

Cambodia's Precedent for Humanity

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July 27, 2010

One might think that the conviction Monday of Kaing Guek Eav, alias Duch, for crimes against humanity was a foregone conclusion. During his 72-day trial before a U.N.-backed tribunal in Phnom Penh, Duch confessed his role as head of the notorious Tuol Sleng Prison in the torture and killing of at least 12,272 individuals between 1975 and '79. But in fact many observers in the courtroom and around the world were eagerly waiting to read the verdict. That's because the legal reasoning behind Duch's conviction will shape the tribunal's upcoming effort to bring senior Khmer Rouge leaders to justice.

The co-prosecutors largely won the legal battle over Duch's criminal liability, and set the stage for vigorous prosecution of the four senior-most Khmer Rouge leaders who next stand trial. The trial chamber discovered the big idea behind the Khmer Rouge atrocities: The criminal persecution of an unprecedented proportion of a nation's citizens because leaders had the specific intent to discriminate against them on political grounds. During the regime of Pol Pot, under which an estimated 1.7 million Cambodians perished, or one-quarter of the population, anyone could be accused of being an "enemy" of the Khmer Rouge.

The tools used for the persecution were murder, unjust imprisonment, enslavement and torture (including rape), but on a scale that was so widespread and systematic that these particular crimes against humanity fed into the master plan of persecution. The co-prosecutors now have the means to show why senior leaders used various crimes against humanity to advance their evil intent to discriminate against and extinguish so many politically inconvenient people.

Significantly, the judges ruled that such systematic attacks against the civilian population of Cambodia were illegal under international law during the 1970s. This conclusion was by no means certain as the trial started. The verdict depended on when crimes against humanity became part of the uncodified realm of customary international

law, thus prohibiting such egregious conduct by all nations and their leaders. The ruling paves the way for such crimes to be vigorously prosecuted against the surviving senior Khmer Rouge leaders. This is especially important because Duch avoided any conviction under Cambodia's 1956 Penal Code. The international judges refused to recognize an extension of the Code's statute of limitations.

The trial chamber also confirmed Duch's role in war crimes against Vietnamese prisoners of war and civilians. He refused all of them protected status under the Geneva Conventions and executed them. The judges found that an armed conflict between the Khmer Rouge and Vietnamese forces clearly existed and that Duch supervised torture and inhumane treatment, including water boarding.

One potent theory emerging from the international war crimes tribunals is that a defendant's individual responsibility can be discovered by searching for his or her participation in a "joint criminal enterprise" of like-minded people set on committing an atrocity. No one knew whether the judges would embrace this theory, which has the potential to impact future trials.

The trial chamber held that Duch knew of the criminal character of Tuol Sleng, acted with the intent to further its purpose, and so participated in a joint criminal enterprise. The judges also tagged Duch with superior responsibility for what transpired at Tuol Sleng. Like many other architects of atrocities, Duch's leadership skills proved to be his undoing. The trial chamber's holdings on joint criminal enterprise and superior responsibility spell more trouble for other defendants.

Drawing upon precedents of other war crimes tribunals, the trial chamber rejected Duch's defense that he had been acting on orders from superiors, because such orders simply do not matter when international crimes, such as crimes against humanity and war crimes, are committed. Duch also claimed that toward the end of his reign of terror, he acted under duress because he feared that he and his close relatives would be killed. But the trial chamber found that he continued to participate willingly and with zeal. He earned some mitigation points for his sentence due to the coercive environment of the Pol Pot regime. But future defendants, those who led the atrocities, will not prevail with any nonsense about acting under duress.

Duch's 35-year sentence for such heinous crimes is the real shocker in this verdict. This

was further reduced to only 19 years for good behavior, time served, and the Cambodian military's unjust imprisonment of Duch for eight years without trial. Atrocity crimes of this magnitude cannot be seriously prosecuted if the punishment is so disconnected from reality.

Bringing the masterminds of such crimes to justice is serious business that demands serious punishments. The co-prosecutors should appeal the sentence to seek punishment reflecting the gravity of Tuol Sleng. If the precedent of Duch's sentence stands, then the gains made in his trial to establishing the criminal liability of Khmer Rouge leaders may be washed away with pathetically short sentences.

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