

Observations of the Cambodian Trial of 'Duch'

Abstract

This article is an account of the trial of Duch, the Khmer Rouge prison chief who commanded S-21 where up to 14,000 men, women and children were incarcerated, interrogated, tortured and killed. The Extraordinary Chambers of the Court of Cambodia, a combined UN and Cambodian Government tribunal, conducted the trial. It is argued that despite many criticisms of the trial—no financial reparations for victims, an inadequate sentence, and delays between the detention of Duch and the trial itself—the tribunal convicting Duch achieved some historical successes including the fact that this was the first time a Khmer Rouge official was held accountable by an international court. The impact within Cambodia itself of this trial and the ones that follow it remains to be seen.

Introduction

This comment is a personal account of the Cambodian trials of former Khmer Rouge leaders and specifically, of the trial of Duch, the prison chief who commanded S-21, where in less than four years, somewhere between 12,000 and 14,000 men, women and children were incarcerated, interrogated, tortured and killed (Chandler 1999; Dunlop 2005). As both a forensic psychologist and criminologist, it was my intention to observe the trial and to raise issues that I believe have great significance for criminologists. One of these issues, namely, the situational and personal characteristics that motivated Duch to commit the crimes he was convicted for, has been dealt with in an earlier article (Wilson 2010). The present account (a preliminary assessment of the trial itself and its impact) is based on three visits to Cambodia which involved personal interviews with staff of the Extraordinary Chambers in the Courts of Cambodia (ECCC), critics of the tribunal, my observations during the trial, reading of transcripts, visits to organisations monitoring the progress of the tribunal, and interviews with journalists, personnel from NGOs and others who have closely observed the Khmer Rouge proceedings.

Criminologists have generally been reluctant to deal with mass atrocity crimes and the impact of international tribunals resulting in missed opportunities to contribute to the field and to improving the disciplines own ideas and theories. Indeed, the lack of attention to some of the key issues on such crimes (the origins, dynamics and facilitators of these forms of violence) has been disappointing, though recently a start has been made at addressing the issue (Winterdyk 2009; Alvarez 2010). Yet, much more needs to be done, especially as international courts and tribunals are increasingly dealing with war crimes, crimes against humanity and genocide and provide criminologists with a rich source of data and material.

Some have argued that there is a better way of handling genocide or major racial or ethnic violence by using reconciliation commissions or tribunals such as in Rwanda or South Africa. In post apartheid South Africa, for example, a Truth and Reconciliation Commission was used, while in Rwanda, the lesser-known '*gacaca*' community justice system was promoted by the government to deal with the crimes of genocide. It should be noted, though, that in Rwanda for example, the International Criminal Tribunal for Rwanda (ICTR), or the Tribunal Pénal Internationale Pour le Rwanda (TPIR), was also established to prosecute those who were accused of committing international crimes especially those who

planned, instigated, ordered, committed or otherwise aided and abetted genocide and related international crimes (Human Rights Watch 2004).

The merits of restorative as opposed to retributive approaches to mass atrocity crimes have been analysed and debated extensively (see for example Asmal 2001; Boraine 2001; Simonovic 2004; Praeger and Govier 2006). It is not my intention to enter into this debate or to suggest that more restorative approaches should have been adopted by the Cambodian Government to deal with the crimes of the Khmer Rouge regime. Instead I wish instead to look at how ECCC—essentially a retributive tribunal established to try Duch and others accused of major crimes during the Khmer Rouge occupation his trial—was perceived by communities, victims, NGOs, secondary victims, and by the justice system itself. First some background to the trials themselves.

The Khmer Rouge Trials

Pol Pot's Khmer Rouge regime took power on 17 April 1975 and was overthrown on 7 January 1979. Estimates of the number of people killed vary, but according to Cambodian authorities, somewhere between two and three million people died as a result of mass murder, disease or starvation (ECCC 2008). When the regime was defeated in 1979 there was a genocide trial in Phnom Penh where Pol Pot and another senior leader, Ieng Sary, were tried, but neither ever appeared in court nor served any form of sentence. The end of the regime was followed by a period of civil war, a war that dragged on until 1996 when the Khmer Rouge dissolved itself as a formal organisation. Cambodia first approached the United Nations for assistance to conduct a trial in 1997, but it has taken many years for both parties to work out the details of how the trials should be conducted, and, who exactly should be placed on trial. In 2003 however, the lengthy and sometimes acrimonious negotiations were concluded and a new, hybrid court was established, which became operational in 2007.

The ECCC works on three levels. First, there is a pre-trial chamber consisting of three Cambodian and two international judges, which deals with appeals in the pre-trial phase of proceedings, such as orders for detention of those accused and any disagreements between the co-prosecutors and co-investigating judges as to whether or not to take a case to court. The second tier is the trial court chamber, which consists of three Cambodian and two international judges who hear the cases. Finally, the third tier is the Supreme Court Chamber that hears appeals. The judges must try to reach a unanimous decision, but if not, four out of the five judges in the trial chamber must vote for a conviction, and five out of the seven judges must agree about an appeal decision (ECCC 2008). The court is physically located on the National Road leading from Phnom Penh to the Dangkor district, which is approximately thirty to forty-five minutes by car from the capital, though it takes longer by bus or tricycle. The court itself is huge—reputedly one of the largest in the world—with well-equipped multimedia and translation facilities.

Despite differences of opinion about who should be prosecuted, both the UN and the Cambodian government decided that the court should only prosecute senior leaders of the Khmer Rouge regime who 'planned or gave orders', as well as those most responsible for committing 'serious crime' (ECCC 2008:4). It was the court itself that was to decide who the 'senior leaders' were and who were 'most responsible' for any crimes committed and the specific charges. Importantly, the UN and Cambodia governments made the decision not to

prosecute low-level and middle-ranking Khmer Rouge members who were not responsible for serious crimes as well as children and family members or associates of regime leaders. In addition, there were to be no posthumous trials, and the death penalty was ruled out as a punishment for any persons convicted by the ECCC.

Five suspects were arraigned and arrested in July 2007, but in this article I am only concerned with the trial of Kaing Guek Eav, alias Duch, the commander of S-21, who was charged with crimes against humanity. Though there are many legal issues, crimes that can be prosecuted by the ECCC include genocide, crimes against humanity and war crimes.

The court has many unique features, some of which have led to difficulties that continue to haunt it today and indeed, threaten its very existence, a point raised later in this comment piece. Some thirty-five countries largely supplement the cost of the court although the Cambodian government has contributed \$1.5 million in cash and more than \$5 million in extra-budgetary support. Continuous funding is still required however, and unless it is forthcoming, the life of the court could be limited.

The composition of the court reflects its hybrid beginnings, headed as it is by international and Cambodian judges. The Cambodian Supreme Council of the Magistracy selected the international judges. Two co-prosecutors (one Cambodian and one international) collect evidence and decide whom to charge and with what crimes. A wide range of evidence—documents, physical evidence such as mass graves, former prisoners, statements and testimony of victims and perpetrators—can be presented at the hearings. Though adversarial in nature, the procedures follow an inquisitorial format where judges play an active role in questioning and controlling the proceedings.

Uniquely, ‘victims who have suffered physical, psychological and material harm as a result of a crime investigated by the Court may become a civil party and were heard by the court’ (ECCC 2008:16). A special victims unit designed to assist victims who wish to participate in the proceedings was established and offers psychological, social and legal help. Even though the court has determined that individual financial compensation will not be awarded if a defendant is found guilty, it can award what they call ‘collective and moral reparations’, essentially meaning reparations that benefit civil parties. Specifically this might mean the ECCC paying for the publishing of court judgements in newspapers, a memorial in a local area or perhaps, establishing a mental health clinic for victims.

What Was the Value of the Duch Trial?

The ECCC found Duch guilty of war crimes and crimes against humanity for atrocities committed at S-21. The crimes against humanity included enslavement, imprisonment, torture, wilfully causing great suffering or serious injury to body and health, wilfully depriving a prisoner of war or civilian of the rights of fair and regular trial and unlawful confinement of a civilian (Open Society Justice Initiative 2010). He was sentenced to 30 years in prison, which will be reduced to 20 years after the time Duch had already served in detention was taken into account. This verdict was a watershed for Cambodia as it was the first time that a Khmer Rouge official had been held accountable in an internationally recognised court of law for the crimes of Pol Pot and the regime.

However, the 30-year sentence was one that angered many in Cambodia including the secondary victims. The prosecution had asked for a 40-year sentence and many of the

victims I spoke to felt that Duch had not received his 'just desserts'. Some pointed out that Duch could leave jail if he lived to the age of 86, which seemed to them to be a small price to pay for the atrocities that occurred at S-21 (Ciorciari 2010). Of course sentencing, especially with major human rights crimes, is hardly an exact science and opinions will vary widely as to the appropriate punishment. On the other hand Duch's detention before the trial was generally considered illegal under both Cambodian and international law and this may have been just one reason for sentencing Duch to a lesser term than the prosecution demanded (Ciorciari 2010). In addition, the accused's co-operation throughout the trial and his contrite attitude may also have been a compelling reason for a lesser sentence, especially as his testimony may be required in future trials against four others charged with genocide and related crimes.

Duch himself was given almost unlimited opportunity to cross-examine witnesses and most experienced observers believed he was fairly treated throughout the trial. He was also given many opportunities to express his remorse at what had occurred at S-21. The admissions of regret that Duch professed during the proceedings were somewhat soured by two factors however. First, he never directly apologised to victims; and secondly, though he acknowledged his own guilt, at the end of the trial his Cambodian defence lawyer entered a 'not guilty' plea, surprising given his earlier admissions (Ciorciari 2010; KRT Trial Monitor 2009).

A more substantial criticism against the outcome of the trial was that no financial reparations were given to civil parties who were allowed to join the case in order to pursue redress for harm caused by Duch's conduct. All that these people received from the court was the promise to publish the names of victims in the verdict and to record Duch's admissions to his crimes. However, the court had neither the resources nor the authority to grant compensation though it was allowed to provide 'collective and moral reparations' (Ciorciari 2010). At the time of writing these reparations had neither been decided upon nor implemented.

Yet another major criticism levelled was that justice procedures as used by the ECCC and other international courts and tribunals only target small time players in war and human rights crimes, that the time between the offences and the trial is too long, and that lawyers, and politicians leave victims 'to sort out themselves' (Rose 2009:1).

While it is true that international courts have successfully tried few despots, many of the Nuremberg defendants (historically a forerunner to the ICC) were high ranking Nazi officials. In addition, the International Criminal Court was only established in 2002 and cases brought before it include investigations in the Democratic Republic of Congo, Uganda, the Darfur region of Sudan and the Central African Republic involving high ranking persons (International Criminal Court 2009). Though Duch may not have been a high-ranking official of the Khmer Rouge regime, S-21 was a potent symbol of the Cambodian genocide. In any event the four trials to follow all involve very high-ranking officials in Pol Pot's ruling elite.

It is clear that a great deal of time elapsed between the crimes committed at S-21 and the trial of Duch, but this was inevitable given the legal and political complexities involved in establishing the ECCC. This delay however, does legitimately lead critics to question the value of the trials both for the people of Cambodia and for victims. Inevitably, there are divided opinions on this question and a wide range of reasons given for their perceived success or failure. 'A waste of time and money,' one 26-year-old Australian-educated

Cambodian businessman told me, while a colleague dissented saying, 'we can't forget the past; we must remember the dead' (Personal Communication 2009). This latter opinion appeared to be swamped by others of his generation who said, in one way or the other, that they would rather forget the past and concentrate on the present: 'We have big problems with PM Hun Sen and those in power who want to waste our country's resources,' a 30-year-old hotel manager said. 'It is a luxury we cannot afford to go back to the past otherwise we will stand still' (Personal Communication 2009).

The last respondent's comments reflected the views of most people under forty, many of whom had not even been born when Pol Pot's regime was in power. Even so, a large number of school and university students regularly appeared at the courthouse during Duch's trial and seemed attentive and engaged with the proceedings. Though language difficulties interfered with obtaining coherent answers, most of those with whom I spoke were glad that the S-21 commander was facing justice. In addition, those who were adolescents or young adults at the time of the Khmer Rouge were strongly in favour of the ECCC. For example, a 53-year-old taxi driver told me that he wanted 'to see those men tell the truth, tell the people what they did; the torture, the murders, everything' (Personal Communication 2009).

These comments may only provide anecdotal evidence for the overall support or rejection by the Cambodian population for the proceedings of the ECCC. Faced with criticisms of negligible public interest from sections of the media, the tribunal itself attempted to provide some solid evidence to demonstrate such public acceptance. 'We have gone to extraordinary lengths to tell the people of Cambodia about the trial', Helen Jarvis, formerly the media liaison officer and later appointed to head the victims unit, told me (Personal Communication 2009). To back up her claim, she pointed to the statistics that the ECCC released about attendance. From the commencement of the trial to its conclusion 31,000 people visited the court (ECCC 2010), though how many of these were brought by the ECCC itself or by voluntary organisations is unclear.

According to Jarvis, the ECCC members have visited 'numerous towns' and villages across the country and the 'proceedings of the court are shown widely throughout the Kingdom' (Personal Communication 2009). However, just how 'numerous' these visits were and how many villages were actually visited by Commission staff was also unclear. Certainly the television, radio and general media coverage of the trial appeared to be extensive with all Cambodian television and radio stations broadcasting regular coverage. Indeed, some stations, such as TVK, had weekly updates on the trial, as did many FM stations. It is unclear as to how much coverage was given in the local Khmer press, though the main English language newspaper, *The Phnom Penh Post*, gave extensive daily attention to the proceedings together with expert comment, blogs and links to relevant web sites. International media organisations such as CNN, the BBC and the *New York Times* also had numerous reports about the trials and though this may have not impacted upon Cambodians it certainly made many in both Asian and Western countries aware of the work of the court (ECCC 2008:20-1).

It should be noted that Ms Jarvis was an exceptionally controversial figure during the trial and was attacked by the defence team and others for her political beliefs and affiliations (Editorial 2009a). In addition, many within Cambodia NGOs disagreed with Jarvis' assessment on the outreach of the Commission and were initially critical of the work done by the ECCC in informing the Cambodian people about the trial of Duch and its importance. Indeed the Cambodia Human Rights Action Committee, a coalition of 21 NGOs created in

1994, had for years worked tirelessly to involve and support victims in the work of the ECCC. In addition they have lobbied within the country for a more active community outreach program and, as a result of the Duch trial, for better support and preparation for victims who wish to give evidence in future trials (CHRAC 2009).

Accounts from survivors of Pol Pot's murderous regime and secondary victims of S-21 would indicate that at least some of them saw the proceedings as worthwhile. New Zealander and former Olympic rower Kerry Hamil, whose older brother was killed at Tuoi Seng, found it cathartic to express his anger towards Duch when he confronted him at the proceedings. Reflecting the views of many other victims, Uth Em, a farmer who lost his parents, five siblings, and twenty other relatives said he experienced 'pity' for Duch after visiting the tribunal. 'I pitied him,' he said. 'It made me feel a bit of release and reduced my anger' (Editorial 2009b). Universally, the relatives of victims with whom I spoke who either visited the proceedings or followed them in the media said that they felt a great psychological release as a result of the trial, a view endorsed by many Cambodian mental health professionals trying to deal with post-traumatic stress symptoms among survivors and relatives of victims.

However, many victims appeared untouched and unaware of the ECCC's activities. One survey conducted by the Human Rights Centre at the University of California discovered that even though 93 per cent of those who lived under the Khmer Rouge regime considered themselves to be victims, less than 1 per cent said they had participated in an ECCC outreach program. 40 per cent of the respondents in the Berkley survey had no knowledge of the ECCC and nearly half only limited knowledge (Pham 2009). However, this survey was conducted in September 2008 and there is little doubt that as the trial progressed more information about the work of the court became known, given the activities of both the ECCC and Cambodian organisations such as the Cambodian Genocide Program at Yale University and the Documentation Centre of Cambodia.

The Documentation Centre of Cambodia, though not an organ of the ECCC, has a strong association with it. Working closely with some American genocide projects at universities, the Centre, staffed entirely by Cambodians, has the largest collection of information relating to the Khmer Rouge regime available, most of which is posted on an accessible web site. They have catalogued approximately 155,000 pages of primary Khmer Rouge documents and more than 6,000 photographs, allowing Cambodians to come to terms with their own history.

In addition, The Documentation Centre distributes a regular print journal with articles by Cambodians on how information about the progress of the trial was presented at the village level by the ECCC and a number of NGOs. The impact of these activities is hard to measure. However, a major reason for easy web access to the Centre's resources and visits to villages explaining what has happened during the trial was to ensure that younger Cambodians were made aware of what had occurred. (Documentation Centre of Cambodia 2009).

Another significant distributor of information about the trial is the well-funded Open Forum of Cambodia, which hosted a detailed web site, distributed a weekly trial print monitor and also visited villages in the provinces to inform people about the trial. Realising that few in Cambodia have access to the World Wide Web the Open Forum distributed articles extracted from daily newspapers on the proceedings of the ECCC. The Open Forum did not attempt to present any point of view about the ECCC or of Duch's role in S-21, it

simply summarised what had happened on a day-by-day basis. When I asked Poun Sohay, the executive director of the Open Forum, why he thought the regime engaged in the atrocities that had occurred and Duch's role in these, he said, 'I do not know, I hope ECCC gives us the answer' (Personal Communication 2009). It should be added that Poun Sohay's response was typical of many individuals and organisations I talked to in Cambodia. This suggests that the ECCC's final judgment in the trial of Duch—and of other defendants—will be crucial in contemporary narratives of Khmer history during the reign of Pol Pot.

The ECCC itself (essentially a hybrid domestic/international tribunal) as with many other international tribunals such as the ICC, ultimately believes that perhaps the main purpose of such trials is to strengthen the rule of law and to deter other despots from committing similar crimes. It also hoped to educate younger Cambodians about the terrible mistakes of the past and, in the process, to help them contribute to the reconstruction of a more just society (ECCC 2008). These are lofty goals indeed and ones that history will ultimately judge as to their success although UN secretary-general Ban Ki-Moon was in no doubt that the trial and interest in it showed 'their desire to bring a sense of closure and reconciliation to a harrowing chapter in their history' (ECCC 2010).

Discussion and Conclusion

The tribunal has been racked with allegations of corruption, accusations of ideological zealotry against some of their senior executives, doubts about continued funding by international donors and the Cambodian authorities, and rumblings about political influence in the way that the court is managed (Editorial 2009b; Lawansiri 2010). These difficulties were perhaps inevitable in a system that arose as a result of political compromises between the Cambodian government and international backers of the ECCC. In addition, other critics of the international tribunal say that the real 'causes' of mass atrocity crimes (i.e. the interference of powerful nations like the USA and Vietnam in the affairs of Cambodia; massive social inequality in Cambodia) have not been uncovered.

Regardless of how the ECCC is finally assessed, it is clear that there have been at least some positive outcomes for the people of Cambodia and the international community since its inception. To begin with, it has offered at least some of the victims and secondary victims of Duch and the regime a chance to see justice done. Phung Guth Sunthary, whose father, a respected university professor, died in S-21, is one person who, though critical of some aspects of the tribunal, was delighted that the trials went ahead. She said that she had been 'waiting for this moment for thirty years' and that 'today's tribunal allows opening the eyes of those young people who do not know or believe in the crimes of the Khmer Rouge regime', sentiments that I heard echoed by some of the relatives of other victims (Gee 2009). It should be noted though that many victims were also critical of the work of the Tribunal. Nevertheless, some seasoned observers of the Duch trial, such as *The Phnom Penh Post's* deputy news editor and regular Duch trial correspondent, Robbie Corey-Boulet, agreed. He told me that 'there is a compelling argument to be made that the symbolic importance of seeing a man made to testify for the atrocities committed at S-21 could do much to counter the culture of impunity that prevails in Cambodia today' (Personal Communication 2009).

Despite criticism that the ECCC has not publicised its efforts as much as some would like, it is quite clear that both in Cambodia and internationally a major effort increasingly is

made to ensure that the media are aware of the Duch trial so that history does not forget the appalling atrocities that occurred in S-21 during Pol Pot's regime. Much of the credit for this is due to the work of locally based NGOs. As mentioned earlier, Cambodian and international news agencies regularly reported on the progress of the trial and, in that sense, the public relations efforts of Cambodian NGOs and the ECCC would seem to have been successful. Though numbers attending the trial appeared to be small to begin with, attendance figures suggest that they had become substantial as the hearings progressed (Olsen 2010).

Finally, the Duch trial and the ones that will follow symbolically signify that the world will not forget the atrocities that occurred. Thomas Buergenthal, an Auschwitz survivor and academic, author, and now Judge on the International Criminal Court, believes that international trials show despots and nations alike that the world community will never tolerate the perpetrators of mass atrocities. In castigating the United States for not ratifying the ICC, Buergenthal suggests that if nations can so easily wash their hands of genocides that occur, then 'what hope is there that future generations will be spared a repeat of the mass killings of the past?' (Buergenthal 2009:225). While the Duch trial and other similar war tribunals may not by themselves stop mass killings, they at least serve the important function of signifying the seriousness of mass atrocity crimes. Whether the trial and sentencing of Duch 35 years after the event motivates nations to do more than just signify our disgust at mass atrocity crimes is debatable.

Four other senior officials in the Khmer Rouge regime are due to be face the ECCC in 2011. Regardless of the results of these trials my own view is that the Duch case has already demonstrated that the EcCCC is capable of conducting proceedings that accord with generally accepted practices of due process (KRT Trial Monitor 2009). However, a longer historical perspective is needed before we can say that the trial has positively impacted the Cambodian people, especially the victims and relatives of Pol Pot's regime.

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