

មជ្ឈមណ្ឌលឯកសារកម្ពុជា

**International Sentencing Guidelines Applicable to the Trial of Kaing
Guek Eav, at the Extraordinary Chambers in the Courts of
Cambodia**

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Table of Contents

QUESTIONS PRESENTED	1
BRIEF ANSWERS	1
EXECUTIVE SUMMARY	2
BACKGROUND INFORMATION	3
DISCUSSION	5
I. Due to the lack of sentencing guidance provided for in the laws and rules of the ECCC and Cambodian legal practices, the ECCC should rely on international sentencing jurisprudence when sentencing Kaing Guek Eav.	5
A. The Law, Rules, and Agreement governing the ECCC provide few sentencing guidelines, and instead direct the court to consider either Cambodian or international legal standards.	5
B. Cambodian sentencing practices offer little guidance to the ECCC and, therefore, indicate more weight should be placed on international jurisprudence.....	7
II. International sentencing guidelines indicate the ECCC should examine the gravity of the offense and personal circumstances of the accused, including aggravating and mitigating factors, when considering the appropriate sentence for Duch.	8
A. The offenses that Duch is on trial for are particularly grave and may justify a heightened penalty.	10
1. The nature and scope of Duch’s crimes are particularly heinous and extensive, and seem to justify a heightened penalty.	11
2. As the leader of S-21, Duch was directly responsible for the staff and prisoners at S-21, and therefore played a substantial role in the torture and executions that took place there, indicating the need for a heightened punishment.	13
B. The individual circumstances concerning Duch, and the crimes he committed, indicate there are aggravating factors that justify a heightened punishment, but also some mitigating factors that justify a mild reduction in sentencing.	16
1. Aggravating factors exist in Duch’s case that may weight in favor of a heightened penalty for Duch.	17
i. Duch was in a position of authority at S-21, therefore indicating a heightened penalty may be justified.	18
ii. Duch’s crimes were committed against particularly vulnerable victims, including women, children, and prisoners under his control, and, therefore, the Trial Chamber may want increase his punishment.	19
2. There seem to be mitigating factors in Duch’s case that may weight toward a reduction in his sentence.	21
i. Duch seems to have cooperated with the Trial Chamber, therefore indicating it may be appropriate to mitigate his sentence.	21
ii. It seems likely that Duch committed his crimes pursuant to an order by his superiors, thus indicating the Trial Chamber may want to consider mitigating Duch’s sentence.	22
iii. Duch’s acceptance of guilt seems qualified and does not appear to have facilitated an efficient trial, therefore possibly negating any justification for a sentence reduction on these grounds.	24
iv. There are questions as to the sincerity of Duch’s remorse and, therefore, the Trial Chamber may find it unnecessary to include it as a mitigating factor.	27
v. Duch seems to lack respect for humanity and the rule of law, and therefore, it may not be appropriate to consider his character as a mitigating factor.	29
C. The sum effect of Duch’s personal circumstances and the gravity of his offences indicate that the Trial Chamber should apply a punishment near, but less than, the maximum penalty available.	30

III. International and civil law justifications for criminal sentencing further indicate the Trial Chamber may want to impose a sentence near, but less than, the maximum penalty.	33
A. International tribunals focus on deterrence and retribution as the main justifications for criminal sentencing, with a secondary consideration for rehabilitation.	34
B. Theoretical justifications for sentencing among civil law countries tend to focus on rehabilitation, indicating that the ECCC may also want to place emphasis on this factor.	36
CONCLUSION.....	37

QUESTIONS PRESENTED

1. What sentencing guidelines might the ECCC Trial Chamber want to apply at the trial of Kaing Guek Eav (alias Duch)?
2. Based on the gravity of the offense and personal circumstances of the Accused Person, what is an appropriate sentence for Kaing Guek Eav (alias Duch)?
3. How might criminal sentencing theories among international courts and civil law jurisprudences impact sentencing in the case of Kaing Guek Eav (alias Duch)?

BRIEF ANSWERS

1. The ECCC Trial Chamber should apply international sentencing guidelines, which direct courts to consider the gravity of the offense and personal circumstances of the accused, including an examination of aggravating and mitigating factors.
2. While the gravity of Duch's offenses and aggravating factors seem to justify imposing the maximum penalty of life imprisonment, there are some mitigating factors, including the fact that Duch has cooperated with the court and committed his crimes pursuant to government orders, that indicate the penalty should be slightly reduced.
3. International criminal courts tend to justify criminal sentencing on theories of retribution, social deterrence, and reconciliation. French civil law tradition, on the other hand, tends to justify sentencing with theories of rehabilitation and individual deterrence. When applied to the Duch case, international theory seems to support a punishment close to the maximum sentence, while civil law theory may justify a punishment substantially less than that.

EXECUTIVE SUMMARY

In determining the appropriate sentence for the accused person, Kaing Guek Eav (alias Duch) for Crimes Against Humanity and Grave Breaches of the Geneva Convention, the ECCC Trial Chamber should apply international sentencing guidelines, which direct courts to consider the gravity of the offense as well as personal circumstances of the accused, including relevant aggravating and mitigating factors. While the rules governing the ECCC order the court to first consider Cambodian law, in cases where Cambodian law either does not address a legal issue or meet international standards, the ECCC is required to apply international jurisprudence. Cambodian law fails to provide sufficient sentencing standards regarding Duch's crimes. Therefore, the ECCC should apply international jurisprudence.

When examining the gravity of Duch's offenses, international courts generally consider the nature and scope of the crimes committed. When examining the personal circumstances related to the crimes, courts generally consider any aggravating and mitigating factors surrounding the crime or the accused person that may indicate the need for a heightened or reduced punishment.

In the case of Duch, the accused has admitted guilt for acts of torture and the execution of over 12,000 victims, which are crimes of a particularly heinous nature and broad scope, and justify applying the maximum possible penalty of life imprisonment. Additionally, the fact that Duch was in a position of authority over the group of people who committed acts of torture and execution, and the fact that his victims included especially vulnerable individuals, such as civilian men, women, and children under his control at S-21 prison, both indicate the need for a heightened punishment. However, some mitigating circumstances may exist in Duch's case.

These include the fact that Duch's crimes were committed pursuant to superior orders, possibly under duress, and the fact that Duch has substantially cooperated with the prosecution, which all support slightly reducing his sentence from the maximum punishment.

International criminal sentencing theory also seems to provide support for giving Duch a punishment close to the maximum sentence. International courts have traditionally relied on notions of retribution and social deterrence as justifications for criminal sentencing. The former justifies a heightened punishment in Duch's case on the grounds that his crimes were of a most heinous nature and should therefore be condemned as strongly as possible. The latter justifies a heightened punishment in Duch's case because, given the heinous nature of his crimes, it seems desirable for the ECCC to apply a punishment that will act as a powerful deterrent against similar crimes in the future.

Considering international jurisprudence and the theoretical justifications for international criminal sentencing, it seems appropriate that Duch is given a sentence duration slightly less than the maximum of life imprisonment.

BACKGROUND INFORMATION

Kaing Guek Eav (alias Duch) is currently being tried for Crimes Against Humanity and Grave Breaches of the Geneva Convention.¹ The Crimes Against Humanity include 1) murder, 2) extermination, 3) enslavement, 4) imprisonment, 5) torture, 6) rape, 7) persecutions on political grounds, 8) and other inhumane acts. The Grave Breaches of the Geneva Convention include 1) willful killing, 2) torture or inhumane treatment, 3) willfully causing great suffering or serious injury to body or

¹ Kaing Guek Eav (alias Duch), Case No. 001/18-07-2007-ECCC-OCIJ, Closing Order Indicting Kaing Guek Eav, Public Redacted Version, page 44. August 8th, 2008.

health, 4) willfully depriving a prisoner of war or civilian the rights of fair and regular trial, and 5) unlawful confinement of a civilian.²

During the Khmer Rouge Era, from 1975-1979, Duch was chairman of the Communist Party of Kampuchea Special Branch of the Secret Police known at the time as S-21 and presently home of the Tuol Sleng Genocide Museum.³ Prior to this time, Duch was chairman of Office 13 (M-13), a security office in Kompong Speu province.⁴

S-21 was located in Phnom Penh and, according to the prosecution, operated uniquely within the network of security branches because it was the only one with direct link to the Central Committee (the central Khmer Rouge government) and because it was used for the detention and execution of Khmer Rouge cadre.⁵

During his time as head of S-21, Duch divided the security office into two units: the defense unit and interrogation unit. He delegated administration of the defense unit to a subordinate and maintained direct oversight of the interrogation unit.⁶ The interrogation unit was subdivided into the document unit, special unit, and various other groups, including photography, medicine, cooking, and logistics.⁷ Duch ran S-21 on hierarchical lines, maintained reporting systems to make sure his orders were followed exactly, and was described by at least one witness as being feared by everyone.⁸

² *Id.*

³ *Id.*, at ¶ 1.

⁴ *Id.*

⁵ *Id.*, at ¶ 20.

⁶ *Id.*, at ¶ 24.

⁷ *Id.*

⁸ *Id.*, at ¶ 24-25.

While under his control, prisoners at S-21 were subjected to starvation, torture medical experimentation, and almost always killed.⁹ In total, over 12,380 detainees were executed at S-21.¹⁰

DISCUSSION

Kaing Guek Eav (alias Duch) is currently on trial for committing crimes against humanity and grave breaches of the Geneva Convention, and has admitted guilt for both. Therefore, it is very likely that he will be found guilty of these crimes. The purpose of this memo is to provide guidance to the court as to the relevant domestic and international sentencing practices that may be useful to consider when determining an appropriate sentence. First, this memo will present the textual guidance provided in the rules governing the ECCC, Cambodian legal codes, and various international criminal tribunals. The memo will then apply these standards to Duch's case, drawing conclusions about how individual sentencing factors may impact the overall sentence given to the accused. Lastly, this memo will examine various justifications for criminal sentencing practices and how different sentencing objectives would influence Duch's sentence.

I. Due to the lack of sentencing guidance provided for in the laws and rules of the ECCC and Cambodian legal practices, the ECCC should rely on international sentencing jurisprudence when sentencing Kaing Guek Eav.

A. The Law, Rules, and Agreement governing the ECCC provide few sentencing guidelines, and instead direct the court to consider either Cambodian or international legal standards.

Textual sentencing guidelines for the ECCC are provided for in three documents: The Law Establishing the ECCC (Law), the Internal Rules (Rules), and the Agreement between the UN and Cambodia (Agreement).

⁹ *Id.*, at ¶ 67-107.

¹⁰ *Id.*, at ¶ 107.

The Law offers the court the most directives in terms of sentencing guidelines. If Duch is convicted of any of the crimes he is being tried for, Article 39 of the Law mandates a sentence of 5 years to life imprisonment.¹¹ Furthermore, the Law states that one's position or rank does not mitigate punishment, and the fact that one commits acts pursuant to government or superior orders does not relieve that person of criminal liability.¹² The Rules and the Agreement offer little sentencing guidance useful to the court. The Rules state: "if the accused is found guilty, the Chamber shall sentence him or her in accordance with the Agreement, the ECCC Law and these [internal rules]".¹³ Article 10 of the Agreement, like Article 3 of the Law, limits the form of punishment to imprisonment.¹⁴ Lastly, the Agreement mandates that procedure must be in accordance with Cambodian law, except in cases where domestic law is silent on a matter, where there is uncertainty pertaining to a particular rule, or where there is a question as to whether domestic law is consistent with international standards.¹⁵ In such cases, the court is directed to follow internationally developed jurisprudence.¹⁶

¹¹ The Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, Article 39, 27 October 2004. (Article 39 mandates a sentence of 5 years to life imprisonment for convictions. for any of the following crimes: Homicide, Torture, or Religious Persecution under The 1956 Penal Code, crimes of genocide as defined by the Convention on the Prevention and Punishment of the Crime of Genocide of 1948, crimes against humanity, grave breaches of the Geneva Conventions of 12 August 1949, destruction of cultural property during armed conflict pursuant to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, and crimes against internationally protected persons pursuant to the Vienna Convention of 1961 on Diplomatic Relations.)

¹² *Id.*, Article 29.

¹³ The Internal Rules of the Extraordinary Chambers in the Courts of Cambodia (Rev. 3), Rule 98(5), 6 March 2009.

¹⁴ The 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, Article 10, 6 June 2003. (Citing The Constitution of the Kingdom of Cambodia. Article 32).

¹⁵ *Id.*, Article 12.

¹⁶ *Id.*

B. Cambodian sentencing practices offer little guidance to the ECCC and, therefore, indicate more weight should be placed on international jurisprudence.

The Cambodian law provides little guidance useful to the ECCC for determining appropriate sentence durations for crimes against humanity, including torture and extermination.

The 1956 Penal Code of Cambodia was in effect at the time of the Khmer Rouge, but it does not adequately address the international crimes that Duch is accused of and there is no available case law based on that code to assist in its interpretation. However, it is worth noting that the 1956 Penal Code was largely influenced by the French legal system, and as such, is born of the civil law tradition. Traditionally, civil law countries, such as France and Germany, have placed great emphasis on the need to tailor sentences to the specific facts of each case.¹⁷ This historical influence suggests considering a variety of factors related to the accused's personal circumstances and may indicate that Cambodian law, like its French predecessor, would include a consideration of aggravating and mitigating factors related to personal circumstances of the accused.

While there are more recent texts, including the laws promulgated by the United Nations Transitional Authority in Cambodia (UNTAC Law), the State of Cambodia Law (SOC Law), the Code of Criminal Procedure of the Kingdom of Cambodia, and a draft version of a new Cambodian penal code that has yet to be enacted, they also provide little guidance. The only textual provision that the ECCC may want to consider is Article 63 of the UNTAC code, which directs domestic courts to consider attenuating circumstances at the time of sentencing.¹⁸ However, it must be noted that this law was enacted in 1992 and was therefore not in effect at the time

¹⁷ Delmas-Marty, Mireille & J.R. Spencer, *European Criminal Procedure*, Cambridge University Press, United Kingdom, 2005, p. 624.

¹⁸ United Nations Transitional Authority in Cambodia Law (UNTAC), Art. 63.

of the Khmer Rouge. Additionally, it was promulgated by the United Nations Transitional Authority in Cambodia, and therefore may not reflect domestic practices.

Despite the historical aspects of the 1956 Penal Code and the textual directives contained in the UNTAC law, Cambodian jurisprudence seems to lack sufficient textual directives concerning criminal sentencing for the crimes that Duch is accused of. Additionally, it is not the practice among the Cambodian judiciary to issue reasoned opinions so there is no way to assess judicial practices.

After considering the Rules, Agreement, and Law governing the ECCC, as well as domestic Cambodian practices, there remains an open question as to what factors the court should consider when sentencing a person for crimes against humanity such as torture and extermination. Furthermore, the ECCC has yet to create any case law useful in resolving such questions. Therefore, the court may find it desirable to apply Article 12 of the ECCC Agreement, which directs the court to look at international jurisprudence for sentencing guidance.¹⁹

II. International sentencing guidelines indicate the ECCC should examine the gravity of the offense and personal circumstances of the accused, including aggravating and mitigating factors, when considering the appropriate sentence for Duch.

International courts, including the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), the International Criminal Court (ICC), the Special Court for Sierra Leone (SCSL), and the Special Panels for Serious Crimes in East Timor (SPSC in East Timor), all consider the gravity of the offence and individual circumstances of the convicted

¹⁹ See note 12, The Agreement, Article 12. (“Where Cambodian law does not deal with a particular matter, or where there is uncertainty regarding interpretation...guidance may be sought in procedural rules established at the international level.”).

person when determining an appropriate sentence length.²⁰ A gravity-of-the-offense analysis includes factors related to the crime itself, and the convicted person's role in that crime. When considering personal circumstances, courts look at a variety of aggravating and mitigating factors, aside from the crime itself, that indicate the need for a harsher or lighter punishment.

International courts are also directed to consider any aggravating or mitigating factors that the courts deems relevant. While judges are given discretion to include any factors they deem pertinent, text guidelines at most courts explicitly state that if a convicted person was determined to have acted "pursuant to an order of a Government or superior"²¹ or "substantial[ly] cooperat[ed] with the prosecution before or after conviction" the sentence should be mitigated.²² However, it is left to judicial discretion to determine how much weight should be given to various aggravating and mitigating factors at sentencing.

While the ICTY, ICTR, and SCSL are explicitly directed to consider gravity of the offense and personal circumstances, the ICC is directed by language similar in meaning, but considerably more detailed. According to the rules of procedure at the ICC, the court must consider:

"All relevant factors, including any mitigating and aggravating factors, and to consider the circumstances both of the convicted person and the crime...[including] the extent of the damage caused...harm caused to the victims...the nature of the unlawful behavior and the means employed to execute the crime; the degree of participation of the convicted person, the degree of intent; the circumstances of manner, time, and location; and the age, education, social and economic condition of the convicted person."²³

²⁰ The Statute of the ICTY, Article 24(2); The Statute of the ICTR, Art. 23(2); The Statute of the Special Court of Sierra Leone, Article 19(2); The Rome Statute, Article 78; UNTAET Regulation NO. 2000/15, June 6th, 2000, Sec. 10(1).

²¹ The Statute of the ICTR, Article 6(4), The Statute of the ICTY, Article 7(4), The Statute of the Special Court of Sierra Leone, Article 6(4).

²² The Rules of Procedure and Evidence for the ICTY, Rule 101(b)(ii); The Rules of Procedure and Evidence for the ICTR, Rule 101(b)(ii); The Rules of Procedure and Evidence for the Special Court of Sierra Leone, Rule 101(b)(ii); UNTAET Regulation NO. 2000/15, June 6th, 2000, Sec. 21, Rules of Procedure and Evidence for the ICC, Rule 145(1).

²³ The Rules of Procedure and Evidence for the ICC, Rule 145(1).

When discussing aggravating and mitigating factors, the ICC rules include a list of potential factors the court may consider. Aggravating factors may include abuse of power or official capacity, crimes against particularly vulnerable victims, commission of a crime with particular cruelty or against multiple victims, and commission of a crime motivated by discrimination.²⁴ Mitigating factors may include the convicted person's conduct after the act and circumstances that may have caused substantially diminished mental capacity or duress.²⁵

One key textual difference between the rules governing the ICTY, ICTR, and SCSL, and the rules governing the ICC is that the ICC is not explicitly directed to consider 'following government or superior orders' as a mitigating factor.²⁶

It is also worth noting that the ICC has yet to sentence anyone and, therefore, can offer no jurisprudence that may help us understand how the court has interpreted the textual sentencing guidelines.

A. The offenses that Duch is on trial for are particularly grave and may justify a heightened penalty.

When sentencing a convicted person, courts first look at the gravity of the offense that the convicted person committed.²⁷ As the ICTY stated, "gravity of the offence is a factor of primary importance" and should be regarded as the litmus test when assessing an appropriate sentence.²⁸

²⁴ *Id.*, Rule 145(2)(B).

²⁵ *Id.*, Rule 145(2)(A).

²⁶ See generally, The Rome Statute for the ICC. See also, The Rules of Procedure and Evidence for ICC.

²⁷ The Statute of the ICTY, Article 24(2); The Statute of the ICTR, Article 23(2); The Statute for the Special Court of Sierra Leone, Article 19(2); The Rome Statute for the ICC, Article 78; And generally, *Prosecutor v. Sedyono*, Case Reg. No. 01/Ham/Tim-Tim/02/2002, Special Panels for Serious Crimes in East Timor, Judgment (TC), 15 August 2002, available at http://istocrates.berkeley.edu/~warcrime/East_Timor_and_Indonesia/Indictments_and_judgments/Indonesia_Sedyono_Judgment.htm, (NOTE: page and paragraph numbers not available).

²⁸ *Prosecuton v. D. Nikolic*, Case No. IT-94-2-S, ICTY, Sentencing Judgment (TC), ¶ 144. 18 December 2003.

When assessing the gravity of a particular offense in relation to sentencing, courts generally examine the nature of the crime and the role of the accused.²⁹ The Trial Chamber of the ICTY stated in *Prosecutor v. Kupreskic* that “the determination of the gravity of the crime requires a consideration of the particular circumstances of the case, as well as the form and degree of the participation of the accused in the crime”.³⁰ In *Prosecutor v. M. Nikolic*, the ICTY Appeals Chamber broke down ‘gravity of the offense’ into an assessment of the scope and impact of the criminal activity (including the number of people effected by the crime and the harm caused to them), as well as the role of the accused in committing the criminal activity (including the formal role of the accused, the manner in which that role was performed, and the circumstances under which those duties were performed).³¹

It is worth noting that courts vary with regard to considering the vulnerability of the victims. While some consider the status of the victims under a gravity-of-the-offense analysis, others examine the victim’s status as an aggravating factor.³² The judges may decide where to consider the victim’s status, but for the purposes of this memo I will consider it as an aggravating factor.

1. The nature and scope of Duch’s crimes are particularly heinous and extensive, and seem to justify a heightened penalty.

When assessing the nature and scope of crimes against humanity, courts have found the crimes of torture, execution, and persecution to be particularly heinous and worthy of a heightened penalty. For example, in *Prosecutor v. M. Nikolic*, the ICTY gave substantial weight toward a heightened penalty because the nature and scope of

²⁹ *Prosecutor v. Bisengimana*, Case No. ICTR-00-60-T, ICTR, Judgment and Sentence (TC), ¶ 178. 13 April 2006.; *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-T, ICTY, Sentencing Judgment (TC), ¶ 182, 25 June 1999.

³⁰ *Prosecutor v. V. Kupreskic*, Case No. IT-95-16-T, ICTY, Judgment (TC), ¶ 852, 14 January 2000.

³¹ *Prosecutor v. M. Nikolic*, Case No. IT-02-60/1, ICTY, Judgment on Sentencing Appeal, ¶ 103, 8 March 2006.

³² *Id.* at ¶ 103.

M. Nikolic's acts included joint criminal responsibility for the torture and execution of 7000 Bosnian Muslims, as well as the displacement of another 30,000 Bosnian Muslims.³³ The court placed additional weight on the fact that M. Nikolic's crimes included persecution, which they found to be particularly grave in itself.³⁴ The ICTY made a similar conclusion in *Prosecutor v. D. Nikolic*, justifying a heightened punishment for the convicted person because of the high number of victims and the multitude of criminal acts that he committed.³⁵ In that case, the accused admitted to taking part in, or being responsible for acts of persecution, murder, rape, and torture of Bosnian detainees at a detention camp under the authority of the accused.³⁶

In *Prosecutor v. Bisengimana*, the ICTR also found the crimes of execution and murder to be particularly heinous and worthy of a heightened sentence.³⁷ Further, the court put substantial weight on a finding that the scope of the crimes included the execution of several thousand civilians.³⁸ Lastly, the court notes that the scope and impact of the crimes were not limited to executions, but encompassed the physical and mental torture suffered by the victims of the criminal activity.³⁹

In the case of Duch, the crimes he is charged with, including the torture and extermination of civilian detainees, are of an extremely heinous nature and therefore warrant a heightened penalty. Similar to the case of *M. Nikolic*, who was, along with other military leaders, jointly responsible for 7000 Bosnian Muslims being tortured and killed, under Duch's command, over 12,380 people were tortured and executed at S-21 and Cheung Ek.⁴⁰ And like the case of *D. Nikolic*, where the accused was head

³³ *Id.* at ¶ 121.

³⁴ *M. Nikolic*, ¶ 105.

³⁵ *D. Nikolic*, ¶ 213.

³⁶ *Id.*, at ¶ 65-104.

³⁷ *Bisengimana*, ¶ 112.

³⁸ *Id.*, at ¶ 112.

³⁹ *Id.*, at ¶ 118.

⁴⁰ See note 1, Closing Order for Case 001, ¶ 107.

of a detention camp where hundred of detainees where tortured and executed, Duch too was head of a prison where mass numbers of detainees were tortured and executed. Additionally, like the crimes of Bisengimana, Duch's crimes seem to include mental torture of the victims at S-21, as evidenced by findings that detainees were kept in small, dark cells, shackled to the floor, for weeks at a time.⁴¹

Due to the particularly heinous nature of Duch's criminal activity and the wide scope of the crimes' effect, the court may find it necessary to give Duch a heightened punishment.

2. As the leader of S-21, Duch was directly responsible for the staff and prisoners at S-21, and therefore played a substantial role in the torture and executions that took place there, indicating the need for a heightened punishment.

When examining the role of the accused, courts tend to look at the mental state of the accused and the contribution they made toward the commission of the crimes for which they are on trial.

For example, in *Prosecutor v. D. Nikolic*, the ICTY interpreted the 'role' of the accused to mean the relative significance of the accused in carrying out the criminal activity. Thus, even if the formal role of the accused was relatively low in the hierarchy, it does not necessarily follow that a lower sentence will be imposed.⁴² Applying that interpretation to D. Nikolic, the ICTY found his offenses relatively more grave because the accused was not just following orders, but was actively furthering the criminal activity by managing and coordinating the detention and execution of the victims, and because the accused committed the crimes with a "methodical and chilling efficiency" that displayed a total disregard for humanity.⁴³ The court found D. Nikolic's role particularly significant because he directed

⁴¹ *Id.*, at ¶ 136.

⁴² *D. Nikolic*, ¶ 115.

⁴³ *Id.*, at ¶ 121.

subordinates to commit particularly depraved acts.⁴⁴ In *Prosecutor v. Jelusic*, the ICTY also justified a heightened penalty based on findings that the “particularly cold-blooded manner in which executions were carried out indicated...[the accused had] enthusiastically committed his crimes”.⁴⁵

In *Bisengimana*, the ICTR addressed a case where the accused held a position as a local government leader in a village where Hutu fighters under his authority massacred a group of Tutsi civilians.⁴⁶ Although he did not participate or order the crimes, the ICTR still found that the accused played a substantial role in the commission of the executions, reasoning that his failure to prevent the massacre violated his duty to protect his Tutsi constituents and that his silence encouraged the Hutu fighters to carry out the crimes.⁴⁷ Therefore, the court found the role of the accused to justify a heightened punishment.

Conversely, in *Prosecutor v. Alexsovski*, the ICTY found that the crimes of the accused were relatively less grave because the accused did not play an “instrumental” role in the commission of the criminal enterprise.⁴⁸ In that case, the accused worked in a prison and was in charge of the welfare of 50 inmates who were found to be treated inhumanely.⁴⁹

In the Duch trial, the role of the accused seems to lend weight toward justifying a heightened sentence. Like the case of *D. Nikolic*, where the accused was head of a prison where detainees were tortured and killed, Duch was chairman of S-21 where at least 12,380 detainees were subjected to depraved treatment, including

⁴⁴ *Id.*

⁴⁵ *Prosecutor v. Jelusic*, Case No. IT-95-10-T, ICTY, Judgment (TC), ¶ 130-31, 14 December 1999.

⁴⁶ *Bisengimana*, ¶ 120.

⁴⁷ *Id.*

⁴⁸ *Prosecutor v. Alexsovski*, Case No. IT-95-14/1-T, ICTY, Sentencing Judgment (TC), ¶ 231-37, 25 June 1999.

⁴⁹ *Id.*

inadequate food and unsanitary living conditions⁵⁰ before being executed.⁵¹

Additionally, former S-21 Prison Guard, Prak Khan, testified that at least half of the detainees at S-21 were interrogated and tortured.⁵²

Like the case of *Bisengimana*, where the accused was found to have had a substantial role in the execution of victims because he held a position of leadership over the soldiers whom he watched massacre Tutsi civilians that he had a duty to protect, Duch had a duty to protect the detainees S-21 from inhumane treatment. Furthermore, Duch actively encourage the torture and execution of detainees by explicitly ordering subordinates to commit those acts. In this way, Duch's role is more substantial than *Bisengimana*, who did not explicitly order his subordinates to kill Tutsis, but simply failed to prevent them from doing so. Therefore, it seems that Duch played a substantial role in the crimes for which he is on trial.

Additionally, the prisoners under Duch's control seemed to have been tortured and executed in a methodical, cold-blooded manner, similar to the crimes being tried in the cases of *Jelusic*, where the ICTY held that the accused enthusiastically contributed to acts of torture and execution, and therefore deserved a heightened penalty. For almost five years, Duch managed an assembly line of murder, keeping records, imposing a strict chain of command, and giving his subordinates instructions on how to torture prisoners and how to make them feel like animals.⁵³ Going beyond mere detainment, Duch ordered guards to treat detainees in horribly deprived ways, indicating the accused played an enthusiastic role in furthering the crimes for which he is being tried. In accordance with Duch's instructions, prisoners were kept in tiny cells, shackled to the floor, with little food or water, at times left without clothing, and

⁵⁰ See note 1, Closing Order for Case 001, ¶ 18-19 and ¶ 62-71.

⁵¹ See note 1, Closing Order for Case 001, ¶ 107.

⁵² See note 1, Closing Order for Case 001, ¶ 85-89.

⁵³ *Id.*, at ¶ 62-71.

forced to remain silent.⁵⁴ Additionally, Duch showed a particularly cold-blooded attitude when he was seen laughing and joking with other interrogators while he and the others were torturing a female detainee.⁵⁵

If the Trial Chamber of the ECCC agrees that Duch's role in committing the criminal acts was both substantial and enthusiastic, it would seem to justify adding substantial weight toward applying a heightened sentence.

B. The individual circumstances concerning Duch, and the crimes he committed, indicate there are aggravating factors that justify a heightened punishment, but also some mitigating factors that justify a mild reduction in sentencing.

As stated above, all international courts consider the “gravity of the offence and the individual circumstances of the convicted person” as well as other mitigating or aggravating factors related to the crime or the convicted person, when considering an appropriate sentence length.⁵⁶ Additionally, the textual guidelines of the ICTY, ICTR, and SCSL explicitly state that cases where an accused person is determined to have acted “pursuant to an order of a Government or superior”⁵⁷ or cases where an accused “substantial[ly] cooperat[ed] with the prosecution before or after conviction” are both mitigating factors at sentencing.⁵⁸

The ICC's rules instruct the court to consider mitigating factors such as “the convicted person's conduct after the act, including any efforts by the person to

⁵⁴ *Id.*

⁵⁵ See note 1, Closing Order for Case 001, ¶ 93.

⁵⁶ Statute of the ICTY, Art. 24(2);; Statute of the ICTR, Article 23(2);; Statute of the SCSL, Article 19(2);; The Rome Statute, Article 78; And generally, *Sedyono*.

⁵⁷ Statute of the ICTR, Article 6(4);; Statute of the ICTY, Article 7(4);; Statute of the SCSL, Article 6(4).

⁵⁸ ICTY Rules of Procedure and Evidence, Rule 101(b)(ii);; ICTR Rules of Procedure and Evidence, Rule 101(b)(ii);; SCSL Rules of Procedure and Evidence, Rule 101(b)(ii).

compensate the victims and any cooperation with the Court”⁵⁹, but the ICC is not directed to consider following orders as a mitigating factor.⁶⁰

Beyond these guidelines, the judges presiding over a particular case are given considerable discretion when deciding what factors to consider and how much weight to accord each one.⁶¹

As the ICTR Trial Chamber observed, “The judges of the Chamber cannot limit themselves to the factors mentioned in the Statute and Rules...Their unfettered discretion to evaluate the facts and attendant circumstances should enable them to take into account any other factor that they deem pertinent”.⁶² As discussed below, some factors that have been considered included an admission of guilt, co-operation with the prosecutor, remorse, voluntary surrender, good character, and family circumstances.

According to ICTY jurisprudence, to be established as fact, mitigating factors must be established on the balance of probabilities (analogous to a more-likely-than-not standard).⁶³ Aggravating factors must be proven beyond a reasonable doubt to be established as fact.⁶⁴

1. Aggravating factors exist in Duch’s case that may weight in favor of a heightened penalty for Duch.

In Duch’s case, it seems the court may justify a heightened penalty on the grounds that Duch was in a position of authority at S-21 and the fact that the victims of his crimes may constitute a particularly vulnerable group.

⁵⁹ ICC Rules of Procedure and Evidence, Rule 145(2).

⁶⁰ See generally, the Rome Statute and the Rules of the ICC.

⁶¹ *Prosecutor v. Kambanda*, Case No. ICTR 97-23-S, ICTR, Sentencing Judgment (TC), ¶ 30, 4 August 1998.; See also, *M. Nikolic*, ¶ 125.; See also, *Prosecutor v. Ruggiu*, Case No. ICTR-97-31-I, ICTR, Sentencing Judgment (TC), ¶ 34-35, 1 January 2000.

⁶² *Kambanda*, ¶ 30.

⁶³ *M. Nikolic*, ¶ 126.; *D. Nikolic*, ¶ 145.; *Bisengimana*, ¶ 111.

⁶⁴ *Id.*

i. Duch was in a position of authority at S-21, therefore indicating a heightened penalty may be justified.

International courts have generally found that when a convicted person was in a formal position of authority over a group of people that collectively committed war crimes or crimes against humanity, it is to be considered an aggravating factor necessitating a harsher penalty. At the ICTY, the court emphasized this point in *D. Nikolic*, when they held that the defendant's sentence should be increased due to the fact that he held the position of commander at Susica Detention Camp, where he was in charge of a staff that committed crimes against humanity, including torture and murder.⁶⁵ In *M. Nikolic*, the ICTY held that, while the defendant was found to be implementing orders from his superiors, his position as Assistant Commander and Chief of Security and Intelligence put him in a position of authority and he thus played an important part in carrying out the "murder operation".⁶⁶ Therefore, the court found this fact to be aggravating at sentencing.⁶⁷ At the ICTR, in the case of *Prosecutor v. Kambanda*, the court also held that the accused's position in a leadership role was an aggravating factor.⁶⁸ The same court, in *Bisengimana*, observed "one who orders the extermination is more culpable than one who merely aids and abets".⁶⁹ In *Prosecutor v. Soares*, the SPSC in East Timor followed a similar jurisprudence when they heightened the sentence of the accused because he had held a position of authority.⁷⁰

⁶⁵ *D. Nikolic*, ¶ 179.

⁶⁶ *M. Nikolic*, ¶ 135.

⁶⁷ *Id.*, at ¶ 135.

⁶⁸ *Kambanda*, ¶ 61-62.

⁶⁹ *Bisengimana*, ¶ 183.

⁷⁰ *Prosecutor v. Soares*, Case File No. 02/HAM/TIM-TIM/02/2002, Special Panels for Serious Crimes in East Timor, 4 March 2002, available at: http://ist-socrates.berkeley.edu/~warcrime/East_Timor_and_Indonesia/Indictments_and_judgments/Indonesia_Soares_Judgment.htm. (page and paragraph numbers not available).

In Duch's case, the accused was the chairman of S-21 and reported directly to the Central Committee.⁷¹ Additionally, Duch has admitted in court that he was in a position of authority over the staff of S-21 who committed most of the tortures and executions. Lastly, the ECCC only has jurisdiction over senior leaders, so, by definition, Duch has been determined by the court to have held a position of authority.⁷² Based on these facts it seems the ECCC Trial Chamber may want to consider a heightened punishment for Duch.

ii. Duch's crimes were committed against particularly vulnerable victims, including women, children, and prisoners under his control, and, therefore, the Trial Chamber may want increase his punishment.

Courts have generally held that sentencing is aggravated by findings that the victims of the offense included especially vulnerable populations, such as women, children, the elderly, or prisoners in custody. In *M. Nikolic*, the ICTY found the crimes to be deserving of a heightened punishment because the victims include the entire Bosnian Muslim population, children and elderly, males and females.⁷³

In *D. Nikolic*, the court found that the victims were particularly vulnerable because they were illegally detained with no contact with the outside world, and included woman, children and the elderly, and largely focused on Muslims.⁷⁴ On these grounds, the court justified a heightened sentence.⁷⁵ The vulnerability of victims was also found to necessitate a harsher penalty in *Prosecution v. Simic*.⁷⁶ In that ICTY case, the victims were determined to be vulnerable because they were in the

⁷¹ ECCC Trial Chamber Transcripts, Case 001, March 31, 2009, p.68.

⁷² See note 9, The Law, Art. 1.

⁷³ *M. Nikolic*, ¶ 121.

⁷⁴ *D. Nikolic*, ¶ 184.

⁷⁵ *Id.*

⁷⁶ *Prosecutor v. Simic*, Case No. IT-95-9-T, ICTY, Judgment (TC), ¶ 1083, 17 October 2003.

custody and control of Simic's command, had been detained for several months, and suffered repeated beatings, all of which they were defenseless against.⁷⁷

In the *Bisengimana* case at the ICTR, where the accused was convicted for participation in the execution of Tutsi civilians, the Trial Court justified a heightened punishment because the executions were targeted at a civilian population defined by ethnic identity.⁷⁸

The victims of Duch's crimes, like the cases of *Bisengimana* and *M. Nikolic*, included civilian men, women, and children.⁷⁹ Furthermore, like *Simic*, where the court found the victims more vulnerable because they were in the control and custody of the accused, the victims of Duch's crimes were also under his control and custody.

On the other hand, it is also important to distinguish Duch's victims from the cases of *Bisengimana*, *M. Nikolic*, and *D. Nikolic*. In each of those cases, the court found crimes justified a heightened sentence because they were focused at civilian populations defined by ethnic identity; an immutable characteristic. In the case of Duch, his victims were mainly targeted for political reasons.

The status of Duch's victims, which included civilian men, women, and children, under his control as prisoners, indicate the court may want to consider a heightened punishment. However, because it is not clear that these victims were targeted because of their ethnic identity or other immutable characteristic, it may be desirable to give relatively less weight to the victim's status when justifying a heightened punishment.

⁷⁷ *Id.*

⁷⁸ *Bisengimana*, ¶ 118.

⁷⁹ See note 1, Closing Order for Case 001, ¶ 47.

2. *There seem to be mitigating factors in Duch’s case that may weight toward a reduction in his sentence.*

While the Trial Chamber is free to consider a range of mitigating factors, this memo will address the most frequently cited mitigating factors that may be applicable to the Duch case. Those factors are 1) substantial cooperation with the prosecution, 2) committing a crime pursuant to a superior order, 3) the character of the accused, 4) accepting guilt and responsibility, and 5) sincere remorse for the crimes.

i. Duch seems to have cooperated with the Trial Chamber, therefore indicating it may be appropriate to mitigate his sentence.

Cooperation is considered a mitigating factor so long as it is “substantial”.⁸⁰ The ICTY, in *Prosecutor v. Blaskic*, established an analytic matrix that considers the extent and quality of information provided, to determine whether cooperation is “substantial”.⁸¹ In *D. Nikolic*, the ICTY applied the ‘Blaskic Test’ to find the accused had substantially cooperated with the court on the grounds that the accused provided extensive and useful information that contributed to the fact-finding mission of the tribunal.⁸² In *Prosecutor v. Erdemovic*, the accused was also found to be cooperative based on the fact that he gave high-quality information, including new names of other perpetrators, and corroboration of existing information.⁸³

In addition to providing substantial information, the SPSC in East Timor has recognized cooperation as mitigating based solely on the accused attitude in court. For example, in *Prosecutor v. Sedyono*, the accused’s sentence was mitigated on the grounds that the accused “show[ed] respect for the court”.⁸⁴

⁸⁰ *D. Nikolic*, ¶ 260.

⁸¹ *Id.*, at ¶ 253.

⁸² *Id.*, at ¶ 253-260.

⁸³ *Prosecutor v. Erdemovic*, Case No. 11-96-22Tbis, ICTY, Sentencing Judgment (TC), ¶ 16(iv), 5 March 1998.

⁸⁴ *Sedyono*, (page and paragraph numbers not available).

In the case of Duch, the facts seem to indicate that it is more likely than not that the accused has been substantially cooperative and respectful of the court. On the second day of his trial, Duch expressed a willingness to answer all questions asked by the court and civil parties.⁸⁵ At times, it seems Duch has followed up on this pledge, offering details of his own crimes, the crimes of the Khmer Rouge generally, as well as elaborating on the structure, policies, and operations of the Central Committee.⁸⁶ Indeed, the investigating judges seem to agree, stating in the Closing Order that “Duch has cooperated willingly in the judicial investigation”.⁸⁷

However, one may argue Duch has not been fully cooperative because he only confirms testimony already proven by the court through other evidence.⁸⁸ Nonetheless, the fact that he provides additional details and has provided lengthy testimony about the operations and structure of the Khmer Rouge regime seems to satisfy the analysis employed in *Blaskic*. Furthermore, his affirmation of facts presented in court seems valuable to the court’s goals of reconciliation and building an accurate historical record. Therefore, it seems the Trial Chamber may want to reward Duch for this behavior via sentence mitigation.

ii. It seems likely that Duch committed his crimes pursuant to an order by his superiors, thus indicating the Trial Chamber may want to consider mitigating Duch’s sentence.

The rules of the ICTY, ICTR, and SCSL explicitly state that actions “pursuant to an order by the government or superior does not relieve of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal

⁸⁵ ECCC Trial Chamber Transcripts, Case 001, March 31, 2009, p.70.

⁸⁶ ECCC Trial Chamber Transcripts, Case 001, May 27, 2009, pp.3-52. (Duch provides details concerning the structure, policies, and operations of the Central Committee).

⁸⁷ See note 1, Closing Order for Case 001, ¶ 168.

⁸⁸ ECCC Trial Chamber Transcripts, Case 001, July 8, 2009, p.3

decides justice so requires”.⁸⁹ The SPSC in East Timor has applied a similar jurisprudence, referencing the ICTY and ICTR in some of its judgments.⁹⁰ In *Sedyono* the SPSC in East Timor noted “actions that were carried out as an order from a superior officer...can be used as a consideration for leniency”.⁹¹

In Duch’s case, it seems likely that the accused ordered the torture and execution of prisoners to implement orders coming from the Central Committee. Indeed, the Closing Order indicting Duch seems to support this assertion, stating that Duch was action under the direct orders of Son Sen and the Central Committee.⁹² Based on these findings, it seems appropriate that the ECCC give some weight toward mitigating Duch’s sentence because he was acting pursuant to superior orders.

Additionally, Duch has claimed that he was implementing superior orders under the threat of death, which may justify additional sentence mitigation.⁹³ In *Blaskic*, the court noted “duress...does mitigate the criminal responsibility of the accused when he had no choice or moral freedom in committing the crimes”.⁹⁴ Similarly, in *Erdemovic*, the court justified a lesser sentence because the accused was found to have been following orders under the threat of death.⁹⁵ If the Trial Chamber is convinced that Duch acted under some duress, the court may want to consider adding additional weight toward mitigating Duch’s sentence.

On the other hand, in the first trial for genocide, which was against Adolf Eichmann, tried in the domestic Israel court system, the court held that following orders could not mitigate the accused’s crimes because the crimes were excessively

⁸⁹ Statute of the ICTY, Article 7.; Statute of the ICTR, Article 6.; Statute of the SCSL, Article 6.

⁹⁰ *Sedyono*, (page and paragraph numbers not available).

⁹¹ *Id.*

⁹² See note 1, Closing Order for Case 001, ¶ 2.

⁹³ ECCC Trial Chamber Transcripts, Case 001, March 31, 2009, pp.68-69.

⁹⁴ *Prosecutor v. Blaskic*, Case No. IT-95-14-T, ICTY, Judgment (TC), ¶ 769, 3 March 2000.

⁹⁵ *Erdemovic*, ¶ 4-16(i).

depraved.⁹⁶ Some may argue that the ECCC should follow similar jurisprudence to find that Duch's crimes are too depraved to allow mitigation for following superior orders. However, since the *Eichmann* case was tried in the domestic Israeli legal system it does not represent international jurisprudence. Therefore, it still seems appropriate for the ECCC to consider "acting pursuant to government orders" as a mitigating factor.

iii. Duch's acceptance of guilt seems qualified and does not appear to have facilitated an efficient trial, therefore possibly negating any justification for a sentence reduction on these grounds.

The rules governing the ICTY, ICTR, SCSL, do not allow formal guilty pleas to be accepted by a court unless the guilty plea is unequivocal and the ICC may not accept a guilty plea unless it is supported by the facts of the case contained in witness testimony or other evidence.⁹⁷ Additionally, some international courts have found that guilty pleas do not mitigate if the accused is found to be evasive or not fully forthcoming with their testimony.⁹⁸

Both the ICTR and the ICTY have observed that guilty pleas should mitigate sentencing on the grounds that mitigation encourages the accused to be forthcoming with information and to recognize their crimes publicly so as to help develop a more comprehensive historical record.⁹⁹ The ICTY has also observed that, "in relation to the Tribunal's mission to assist in restoring peace and bring reconciliation to the territory of the former Yugoslavia, guilty pleas can certainly contribute significantly". Lastly, the ICTY has found guilty pleas mitigate sentencing on the grounds that it

⁹⁶ *Eichmann* case, May 29th, 1962, available at: <<http://www.nizkor.org/hweb/people/e/eichmann-adolf/transcripts/Sessions/Session-121-01.html>>.

⁹⁷ ICTY Rules of Procedure and Evidence, Rule 62(iii); ICTR Rules of Procedure and Evidence, Rule 62(B); SCSL Rules of Procedure and Evidence, Rule 62(iii); Rome Statute, Article 65(1)(c).

⁹⁸ *M. Nikolic*, ¶ 156.

⁹⁹ *Erdemovic*, ¶ 16(iii). ("An admission of guilt demonstrates honesty and it is important for the International Tribunal to encourage people to come forth, whether already indicted or as unknown perpetrators").

shows an expression of honesty and readiness to take responsibility, and contribute to reconciliation on the part of the accused.¹⁰⁰ Like the ICTY, the ICTR has also found guilty pleas to be mitigating factors at sentencing because it shows remorse, repentance, contribution to reconciliation, the establishment of truth, the encouragement for others to come forward, saving of resources, and saving the witnesses from testifying in court.¹⁰¹

In the case of Duch, the accused seems to have accepted responsibility and has even been recognized by the investigating judges as doing so.¹⁰² But despite formally accepting responsibility and apologizing, it seems that the accused may be equivocating his acceptance of guilt by subtly shifting blame onto his superiors and subordinates. In his apology, made on Day 2 of the trial, Duch explained how he was guilty for the crimes at S-21, but that he was acting under superior orders and the threat of death. The accused stated that, “although I did [the crimes at S-21] because I received the order from [the Central DPK government], I am solely responsible for those crimes”.¹⁰³ He then went on to explain that he “never dare think about” questioning orders, because he feared it would cost the life of himself and his family.¹⁰⁴ When outlining his defense argument, Duch began by saying that “from the 17th of April 1975, to the 6th of January 1979, the Democratic Kampuchea party was exclusively in charge of the crimes in Cambodia”.¹⁰⁵ As part of his defense, Duch also claimed that he played no part in setting policies, but merely implemented orders of the Central Committee. However, expert Witness Dr. Craig Etchison testified that many of the killings were left to Duch’s discretion, given his high

¹⁰⁰ *D. Nikolic*, ¶ 237.

¹⁰¹ *Bisengimana*, ¶ 126.

¹⁰² See note 1, Closing Order for Case 001, ¶ 167. (“Duch has consistently recognized his responsibility for the crimes committed at S-21”).

¹⁰³ ECCC Trial Chamber Transcripts, Case 001, March 31, 2009, pp.68-69.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*, at p.66.

ranking status, and the fact that his superiors were likely too busy to supervise individual killings at S-21 and would have instead delegated decision making authority to Duch.¹⁰⁶ This directly contradicts Duch's claim that he was merely implementing orders, and may indicate Duch's unwillingness to accept full responsibility for his crimes.

Even if the Trial Chamber finds that Duch's acceptance of guilt and responsibility has not been qualified, the court may still want to reduce the weight given to his acceptance of guilt and responsibility on the grounds that Duch denies guilt for anything the court cannot prove, appearing evasive and reducing the justification for mitigating sentencing for a guilty plea. As the ICTY has observed in the *Erdemovic* trial, "[a] voluntary admission of guilt which has saved the International Tribunal the time and effort of a lengthy investigation and trial is to be commended".¹⁰⁷ However, at the ECCC, the acceptance of guilt by the accused has not lead to a more efficient or speedy trial because the burden of proving guilt has not been removed from the prosecution. And while admissions of guilt could potentially facilitate a more speedy trial by providing evidence for the prosecution, in Duch's case, the accused has expressed an unwillingness to do so. Indeed, his defense lawyer explicitly stated that Duch is only willing to accept guilt for assertions supported by "ample evidence".¹⁰⁸

Based on the fact that Duch's acceptance of guilt is qualified and has done little to produce a more efficient trial or reduce the burden of proof on the prosecution, the court may choose not to give any weight to Duch's guilty plea as a mitigating factor.

¹⁰⁶ ECCC Trial Chamber Transcripts, Case 001, May 27, 2009, May 27th, pp.83-90.

¹⁰⁷ *Erdemovic*, ¶ 16(ii).

¹⁰⁸ ECCC Trial Chamber Transcripts, Case 001, July 8th 2009, p.3.

iv. *There are questions as to the sincerity of Duch's remorse and, therefore, the Trial Chamber may find it unnecessary to include it as a mitigating factor.*

While courts generally consider remorse to be mitigating, they do so only when it is found to be sincere. Courts tend to mitigate sentencing for sincere remorse because “when an admission of guilt is coupled with a sincere expression of remorse, a significant opportunity for reconciliation may be created”.¹⁰⁹ To analyze the sincerity of an accused, courts use an objective standard that looks at the statements and behavior of the accused, such as a voluntary surrender or guilty plea.¹¹⁰

In the cases of *Erdemovic* and *D. Nikolic*, the ICTY focused on the apology of the accused and their behavior in court to determine that their remorse was sincere and therefore a mitigating factor.¹¹¹ In the case of *Blaskic*, the ICTY focused its assessment of sincerity on the statements made by the accused and his behavior in court. In that case, the court found that the statements of remorse, which included assertions by the accused that he did what he could to improve the situation, contradicted facts of the case and therefore indicated his remorse was “dubious”.¹¹² Similarly, in *Jelusic*, the accused's stated remorse was determined to be insincere, largely because it was not expressed until the guilty plea was negotiated and the accused did not voluntarily surrender himself.¹¹³ The implication of the court's decision is that, in its view, the accused's statement of remorse was only strategic.

In Duch's case, the accused tried to show his sincere remorse when he made an apology on Tuesday, March 31st, 2009, the second day of hearings at the trial chamber. In it, he expressed his “regretfulness (sic) and heartfelt sorrow and loss for

¹⁰⁹ *M. Nikolic*, ¶ 72.

¹¹⁰ *Blaskic*, ¶ 775.

¹¹¹ *Erdemovic*, ¶ 16(iii). See also, *D. Nikolic*, ¶ 242.

¹¹² *Blaskic*, ¶ 775.

¹¹³ *Jelusic*, ¶ 127.

all the crimes committed by the [DPK] from 1975-1979”¹¹⁴ and that that he is “very regretful, and...very shameful”.¹¹⁵ He further goes on to say that he desires to show his remorse by co-operating with the court and accepting his guilt.¹¹⁶ Lastly, Duch explained that he gets very depressed when he thinks about his past actions and all he can do to relieve that pain is to pray for forgiveness from both his family and the victims.¹¹⁷ These statements, taken as a whole, seem to indicate a general remorse for the crimes he committed.

However, Duch’s remorse seems insincere because it was not made until he was involuntarily captured and tried for his crimes. Indeed, this seems analogous to the case of *Jelusic*, where the ICTY found the expression of remorse by the accused insincere because it was not made until after the accused had been involuntarily taken into custody and tried for his crimes.¹¹⁸ Like the court in *Jelusic*, the Trial Chamber should take into consideration the fact that Duch did not express remorse until trial proceedings had begun and he did not voluntarily surrender.

Further indicating the possible insincerity of Duch’s words are his actions after the Vietnamese liberation in 1979. After the liberation, Duch stayed with the Khmer Rouge in hiding until being captured by Cambodian military authorities in May of 1999.¹¹⁹ These actions seem to contradict Duch’s assertions that he disagreed with the killing policies of the DPK, but continued to follow DPK orders out of fear for his life and the life of his family.¹²⁰ Indeed, Duch stayed with the Khmer Rouge decades after having the opportunity to leave their ranks. Like the court in *Blaskic*, where the ICTY found statements made by the accused insincere because they

¹¹⁴ ECCC Trial Chamber Transcripts, Case 001, March 31, 2009, p.67.

¹¹⁵ *Id.*, at p.69.

¹¹⁶ *Id.*, at p.69-70.

¹¹⁷ *Id.*, at p.71-72

¹¹⁸ *Jelusic*, ¶ 127.

¹¹⁹ See note 1, Closing Order for Case 001, ¶ 3.

¹²⁰ ECCC Trial Chamber Transcripts, Case 001, March 31, 2009, pp.68-69.

contradicted other facts or testimony,¹²¹ the court in the Duch case may find it desirable to reduce the weight given Duch's remorse toward mitigation because it seems to contradict established facts.

Lastly, Duch's remorse may be insincere because it seems to contradict his claim that he committed his crimes under duress. Indeed, it would seem that, to the extent Duch was forced to commit the crimes for which he is accused, it is difficult to see how he could be remorseful, as that indicates regret about a past decision. On the other hand, Duch has asserted that, although he acted under threat of death, he regrets putting his life, and the lives of his family members, above those of the victims. If the Trial Chamber is persuaded by Duch's explanation, they may not find anything contradictory in Duch's simultaneous expressions of remorse and duress. If not, the court may find the sincerity of Duch's remorse diminished.

v. Duch seems to lack respect for humanity and the rule of law, and therefore, it may not be appropriate to consider his character as a mitigating factor.

The character of an accused has been considered a mitigating factor where the accused demonstrated that the crimes he is on trial for are an isolated event in his life. Courts tend to justify a mitigated sentence on these grounds because it indicates the accused person is unlikely to engage in future criminal activity. At the ICTY, in *D. Nikolic*, the Trial Chamber held that, because the accused had no criminal record before the war, and was found to be someone not inclined toward violence, his sentence should be mitigated.¹²² Similarly, in *Erdemovic*, the court found Erdemovic's disposition to one toward pacifism and tolerance of others, and as such, found these factors to be mitigating.¹²³ The ICTR followed a similar jurisprudence in

¹²¹ *Blaskic*, ¶ 775.

¹²² *D. Nikolic*, ¶ 265.

¹²³ *Erdemovic*, ¶ 16(i).

Bisengimana, where they held that the accused had a good character before the genocide based on his job as commune leader, his role as a father and husband, and lack of a history of extremism, and that gave cause to mitigate his sentence.¹²⁴

In Duch's case, the accused spent almost 10 years of his life running the torture and execution prisons of S-21, M-13, and Choeung Ek.¹²⁵ The long period during which Duch engaged in crimes against humanity seems to indicate his total disregard for human life or the rule of law. Additionally, after the Vietnamese entered Phnom Penh on January 7th, 1979, Duch fled the city and went into hiding with them, showing a desire to remain loyal to the Khmer Rouge and to avoid taking responsibility for his actions.¹²⁶ Therefore, it seems that Duch's character is stained by a lack or respect for humanity and the rule of law, and thus it may not be appropriate for the Trial Chamber to mitigate Duch's sentence based on his character.

On the other hand, it may be argued that the court should give some favorable attention to the fact that Duch, prior to become consumed by the Khmer Rouge revolution, led a peaceful life as a math teacher.¹²⁷ However, given the extreme long duration of his involvement with the Khmer Rouge, running torture and execution prisons, it seems hard to characterized Duch as a person inclined toward peace or pacifism.

C. The sum effect of Duch's personal circumstances and the gravity of his offences indicate that the Trial Chamber should apply a punishment near, but less than, the maximum penalty available.

Due to the large amount of factors that can be considered, and the substantial discretion given to the judges in determining what factors to consider and how much

¹²⁴ *Bisengimana*, ¶ 149-150.

¹²⁵ See note 1, Closing Order for Case 001, ¶ 2.

¹²⁶ *Id.*

¹²⁷ See note 1, Closing Order for Case 001, ¶ 2.

weight to give them when sentencing, courts tend to engage in a totality-of-the-circumstances analysis to determine an appropriate sentence. Therefore, it may be useful to consider some cases similar to Duch's and how the judges weighted various combinations of mitigating factors against the crime(s) being punished.

At the ICTY and ICTR, "principal perpetrators convicted of crimes against humanity, such as murder or extermination have received sentences ranging from 10 years to life".¹²⁸ In *D. Nikolic*, the court determined that, based on the gravity of his offenses, which included persecution, murder, rape, and torture while acting as a prison chief, he deserved a sentence of life imprisonment. However, his acts of "Remorse, guilty plea, cooperation, and acts that helped reconciliation" were found to justify a substantial reduction in sentencing, leading to an overall sentence of 23 years.¹²⁹ In *Jelusic*, the ICTY handed down a sentence of 40 years for violations of war crimes and crimes against humanity related to the execution of Bosnian Muslim prisoners at Luka Camp.¹³⁰ The sentence in that case was largely animated by the lack of any mitigating circumstances combined with aggravating factors related to his enthusiastic approach to committing the tortures and executions of prisoners under his control.¹³¹ It is worth noting that, while the accused pled guilty and expressed remorse, the court found both of these expressions to be insincere and therefore gave them little weight.¹³² In *Kambanda*, the accused pled guilty and cooperated with prosecutor, but still received life imprisonment due to aggravating factors of

¹²⁸ *Bisengimana*, ¶ 199.

¹²⁹ *D. Nikolic*, ¶ 274.

¹³⁰ *Jelusic*, ¶ 138-39.

¹³¹ *Jelusic*, ¶ 124-34.

¹³² *Id.*, ¶ 127.

occupying a high ministerial post, committing the crimes premeditated, and the intrinsic gravity of systematic genocide.¹³³

In contrast to the aforementioned cases, in *Erdemovic*, the court's ruling seemed animated by the fact that Erdemovic was not in a position of authority, was acting under duress, and voluntarily came forward to authorities to confess his role before his role was known by investigators.¹³⁴ These factors led to an overall sentence of 5 years for executing hundreds of Bosnian Muslim civilians.¹³⁵

In the case of Duch, the totality of the circumstances indicate that Duch should receive a sentence near the maximum of life imprisonment, but slightly less to recognize some of the mitigating factors present in his case. Similar to *Jelusic*, the facts surrounding Duch's case seem to indicate there are multiple aggravating circumstances, coupled with extremely grave crimes that seem to justify the maximum penalty. And, like *Kambanda*, Duch has cooperated with the prosecution, and may be found to have accepted guilt, but the gravity of his offenses seem to apply substantial weight toward the maximum penalty. However, the court may also be persuaded to consider Duch's cooperation with the court, like the case concerning D. Nikolic, and the fact that Duch acted under superior orders and possibly duress, like the case concerning Erdimovic, to justify some reduction in his sentence.

Based on the aforementioned case law, it seems appropriate to give some weight to Duch's cooperation with the court and the fact that Duch was acting pursuant to superior orders, possibly under duress. However, the weight accorded these factors seems to only slightly counter the aggravating factors and gravity of the offense, as discussed above. Therefore, while gravity of the offense and aggravating

¹³³ *Kambanda*, ¶ 40.

¹³⁴ *Erdemovic*, ¶ 16.

¹³⁵ *Id.*, at ¶ 15.

factors seems to justify imposing the maximum penalty, the mitigating factors may apply some slight weight toward reduction.

III. International and civil law justifications for criminal sentencing further indicate the Trial Chamber may want to impose a sentence near, but less than, the maximum penalty.

One or more of the following theories of punishment have generally been cited as justification for criminal sentencing: deterrence, retribution, rehabilitation, and social defense.¹³⁶ When the ECCC considers how to weigh mitigating factors into a sentencing formula, it may be desirable to consider what theories of punishment are desirable for the ECCC to emphasize.

According to the deterrence theory of punishment, the main goal of sentencing is the goal of sending a message strong enough to deter a person from committing a crime that they would otherwise have committed.¹³⁷ Indeed, the theory supposes that the idea of punishment will persuade the potential criminal to be persuaded not to commit a crime so as to avoid the punishment.¹³⁸ As a result, the theory seems to focus more on the safety of society as a whole and less so on the individual being sentenced.

The retribution theory evokes ideals of responsibility and fairness to justify punishment.¹³⁹ Indeed, the retribution theory may be best summed up with the phrase: “An eye for an eye, a tooth for a tooth”, expressing the notion that a crime should be punished with sentence proportional to the wrongfulness of the criminal act.¹⁴⁰ A court that wishes to follow such a theory would consider the wrongfulness

¹³⁶ Andrew Dubinsky, *An Examination of International Sentencing Guidelines and a Proposal for Amendments to the International Criminal Court’s Sentencing Structure*. 33 NENGJCCC 609, 618 (Summer 2007).

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

of a crime and impose a penalty that reflects the gravity of the offence, and as a result, the harm caused by the criminal act would be directly considered when determining the sentencing.¹⁴¹

The rehabilitation theory of punishment focuses on the needs of the individual who committed a crime, and seeks to rehabilitate the criminal so that he or she is able to rejoin society. When sentencing with the intention of rehabilitation, a court must consider the individual's personal situation, and what punishment is necessary to prevent the individual from committing more crimes in the future.¹⁴²

The social defense theory of punishment presupposes that crimes will occur unless actively prevented by society. When a convicted person is being sentenced, proponents of such a theory would argue that sentencing should reflect the need to protect society from that criminal.¹⁴³

Depending on the particular sentencing objectives and the specific facts of the Duch case, the Trial Chamber may be compelled to issue a lighter or harsher penalty. Theories that seem to justify a lesser sentence include the goals of 1) rehabilitation, 2) individual deterrence, 3) restoration and maintenance of peace, while theories that seem to justify a heightened penalty include the goals of 1) retribution 2) social deterrence, 3) promote rule of law, and 4) creating a sense of reconciliation.

A. International tribunals focus on deterrence and retribution as the main justifications for criminal sentencing, with a secondary consideration for rehabilitation.

In their rulings, tribunals have most often cited deterrence and retribution as their reasons for sentencing, with rehabilitation sometimes added as a third

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

consideration, but one that is given less weight than the others.¹⁴⁴ Social deterrence was one of the principles referenced by the Security Council justifying the establishment of both the ICTY and ICTR.¹⁴⁵ Furthermore, the trial and appeals chambers of the ICTY and ICTR frequently cite deterrence as one of the key factors when determining sentencing.¹⁴⁶ Indeed, the Trial Chamber at the ICTY observed in *Prosecutor v. Todorovic* that “sentencing must have sufficient deterrent value so as to dissuade others who would consider committing similar crimes from doing so”.¹⁴⁷ And while some contest whether the tribunals are actually effective at deterring future violations of human rights, many empirical studies indicate that criminal sentencing does in fact act as a deterrent against crime generally.¹⁴⁸

Along with deterrence, retribution tends to be most often cited by international criminal courts as a leading consideration for sentencing. As the court noted to *Erdemovic*, “One of the main goals with sentencing is to reflect the international community’s indignation over heinous crimes and denunciation of the perpetrators.”¹⁴⁹ At the ICTR, the Trial Chamber observed that “the tribunal is...focused on facilitating reconciliation and restoration of peace through the redress of past criminal acts, and in terms of sentencing, the sentences must reflect the issues of retribution and deterrence to accomplish these goals”.¹⁵⁰

If the ECCC chooses to emphasize goals of retribution, it would likely result in a heightened sentence for Duch. Being tried for some of the most heinous crimes

¹⁴⁴ Danner, Alison Marston, *Constructing a Hierarchy of Crimes in International Criminal Law Sentencing*, 87 VALR 415, 444-48, May 2001.; See also, *M. Nikolic*, ¶ 85. (“The Trial Chamber finds that the purposes of punishment recognized under the jurisprudence of the Tribunal are retribution, deterrence and rehabilitation”).

¹⁴⁵ 87 VALR at 446.

¹⁴⁶ 87 VALR at 447.

¹⁴⁷ *Prosecutor v. Todorovic*, Case No. IT-95-9/1-S, ICTY, Sentencing Judgment (TC), ¶ 30, 31 July 2001.

¹⁴⁸ 87 VALR at 447.

¹⁴⁹ *Erdemovic*, ¶ 65.

¹⁵⁰ *Kambanda*, ¶ 26.

possible, one could argue that a penalty of anything less than life imprisonment would not sufficiently relate the domestic and international outrage against those who commit grave crimes against humanity like genocide and torture.

To the extent that the court finds in desirable to use the sentencing for social deterrence and promotion of the rule of law, it would also likely result in a heightened penalty for the accused. Indeed, deterring others from committing similar crimes and promoting the rule of law are both substantial goals, and indicate the need for a punishment near the maximum of life imprisonment.

B. Theoretical justifications for sentencing among civil law countries tend to focus on rehabilitation, indicating that the ECCC may also want to place emphasis on this factor.

As stated above, Cambodia's legal system was largely based on the French civil law tradition. As such, the court may find sentencing objectives among civil law countries to be particularly instructive as to sentencing objectives within Cambodia. In France and Germany, "the aim of judges...is to have a positive impact on the wrongdoer".¹⁵¹ Such an ideology reflects the fact that criminal courts see their role primarily as one of assisting an accused to become rehabilitated and enabling them to readapt to society.¹⁵² To accomplish this, civil law countries tend to emphasize the importance of personalizing a sentence to the characteristics of wrongdoer.

To the extent that the ECCC follows civil law theory, it may find it desirable to place a greater emphasis on the goals of rehabilitation and individual deterrence. If so, it is likely this approach would lead to a reduced sentence because it seems unlikely that Duch will commit future crimes similar to those he is on trial for. On the other hand, it is not clear whether he has actually been rehabilitated or whether he

¹⁵¹ See note 14, Delmas, p.525.

¹⁵² *Id.*, at 526.

has simply be unable to continue committing crimes against humanity because of the political changes that have occurred in Cambodia.

CONCLUSION

While the ECCC is directed to first consider Cambodian laws, it seems that Cambodian law does not sufficiently address how to sentence persons convicted of Crimes Against Humanity and Grave Breaches of the Geneva Convention. Therefore, the court should apply international sentencing practices that rely on an analysis of the gravity of the offense and the personal circumstances surrounding that offense, in order to determine an appropriate sentence length.

In Duch's case, where the accused has admitted guilt for Crimes Against Humanity and Grave Breaches of the Geneva Convention, which led to the torture and extermination of over 12,000 prisoners under his supervision, it seems that an appropriate sentence would be the maximum punishment of life imprisonment. The fact that Duch was in a position of authority over the people who aided in committing these crimes, and that the victims represented a particularly vulnerable group, seems to further support using a heavier sentence. However, the fact that Duch seems to have acted pursuant to superior orders, possibly under duress, and has substantially cooperated with the prosecution, indicates that it may be appropriate to slightly mitigate his sentence.

Lastly, international justifications for criminal sentencing, including retribution and social deterrence, further support the notion that Duch's sentence should be near the maximum penalty available.

Considering international jurisprudence and the theoretical justifications for international criminal sentencing, it seems appropriate that Duch is given a sentence duration slightly less than the maximum of life imprisonment.