be explicable in terms of the complexity and social character of the perpetration of crimes of mass atrocity. As I noted in Chapter Two, study of the genocide in Rwanda revealed that it was not amenable to analysis through the framework of the Western trial models. I visit this issue again in the next section as I discuss other communicative legacies of the trial.

As discussed in Chapter Four, certain corrupt practices and resistance by national officers to the progress of investigations into Cases 003 and 004 under pressure from the Cambodian

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40 Ibid 255.
41 Ibid 121.
government were reminders of the authoritarian political culture affecting the administration of justice in Cambodia. The government’s expressive action to prevent further ECCC prosecutions of lower level Khmer Rouge cadres brought to light the counterproductive effects of executive interference in Cambodia’s legal system. The otherwise largely constructive collaboration between national and international staff in nationally important work was also blocked. This would have been amply clear to the Cambodian lawyers who were gaining significant vocational experience and contributing to the development of their country’s judicial system.

III ELEMENTS OF THE COMMUNICATIVE TRIAL

I noted in Chapter One that in national criminal law philosophy we find some discussion of the notion of communication through trials.43 International criminal justice for the most part contained an expressivist emphasis on the prosecution and punishment of individuals responsible for core international crimes.44 An expressivist account of the victim redress regime of the ICC suggested broader scope for the administration of transitional justice than the international model had hitherto supported, which implied some communicative effects within subject communities.45 In addition, some transitional justice theorists argued for flexibility in transitional trial procedure to foster communicative trials.

In Chapter One, I examined the possible theoretical basis for a communication theory of the transitional trial from the work of Jürgen Habermas, Mark Osiel and Frédéric Mégret. I noted that Habermas emphasised the value of communicative action in social reconstruction. Both Habermas and Osiel recognised trials as communicative spaces that assisted the building of social solidarity. Osiel argued that the transitional trial’s platform for courtroom story-telling mediated by flexibly applied rules of legal procedure fostered communal engagement with

44 Damaska above n 1, 331.
the social breakdown arising from crimes of mass atrocity. Through civil disagreement within trial proceedings, a discursive solidarity emerging from trial dialogue (not recognised by Durkheim), provided the basis of new collective memory and a foundation for deliberative social recovery. Osiel emphasised the value of the liberal trial to this end. He drew no real distinction between national and international transitional trials in terms of preferable procedural models, but highlighted the social significance of trials following large-scale ‘administrative massacre’ over both the short and longer term.

Osiel’s conception of the transitional trial as a theatre of ideas surrounding the commission of mass atrocity is complemented by the work of Mégret. Making the case for more representation in trials by engaging national and international interests in transitional justice, Mégret proposed a normative basis for the hybrid or internationalised court based on a theory of the dual nature of international crimes. Simultaneously, he advocated a shift in focus from the outcomes of transitional trials in the form of expressive verdicts and sentences, to the communicative potential of hybrid court proceedings. Drawing from Durkheim, he suggested that transitional trials function to reconstitute the social through the theatre of court process. While Mégret did not assign a specific role for the victim of international crimes within the court’s representational structure, his emphasis on expanded representation in transitional trials, and focus on trial proceedings rather than outcomes urged recognition of the communicative purpose of the transitional trial.

Drawing from the abovementioned theorists I posit that two elements in trial proceedings distinguish the communicative trial from the expressive trial. Those elements are representation and trial dialogue. The thesis has discussed the operation of these elements at the ECCC. I now revisit the manifestations of those elements in the Duch trial proceedings from my case study.

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47 Ibid.
48 Ibid 299.
In Chapter Four, I highlighted aspects of the ECCC’s structure and procedure that revealed the potential for greater representation of the constituencies affected by the crimes of the Khmer Rouge. In the previous section I discussed the communicative dynamics of role-sharing at the ECCC between national and international staff. Role-sharing at the ECCC also reflected ownership of its trials by Cambodia and the international community as represented by the United Nations. Mégret argued that because the magnitude of some international crimes may threaten our sense of humanity, an international interest in their prosecution exists alongside the specific national interest.\(^{50}\) He added that the hybrid or internationalised court offered more representative justice because it identified and acknowledged all the communities affected by the crimes.\(^{51}\) Revisiting some of the proceedings of the Duch trial, I now consider ways in which the communities affected by the Khmer Rouge crimes were represented. I do this by returning to the trial discussions on trauma resulting from the Khmer Rouge regime, and the nature of perpetration by the accused, Duch.

1 \textit{Trauma in Post-Khmer Rouge Cambodia}

Trauma and victim recovery from the Khmer Rouge regime was traversed from various perspectives during the proceedings. During the examination of Vann Nath’s evidence, Judge Lavergne asked the survivor of S-21 to explain how he had dealt with the trauma flowing from his incarceration. Vann Nath spoke of the importance of confronting and recording the suffering and injustice of the regime in his creative works. He did this to educate the young on an important period in Cambodian history and to fill a void left by the silence of their parents for whom confrontation and dialogue had been too painful.

The civil parties by virtue of their inclusion as parties to the proceedings provided specific accounts of how the regime had affected them. Chhim Sotheara, a psychiatrist with the TPO

\(^{50}\) Ibid 737.  
\(^{51}\) Ibid 740-743.
in Cambodia, was called to give evidence in relation to civil party reparations. Chhim represented the larger victim constituency as an intermediary between the group collectively and the court. A psychiatrist with the TPO in Cambodia, Chhim faced broad examination by the Judges and other court actors. Chhim communicated his findings on trauma and post-traumatic stress syndrome based on decades of experience working with Cambodian survivors of the Khmer Rouge. He explained the particular manifestations of the conditions in Cambodian society and connected their incidence with specific social problems, such as alcoholism and domestic violence. In this he gave voice to the plight of a broad spectrum of victims who had little or no representation.

Chhim was also given opportunity to communicate the needs and expectations of victims in relation to the justice process which they had waited for, and were now participating in. In Chapter Six I described how he articulated this for them. The opportunity to express their trauma helps, but does not heal completely. Victims participate in the proceedings to seek justice for themselves or their lost relatives and to hear the truth. Honesty from former Khmer Rouge leaders helps them, while persistent denial angers them.52

Questioning on the TPO’s work with victims within their communities connected the proceedings of the ECCC to the process of reconciliation in Cambodia. Chhim explained that thus far the TPO’s work had been with victims only. He explained that because of the long-term impunity of the Khmer Rouge and conditions in villages, reconciliation in such communities had been inhibited by the lack of credible justice process at the national level. However, programs aimed at reconciling victims and perpetrators in communities were foreseeable now that the ECCC process was under way.53

The Court’s engagement with the expert witness beyond strict factual matters expanded the trial conversation on the effects of the crimes. It also highlighted the role of the ECCC in the sequencing of transitional justice measures towards reconciliation in Cambodia. Chhim

represented the plight of the Khmer Rouge victims and their view of the necessary steps on the path to reconciliation. He articulated the victims’ preference over the national government’s policy of closing the books on Khmer Rouge human rights violations. The conversation revealed action afoot through civil society organisations based on deliberative social reconstruction from a foundation laid by the ECCC.

2 Duch – ‘Monster’ and Human Being

Mégret’s thesis that some international crimes so ‘threaten our sense of humanity’ that international ownership of trials that address such crimes is justified had resonance in the ECCC trial proceedings as two non-Khmer witnesses gave evidence.\(^\text{54}\) The first was Frenchman François Bizot, who was conducting research on Cambodian Buddhism in 1971 when he was suspected by the Khmer Rouge of being a CIA spy. Khmer Rouge cadre imprisoned Bizot at the M-13 detention camp which was overseen by Duch. The second witness was American historian David Chandler who studied the S-21 archives.

As a detainee of M-13, Bizot was shackled along with two of his Khmer companions, kept in inhumane conditions and interrogated by Duch over a period of two months. Aware that other prisoners were beaten and disappeared, Bizot feared he would not escape death. However, when Duch was convinced that he was not a spy he engineered Bizot’s release through negotiations with his superiors Ta Mok and Vorn Vet. In a meeting with Duch just before Bizot was released, Duch admitted to him that he sometimes beat prisoners when there were inconsistencies in their testimonies. He added that while it was not at all what he wished to do, it was his responsibility under Angkar. A kind of terror took hold of Bizot as he reflected on the truth he had to absorb. Bizot’s book, The Gate, recorded his personal trauma of having known someone who was both a torturer and one who had protected him. Bizot communicated in narrative form the depth of a continuing sense of disquiet from his experience at M-13:

\(^{54}\) Mégret above n 50, 737.
Your Honour, I should say that until then, I had felt reassured. I believed that we were—that I was—on the right side of humanity; that some men were monsters and thank heaven, I could never be one of them. I believed that this was the state of nature, that some of us are born evil while the rest of us could never be. But that evening, Duch’s response, combined with my perception of him throughout the course of various interrogation episodes opened my eyes… I had expected to encounter someone inhumane, as we are accustomed to think of such monsters. But I realised that this was far more tragic and infinitely more terrifying, because in front of me stood a man who looked like friends of mine: a Marxist who was prepared to die for his country and for the Revolution. The ultimate goal, for him, was the welfare of the inhabitants of Cambodia; he was fighting against injustice and inequity…And even if there was something insidious in the naïveté of the typical Khmer peasant, there was also a fundamental sincerity in his beliefs, as is the case with many revolutionaries. I myself had many friends in Paris at the time who were committed to this communist revolution and they were looking at events in Cambodia with an outlook that, to me was horrifying. But in their eyes, the ends justified the means — in this case Cambodia’s independence, Cambodia’s right to self-determination, the end to its citizens’ misery, and so on. The Cambodians are not the only people that have killed in the name of fulfilling a dream. So here I was, looking behind the mask of the monster in front of me. His job was to write up reports on the people sent to be executed, and I saw that this monster was, in fact, human, which was just as disturbing and terrifying. I was no longer sheltered from this knowledge — we are no longer sheltered from this knowledge — and the worst mistake we could make would be to separate such monsters into a different category of being.55

Cruvellier, observing Bizot’s demeanour and testimony, reported that it was in the ‘solemn intensity’ of the courtroom that Bizot had found the way to articulate the universal scope of his suffering and ongoing personal ambivalence. In perhaps an unexpected way Bizot represented our collective ‘tormented conscience’ in the internationalised proceedings.56

Something additional to the Durkheimian conception of crime as offensive to the collective conscience and which will be avenged by punishment was imported to the proceedings as Bizot gave voice to the complex nature of the perpetration of international crimes and the depth of their effects.

Under examination, David Chandler also added nuance to the search for truth during the proceedings. He communicated that there existed inescapable universal truth with respect to the perpetration of mass atrocities. This testimony did not spring from a personal encounter with Duch, but from Chandler’s analysis of the S-21 archive, accounts of mass atrocities in


56 Ibid 166.
numerous historical contexts and modern psychological research on human conditioning. He opined ‘in order to find the root of evil that was implemented at S-21, we should look no further than ourselves.’\(^{57}\) Given the existence of extraordinary conditions, ordinary individuals will support systems that include the commission of atrocities. Such conditions existed at S-21 and reasonable people could be led to commit acts of the kind that took place there.\(^{58}\)

Both witnesses of fact from their personal and professional encounters with Duch’s crimes drilled beneath the facts to communicate their perspectives on them. In this, while the witnesses pointed to uncomfortable truths for all affected constituencies, their reflections added to our understanding of some of the structural dynamics of crimes against humanity. The trial’s procedural form permitting narrative testimony and engagement with the evidence, as described in Chapter Five, gave broad representation to the nature of crimes of mass atrocity. This was evident from study of the communications of the proceedings rather than the trial outcomes.

**B Trial Dialogue**

In Chapter Five, I introduced the case against Duch, and discussed the ways in which trial dialogue flowed from the various accounts of past events as the Court tested the evidence on the case file. I discussed the broader brush or discursive approach adopted by the Judges which admitted wider trial dialogue in the course of the inquisitorial search for the truth surrounding the crimes, and in the interest of the reconciliatory purpose of the ECCC. I described exchanges between the judiciary and witnesses, and between witnesses and other actors in trial process, including the accused, which went beyond establishing legal proof. Dialogue at times encompassed historical, psychological or social issues of relevance to the context and consequences of the crimes. Dialogically based transitional justice processes have been found to more directly address issues of social concern in the aftermath of violent

\(^{57}\) Transcript of Trial Proceedings - Kaing Guek Eav ‘Duch’ Trial (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case File No. 001/18-07-2007/TC, Day 55, 6 August 2009) 120.

\(^{58}\) Transcript of Trial Proceedings - Kaing Guek Eav ‘Duch’ Trial Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case File No. 001/18-07-2007/TC, Day 55, 6 August 2009) 73-74, 115-121.
regimes. Generally, trials have not been associated with dialogic mechanisms. However, the Duch trial proceedings frequently traversed matters of continuing social significance within Cambodia but which have not been widely approached in dialogic fora.

One such issue is the victim/perpetrator relationship in Cambodia. While the ECCC targeted senior leaders of the Democratic Kampuchea or those most responsible for crimes of the regime, the issue of the lower level perpetrator as victim of a coercive regime pervaded the proceedings. This was in part due to Duch’s defence that he was a victim as well as a perpetrator under the regime. The issue had deep significance in Cambodia because the Khmer Rouge relied on Cambodian youths on a large scale to implement their policies in the system of agrarian collectives throughout the country and within their detention centres. After the regime, many Cambodians returned to their villages only to find themselves having to live in close proximity to Khmer Rouge cadre and without any preliminary reconciliation process. In the course of the trial, the issue was visited from a number of angles through the dialogic format engaged by the judges.

During his examination, Chhim Sotheara was asked to comment on the victim perpetrator equation which had surfaced in the proceedings. Chhim answered from his experience of clinically treating former guards of S-21 who were generally aged around 12 or 13 years when they became Khmer Rouge cadre. He explained their victimisation as a result of Democratic Kampuchea’s policy of dissolution of family units, the assumption of a collective identity and other indoctrination which turned them into perpetrators of crimes. The discursive proceedings illuminated the individual and social breakdown forced on a generation of Cambodians and gave some representation to the plight of less senior perpetrators during and after the regime.

Bou Meng was a former Khmer Rouge cadre whose testimony revealed the nature of his suffering as a detainee at S-21 along with thousands of others as the CPK purged its own...

60 See Suzannah Linton, Reconciliation in Cambodia (Documentation Center of Cambodia, 2004) 57-66.
ranks. Duch’s response to Mam Nai’s evasive testimony displayed attitudes towards the past by older perpetrators thirty years after the Khmer Rouge regime. ‘You can’t cover an elephant with a rice basket,’ said Duch to Mam Nai as he implored him to now tell the truth about the regime they had been committed to, for the sake of humanity.⁶¹

The Court’s wide-ranging examination of the expert evidence of Sironi-Guilbaud and Ka Sunbaunat became a forum for discussion of the mindset assumed by the Khmer Rouge perpetrator, as well as the psychological adjustment faced by the population at large as a result of the regime. The discussion within nationally broadcast proceedings delved deeply into the psyche of a regime which had been virtually eliminated from Cambodian school curricula, but whose legacy continued to pervade the society. The experts testified that Duch, through the process of the trial and their engagement with him, was progressively coming to terms with his Khmer Rouge conditioning. As I noted earlier, the trial proceedings were well attended. The proceedings were broadcast and widely commented on in the media. The trial judgment, conveying the extent of the Court’s engagement with the experts’ report, was distributed throughout the country. The scope for reflection within the society on the matters raised in the proceedings seems clear, as does the fact that individuals, whether perpetrator or victim, may both discuss and benefit personally from the Court’s analysis of Duch’s life. The in-court analysis and discussion may contribute to renewed collective memory through what Osiel described as ‘discursive engagement with a society’s past,’ cultivated by trial process.⁶² Osiel argued that recognition of the reality and possible co-existence of conflicting interpretations of history through collective engagement with the past may foster a discursive solidarity (not entertained by Durkheim), as the communications of trial proceedings resonate beyond the walls of the courtroom.⁶³

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⁶² Osiel above n 46, 39.
⁶³ Ibid.
I concluded in Chapter Seven that the rulings and the judgments of the ECCC had both expressive and communicative elements. The communicative dynamic of the process of judgement can be summarised by reference to the rulings on civil party rights, sentence, and Duch’s right to a remedy for violation of his rights while detained by the Cambodian Military Court from 1999. The communicative dimension of the evolving framework of reparations presided over by the ECCC judges is also considered below.

1 Trial Chamber Ruling on Civil Party Submissions on Character

Judicial rulings will be expressive by virtue of the authority of the Court. If rulings are directed at an individual or a particular group, they may be met with a response and in that sense may be communicative. Perhaps this is more likely in representative proceedings which empower those recognised as entitled to participation. The Trial Chamber’s majority ruling which prevented civil party submissions in proceedings on Duch’s character serves as an example. The ruling evoked a strong reaction among the civil party group. With the solidarity gained from their collective participation in the trial proceedings they sent a joint letter to the President of the Trial Chamber expressing their discontent with the ruling preventing their participation.64 A group of 28 civil parties announced they would not attend the proceedings dealing with character evidence as observers.65 As those proceedings began, the group travelled to the Tuol Sleng Genocide Museum, where they conducted a public memorial service to the dead victims of S-21.66 As discussed earlier in this chapter, their right to participate was supported by Judge Lavergne in his dissenting judgement. The civil disagreement on the issue was thus aired through various channels of communication.

64 See ‘Letter of Civil Parties in Case 001 to the President of the Trial Chamber’<http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/E166.1_FR.pdf>
In Chapter Six, I discussed the agency of victims participating in trial proceedings. After the Trial Chamber delivered its judgement there was a strong response by the civil parties against Duch’s sentence of 35 years imprisonment, albeit reduced to approximately 19 years due to his long pre-trial detention, and the remedy granted by the Chamber for breach of his civil rights while detained by the Cambodian Military Court. Generally, Cambodians viewed the sentence as too short. The civil parties exercised their appeal rights, along with the Co-Prosecution, against the sentence. When the Supreme Court Chamber overturned the trial sentence and ordered a term of life imprisonment for Duch, the civil parties were jubilant. Civil party, Bou Meng said ‘I am fully relieved and fully satisfied with the Court’s ruling…This court is a good model for the world.’

However, the appeal decision on sentence was read by one international NGO as public opinion overriding human rights. For Cambodians viewing the ECCC as a model court setting precedent in upholding fair trial rights and violations thereto, the reversal of the Trial Chamber ruling granting Duch a remedy for breach of his rights while in pre-trial detention by the Supreme Court Chamber sent a contradictory message. On the other hand, as I discussed in Chapter Seven, the Supreme Chamber judgement included a strong dissenting opinion by two of the international judges against the majority ruling on the matter. Their more finely grained analysis synthesised human rights precedents applicable to the Cambodian case and framed the remedy as restorative. This contrasted with the relatively limited analysis of the majority which was confined to a narrow reading of a single ICTY precedent. As discussed earlier, the divergent judicial approaches will form part of the

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67 Stover above n 65, 39.
68 Ciorciari above n 2, 121.
69 Randle DeFalco, ‘Case 001 Appeal Judgement: Duch Sentenced to Life Cambodia Tribunal Monitor (4 or 5 February 2012) 1, 5.
70 ‘Former Khmer Rouge Jailer Gets Life Imprisonment’ Kyodo News Service (3 February 2012).
ECCC’s legacy of legal reasoning in various shades which will be available to the Cambodian judiciary to reflect on.

3 Reparations

In Chapter Four I described the limited nature of reparations the ECCC could award civil parties under the original version of the Internal Rules. Several civil parties of Cases 001 and 002 expressed their determination to build a memorial at S-21, ‘no matter what reparations may be awarded by the Court.’ Civil parties were also instrumental in forming victims associations: the Association of Victims of Democratic Kampuchea and the Ksaem Ksan Association. Their actions reflected a degree of survivor empowerment and also communicated how serious to them the issue of reparation was.

In Chapter Seven, I discussed the Trial Chamber reparations award in light of the fact that Duch was indigent. The Chamber declared that it lacked jurisdiction to order the Cambodian government to make reparations to civil parties and could, at best, only ‘encourage’ the government and other organisations to fund forms of reparation. In the absence of any established alternative financing mechanism, the civil parties’ reparations were restricted to the publication of the names of victims in the judgement as well as compilation and publication of Duch’s apologies and statements of remorse throughout the trial process. The Supreme Court did not overturn the lower court’s order.

However, the issue of reparations in the Duch trial has to be viewed as part of the evolving civil party participation scheme. In Chapter Four, I discussed the revision of the civil party participation and reparations provisions of the Internal Rules which also altered the powers of the Victims Support Section (VSS). The VSS may now develop and implement ‘non-

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73 Phuong N. Pham, Patrick Vinck, Mychelle Balthazard, Judith Strasser and Chariya Om, ‘Victim Participation and the Trial of Duch at the Extraordinary Chambers in the Courts of Cambodia’ (2011) 3 Journal of Human Rights Practice 264, 284.
74 Sperfeldt above n 15, 157.
75 Co-Prosecutors v Kaing Guek Eav (alias) Duch (Judgement) Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case File No. 001/18-2007/ ECCC TC, 26 July 2010) [663-664].
76 Co-Prosecutors v Kaing Guek Eav (alias) Duch (Judgement) Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case File No. 001/18-2007/ ECCC TC, 26 July 2010) [668].
judicial measures’ as reparations to address a greater range of victims’ interests. Shortly after the amendments were passed, the VSS, with funding from the UN Trust Fund to End Violence against Women began working with locally-based civil society organisations to implement a three year project to promote gender equality and improve access to justice for female victims of gender-based violence during the Khmer Rouge regime. The amendments also provided that the VSS would work with the co-lead lawyers of the civil parties in identifying reparations projects that the ECCC might endorse, provided funding for those projects was secured from external donors in advance of the trial judgement.

In Case 002/01 the VSS and the civil party co-lead lawyers submitted 13 projects as appropriate reparations. Despite the low expectations of some commentators, the VSS ultimately secured over US$770,000 from individuals, governments and NGOs to fund the projects. The Trial Chamber endorsed 11 of the 13 requested projects, with two projects going unsupported because the Court was not satisfied that sufficient external funding had been secured.

The Chamber interpreted the new reparations provisions as enabling the Court to recognise projects ‘contributing to the rehabilitation, reintegration and restoration of the dignity of civil parties,’ and the support of donors, financially and in other ways, as assistance demonstrating ‘solidarity with victims of the Khmer Rouge era.’ The approved projects include public memorials, the construction and maintenance of a regional community peace learning centre, mental health programs (one offering testimonial therapy), permanent exhibitions on aspects of Case 002/01, new educational material for teachers on the Khmer Rouge regime, and wide distribution of the trial judgement with accompanying informational material. The symbolic

77 ECCC Internal Rules (rev 5) rule 12 (bis) 3.
78 Rong Chhorng, Conflict’s Female Victims Far From Forgotten Phnom Penh Post (6 June 2012).
79 ECCC Internal Rules (Rev 8) r 23 quinquies (3) (b).
81 Co-Prosecutors v Nuon Chea and Khieu Samphan (Judgement) (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case File No 002/19-09-2007/ECCC/TC, 7 August 2014) [1152-1160].
82 Co-Prosecutors v Nuon Chea and Khieu Samphan (Judgement) (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case File No 002/19-09-2007/ECCC/TC, 7 August 2014) [1116].
or transformative potential of reparations flowing from consultation with, and the participation of victim groups was recognised by the ICC in the reparations principles applicable in the Lubanga case. The argument that collective reparations are future oriented and contemplate rebuilding social solidarity in transitional contexts has also been made. Carefully designed reparations projects may also have a corrective and preventive function and create conditions in which ‘communal and gender relations’ may eventually be transformed. The responsive ECCC model resulting from communicative processes now adds to debates on the theory of reparations for crimes of mass atrocity. The approved projects of Case 002/01 were tangible responses to the civil parties’ claim and their representations at trial, with potential benefits for the larger Khmer Rouge victim constituency.

In the 2010 Plenary Session in which changes to the civil party scheme and the VSS mandate were discussed, Judge Silvia Cartwright in her opening speech said she believed that non-judicial measures ‘will be a major legacy of the ECCC.’ Commentators on the changes to the VSS powers did not anticipate the ECCC’s capacity to negotiate the reparations results it has achieved in Case 002/01. While they are expressive outcomes, the projects were the product of representation and dialogue, and are likely to have ongoing communicative effects within Cambodia and beyond as they are implemented.

At a deeper level the reparations represent the hopes of those who collectively fought for their realisation. Braithwaite’s research on hope and governance describes institutions of hope as ‘part of the family of enabling institutions that offset, loosen, or challenge the constraints imposed by regulatory institutions.’ The ECCC as a temporary internationalised

83 Prosecutor v Thomas Dyilo Lubanga (Decision establishing the principles and procedures to be applied to reparations) (International Criminal Court, Trial Chamber 1, Case no ICC-01/04-01/06, 7 August 2012) [40] [209] [239-240].
84 Frédéric Mégret, ‘The Case for Collective Reparations before the ICC’ Paper presented at McGill University Faculty of Law 15 November 2012 9 (SSRN2176911).
85 Ibid 9 citing the submission of the Women’s Initiative for Gender Justice Submission in the Lubanga case.
86 Silvia Cartwright, ‘Opening Speech to the Extraordinary Chambers in the Courts of Cambodia, 7th Plenary Session’ (2 February 2010).
87 Ciociari above n 2, 228-229.
court found a way to respond to the collective hope reposed in it by the large Khmer Rouge victim constituency, and dynamically accommodated the various requests made of it through its institutional structures. This together with the Court’s policy of inclusion and dialogue in trial proceedings may account for the increasing local approval of the ECCC. In the second independent population survey conducted after the Duch trial, and referred to earlier in this chapter, 75 per cent of respondents believed that the ECCC was ‘neutral,’ and 77 per cent believed that the trial had been conducted fairly. In addition, 81 per cent saw the ECCC as helping promote reconciliation, and 76 per cent believed the Court would have positive effects for victims and their families. The perceptions contrast with the generally poor public opinion of Cambodian national courts. Furthermore, the ad hoc Tribunals at the same stages of their development did not attract public support in this way. It is suggestive that the ECCC was becoming an enabler of individual and collective hope and as such I posit it was more in tune with the social purpose of transitional justice.

IV CONCLUSION

The first trial of a leading Khmer Rouge perpetrator was assessed by international commentators and victims alike as fair. As such it had considerable expressive value. Nevertheless, overall assessments of the ECCC by commentators remained tinged with concerns about matters which they considered would make the Court an expressive failure. As Case 001 proceeded, the spectre of political interference affected the investigation of Cases 003 and 004. The worst fears of the international side to the Agreement for the Court between the UN and the Cambodian government seemed to have been realised. Damage to the UN as representing the highest international standards of justice became expressive in the negative while the UN, as the minority partner in the court, struggled to counter the government’s influence on the national staff involved in those cases.

89 Ibid 15.
90 After the First Trial Survey above n 32, 26-27.
91 Ibid 29.
92 Ciorciari above n 2, 263.
The lack of international control of the trial process, perceived inefficiencies in dividing the functions of the Court between national and international staff, and accommodating inquisitorial procedure unfamiliar to Common Law trained personnel were other factors suggesting the ECCC was not operating as a model court. The ECCC’s autonomous rule-making might also have undermined the expressive value of consistency in international rule-making. On this analysis the ECCC carried an expressive deficit in due process modelling and norm development.

Case 002, with its multiple elderly accused, the wider scope of the charges and larger civil party contingent presented fresh challenges for the Trial Chamber. The Chamber’s severance decision was criticised as unrepresentative and the hearings of the majority of civil party claims were carried over to Case 002/02. However, the successful completion of Case 002/01 in August 2014 with its innovative reparations awards suggests that there is cause for reappraisal of assessments of the ECCC limited to the aforementioned matters. Following revision of the reparations scheme and the collaborative work of court officers with external actors, the reparations projects approved by the Trial Chamber provided tangible responses to the civil parties’ claim, with potential benefits for the larger Khmer Rouge victim constituency. In addition, my analysis of the Duch trial invites appraisal not from a dominantly expressive perspective, but one aligned with the social value of the trials within the communities affected by the crimes they address.

The case study demonstrated that dialogue on the past among victims and perpetrators, identified as one of the most important needs within societies recovering from violence, may be accommodated within the transitional trial. Trial process tailored not only to retribution and expressivism, but also to conversation on the nature and effects of international crimes, may fan the flames of reconciliation and precipitate complementary communication processes. This will be all the more so when the Court is supported by a strong civil society which acts as intermediary between the institution and victim/perpetrator constituencies within the affected community. Carefully managed communicative proceedings may

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93 Ibid 264.
accommodate the discussion of matters connected with the crimes which are of serious social concern, such as the extent of post-traumatic stress disorder resulting from the former regime. At the ECCC, the Court’s engagement with the complex nature of the perpetration of Duch’s crimes had both local and universal resonance. The revised ECCC reparations scheme and the communicative action pursuant to it in Case 002/01 demonstrated that transitional courts may be dynamic and procedurally responsive to their social contexts. Thus, the ECCC’s representative and discursive proceedings were not disconnected from the concerns of the broad spectrum of constituents who were affected by Khmer Rouge crimes.

However, some qualifications to the communicative theory of transitional trials I have proposed should be made. The Duch trial involved a single accused and a well-defined crime site. Duch was aged in his 60s and accepted responsibility for his crimes. In Case 002, there are several aged accused who deny responsibility, as well as more extensive charges and multiple crime sites. The difference in the complexity of cases at the ECCC or other courts, suggest that a communicative versus an expressive approach to transitional trials is a question of balance in light of the varying potential for threats to fairness and expeditious proceedings. At the same time, the case has been made that reversion to strictly expressive trial procedure is appropriate in few circumstances.

It is clear that the ECCC is a sui generis court due to the particular historical and political imperatives affecting its creation with consequent non-international control of its trials. Fortuitously, the latter activated criminal procedure with greater communicative potential. In the hands of judges attuned to the Court’s reconciliatory purpose, the largely inquisitorial trial procedure expanded the hybrid trial dialogue beyond limits normally imposed by adversarial procedure. However, the scope for hearing the victim voice within the trial, not only as witness, but also civil claimant, and with those claims heard during the trial proceedings was probably the key factor in producing a more communicative trial.

It was also the factor than shifted the proceedings towards restorative justice as the accused in both Case 001 and Case 002/01 were moved to engage directly with the civil parties who addressed them. This may seem unsurprising in Duch’s case because he had assumed responsibility for his crimes and generally cooperated with the Court. In Case 002/01,
however, Nuon Chea, who denied criminal responsibility and mounted a vigorous defence, publicly accepted moral responsibility for the suffering of victims of Khmer Rouge crimes in response to civil party questions. Also, this exchange occurred during proceedings which were less broadly dialogical following the judges’ delegation of the questioning of witnesses to just one of the parties.

In Case 001, the civil party voice produced more representative proceedings than Mégret conceived and catalysed deeper debate on the issues at stake in the trial, even in the circumstances of a poorly designed admission procedure. The civil party presence also precipitated dialogue around appropriate reparations following in-trial discussion of the consequences of the crimes. I suggest that the scope for a degree of mediated interaction between victims and accused persons in trials as it operated in ECCC proceedings makes less stark the choice between instituting a truth-telling mechanism, which may trade away prosecutions, and a transitional trial.

The theory I have proposed based on the distinction between expressivism and communication more readily applies to the hybrid or internationalised in-country tribunal engaging inquisitorial trial process rather than adversarial procedure. International proceedings on the other hand seem to be locked into largely expressive outcomes. While the ICC gives voice to the victim of crimes in principle, in reality their voice in adversarial proceedings is constrained by the requirements of factual testimony, and this in turn limits dialogue around their testimony to that which is evidentiary pursuant to retributory objectives. In addition, the remoteness of ICC proceedings from the subject community limits the immediate communicative impact of the proceedings witnessed in situ by the affected victim constituencies. Victims of crimes may also be removed from the direct support of local civil society groups who are invested in ongoing reconciliatory actions. The ICC Victims’ Trust Fund provides scope for engagement with issues affecting victims’ interests in a broad sense and approved projects may bring relief to certain communities. However, the separation of reparations hearings from trial proceedings denies victims the opportunity to contribute substantively to the process of justice, and to the deeper work of social reconstruction through communication. There seems to be no reason why communicative rationality ought not to operate at the ICC. The large victim contingents in ICC cases mean
that the voice of the victim in proceedings must be limited as it was at the ECCC. However, it may not be beyond the realms of possibility to reconfigure reparations hearings as a segment of the trial proceedings. Based on the ECCC precedent, a representative number of victims might be called to make statements, subject to examination by the Court in the public space it provides.

While the expressivism of sentencing subsisted in the Duch trial, the ambiguities of expressivism explored in this thesis call for an alternative means of evaluating transitional trials. I have proposed assessment of the transitional trial from the perspective of communication in order to reduce the dissonance between courts and the societies they serve. This approach renders the trial form more amenable to the essence of transitional justice and may create pathways to individual and collective hope in contexts where hope had died. The result may well be a social dividend not predicted in the financial planning and design of expressive trial models.

The validity of a communicative theory of transitional trials finds support in the work of Habermas, Osiel and Mégret and peace-building literature. Through the lens of communication a multi-faceted conception of transitional justice emerges which is not limited to the expressivism of criminal law or confined to truth-telling mechanisms such as truth commissions. The latter generally permit more comprehensive coverage of the context of the crimes than trials by their nature allow, and create space for dialogue between victims and perpetrators. However, it should be remembered that truth commissions may carry justice deficits where perpetrators do not come forward in response to offers of amnesty, and governments may fail to prosecute those who refused amnesty in exchange for testimony at the relevant commission. Moreover, as we saw in the East Timor case, a truth and friendship commission may be more concerned with securing expressive outcomes than fostering genuine justice dialogue between victims and perpetrators. A transcendant view of justice is to be preferred: each transitional justice mechanism will form part of a sequence of acts/or measures in transitioning societies whose timing and particular sequencing will not be orchestrated exclusively by national or international authorities. The long durée of justice for mass atrocity will include the acts, conversations and ongoing participation of survivors of past conflict in their society’s historical trajectory. This was confirmed by victims of the
Khmer Rouge who communicated that the ECCC’s work in holding national trials is merely the beginning of justice for them.
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