

# Understanding Acceptance of International Justice through Duch's Sentence at the Extraordinary Chambers in the Courts of Cambodia

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## 1. Introduction

From 1975 to 1979, Cambodia was ruled by the Khmer Rouge regime, which imposed brutal policies resulting in the death of approximately 1.7 million Cambodians from, amongst other causes, starvation, exhaustion, torture, and summary execution. The regime was overthrown in 1979 by Vietnam, which occupied Cambodia and set up legal and political systems according to the Communist model until 1989. The Khmer Rouge fled to the jungles along the Thai border and continued to wage guerrilla warfare against the government forces. The struggle finally ended in 1998 when the Khmer Rouge's political and military structures were dismantled, mainly due to the death of Pol Pot, the Khmer Rouge leader.

Peace talks began in 1989 when Vietnamese troops were forced to withdraw from Cambodia due to the end of Cold War. For lasting peace to materialise, the international community, with the support of the United Nations Security Council (UNSC), intervened in the peace-talks to bring the enduring conflict between the warring parties to an end. As a consequence, the Paris Peace Agreement was signed in 1991, which established the presence of United Nations (UN) peacekeepers to assist Cambodia in restoring peace and security. In 1993 the United Nations Transitional Authority in Cambodia (UNTAC) was created, which established new political and legal systems, arranged national elections, and drafted a new Constitution for Cambodia based on democratic values and the respect for human rights.<sup>2</sup>

Against this background, in 1997, the Cambodian Government and the UN commenced negotiations to establish the Extraordinary Chambers in the Court of Cambodia (ECCC) to prosecute the Khmer Rouge leaders for crimes committed under the regime. The UN initially sent a group of experts to conduct a field study to find a suitable model, and recommended an *ad hoc* international tribunal administered by the UN, claiming that Cambodia's judicial system fell short of international criminal justice standards (Linton, 2002, 96). However, Cambodia

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<sup>2</sup> See Final Act of the Paris Conference on Cambodia. 1991. Accessed February 11, 2016.

rejected the recommendation and unilaterally passed the Law on the Establishment of the ECCC in August 2001 that would create special chambers within the domestic court structure. As a consequence, the UN withdrew from the negotiation process in 2002, as it claimed that this law did not reflect the draft Memorandum of Understanding between the government and the UN, and that these special chambers could not guarantee judicial independence and procedural fairness (Ibid.). The government maintained its position to proceed with the creation of the special chambers with or without the involvement of the UN. In 2003, these negotiations ultimately led to an agreement between the UN and the Cambodian Government to establish the ECCC,<sup>3</sup> and subsequently amended the Law on the Establishment of the ECCC in 2004<sup>4</sup> as part of the agreement. The ECCC commenced its operation in 2006.

In August 2008, the Co-Investigating Judges issued its first Closing Order indicting Kaing Guek Eav *alias* (and hereinafter) 'Duch' as Deputy Secretary or Secretary of the notorious prison, Tuol Sleng (also known as S-21) for planning, instigating, ordering, committing, or aiding and abetting crimes against humanity, grave breaches of the Geneva Conventions of 1949, as well as the domestic crimes of premeditated murder and torture (Closing Order 2008).

In July 2010, the Trial Chamber of the ECCC delivered its first verdict, finding Duch guilty of crimes against humanity and grave breaches of the 1949 Geneva Conventions committed during the Khmer Rouge regime (Trial Judgment 2010). While a life sentence was available to the court, Duch was sentenced to 35 years in prison. However, he will only serve 19 years, as the court reduced his sentence by five years for his cooperation with the court and another eleven years in acknowledgment of his illegal detention by a military court and his pre-trial detention at the ECCC.<sup>5</sup>

In February 2012, the majority of the Supreme Court Chamber judges (the Appeals Chamber) upheld the prosecution's appeal against Duch's sentence, imposing life imprisonment. The majority refused to discount the sentence on account of his illegal detention and cooperation with the court. A minority of the Chamber, composed of international judges, upheld the sentence imposed by the Trial Chamber.<sup>6</sup>

This chapter explores the acceptance of international criminal justice in the context of the ECCC, using Duch's sentence in the final verdict to consider how the sentence imposed by the Appeals Chamber indicates acceptance of international criminal justice in Cambodia from a legal, political, and moral perspective.

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<sup>3</sup> The ECCC Agreement 2003.

<sup>4</sup> The ECCC Law 2004.

<sup>5</sup> Trial Judgment 2010, Annex I.

<sup>6</sup> Appeal Judgment, 2012.

## 2. Duch's Sentence and Acceptance of International Criminal Law

The verdict against Duch was a significant milestone for the ECCC because he was the first Khmer Rouge leader to stand trial for the crimes committed during the Khmer Rouge regime, which had been overthrown more than 30 years earlier. Duch was convicted as the person most responsible for the atrocities committed in and around the S-21 complex and Choeng Ek, a killing field located 15 kilometres southwest of Phnom Penh where prisoners were transferred from S-21 to be executed and buried en masse. The offences Duch was convicted of resulted in the death of around 12,273 people who were imprisoned, tortured, and ultimately executed. Although Duch did not have a central position in the Communist Party of Kampuchea (hereinafter CPK) he was found to be the most culpable person through holding a central leadership role at S-21, where he trained and supervised staff in the systematic torture and execution of prisoners perceived to be opponents of the CPK.<sup>7</sup>

## 3. Legal Analysis of the Appeals Chamber's Judgment

Two key matters influenced the judgment of the majority of the judges on the Appeals Chamber when determining the appropriate sentence for Duch: the applicable law and the available sentencing standard. These are now considered in turn.

### 3.1 The Applicable Law for Sentencing

In its appeal, defence counsel for Duch argued that the Trial Chamber failed to consider mitigating factors such as the admission of guilt, remorse, and his cooperation with the Chamber and the Parties throughout the proceedings. In making this argument, the defence referred to Articles 95 and 46 of the 2009 Cambodia Criminal Code (the Criminal Code), which provides judges, in granting mitigating factors in case of a life sentence, with discretions to impose a reduced sentence of fifteen to thirty years' imprisonment.<sup>8</sup> In contrast, under the ECCC legal framework, the sentencing range varies from five years to life imprisonment, without specifying a tangible range for judges to reduce a sentence when considering mitigating factors.<sup>9</sup> To put it simply, whether or not mitigating factors were accepted did not affect the sentencing range. The defence relied on the principle of *lex mitior* and argued that Duch should benefit from the lighter sentence rules that applied under domestic law, rather than being subject to the more punitive ECCC legal framework. The defence contended that 15 years' imprisonment would be the most appropriate sentence.<sup>10</sup>

In response, the Co-Prosecutors argued that domestic provisions concerning sentencing did not apply at the ECCC for two reasons. First, Article 668(2) of the Criminal Code does not apply to

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<sup>7</sup> Trial Judgment 2010, paras. 141, 184 and 602.

<sup>8</sup> Appeal Judgment 2012, paras 37-38.

<sup>9</sup> ECCC Law 2004, Article 39.

<sup>10</sup> Appeal Judgment 2012, para 38.

'special criminal legislation', and the ECCC law constituted such legislation. Secondly, the ECCC was not bound by the Criminal Code because the ECCC Agreement and the ECCC Law created a '*sui generis* institution' to which a specific sentencing regime applies.<sup>11</sup>

The Appeals Chamber upheld the Co-Prosecutors' arguments, concluding that Rule 98(5) of the Internal Rules of the ECCC (hereinafter IRs) was the source of applicable sentencing laws at the ECCC, and that these laws included the ECCC Agreement, the ECCC Law, and the IRs themselves. The Appeals Chamber concluded that the Criminal Code is a law of general application binding on all Cambodian domestic courts, while the ECCC Law is a special criminal legislation designed for the unique purposes of the ECCC. Therefore, the Appeals Chamber held that the ECCC legal framework should govern the sentencing regime, rather than domestic provisions.<sup>12</sup>

### 3.2 The Sentencing Standard

In the judgment, the Appeals Chamber found that there was no guidance regarding sentencing standards in the ECCC Agreement, the ECCC Law or the IRs. For this reason, the Appeals Chamber resorted to jurisprudences of other international tribunals in order to determine the appropriate sentencing standard. The Appeals Chamber considered that there were two key factors in determining the appropriate sentence: the weight of mitigating factors, and the gravity of the crimes committed.<sup>13</sup>

To assess the weight of mitigating factors, the Appeals Chamber examined the mitigating factors the Trial Chamber considered when it imposed its sentence. These included Duch's cooperation with the Chamber and the Parties, his admission of responsibility, expression of remorse, the coercive environment at S-21 during the regime, and his prospects for rehabilitation. The Appeals Chamber found that these mitigating factors carried little weight, and that the Trial Chamber's failure to demonstrate the significance of the combination of these factors constituted an error of law.<sup>14</sup>

The Appeals Chamber found the argument that Duch was under a coercive climate unsound due to the agreed fact that he did not attempt to avoid committing the crimes, but actively participated, given his repeated statement that he had to 'implement' the regime policies 'by all possible means'.<sup>15</sup> Second, the Appeals Chamber rejected the argument that Duch was in a subordinate position because there was no indication that he had actually been threatened by his superiors. Third, the Appeals Chamber agreed with the Co-Prosecutors' argument that Duch's cooperation was of little weight because the quantity and quality of information he provided was incomplete and inconsistent with other evidence, as a result of Duch attempting

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<sup>11</sup> *Ibid.*, para 341.

<sup>12</sup> *Ibid.*, paras 342, 348 and 351.

<sup>13</sup> *Ibid.*, para 354.

<sup>14</sup> *Ibid.*, paras 361, 363.

<sup>15</sup> *Ibid.*, para 365.

to minimise his personal involvement in the crimes. Fourth, the Appeals Chamber refused to give much weight to his expression of remorse, noting that, in his final statement, Duch did not make the best use of his chance to express his remorse, as he only said a few sentences in apology, preferring to devote most of his statement to explaining his limited roles in relation to the crimes and requesting forgiveness.<sup>16</sup> As for the last mitigating factor, the Appeals Chamber referred to jurisprudence from the Appeals Chamber of the International Criminal Tribunal for Yugoslavia (ICTY), which found that an accused's willingness to rehabilitate was of limited mitigating value.<sup>17</sup> In sum, the Appeals Chamber rejected the Trial Chamber's finding that these mitigating factors were 'significant' and thereby concluded that Duch was not entitled to a fixed prison term.

As for the gravity of the crimes, the Appeals Chamber found that the Trial Chamber's decision to impose a fixed term imprisonment gave insufficient weight to the gravity of the crimes. The Appeals Chamber ruled that the scale and brutality of the crimes and Duch's role were overriding factors in determining the sentence. In this regard, the Appeals Chamber considered that the fact that at least 12,273 prisoners died in agony at S-21 and Choeng Ek<sup>18</sup> in such a prolonged period transformed these crimes into the gravest degree of crimes, when compared with crimes tried by other international criminal tribunals. This conclusion was supported by the Appeals Chamber's conclusion that Duch held a central leadership role at S-21, where he supervised operations, contributing to the commission of the crimes.<sup>19</sup>

In determining the sentence, the Appeals Chamber also took into consideration Duch's illegal detention at the military tribunal, where he was held for eight years without trial. However, the Appeals Chamber rejected the Trial Chamber's conclusion that this warranted reducing Duch's sentence, arguing that, for the ECCC to provide a remedy for this particular violation of Duch's liberty, there needed to be evidence that the ECCC's judicial authorities had contributed to the violation. However, there was no such evidence. In defending its argument, the Appeals Chamber compared Duch's case to other similar cases at the ICTY and the International Criminal Tribunal for Rwanda (ICTR).<sup>20</sup>

As for the arguments around the pre-trial detention, the Appeals Chamber concluded that the applicable law did not offer any guidance as to how to treat the argument. It acknowledged that Article 51 of the Criminal Code provides that time spent in pre-trial detention should be deducted from the sentence imposed, and that such practice is consistent with international

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<sup>16</sup> *Ibid.*, para 369.

<sup>17</sup> *Ibid.*, paras 370-372.

<sup>18</sup> The Trial Judgment, paras. 184-189. Choeng Ek became the main killing and burial site as a replacement for S-21 where burial space was becoming less available after 1976. The relocation was also due to the fear of the risk of epidemic at S-21. The execution site at Choeng Ek consisted of a wooden house where prisoners were held until just before their execution, and a large area that consisted of pits for executions. There, a handful of guards were permanently stationed and were responsible for maintaining the site's secrecy, digging pits, and burying the detainees' corpses. The detainees transferred from S-21 were handcuffed, blindfolded, summarily executed and dropped into the pits.

<sup>19</sup> Appeal Judgment 2012, paras. 375-383.

<sup>20</sup> *Ibid.*, paras 398-399.

standards. The Appeals Chamber decided to apply such credit by way of declaring that Duch had served a total of 12 years and 269 days, and deducted this period from the sentence, counting from the day he was detained at the Military Court until the release of the Appeal Judgment.<sup>21</sup> Therefore, the remedy and credit given to Duch in the Appeal Judgment are purely symbolic.

### 3.3 The Dissenting Opinion against Imposed Sentence

Judges Agnieszka Klonowiecka-Milart and Nihal Jayasinghe (the Dissenting Judges) disagreed with the majority's decision to deny Duch a remedy for the violation of his liberty, although they did agree with the decision to impose life imprisonment.<sup>22</sup>

In contrast with the finding of the majority, the Dissenting Judges concluded that domestic provisions concerning sentencing should apply, based on two key considerations. First, the ECCC is a Cambodian court by nature, despite having some international characteristics. They posited that both the ECCC Agreement and the ECCC Law explicitly identify the ECCC as being established 'by and within the domestic system'.<sup>23</sup> The ECCC also applies domestic substantive law to the extent delineated in the ECCC Law and the ECCC Agreement. International judges are appointed by the Supreme Council of Magistracy, a public institution that oversees the judiciary in Cambodia. It is also the responsibility of the local prison authorities to enforce a jail sentence imposed by the ECCC. For these reasons, the Dissenting Judges concluded that the ECCC is heavily integrated into the domestic system and that domestic sentencing provisions should therefore be considered.

Second, the Dissenting Judges contended that there was a strong nexus between Duch's illegal detention and the ECCC proceedings. In doing so, they considered the background to Duch's detention by the military court. Duch was detained without trial from 1999 until he was transferred to stand trial before the ECCC in 2007. During the period of the negotiation and establishment of the ECCC, there was no evidence to suggest that the military court had investigated Duch, while senior government officials had made statements that Duch was the likely target for prosecution at the ECCC.<sup>24</sup> Therefore, it was clear that there was no intention for the military court to prosecute Duch, and his detention was therefore based on his anticipated prosecution at the ECCC. Thus, the Dissenting Judges concluded that there was a strong connection between Duch's illegal detention and the ECCC, and that Duch should be entitled to a remedy for the violation of his right to liberty.

In addition, the Dissenting Judges noted several reasons for considering domestic sentencing practices under Article 46 of the Criminal Code. First, Article 39 of the ECCC Law offers a broad range of sentencing options, while the ECCC Law provides little guidance on this issue. Second,

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<sup>21</sup> *Ibid.*, paras 401 and 404.

<sup>22</sup> *Ibid.*, sec. XI, Partially Dissenting Joint Opinion of Judges Agnieszka Klonowiecka-Milart and Chandra Nihal Jayasinghe, para. 1.

<sup>23</sup> *Ibid.*, paras 9-10.

<sup>24</sup> *Ibid.*, paras. 12-13.

the Dissenting Judges considered that there was very limited guidance on sentencing for international crimes at the international level. Although the *ad hoc* tribunals and the International Criminal Court (hereinafter ICC) have developed some sentencing guidelines, they offer no tangible range of sentencing. Third, Article 46 of the Criminal Code, which provides a maximum sentence of a thirty years' imprisonment, is not inconsistent with international standards as there is no clear sentencing standard in jurisprudence of other international tribunals.<sup>25</sup> Therefore, the Dissenting Judges disagreed with the majority opinion for not using sentencing standard available in domestic provisions to determine Duch's sentence.

#### **4. How does the Sentence Imposed Explain Legal Acceptance of Duch's Sentence?**

When examining acceptance in a legal sense, it is relevant to look at the view of professionals working in the legal fields that focus on retributive justice, especially procedural justice and sound legal judgments (Cohen et al., 2015). The goal of retributive justice is to end impunity and punish offenders, which is intended to deter future criminal behaviour and uphold the rule of law (Arnould and Sriram, 2014, 2-3).

While this chapter does not offer a conclusive definition of legal acceptance, one way to look at it is to examine how a sentence reflects sound legal judgments that are based on an exhaustive, considered, reasoned, and objective analysis of all legal and factual findings. The more credible a legal judgment is, the more likely it is participants and reasonable observers will accept the merit of the findings in the judgment, which ultimately indicates acceptance. Whether the judgment of the Appeals Chamber can be considered to meet such standards will be discussed below.

In their judgment, the Dissenting Judges offered a critical analysis of the soundness of the majority opinion in relation to the sentence imposed on Duch. They emphasised the importance of the sentence being consistent with internationally recognised standards of fairness, noting that the ECCC acts as a model court (Ciorciari and Heindel, 2013, 69) for other Cambodian courts in relation to how to conduct a just and fair trial with due respect for the accused's rights.

The decision by the dissenting judges regularly emphasised Cambodia's obligations to respect the right to liberty, which is a fundamental right protected under Articles 9(1), (3) and 14(3)(c) of the International Covenant on Civil and Political Rights (ICCPR). The ICCPR requires member states to provide effective remedies for violations of this right. The dissenting judges reinforced their argument through reference to the Constitution of the Kingdom of Cambodia, which

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<sup>25</sup> Ibid., paras. 26-28.



guarantees the protection of individual liberty. They contended that these laws constitute binding laws before the ECCC because of its nature as a Cambodian court.<sup>26</sup>

The dissenting judges argued that the majority opted for sentencing practices of other international criminal tribunals that offered little sentencing guidance, instead of valuable guidance of domestic provisions that offer a tangible range for sentencing. By overlooking the applicable law and sentencing standards, the dissenting opinion shows that the majority judgment falls short of sound legal judgments, as it is selective regarding the applicable law and practices. Michael Karnavas, former international defence counsel in Case 002 and current defence counsel in Case 003 at the ECCC, explains at length that the ECCC as a model court for domestic courts is 'more aspirational than actual', arguing that legal decisions and practices at the ECCC failed to adhere to international standards of fair trial rights (Karnavas, 2014, 48). One of his examples to support this conclusion concerns the appeal sentence imposed on Duch. Karnavas considers the decision to deny Duch's remedy for his lengthy unlawful detention on the ground of the lack of connection between his illegal detention and the ECCC to be meritless. Karnavas presupposes that a lengthy detention without trial has always been a serious concern in Cambodia, and that the President of the Trial Chamber has explicitly acknowledged such deficiency, which later resulted in Duch's reduced sentence as a remedy for the named deficiency. Karnavas argues that the decision by the Appeals Chamber to reverse the Trial Chamber's judgment and sentence Duch to life imprisonment sets 'a worrying precedent' to domestic courts, sending an implicit message to Cambodian people and domestic justice systems that due process and human rights standards can be disregarded (Ibid., 63). Assuming that the ECCC is intended to provide a positive legacy of meaningful and sustainable reforms of the judicial system by advancing the rule of law in Cambodia, at least the right to a fair trial must be guaranteed, as it is a 'cardinal requirement' of the rule of law, encompassing fundamental principles such as the equality before the law (Ibid., 67). Karnavas's argument reaffirms the minority's opinion on the majority's failure to uphold Duch's fundamental rights to effective remedy, which demonstrates their different level of acceptance of international criminal law norms from a legal perspective.

This difference of opinion over sound legal judgment makes a significant contribution to our understanding of legal acceptance. Legal acceptance can be determined from which legal judgment adheres to applicable legal standards, the failure of which would be considered as unacceptable by legal standards expected of reasonable observers. That being the case, one might look at acceptance from other perspectives.

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<sup>26</sup> Ibid., para. 2.

## 5. How does the Sentence Imposed Demonstrate Political and Moral Acceptance?

Understanding the concept of 'justice' is highly intuitive and is complicated by its multiple and distinctive meanings within law, ethics, politics, economics, and sociology (Leanza and Pridal, 2014, sec. 1). Duncan McCargo discusses the way Cambodians understand justice within the meaning of restorative justice, such as truth finding, national reconciliation, challenging the culture of impunity, and reparation (McCargo, 2011, 613). When examining acceptance of international criminal justice, it is therefore necessary to understand that it involves many actors, whose views are very likely to diverge, depending on their different interests and expectations.

Theary Seng, one of the civil parties in Case 001 and founder and former president of the Association of Khmer Rouge Victims, distinguished between legal and moral responsibilities of the accused persons. She explains:

*'When the Cambodian public (of which I am a part) speaks of the guilt of the Khmer Rouge leaders, we are referring to the moral guilt of these individuals. The word 'guilt' therefore does not, and indeed cannot, have a legal connotation. [...] When we say that Mr. Khieu Samphan, for example, is guilty, [...] we mean that as one of the senior Khmer Rouge leaders, he bears a moral responsibility to the people to account. Ours is a moral, and not a legal pronouncement' (Seng, 2007).*

Seng did not demand that the public should forsake their view on the guilt of the Khmer Rouge, but insisted that the public should leave it to the ECCC to determine the guilt or innocence of the accused based on the laws and evidence, and that the press, public officials, and other authorities should refrain from making any public statement on the supposed guilt of a suspect as it may influence the public's perception (Ibid.). The sentiment expressed in Seng's argument therefore embodies the view that legal acceptance is different from moral and political acceptance, depending on the actors.

In this case, it can be understood from the minority opinion that providing an effective remedy in the sentencing verdict, such as by reducing the sentence, may be very difficult for other stakeholders, particularly victims and political actors. Consequently, the acceptance or resistance of international criminal justice can be assessed by the reaction of these key actors to the sentencing verdict. The following section will therefore examine the reaction of the victims and the public in order to understand acceptance in a moral framework. The reaction of political actors which drive the existence and operation of the ECCC indicates acceptance within the political realm.

## 5.1 Political Acceptance

The establishment and operation of international criminal tribunals does not occur in a political vacuum. Without a doubt the political context can be crucial as to whether such tribunals are considered successful and whether they are ultimately accepted, particularly by international and national political actors who engineer the justice process. This is certainly true in the case of the ECCC.

After the collapse of the Khmer Rouge regime, the new regime, the People's Republic of Kampuchea (the PRK) established the People's Revolutionary Tribunal (the PRT) in 1979 to try two Khmer Rouge leaders, Pol Pot and Ieng Sary for genocide (Boulet, 2009). It was widely held that these trials were mere 'sham trials,' with most Western countries, led by the United States, considering that they were held to defend the Vietnamese invasion and legitimise the Vietnamese backed PRK (Ciorciari, 2009, 39-40). Despite the resistance to the PRT by most of the international community, Kelly Whitley observes that the PRT did obtain general acceptance by Cambodian people 'largely on moral and political grounds' (Whitley, 2006, 31). Nonetheless, the majority of the people embraced the Vietnamese intervention on humanitarian grounds although they were not pleased about the presence of Vietnamese troops and administration.

Political reasons aside, most of the international community also found that the PRT had a number of flaws that subverted its impartiality and adherence to basic fair trial rights. Both Pol Pot and Ieng Sary were tried *in absentia*, denying their right to defend themselves in person before the court (Ciorciari, 2009, 40). Although they were represented by defence lawyers, they had no contact with their lawyers who were assigned to represent them without their consent (Ibid.). In consequence, their lawyers appeared to accept all allegations against the accused and even denounced them (Ibid.). More importantly, the presiding judge publicly announced their guilt before the trial even commenced (Ibid.). Ultimately, the PRT found the two accused guilty of genocide and sentenced them to death. However, sentence was never carried out. Thus, the PRT's verdict did not reflect sound legal judgments.

Thirty years later, Cambodia and the UN jointly established the ECCC to bring to trial the most senior leaders and responsible people of the Khmer Rouge regime. As a hybrid tribunal, it was hoped that the ECCC would conduct criminal trials of the highest standards with proper investigations and respect for both the substantive and procedural rights of all parties, thereby providing quality justice to the victims of the regime. John Ciorciari notes that the history of international criminal tribunals including the ECCC has demonstrated that they take place in the political realities in which they are established (Ciorciari, 2009a, 4). For the ECCC to 'be a model of justice not a kangaroo court' Ciorciari contends that the ECCC must provide a just outcome that demands the upholding of the fair trial rights of the accused (Ibid.).

By way of comparison, it is reasonable to conclude that the ECCC has displayed different levels of acceptance of international criminal justice to the 1979 Court. The mere fact that the sentencing judgment of the ECCC against Duch involving international personnel at all stages of the proceedings denotes a higher degree of quality as compared to the 1979 sentencing

judgment, which was perceived as politically motivated and highly illegitimate in the above analysis.

Despite the obvious doubt of how sound the sentencing verdict is, as shown in the dissenting opinions, it gives national and international political actors that have established and provided the ECCC with support, either politically or financially, a strong basis to claim recognition of their efforts to push for a legitimate verdict. Thus, the sentencing judgments of the ECCC in Duch's case and the PRT demonstrate a different degree of acceptance of international criminal justice, depending on the political context in Cambodia before and after the Cold War. The degree of such acceptance between the ECCC and the PRT can be measured through the reaction of political actors, victims, and the public, which is analysed in the section below.

## **5.2 Understanding Political Acceptance through the Reaction of Political Actors to the Sentencing Judgment**

In assessing political acceptance of international criminal justice, it is important to understand that the Cambodian Government and the UN may have a common interest in ensuring that the ECCC secures convictions of the accused and imposes punishment. After the pronouncement of Duch's verdict by the Trial Chamber, Cambodia's Prime Minister Hun Sen publicly expressed his support of Duch's sentence to 35 years imprisonment.<sup>27</sup> Less than three months later, Ban Ki-moon, the United Nations Secretary-General, visited the ECCC and welcomed the verdict as a success since it was 'in accordance with international standards'.<sup>28</sup> The appeal verdict, sentencing Duch to life imprisonment, received great support from government officials, as well as international donors who sent a similar statement of support, congratulating the ECCC on the conclusion of the trial (Seiff, 2012). Stephen Rapp, the US Ambassador-at-large for War Crimes, applauded the appeal verdict, but rejected the sentence as he felt that it did not reflect the 'gravity' of the crimes committed (Ibid.). Sok An, Cambodia Deputy Prime Minister, also embraced the appeal verdict and called it a 'major success' (Ibid.). Either a failure to obtain convictions or convictions with perceived lenient penalties would be interpreted as the failure of both Cambodia and the UN to provide justice to the victims.

However, in a recent report the International Bar Association pointed to allegations of some donor countries that withheld their financial support for the ECCC until verdicts were given, and that their financial support depended on whether the court has delivered the 'right' verdict or not (International Bar Association, 2015, 60). Evidently, one month following the announcement of the appeal verdict on February 3, 2012, a number of major donors including Japan, the United Kingdom, and Australia pledged to provide further financial assistance to the

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<sup>27</sup> 'Hun Sen Backs Duch Verdict, ECCC's Independence.' *Cambodia Daily*, August 05, 2010. Accessed February 11, 2016. [http://sithi.org/temp.php?url=news\\_detail.php&mid=2283&lg=en](http://sithi.org/temp.php?url=news_detail.php&mid=2283&lg=en)

<sup>28</sup> ECCC Court Report 2010, 1.

ECCC for the upcoming two years.<sup>29</sup> These major donors publicly expressed their approval of the sentencing, stating that the sentence was fair and adhering to international standards, and that justice has been served to the victims and Cambodian people (Ibid.). If such allegations are true it might suggest that the acceptance of the international community of international criminal justice depends on the ECCC's ability to have the right verdict.

It might still be difficult to sum up the definition of political acceptance. However, it is reasonable to conclude that political acceptance in the context of the ECCC can be understood by the extent to which political actors are involved in the justice process, and the degree to which they accept or not accept the outcome of this process.

### 5.3 Moral Acceptance

Uñac and Liang (2006, 133) distinguish between retributive and restorative justice and note that guilty verdicts and life imprisonment normally receive positive reactions in retributive justice, but provide limited impact on restorative justice. This section considers the reaction of the victims and the public to the sentence imposed by both the Trial Chamber and the Appeals Chamber to explore whether it indicates acceptance in a moral perspective within a retributive meaning.

The Human Rights Center of the University of California conducted a survey on perception of justice of the ECCC amongst 1,000 Cambodians of 18 years of age or older, who lived in provincial areas (Pham et al., 2011, 18). The majority of these adult Cambodians used to live under the Khmer Rouge regime. As part of the analysis of perception of justice, the survey analysed the reaction of the public to the sentence imposed on Duch by the Trial Chamber and the findings indicated that public opinion was split on the adequacy of the sentence (Ibid., 27-28). The respondents were informed that, according to the Trial Chamber's judgment, there was a possibility that Duch may serve only 18 to 19 years in prison. When asked for their opinion on the lengthiness of the sentence, 46 percent of the Cambodian adults believed that Duch should serve a longer sentence, while 39 percent believed the sentence was 'adequate'. Ten percent of respondents specifically considered that the sentence seemed heavy, and that 'Duch should spend less time.' Another 5 percent did not believe that they had enough information in order to give an opinion (Ibid.).

Most reactions by victims to the decision of the Trial Chamber were heavily critical and most victims expressed disappointed. Robert Hamill, whose brother was imprisoned at S-21, was a Civil Party in Case 001. He said that the sentence 'did not sit well with him' knowing that Duch still had a chance to walk free from prison (Thomas, 2010). Similarly, Bou Meng, a Civil Party in Case 001 and a survivor of S-21, expressed his dissatisfaction with the sentencing judgment, believing that Duch could walk free again. He felt that it 'humiliated survivors, such as himself'

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<sup>29</sup> Ibid.

(Ibid.). After hearing the announcement of Duch's sentence by the Trial Chamber, Chum Mey, survivor of S-21, expressed his disappointment that, 'we are victims twice, once of the Khmer Rouge time and now once again'. Both Chum Mey and Bou Meng pointed out that Duch enjoyed decent living standards in the ECCC's detention centre, while most of his victims lived in inhumane conditions at S-21 (Thomas, 2010). As a Civil Party, Seng said:

*'I was personally deeply, very deeply disappointed at the verdict of Duch's trial. It is utterly incomprehensible. This lenient sentence means that he will only serve 11 hours of prison for every murder he is responsible for'.<sup>30</sup>*

This reaction is understandable. Superficially, it seems that the sentence of 35 years in prison was unduly lenient, and did not adequately reflect the gravity of the crimes committed and justice did not appear to have been served.

In contrast, the reaction to the sentence imposed in the Appeal Judgment clearly shows further moral acceptances, especially when the majority opinions pointed out the gravity of the crimes committed as the basis to determine the sentence. The Open Society Justice Initiative (OSJI) echoed the appeal verdict, as it claimed the sentence was in line with relevant jurisprudence of other *ad hoc* tribunals when considering the gravity of the crimes, which has been the overriding factor when determining the sentence (OSJI, 2012).

The ECCC conducted an informal survey on the reactions of the victims and the public to the appeal judgment (ECCC, 2012). The survey revealed that most respondents believed that a life sentence was fair and just because Duch should never have a chance to leave prison again (Ibid.). Mey Chum, an S-21 survivor, said that he could not accept the Trial Chamber's sentence, knowing that Duch would be free one day. He argued that this did not act as a sufficient deterrent to the commission of such grave crimes, and set a poor example for the next generation (Ibid.). A few respondents thought that 35 years in prison was enough as Duch would possibly die by then (Ibid.). However, it appeared that these respondents did not know that Duch could have been released after serving only 19 years in prison.

The life sentence imposed also obtained approval statements from civil society. Immediately after the announcement of the Appeal Judgment, the Cambodian Human Rights Action Committee (CHRAC), a coalition of 23 NGOs that have worked on many outreach programmes concerning victim participation and monitoring of the legal proceedings, released a public statement applauding the life sentence imposed and stated that 'the victims are finally given certain justice' (CHRAC, 2012). OSJI also expressed its support for the Appeal Judgment imposing life imprisonment, providing that it adhered to international sentencing standards (OSJI, 2012).

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<sup>30</sup> 'Khmer Rouge Victim's Shock Turns to Bitterness after 'Light' Duch Sentence.' *The Observers*, July 29, 2010. Accessed February 11, 2016. <http://observers.france24.com/en/20100729-cambodia-khmer-rouge-victim-shock-turns-bitterness-after-light-duch-sentence>

By comparing the reaction to the sentence imposed by the Trial Chamber and the Appeals Chamber, we can observe that the moral acceptance of international criminal justice can be understood by looking at whether the sentencing judgment addresses the actors' and especially the victims' interests. These reactions can also draw the conclusion that the victims and the public may not be concerned with ensuring that proper processes of procedural fairness – particularly fair trial rights for the accused – are adhered to in reaching the ultimate verdict, but that there is greater concern ensuring that the outcome is morally acceptable to the public.

These reactions continue to reveal that fundamental rights of the accused can be compromised, provided that the sentence is acceptable to the public mainly on moral grounds. For this reason, it is reasonable to argue that the moral acceptance of international criminal justice depends on the outcome and that, for the public, the only acceptable outcome to the commission of grave crimes is the imposition of the maximum penalty, even if such outcomes do not reflect a fair criminal process that truly adheres to the procedural principles of international criminal justice. The end justifies the means. This conclusion of the gist of moral acceptance is well expressed in the reaction of Youk Chhaing, Director of the Documentation Centre of Cambodia, concerning the sentence imposed by the Trial Chamber, where he said:

*'The Duch verdict is not incorrect. Frustration with the sentence was bound to run high. Had the sentence been a bit longer, it would perhaps have provided greater satisfaction to the majority of the survivors'* (Heindel, 2010).

## 6. Conclusion

This chapter demonstrates how the sentence imposed at the ECCC indicates acceptance of international criminal justice from legal, political, and moral perspectives. Legal experts, as reasonable observers, tend to accept international criminal justice based on how sound the sentencing judgment is, by exhausting all legal considerations of applicable laws and rules. That being the case, moral acceptance delves into the perception of justice of victims and the general public, mostly influenced by moral norms. Another significant aspect of acceptance can be explained by the interest of political actors in the sentencing judgment. The reason is that their acceptance depends on whether or not the outcome serves or at least does not affect their political interest, as they are the ones who initiate, create, and support the criminal justice process in the first place. Therefore, it can be concluded that the extent to which international criminal justice is accepted depends on what is being accepted, which is the sentencing judgment in this case, and by whom, referring to types of the actors, whether they are the general public, politicians, or legal experts.

By the same token, it is obvious that different actors have different interests in the outcome of the criminal justice process, and sometimes their interests overlap. For that reason, one must take a holistic view to understand the concept of acceptance, as acceptance is a multidimensional concept. This chapter therefore offers a limited aspect of understanding acceptance, focusing on only the sentencing judgment in the context of Case 001 of the ECCC.

To assess acceptance in a broader picture, there is a wide range of other relevant aspects to look at in the context of the ECCC. For instance, some Civil Parties prefer truth-seeking and reparations to sentencing judgment, as they believe that it is necessary to heal their past sufferings (Pham et al., 2011, 31 and 35). Acceptance can also look at how credible the ECCC is toward its independence concerning widespread allegations of corruption and political interference, and the effectiveness and fairness of the criminal proceedings, which is the criminal justice process of the ECCC as a whole rather than just the sentencing judgment. Another concept of acceptance that can be examined is when it is the right time to proceed with international criminal justice, and why, as justice for the Cambodian people has been delayed for more than 30 years. Therefore, one must understand that acceptance is a complicated and dynamic concept that is also interlinked with many other aspects, taking into account overall changes in political, social, and economic circumstances in Cambodia.



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