Revolution and International Criminal Law: The Extraordinary Chambers in the Courts of Cambodia

A Thesis Submitted by

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Summary of the Contents

This doctoral thesis examines whether and how a context of revolution impacts the application of international criminal law through a case study of the revolutionary context during the Democratic Kampuchea era in Cambodia, specifically through the jurisprudence generated at the Extraordinary Chambers in the Courts of Cambodia (the ECCC). This study contributes to the understanding of the seemingly unavoidable violence for certain political causes and the subsequent criminal responsibility mechanisms that may flow given the development of international criminal justice. The author argues that the jurisprudence of the ECCC shows that a revolutionary context may influence the application of international criminal law primarily through the elements of crimes against humanity and genocide and the joint criminal enterprise mode of liability doctrine. A significant part of this thesis has sought to analyse and demonstrate how the ECCC has addressed the revolutionary context of a complex situation and the subsequent limits and contradictions of its approach. Although the ECCC has dismissed the consideration of the revolutionary context in defences and sentencing, this study argues that this dismissal could be interpreted as showing bias of a pre-determined assumption of guilt and being mostly driven by the tribunal's goal of punishing the accused. Broad interpretations of international criminal law adopted by the ECCC are not without flaws, especially given that it is a retroactive justice mechanism.

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Declaration of Originality

I, Jia WANG, do hereby declare that the work submitted for examination is my own and that due credit has been given to all sources of information contained herein. With this declaration, I certify that I have not obtained a degree at the National University of Ireland Galway, or elsewhere, based on this work. I acknowledge that I have read and understood the Code of Practice dealing with Plagiarism and the University Code of Conduct of the National University of Ireland Galway and that I am bound by them.

Signature:

Date: 07 / 05 / 2020

Acknowledgement

I would like to thank my two supervisors, Professor William Schabas and Professor Shane Darcy, for their tremendous patience, support and kind encouragement. Professor Schabas planted the idea of this thesis in my mind years ago when he gave a lecture on international criminal law at my home university, the Harbin Institute of Technology, in China. I was a graduate student who just finished law school and was looking for an inspiring and challenging career in academia. Without his generous support and encouragement, I would not have made my first step reaching out of China and embarked on a transformative and enriching journey.

Professor Shane Darcy stepped in during my writing-up stage and offered me diligent and thorough guidance with his valuable experience and impeccable proofreading skills. Every chapter in this thesis has been reviewed multiple times by him with plenty of detailed comments, such as identifying research questions, providing sufficient and proper references, and fluent layout of structure and conclusions etc. His extensive and solid knowledge on international criminal law is especially helpful towards the improvement and final completion of this thesis.

First three years of this project was funded by the Chinese Scholarship Council. In the last decade, Chinese government has supported many students to pursuit doctoral degrees at top universities and institutions oversea. I was given a precious opportunity to explore my interest and gain professional experience in an international environment. Owing deeply to this historical time, my sister and I are the first generation in my family to receive higher education, and I am the first one to study abroad and witness the larger world with my own eyes and mind. The vision and motivation of conducting this thesis has been gradually grounded in a passion to present the voice of the people from the less developed part of the world at the same time with full respect and appreciation of alternative cultures and worldviews. Hopefully the completion of this thesis will continue leading the author on a journey towards that aspiration.

This achievement also owes a big part to the moral support of my previous supervisor, Professor Haifeng Zhao, who has supervised and shepherded me since my early years at law school in China. I finished both of my bachelor and master dissertations under his guidance. His gentle and modest character and high level of academic diligence and persistence of which I have only partly inherited provided constant motivation for this thesis. Without him as a moral example, my career course would have turned out very differently.

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I have known some very intelligent and diligent colleagues from the doctoral program at the Irish Centre for Human Rights, and some of them become dear friends for life. Dr Hadeel Abu Hussein has always inspired me with her strong passion and sharp mind on international law and the current world politics. Her spiritual companion and dear friendship helped me tremendously when I went through difficult times during this PhD journey. Special thanks also go to Dr Amina Adanan and Dr Caroline Sweeney. They have sacrificed their precious time between demanding work and life to proofread this thesis and generously shared their legal expertise and writing skills as native speakers in English. Another former colleague at the Irish Centre for Human Rights, Peter Gallagher, also kindly conducted a final proofread of this thesis. Without naming each of them, I would also like to express my deep gratitude to the larger PhD community connected with the Irish Centre for Human Rights. Their commitment and dedication is constantly inspiring and empowering.

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Thesis Related Publication

Part of Chapter 3 of this study in combination with some major findings and materials from other chapters has been published in the following journal article:

- Jia Wang, ‘Development Education and International Criminal Justice: Reflections on the Trials at the Extraordinary Chambers in the Courts of Cambodia (ECCC)’ (2019) 28 Policy & Practice: A Development Education Review 57-78.

Table of Common Abbreviations

ASEAN	Association of Southeast Asian Nations
CGDK	Coalition Government of Democratic Kampuchea
CPK	Communist Party of Kampuchea
DSS	Defence Support Section of the ECCC
ECCC	Extraordinary Chambers in the Courts of Cambodia
FUNCINPEC	Front Uni National Pour un Cambodge Indépendant, Neutre, Pacifique et Coopératif (United National Front for an Independent, Neutral, Peaceful and Cooperative Cambodia)
ICC	International Criminal Court
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
JCE	Joint Criminal Enterprise
KPNLF	Khmer People's National Liberation Front
KRT	Khmer Rouge Tribunal (informal term for the ECCC)
NATO	North Atlantic Treaty Organization
OCIJ	Office of the Co-Investigating Judges of the ECCC
OCP	Office of the Co-Prosecutors of the ECCC
PRK	People's Republic of Kampuchea
PTC	Pre-Trial Chamber of the ECCC
SCSL	The Special Court for Sierra Leone
SNC	Supreme National Council
SOC	State of Cambodia
TC	Trial Chamber of the ECCC
UN	United Nations
UNAKRT	United Nations Assistance to the Khmer Rouge Trials
UNAMIC	United Nations Advanced Mission in Cambodia
UNGA	United Nations General Assembly
UNTAC	United Nations Transitional Authority in Cambodia

Note on Citations and Currentness of Materials

Citations in this thesis follow the OSCOLA (Oxford Standard for the Citation of Legal Authorities) Ireland (2nd edition 2016), available at www.legalcitation.ie, which has been adapted based on the original OSCOLA.

Judgements and decisions from international criminal trials are referenced by name(s) of the accused, case file number, title of the decision, dossier number of the decision (if available), date of publication, pinpoint to particular paragraph number(s) or page number(s) if provided otherwise, e.g. *KAING Guek Eav alias 'Duch'* (001/18-07-2007/ECCC/TC) Judgement, E188, 26 July 2010 [135], [144]-[146]. In case the square bracket is absent, the pinpoint is being made to page number(s). Other court documents of the ECCC are referenced by name of the issuing office, title of the document, the dossier number, and finally followed by date of publication.

It is a standard practice at the ECCC that each filed document is assigned with a dossier number different with its case file number. Sometimes, the same document might be filed in more than one case. When this happens, the same document will be assigned with different dossier numbers. This thesis will only use one of the dossier numbers without naming the alternatives as it would be sufficient for readers to track the document with one number.

Jurisprudence, legal materials and other sources of information have been considered up until December 2019.

Note on Cambodian Names

Cambodian names begin with surnames followed by given names. Unlike in western sources, the two elements are often reversed. For instance, in the name KAING Guek Eav, KAING is the surname. In order to avoid confusion, this thesis uses capital letters for Cambodian surnames, in consistent with the ECCC's practice in relation to the names of the accused.

List of Tables Generated for This Study

Table 1: Convictions against NUON Chea in Case 002/01 (based on the Trial and Appeal judgments)

Table 2: Convictions against KHIEU Samphan in Case 002/01 (based on the Trial and Appeal judgments)

Table 3: Convictions against NUON Chea in Case 002/02 (based on the Trial judgment)

[Note] Tables are drawn according to the following three steps:

1. List related facts in separate groups in the left column of the table, which is also the starting point of the whole legal process;
2. Add charges as they are brought up in the groups of facts;
3. Divide charges further according to their corresponding modes of liability.

1 Introduction

Does a context of revolution impact the application of international criminal law? This thesis examines this question through a case study of the revolutionary context of the Democratic Kampuchea period in Cambodia and its impact on the assessment of the criminal responsibilities of individuals who played major roles in the design and implementation of certain policies involving international crimes during the era of the Democratic Kampuchea. Four cases are being conducted by the Extraordinary Chambers in the Courts of Cambodia (the ECCC), a special Cambodian court established pursuant to an agreement between the Royal Government of Cambodia and the United Nations with responsibility to prosecute those most responsible for crimes committed during the Democratic Kampuchea. By examining the four cases, this thesis explores the relationship between violent revolutions and criminal responsibilities for crimes against humanity, genocide and war crimes.

The central research question is whether a context of revolution influences the application of international criminal law in situations entailing these international crimes. The author hypothesises that despite international criminal law's seeming dismissal of the relevance of such contexts for the prosecution of international crimes, international jurisprudence is influenced by the revolutionary context in which such crimes occurred.

This introduction includes five parts, namely, the background, significance and contribution, methodology, outline and limits of the study.

1.1 Background of the Study

The following section touches on three aspects that set the background of this research. Firstly, historical accounts of the situation under the Democratic Kampuchea and the preceding events in Cambodia present different views regarding the nature of the revolution and set different tones towards the trials at the ECCC by focusing either on the overall conditions of life or the power struggles of a limited number of individuals that divided and purged victims.[1]

[1] Michael Vickery, *Cambodia: 1975-1982* (first published 1984, Silkworm Books 1999) x-xi.

Different views towards the revolution are highly relevant to the perception of criminal responsibilities, as it will be shown by this study that the trials and judicial deliberations by the Chambers at the ECCC constantly engage with the purpose of the socialist revolution and that purpose's link to the charged offences.[2]

Secondly, three legal regimes of international law, specifically international humanitarian law, international criminal law and human rights law, have gone through significant transformations since the end of the Cold War. These transformations owe a great deal to judicial developments at the *ad hoc* tribunals and subsequently to the International Criminal Court.[3] The evolution of these three bodies of laws presents a trend of expansion of states' obligations and of the individual criminal responsibilities of leaders,[4] which in turn affect the legal findings at the ECCC. The further clarification of the scope of international crimes draws special attention to the jurisprudence at the ECCC given that the charged offences took place in the 1970s.

Thirdly, despite international criminal law's seeming dismissal of the relevance of such contexts and motives for international crimes, international criminal trials have never been completely free of the assessment of political motivations. Consideration of revolutions or just causes of the charged offences shows that the courts struggle to balance the legitimacy of the causes and their punishable results in the bringing about of international criminal justice.[5]

1.1.1 Different Views of a Significant World Event

Scholars in history, politics and anthropology[6] have conducted a significant amount of research on the revolutions and political transitions that have taken

[2] For instance, *NUON Chea and KHIEU Samphan* (002/19-09-2007/ECCC/TC) Case 002/001 Judgement, E313, 7 August 2014, 412-450; *NUON Chea and KHIEU Samphan* (002/19-09-2007/ECCC/SC) Appeal Judgement, F36, 23 November 2016 [811]-[816].
[3] Antonio Cassese and others, *Cassese's International Criminal Law* (3rd edn, Oxford University Press 2013) 4-5.
[4] Thomas Buergenthal, 'The Normative and Institutional Evolution of International Human Rights' (1997) 19 Human Rights Quarterly 703, 717-719.
[5] See section 1.1.3 of this thesis for details.
[6] Alexander Laban Hinton, *Why Did They Kill? Cambodia in the Shadow of Genocide* (University of California Press 2005).

place in Cambodia since the end of World War II.[7] To different extents, all of these researchers have touched upon the period of Democratic Kampuchea, a regime established by the Communist Party of Kampuchea, also known as the Khmer Rouge, which lasted between 1975 and 1979. The Democratic Kampuchea era generated extensive research interest because it featured one of the greatest losses of human life in world history.[8] The number of deaths and the reasons and conditions causing those deaths has been debated by recognised experts who studied and followed the situations in Cambodia.[9] Based on a balanced calculation, Ben Kiernan estimated that the total number of deaths during the Democratic Kampuchea era could be around two million.[10]

Among those studies, historical claims regarding the decades of armed conflicts preceding the establishment of the Democratic Kampuchea set the context of the revolution and demonstrate that the revolution led by the Communist Party of Kampuchea was part of a long struggle of decolonisation and nation-building.[11] The Communist Party of Kampuchea (CPK) officially got its name in 1966. Its predecessor was the Workers' Party

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[7] For the most authoritative and often cited sources in English about the modern Cambodian history, see Russell R Ross (ed), *Cambodia: A Country Study* (Federal Research Division, Library of Congress, United States Government 1990); David P Chandler, *A History of Cambodia* (first published in 1983, 4th edn, Westview Press 2008).

[8] Extensive historical and political studies on the destruction of Cambodia and rising to power of the Khmer Rouge have been conducted by international scholars. See William Shawcross, *Sideshow: Kissinger, Nixon, and the Destruction of Cambodia* (Simon and Schuster 1979); *The Quality of Mercy: Cambodia, Holocaust and Modern Conscience* (DD Books 1984); Elisabeth Becker, *When the War Was Over: Cambodia and the Khmer Rouge Revolution* (Public Affairs 1998); Michael Vickery, *Cambodia: 1975-1982* (first published 1984, Silkworm Books 1999); Michael D Richards, *Revolutions in World History* (Routledge 2004); Ben Kiernan, *How Pol Pot Came to Power: Colonialism, Nationalism, and Communism in Cambodia, 1930–1975* (first published 1985, 2nd edn, Yale University Press 2004); *The Pol Pot Regime: Race, Power, and Genocide in Cambodia under the Khmer Rouge, 1975-79* (3rd edn, Yale University Press 2008).

[9] Edward S Herman and Noam Chomsky, *Manufacturing Consent: A Political Economy of the Mass Media* (first published in 1988, Pantheon Books 2002) 253ff; Michael Vickery, *Cambodia: 1975-1982* (first published in 1984, Silkworm Books 1999) 29ff; Ben Kiernan, 'The Demography of Genocide in Southeast Asia: The Death Tolls in Cambodia, 1975-79, and East Timor, 1975-80' (2003) 35(4) Critical Asian Studies 585, 587.

[10] Ben Kiernan, 'The Demography of Genocide in Southeast Asia: The Death Tolls in Cambodia, 1975-79, and East Timor, 1975-80' (2003) 35(4) Critical Asian Studies 585, 587. For a more specific discussion of the death tolls under the Democratic Kampuchea calculated according to different methods, see Tom Fawthrop and Helen Jarvis, *Getting away with Genocide? Elusive Justice and the Khmer Rouge Tribunal* (Pluto Press 2004) 3-4.

[11] Ben Kiernan and Chanthou Boua (eds), *Peasants and Politics in Kampuchea, 1942-1981* (Zed Press 1982) 31-77; WE Willmott, 'Book Review: Peasants and Politics in Kampuchea, 1942-1981' (1984) 57(2) Pacific Affairs 362.

of Kampuchea (WPK), which was reformed at a secret congress of the Khmer People's Revolutionary Party (KPRP) in 1960. The KPRP was organised in 1951 with major assistance from the Indo-Chinese Communist Party (ICP) and had since served as a forerunner of the CPK.[12] The socialist movement in Cambodia has developed systematic designs and policies regarding social organisations and reforms at different stages.[13] More importantly, it was inspired by the ideologies of liberation, anti-colonialism and anti-imperialism that flourished in the divided Cold War context.[14] It was a continuous movement driven by people sharing these concerns.

Different views exist regarding the Cambodian socialist revolution. The 'Standard Total View' was critical towards the entire revolution. The group of people expressing this view emerged very soon after the Khmer Rouge took control in Cambodia in 1978. It was mainly based on the statements of refugees who fled the war in Cambodia. The book *Cambodia: Year Zero* by François Ponchaud is considered to be a representative and ground-breaking work for this 'Standard Total View'.[15] This view mostly included journalistic analysis about life in the Democratic Kampuchea. It described the 'communist horror' as a standard practice in every part of Cambodia. It was criticised because of its incomplete and selective sources of evidence by historians performing research on Cambodia.[16] The 'Standard Total View' was updated in the 1990s with more available information and it continued to reveal more facts and horrors regarding the Khmer Rouge regime of Democratic Kampuchea.

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[12] Serge Thion, 'Chronology of Khmer Communism' in David P Chandler and Ben Kiernan (eds), *Revolution and Its Aftermath in Kampuchea: Eight Essays* (Monograph Series No. 25, Yale University Southeast Asia Studies 1983) 291-319. A considerable amount of materials regarding the revolution in Cambodia have been translated and compiled by concerned scholars. See also, Karl D Jackson (ed), *Cambodia, 1975-1978: Rendezvous with Death* (Princeton University Press 1982).

[13] Steve Heder, 'Communist Party of Kampuchea Policies on Class and on Dealing with Enemies Among the People and Within the Revolutionary Ranks, 1960-1979: Centre, Districts and Grassroots' (*Cambodia Tribunal Monitor*, 26 April 2012) < http://www.cambodiatribunal.org/assets/pdf/reports/Heder,%20CPK%20Policy%20on%20Class%20and%20Enemies,%20120426.pdf > accessed 28 October 2019.

[14] Ben Kiernan and Chanthou Boua (eds), *Peasants and Politics in Kampuchea, 1942-1981* (Zed Press 1982) 227; Serge Thion, 'Chronology of Khmer Communism' in David P Chandler and Ben Kiernan (eds), *Revolution and Its Aftermath in Kampuchea: Eight Essays* (Monograph Series No. 25, Yale University Southeast Asia Studies 1983) 291-319.

[15] François Ponchaud, *Cambodia: Year Zero* (Nancy Amphoux tr, Penguin Books 1978).

[16] Michael Vickery, *Cambodia: 1975-1982* (first published 1984, Silkworm Books 1999) 30, 39-40.

Michael Vickery pointed out that even the *updated* 'Standard Total View' deserves careful critique for three reasons. Firstly, it helps to justify the international initiatives for tribunals to try the Khmer Rouge, yet these initiatives have been 'tailored to the requirements of the United States or China or other international actors'[17], instead of 'the requirements of a fragile Cambodian society'.[18] Secondly, it presents bias towards the Hun Sen government by ignoring the so-called 'bloody coup' in 1997. Thirdly, it emphasises impunity and injustice in Cambodian society in general 'as though those were specifically Cambodian defects',[19] thereby holding Cambodia accountable according to stricter standards than the rest of Southeast Asia.[20] Michael Vickery was critical of criminal trials held in Cambodia during the 1990s for two reasons. Firstly, in his opinion, as a fragile community, Cambodia had more prescient concerns, which should override the pursuit of criminal justice; and secondly, pursuing criminal justice is in itself an injustice when one situation is scrutinised by a set of standards that are not universally applied elsewhere in the world.

On the other hand, Sophal Ear compiled a collective critique of the 'Standard Total View' titled 'Standard Total Academic View', in which he included many Cambodian scholars living in the West who published between 1975 and 1979 and defended the Khmer Rouge socialist revolution.[21] Authors including Laura Summers, George C Hildebrand, Gareth Porter, Torben Retbøll, Malcolm Caldwell, Noam Chomsky and Edward Herman were categorised as adherents of the 'Standard Total Academic View'.[22] Sophal Ear criticised these authors for assisting and defending a cruel and inhumane social movement on the international stage and helping to cover up their crimes, even though these crimes may not have been a primary objective of the revolution. As more evidence about the destruction of Cambodia during the Democratic Kampuchea era was revealed during the 1980s and 1990s, the

[17] ibid x-xi.
[18] ibid.
[19] ibid.
[20] ibid.
[21] Sophal Ear, 'The Khmer Rouge Canon 1975-1979: The Standard Total Academic View on Cambodia' (Undergraduate Political Science Honors Thesis, University of California, Berkeley 1995).
[22] ibid 7-8.

Standard Total Academic View almost disappeared. The remaining argument developed by Edward Herman and Noam Chomsky mainly focuses on the critique of the 'western media's propaganda machine as it gravitated around the evils of communism during the Cold War era'.[23]

Between the two sides, there is also a more nuanced point of view represented and already mentioned in the above critique by Michael Vickery, which further claims that policies during the Democratic Kampuchea era need to be examined from area to area. One key observation of Vickery is that the socialist revolution during Democratic Kampuchea is substantively different from other 'genocide movements'.[24] Naturally, it has been criticised for relativizing the 'genocidal Pol Pot regime'. The present study however largely agrees with the relativist point of view, because it puts the revolution back into context and reflects upon the policy differences from period to period and from region to region. It is a more balanced approach. For instance, this point of view also presents equally 'sympathetic' treatment towards the post-1979 People's Republic of Kampuchea, when there was an international collective effort to remove the regime supported by Vietnam. By holding the two immediately sequential governments up to the same standard, the relativist point of view presents more consistency and neutrality, which is an essential component of legal research.

Conclusions from different views provide a balanced framework for the legal analysis in this thesis, especially those regarding the pre-revolution events that are not within the jurisdiction of the ECCC, the scale of the atrocities committed during the Democratic Kampuchea period, and the nature of the Cambodian revolution. As will be demonstrated in this thesis, different perceptions of world events could lead to different interpretations of history and eventually influence the proportionality of blameworthiness placed on the selected individuals that stand trials. In domestic criminal law, different motives of the offenders in murder cases could largely affect their

[23] Edward S Herman and Noam Chomsky, *Manufacturing Consent: A Political Economy of the Mass Media* (first published in 1988, Pantheon Books 2002) 260.
[24] See Michael Vickery, *Kampuchea: Politics, Economics, and Society* (L Rienner Publishers 1986); *Cambodia: 1975-1982* (first published 1984, Silkworm Books 1999).

responsibility.[25] Similarly, viewing Khmer Rouge leaders as selfish cold-blooded murderers or social reformers leads to different perceptions of their blameworthiness. Intentionally inflicting harm could in certain circumstances amount to a crime against humanity, however failing to provide the materials and conditions necessary to ensure the survival of one's people may not necessarily amount to a crime, although it may amount to a violation of human rights. It is interesting to observe that by criminalising the overall population movements as policies that were intended to inflict harm, the ECCC brings failures to comply with obligations to respect and ensure human rights under the umbrella of crimes against humanity. As claimed by Michael Vickery, a criminal trial of the leaders of the Democratic Kampuchea would hold them responsible according to a stricter standard compared with other failed governments.[26]

1.1.2 Evolution of Three Bodies of Laws

This study intends to engage with the theme of revolution from a legal perspective, in particular through the lens of international criminal law, but also by drawing on international humanitarian law and human rights law. Legal boundaries addressing internal violence taking place within a State have shifted greatly in the past century. Amongst the sources of treaty law and customary international law applicable to armed conflicts, known collectively as international humanitarian law, are rules that seek to afford civilians in armed conflict a minimum protection by prohibiting certain acts as well as giving rise to individual criminal responsibilities for war crimes.[27] War crimes include grave breaches of the 1949 Geneva Conventions, applicable in international armed conflicts, and other war crimes occurring in non-international armed conflicts. A trend has also emerged whereby grave breaches are gradually being absorbed into, and convicted as, war crimes.[28]

[25] Robert Ferrari, 'Political Crime and Criminal Evidence' (1918-19) 3(6) Minnesota Law Review 365; 'Political Crime' (1920) 20 Columbia Law Review 308.
[26] Michael Vickery, *Cambodia: 1975-1982* (first published 1984, Silkworm Books 1999) 39.
[27] Laura Perna, *The Formation of the Treaty Law of Non-International Armed Conflicts* (International Humanitarian Law Series Volume 14, Martinus Nijhoff Publishers 2006) 11-13.
[28] Marko Divac Öberg, 'The Absorption of Grave Breaches into War Crimes Law' (2009) 91(873) International Review of the Red Cross 163.

The judgement in case 001 at the ECCC confirmed that an armed conflict of international character between Cambodia and Vietnam existed and lasted for the whole period of the court's jurisdiction from 17 April 1975 to 6 January 1979,[29] although the United Nations expert report in 1999 found that 'historians have not linked the bulk of the atrocities of the Khmer Rouge to the armed conflicts'[30]. The bulk of atrocities referred to relates to the common situation whereby Cambodian soldiers were taken to security centres because they were suspected of being traitors and spies of the revolution. Although Duch[31] was convicted for grave breaches of Geneva Conventions based on the establishment of an international armed conflict, his crimes against Vietnamese prisoners of war and civilians only constitute a small part of the total charged offences under the Democratic Kampuchea.[32] The larger part of his crimes were committed against Cambodia's own military personnel. The reported number of the detainees that belonged to the Revolutionary Army of Kampuchea amounts to nearly half of the total number of detainees at the S-21 prison.[33] Rules of international humanitarian law can only address a minor party of the overall situation.

Crimes against humanity also underwent some major transformations since the trials at Nuremberg. One significant change is the elimination of the nexus to armed conflicts in the contemporary definition of a crime against humanity, which can be found in the statutes of other international criminal tribunals and the International Criminal Court.[34][35] Whether the offences

[29] *KAING Guek Eav alias 'Duch'* (001/18-07-2007-ECCC/TC) Judgement, E188, 26 July 2010 [423].

[30] Report of the Group of Experts for Cambodia Established Pursuant to General Assembly Resolution 52/135, UN Doc. A/53/850, S/1999/231, Annex, 27 January 1999 [71]. (the expert report)

[31] *Duch* is the alias for KAING Guek Eav, who is the first and only defendant in Case 001 at the ECCC. He served as the Deputy Secretary of the Khmer Rouge S-21 Security Centre in Phnom Penh.

[32] *KAING Guek Eav alias 'Duch'* (001/18-07-2007-ECCC/TC) Judgement, E188, 26 July 2010 [425]-[426].

[33] *KAING Guek Eav alias 'Duch'* (001/18-07-2007-ECCC/TC) Judgement, E188, 26 July 2010 [141].

[34] Report of the Group of Experts for Cambodia Established Pursuant to General Assembly Resolution 52/135, UN Doc. A/53/850, S/1999/231, Annex, 27 January 1999 [71].

[35] The ICTY Statute maintained the nexus to armed conflict in its definition of crimes against humanity. However, the UN Security Council discarded the nexus in the ICTR Statute. Hence, Cryer and the others concluded that the ICTY Statute was an anomaly. See, Robert Cryer, Darryl Robinson and Sergey Vasiliev, *An Introduction to International Criminal Law and Procedure* (Cambridge University Press 2019) 230ff.

charged against members of the Khmer Rouge qualify as crimes against humanity depends on the status of this nexus during 1975 and 1979. Another less visible change of the crimes against humanity took place regarding the nature of the 'attack' and its targets required by the definition of crimes against humanity in the ECCC law. Victims of the 'attack' and targeting policy of the Democratic Kampuchea were often its own army members and cadres who held leading positions at various level of governance. The Pre-trial Chamber of the ECCC and invited *amici curiae* have debated the necessity of the expansive interpretation of 'civilians' to include the Democratic Kampuchea's own troops who were not victims of war but victims of political persecution.[36]

This expansive interpretation is obviously mingled with human rights concerns because it essentially points to the obligation owed by a ruling government or authority to its own personnel, being military or civilian. However, not all violations of obligations owed by a ruling government to its own personnel would equate to crimes against humanity or other international crimes. Incorporating more human rights violations into crimes against humanity relies heavily on the interpretation of the elements of crimes. A potential risk, as demonstrated by the ECCC's jurisprudence, is that the consequences of a government's failure or inability to ensure human rights during the implementation of certain policies could be used as evidence that the government has committed crimes against humanity. For instance, the court decided that living conditions during population movements amounted to the crime against humanity of an 'act or omission [that] caused serious mental or physical suffering or injury or constituted a serious attack on human dignity'.[37] Similar expansive interpretations risk raising the human rights obligations in selected cases which in turn lead to an unequal application of law. These concerns reflect those highlighted previously by Vickery, namely, that the Khmer Rouge are being held to a set of stricter standards.

[36] *MEAS Muth* (003/07-09-2009-ECCC-OCIJ) Notification of the Interpretation of 'Attack Against the Civilian Population' in the Context of Crimes Against Humanity with Regard to a State's or Regime's Own Armed Forces, D306/17.1, 7 February 2017 [69].

[37] *NUON Chea and KHIEU Samphan* (002/19-09-2007/ECCC/SC) Appeal Judgement, F36, 23 November 2016 [580].

A more general critique towards individual accountability has been developed by scholars of Third World Approaches to International Law (TWAIL).[38] While recognising that individual accountability is an important mechanism in addressing internal conflicts and that human rights law is a vital tool in constraining violence, TWAIL scholars argue that these approaches alone are not sufficient. Considering that violence in the third world has been created partially by the unsustainable economic and social policies promoted by the first world, serious attempts to identify responsibility and to establish universally applicable legal regimes should also inquire into the roles played by other powerful international actors in causing and exacerbating violent situations. Beyond the issue of failing to investigate the role played by influential international actors, TWAIL scholars also challenge the validity of holding selective individuals accountable in situations where whole communities have in fact participated in the perpetration of massive violence against each other. It is indeed the view of certain TWAIL scholars that 'a legal approach that addresses the conditions under which these broad societal conflicts take place may prove more effective in quelling violence against civilians over the long term than a regime of individual accountability alone enforced through national and international courts'[39].

The Cambodian government showed an initial interest in trying the Khmer Rouge leaders at a time when it needed a decisive win among the population to ultimately drive the Khmer Rouge out of the political stage in the country.[40] Even though the direct responsibility of other parties to the conflict may not equal that of the Khmer Rouge, the selective assessment of the Khmer Rouge's responsibility deserves critical analysis because of the risk of the trials being turned into 'show trials' for political exploitation.[41]

[38] Antony Anghie and BS Chimni, 'Third World Approaches to International Law and Individual Responsibility in Internal Conflicts' [2003] Chinese Journal of International Law 77, 90.
[39] ibid 91.
[40] 'Letter dated 21 June 1997 from the First and Second Prime Ministers of Cambodia addressed to the Secretary-General', UN Doc. A/51/930; S/1997/488 (Annex), 24 June 1997.
[41] Matti Koskenniemi, 'Between Impunity and Show Trials' (2002) 6 Max Planck Yearbook of United Nations Law 1. 'This is the paradox: to convey an unambiguous historical "truth" to its audience, the trial will have to silence the accused. But in such case, it ends up as a show trial. In order for the trial to be legitimate, the accused must be entitled to speak. But in that case, he will be able to challenge the version of truth represented by the prosecutor

The pursuit of individual responsibility for crimes under international law is regarded as one means of fostering the rule of law at the international level.[42] Besides ending impunity, the rule of law principle also requires a consistent form of accountability that holds leaders of revolutions or any governments responsible for acts of criminality. In this sense, the substantive meaning of the rule of law remains similar at national and international levels, and it is a principle that sits at the centre of all three of the legal regimes previously mentioned.[43] Norms regarding crimes, including crimes against humanity, genocide and war crimes, should be carefully interpreted and strictly implemented in the process of serving the goal of accountability in order to avoid turning law and justice into political tools.

1.1.3 Addressing the Legitimacy of the Revolution

In the fields of human rights and international criminal law, there have been several studies in recent years which address the responsibility of the Khmer Rouge and also assess the trials at the ECCC.[44] The ECCC is an example of the 'hybrid' model of international criminal tribunals, being both an international tribunal as well as a part of the Cambodian national judicial system. Consequently, it has received special attention in the study of international criminal proceedings.[45] Due to the large number of executions

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and relativise the guilt that is thrust upon him by the powers on whose strength the Tribunal stands. His will be the truth of the *revolution* and he himself a martyr for the *revolutionary cause*.' (emphasis added by the author)

[42] 'Annual Report on Strengthening and Coordinating United Nations Rule of Law Activities', UN Doc. A/64/298, 17 August 2009 [15]-[17].

[43] Theodor Schilling, 'On the Constitutionalization of General International Law' (New York University Jean Monnet Working Paper 06/05, 2005) <http://www.jeanmonnetprogram.org/archive/papers/05/050601.pdf> accessed 29 October 2019; Padraig McAuliffe, 'Transitional Justice and the Rule of Law: The Perfect Couple or Awkward Bedfellows?' (2010) 2 Hague Journal on the Rule of Law 127.

[44] Tom Fawthrop and Helen Jarvis, *Getting away with Genocide? Elusive Justice and the Khmer Rouge Tribunal* (Pluto Press 2004); Steve R Ratner, Jason S Abrams and James L Bischoff, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy* (3rd edn, Oxford University Press 2009) 305-361; Donald W Beachler, 'Arguing about Cambodia: Genocide and Political Interest' (Fall 2009) 23(2) Holocaust and Genocide Studies 214; Nina HB Jørgensen, *The Elgar Companion to the Extraordinary Chambers in the Courts of Cambodia* (Edward Elgar 2018).

[45] For recent overall evaluations of the ECCC as a hybrid model for international criminal justice, see John D Ciorciari and Anne Heindel, *Hybrid Justice: The Extraordinary Chambers in the Courts of Cambodia* (University of Michigan Press 2014); Nina HB Jørgensen, *The Elgar Companion to the Extraordinary Chambers in the Courts of Cambodia* (Edward Elgar 2018). See also Cesare PR Romano, André Nollkaemper, and Jann K Kleffner,

of members of ethnic and religious groups as a result of the Khmer Rouge's policies, Cambodia has attracted considerable attention in genocide studies as well.[46] Some completed doctoral theses across multiple disciplines have also explored the allegation that the Khmer Rouge committed genocide.[47]

Among these studies, little has been said about the link between revolutionary cause and criminal responsibility. As the ECCC tries only a few of the Khmer Rouge leaders, it is only trying one party to the Cambodian conflict although other actors also contributed to the outbreak of the conflict and the deaths of victims.[48] Selectivity has been an enduring problem in international criminal law.[49] Despite the fact that selectivity may occasionally be justified by considerations of necessity and efficiency, it frequently puts

Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo, and Cambodia (Oxford University Press 2004); Open Society Institute, 'Justice Initiatives: The Extraordinary Chambers' (*Open Society Institute*, April 2006) < https://www.justiceinitiative.org/publications/justice-initiatives-extraordinary-chambers> accessed 29 October 2019; Olga Martin-Ortega and Johanna Herman, 'Hybrid Tribunals and the Rule of Law: Notes from Bosnia and Herzegovina and Cambodia' (The research project 'Just and Durable Peace by Piece' Working Paper No. 7, *Lund University*, 2010) <http://issat.dcaf.ch/Learn/Resource-Library/Policy-and-Research-Papers/Hybrid-Tribunals-the-Rule-of-Law-Notes-from-Bosnia-Herzegovina-Cambodia> accessed 29 October 2019.

[46] See George J Andreopoulos (ed), *Genocide: Conceptual and Historical Dimensions* (University of Pennsylvania Press 1994); David Hawk, 'Confronting Genocide in Cambodia' in Samuel Totten and Steven Leonard Jacobs (eds), *Pioneers of Genocide Studies* (Transaction Publishers 2002); Eric D Weitz, *A Century of Genocide: Utopias of Race and Nation* (Princeton University Press 2003); Edward Kissi, *Revolution and Genocide in Ethiopia and Cambodia* (Lexington Books 2006); Ben Kiernan, *Genocide and Resistance in Southeast Asia: Documentation, Denial, and Justice in Cambodia and East Timor* (Taylor & Francis 2008); Sean Bergin, *The Khmer Rouge and the Cambodian Genocide* (Rosen Publishing 2009); Susan E Cook (ed), *Genocide in Cambodia and Rwanda: New Perspectives* (Fourth paperback printing, Transaction Publishers 2009); Ben Kiernan, 'The Cambodian Genocide: 1975-1979' in Samuel Totten and William S Parsons (eds), *Centuries of Genocide: Essays and Eyewitness Accounts* (4th edn, Routledge 2013); TO Smith, 'Cambodia: Paranoia, Xenophobia, Genocide and Auto-Genocide' in Cathie Carmichael and Richard C Maguire (eds), *The Routledge History of Genocide* (Routledge 2015); Adam Jones, *Genocide: A Comprehensive Introduction* (3rd edn, Routledge 2017); Kjell Anderson, *Perpetrating Genocide: A Criminological Account* (Routledge 2018).

[47] Hélène Lavoix, 'Nationalism and Genocide: The Construction of Nation-ness, Authority and Opposition, The Case of Cambodia (1861-1979)' (Doctoral thesis, School of Oriental and African Studies, University of London 2005); Thomas Karl Forster, 'The Khmer Rouge and the Crime of Genocide: Issues of Genocidal Intent with Regard to the Khmer Rouge Mass Atrocities' (Doctoral thesis in international criminal law, University of Berne 2011).

[48] Edward S Herman and Noam Chomsky, *Manufacturing Consent: A Political Economy of the Mass Media* (first published in 1988, Pantheon Books 2002) 260, 270-280.

[49] Shane Darcy, 'Imputed Criminal Liability and the Goals of International Justice' (2007) 20 Leiden Journal of International Law 377, 393.

the value of the rule of law at risk and reminds the public of various political imperatives.[50]

The legal parameters from which to assess revolutions are underdeveloped for various reasons. This may be largely due to the cautiousness and reluctance of international judges to afford any significance to the political motivations behind revolutions that could vary on a case-by-case basis and can only be judged with hindsight. On the other hand, governments might also be reluctant to afford validation to politically-motivated resistance and social movements in case future actions might be taken that threaten their governance. As stated in the appeal judgment in the case against members of the Civil Defence Forces at the Special Court for Sierra Leone, 'inquiry into *motive* opens the door to speculation about the general moral worth of the convicted person, a task for which courts are *ill-equipped*'.[51]

However, despite international criminal law's seeming dismissal of the relevance of such contexts and motives for international crimes, international criminal trials have never been completely free of the assessment of political motivations. For instance, in the same paragraph of the previously mentioned judgment, it further states, '[n]onetheless (…) evaluation of the *motivation* (…) is part of any system that aims to make punishment *proportional* to *blameworthiness*'.[52] Assessment of political motivations can also be found in the discussions around the mental element of the crimes against humanity and genocide.[53] Sometimes the political motive stands as the key to distinguishing crimes against humanity from

[50] Padraig McAuliffe, 'Transitional Justice and the Rule of Law: The Perfect Couple or Awkward Bedfellows?' (2010) 2 Hague Journal on the Rule of Law 127, 134.
[51] *Fofana and Kondewa* (SCSL-04-14-A) Judgment, 28 May 2008 [522]. (emphasis added by the author)
[52] ibid. (emphasis added by the author)
[53] See Martin R Gardner, 'The *Mens Rea* Enigma: Observations on the Role of Motive in the Criminal Law, Past and Present' [1993] Utah Law Review 635; Allison Marston Danner, 'Bias Crimes and Crimes Against Humanity: Culpability in Context' [2002] Buffalo Criminal Law Review 389; Immi Tallgren, 'The Sensibility and Sense of International Criminal Law' [2002] European Journal of International Law 561; Mohamed Elewa Badar, *The Concept of Mens Rea in International Criminal Law: The Case for a Unified Approach* (Bloomsbury Publishing 2013).

genocide because it helps to identify the intent, which further separates the two groups of crimes where the physical elements of both are satisfied.[54]

The role of context in a given situation becomes more complicated when it comes to the concept of joint criminal enterprise (JCE), a special mode of responsibility developed by the International Criminal Tribunal for the former Yugoslavia and partially adopted by the ECCC. It is not always straightforward that the required common purpose under JCE refers to motive or prescribed mental elements in a given case. The trial and supreme chambers in case 002/01 at the ECCC indeed identified two different common purposes. The Trial Chamber refers to the revolutionary motive as the common purpose of JCE by concluding that the common purpose was 'to implement a socialist revolution in Cambodia', and 'this common purpose was not in itself necessarily or entirely criminal'.[55] The Supreme Court Chamber overruled the trial judgment on this matter and emphasised that 'in order to give rise to criminal liability, the common purpose has to be criminal, in the sense that it either *amounted to* or *involved* the commission of a crime', and 'it would have been inapt to constitute a [non-criminal] common purpose giving rise to criminal liability'.[56] Consequently, the appeal judgment identified the 'policy of population movement and the policy of targeting Khmer Republic soldiers and officials'[57] and concluded that 'given that the common purpose was to be achieved through the commission of crimes, as encompassed by the policies, the objective of implementing a rapid socialist revolution in Cambodia was indeed criminal'[58].

The approach taken in the appeal judgment appears consistent with the jurisprudence from other tribunals yet raises a new problem in terms of the lack of specification of the individual role of the accused in each policy or local action, which has been identified as a major challenge in the

[54] William Schabas, 'The Contribution of the Eichmann Trial to International Law' (2013) 26 Leiden Journal of International Law 667, 674.
[55] *NUON Chea and KHIEU Samphan* (002/19-09-2007-ECCC-TC) Case 002/01 Judgement, E313, 7 August 2014 [778], [804], [835].
[56] *NUON Chea and KHIEU Samphan* (002/19-09-2007-ECCC/SC) Appeal Judgement, F36, 23 November 2016 [814]. (emphasis added by the author)
[57] ibid [815].
[58] ibid [816].

application of this mode of liability.[59] A more problematic result of this approach is that it deduces the criminal purpose from results, which in turn raises the uncertainty of the criminality of the purpose in itself. Is this not a contradiction with the claim made by the Supreme Court Chamber that 'the common purpose has to be criminal'? The origin of this puzzle lies in the impulse of the Supreme Court Chamber to convert negligent results into intentionally caused harms. It is questionable whether this jurisprudential development at the ECCC is based on sufficient legal reasoning or a consideration of convenience towards convictions.

One dialogue during the testimony for case 002 between the accused, Nuon Chea, and a testifying expert, Elisabeth Becker, helps to demonstrate how the revolutionary context interacts with the assessment of criminal responsibilities and that dismissing such a context potentially exposes weak states to powerful states' non-compliance of international law. NUON Chea put the following to Elisabth Becker:

> The United States government engaged in the interference and came to invade Cambodia, in particular for the period from 1970 to 1973. It engaged in bombardment for 200 days and nights totalling about three million tons of bombs and as a result, many innocent Cambodian people died and the destruction of the houses, rice fields and pagodas. And I'd like you, the expert, to give us the reason for that bombardment. […] Is it your opinion that the United States government shall be responsible for the tragedy that it inflicted upon Cambodian people? Or is it because it is a powerful country, it can go and invade any smaller countries at its own discretion?[60]

And Becker answered:

> Is the United States responsible for the tragedy involved in the destruction — material and human beings were killed during the bombing? Of course. And that continues to be a debate and in fact, just a couple of weeks ago, when Mr. Henry Kissinger was testifying before

[59] Regarding scholarly debates around the JCE issue, see Hector Olasolo, 'Joint Criminal Enterprise and Its Extended Form: A Theory of Co-Perpetration Giving Rise to Principle Liability, A Notion of Accessorial Liability, or A Form of Partnership in Crime?' (2009) Criminal Law Forum 263; Katrina Gustafson, 'ECCC Tackles JCE: An Appraisal of Recent Decisions' (2010) 8 Journal of International Criminal Jurisprudence 1323; Luke Marsh and Michael Ramsden, 'Joint Criminal Enterprise: Cambodia's Reply to Tadić' (2011) 11 International Criminal Law Review 137; Jared L Watkins and Randle C DeFalco, 'Joint Criminal Enterprise and the Jurisdiction of the Extraordinary Chambers in the Courts of Cambodia' (2011) 63 Rutgers Law Review 193; James G Stewart, 'The End of 'Modes of Liability' for International Crimes' (2012) 25 Leiden Journal of International Law 165.

[60] *NUON Chea and KHIEU Samphan* (002/19-09-2007-ECCC/TC) Transcript of Trial Proceedings, 11 February 2015, 4-6.

> a committee in Congress, some American citizens tried to do a citizen arrest of him. It's an ongoing question and it's a very live question. Can the United States invade any small country at once? No, the International Law says no.[61]

The question posed by NUON Chea has a clear answer as apparent from Elisabeth Becker's response. It is also clear that this is a question beyond the jurisdiction of the ECCC. Attempted legitimation of the Khmer Rouge revolution argue that the revolution was necessary in order for the government to survive foreign interventions.[62] Without sufficiently addressing the legitimacy of the revolution by discussing alternative policies or manners of domestic governance at that particular time, the ECCC struggles with interpreting and applying international crimes to incorporate human rights violations.

1.2 Significance and Contribution of the Study

The study is significant and original for a number of reasons. Firstly, the current study is among a limited number of extensive reviews of the jurisprudence of the ECCC.[63] Compared with the attention that has been given to the International Criminal Court, the two tribunals set up by the United Nations Security Council dealing with the conflicts in the Balkans and Rwanda, and the Special Court for Sierra Leone, the ECCC has not been researched to the same or even a comparable level.[64] However, all of these tribunals are applying and interpreting largely the same body of international criminal law, and personnel and staff are often shared among these

[61] *NUON Chea and KHIEU Samphan* (002/19-09-2007-ECCC/TC) Transcript of Trial Proceedings, 11 February 2015, 6.

[62] See chapter 3 of this thesis for details.

[63] For recent overall evaluations of the ECCC as a hybrid model for international criminal justice, see John D Ciorciari and Anne Heindel, *Hybrid Justice: The Extraordinary Chambers in the Courts of Cambodia* (University of Michigan Press 2014); Nina HB Jørgensen, *The Elgar Companion to the Extraordinary Chambers in the Courts of Cambodia* (Edward Elgar 2018).

[64] John RWD Jones, *The Practice of the International Criminal Tribunals for the former Yugoslavia and Rwanda* (2nd edn, Transnational Publishers 2000); William A Schabas, *The UN International Criminal Tribunals: the former Yugoslavia, Rwanda, and Sierra Leone* (Cambridge University 2006); André Klip and Steven Freeland, *Series of Annotated Leading Cases of International Criminal Tribunals* (Intersentia 1999-2018), contains 53 volumes in total, and only two volumes of those include materials on the ECCC covering the period between 2007 and 2011.

institutions. Therefore, this thesis is an effort to engage the multiple existing fora of international criminal law.

Secondly, this thesis also stands as an innovative critique of the jurisprudence of the ECCC by bringing the charged offences back into a larger social context. Only by recognising the impact of the overall context, may the trials of core international crimes be aligned with their claimed goals of truth and reconciliation.[65] Given that the ECCC's perceived goals include both justice and reconciliation[66], it is crucial to recognise that some of the responsible parties in the selected events together with direct perpetrators have been left out of trials, and that this substantially affects the ECCC's capacity to present a balanced view of the revolution. It is problematic for the ECCC to simply dismiss the Democratic Kampuchea's revolutionary goals when its legal reasoning recognises that the revolution is not entirely criminal. Therefore, the author proposes that further consideration should have been afforded to revolutionary causes in the proceedings at the ECCC.

Criminal trials dealing with these situations have been conferred with different purposes and values. International criminal trials appear to the public to be aimed at providing an impartial historical record. Besides punishing the responsible individuals, they also aim at deterring and preventing the future commission of international crimes, and having a symbolic, community-creating effect.[67] Literature in transitional justice has revealed that criminal trials have inherent limitations that may undermine the achievement of these goals.[68] Hence, it is especially important to bring the

[65] Shane Darcy, 'Imputed Criminal Liability and the Goals of International Justice' (2007) 20 Leiden Journal of International Law 377, 379.
[66] David Scheffer, *All the Missing Souls: A Personal History of the War Crimes Tribunals* (Princeton University Press 2012) 341-405. David Scheffer participated in the negotiation between Cambodia and the United Nations. In this process, America played an active role towards the prosecution of the surviving Khmer Rouge leaders. David Scheffer compiled a personal record of the negotiation and establishment history of the ECCC in this memoir.
[67] See John Borneman, *Settling Accounts: Violence, Justice, and Accountability in Postsocialist Europe* (Princeton University Press 1997); Ruti G Teitel, *Transitional Justice* (Oxford University Press 2000); Matti Koskenniemi, 'Between Impunity and Show Trials' (2002) 6 Max Planck Yearbook of United Nations Law 1.
[68] Cesare PR Romano, André Nollkaemper, and Jann K Kleffner, *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo, and Cambodia* (Oxford University Press 2004); Open Society Institute, 'Justice Initiatives: The Extraordinary Chambers' (*Open Society Institute*, April 2006) < https://www.justiceinitiative.org/publications/justice-initiatives-extraordinary-chambers> accessed 29 October 2019; Olga Martin-Ortega and Johanna

jurisprudence closer to other concerns of transitional justice, such as truth-seeking and reconciliation, by questioning whether these trials have been held in accordance with prevailing international standards of justice and provide more balanced views of world events.

Post-conflict criminal trials may serve multiple goals by delivering punishment, and these practical goals could lead to different criteria and principles being introduced into international criminal law. For instance, different numbers of suspects are pre-determined for different trials, convictions may be moderate in some cases while harsh in others, and amnesties are allowed in some cases while forbidden in others. No uniform jurisprudence has emerged on the adoption and consideration of criminal trials of former revolutionary leaders in transitional situations.[69] The ECCC provides a forum for testing several aspects of international criminal justice, such as the risk of these kinds of trials becoming a political instrument for targeting former adversaries and the challenge of the retroactive application of international criminal law.

It is important to recognise that none of these purposes can stand alone. International criminal justice has always embraced these mixed goals and functions.[70] Some questions will remain relevant to the general understanding of international criminal justice in the foreseeable future. In the Cambodian case, these questions include (i) what is the purpose and significance of the trials, particularly given that some of the accused are too old to live through the trial stage;[71] and (ii) what is the nature of the crimes committed by the accused who at times sincerely believed that they were acting in the best

Herman, 'Hybrid Tribunals and the Rule of Law: Notes from Bosnia and Herzegovina and Cambodia' (The research project 'Just and Durable Peace by Piece' Working Paper No. 7, *Lund University*, 2010) <http://issat.dcaf.ch/Learn/Resource-Library/Policy-and-Research-Papers/Hybrid-Tribunals-the-Rule-of-Law-Notes-from-Bosnia-Herzegovina-Cambodia> accessed 29 October 2019.

[69] Ruti G Teitel, *Transitional Justice* (Oxford University Press 2000) 51-59; Matti Koskenniemi, 'Between Impunity and Show Trials' (2002) 6 Max Planck Yearbook of United Nations Law 1.

[70] William A Schabas, *Unimaginable Atrocities*: *Justice, Politics, and Rights at the War Crimes Tribunals* (Oxford University Press 2012) 153-172.

[71] Ieng Thirith was one of the accused in case 002 at the ECCC when the case started. However, in November 2011 she was removed from the trial due to the fact that she was suffering from dementia. She died on 22 August 2015 at the age of 83. Ieng Thirith's husband, Ieng Sary, was another accused in the same case. He died on 14 March 2013 at the age of 87 and the procedure against him was accordingly terminated.

interests of Cambodians. Some truth-seeking initiatives conducted by independent journalists, such as Thet Sambath [72], also revealed that understanding the genuine motive of the killing fields is essential for deeper reconciliation in Cambodian communities nowadays. Accordingly, a third question that might be asked is what reasons made these revolutionary leaders believe that there was no *alternative method* for achieving the revolutionary goal if the revolution was meant to be constructive instead of destructive. Moreover, the question of whether the mass executions and acts of torture committed within Democratic Kampuchea under the Khmer Rouge regime amount to genocide is still widely debated.[73]

Another reason that the revolutionary context of a conflict is neglected in the study of international criminal justice is that in international criminal law it is generally held that no motivation can justify the commission of atrocity crimes, such as crimes against humanity, genocide and war crimes. At the time of the revival of international criminal justice during the 1990s, the International Criminal Tribunal for the former Yugoslavia confirmed that 'prosecuting persons responsible for serious violations of international humanitarian law'[74] was the major goal and mission of that court. In order to demonstrate an equal application of international humanitarian law, the reason why the parties initiated or participated in the conflict was left out of the assessment of responsibility. Although the judgements often recognise the context of the conflict by including a preliminary background section, the chosen language attempts to be neutral to avoid accusing any particular party of starting the conflict.[75] However, revolutionary cases often involve atrocities that are not directly associated with armed conflicts. This study contributes to the understanding of international criminal justice when it is mobilised to address violence and political persecution committed primarily against one's own citizens.

[72] Co-director of the film *Enemies of the People*. The film was released in 2009 and featured interviews conducted by Thet Sambath in his decade's long search for explanations of the killing fields in Cambodia.
[73] William A Schabas, 'Cambodia: Was It Really Genocide?' (2001) 23(2) Human Rights Quarterly 470; Adam Jones, *Genocide: A Comprehensive Introduction* (3rd edn, Routledge 2017).
[74] United Nations Security Council Resolution, S/RES/827 (1993) 25 May 1993.
[75] *Tadić* (IT-94-1-T) Opinion and Judgement, 7 May 1997 [54]. [19]-[35]; *Đorđević* (IT-05-87/1-T) Public Judgement and Confidential Annex: Volume I of II, 23 February 2011.

Also, given that regime change through the use of external force is prohibited by international law, it is important to explore the impact of external threats faced by a local government. These external threats pose serious challenges to domestic governance policies in different ways and remain relevant in contemporary international society. While legal analysis does not aim to have the last word on a historical event, discussions in this study do highlight alternative viewpoints on important world events. By illuminating multiple perspectives, readers will be brought closer to various sides of a particularly dark period of history. Besides criticising the Khmer Rouge as a cold-blooded regime that murdered its own people, the world today urgently needs to be reminded about the need for responsible governments and non-governmental groups everywhere, and a multifaceted view on events, especially in times of confrontation and distress.

By exploring the case law of the ECCC, the present study proposes potential elements for international criminal law to consider revolutionary causes. These can be both material (e.g. as a mitigating factor), as well as procedural (e.g. the fairness of the set-up of a trial, and the investigation of *all responsible parties* within a situation). Trials of violent revolutions will continue to be challenging if more are held in the future to deal with events such as the revolutions of the so-called 'Arab Spring', the armed conflicts in Syria and Iraq, and the attempted coup in Turkey in July 2016. Clarification of the aforementioned elements through the future jurisprudence of international trials, especially those held before the International Criminal Court, should eventually help to promote the rule of law at an international level.

1.3 Methodology of the Study

This thesis mainly adopts the doctrinal research methodology.[76] In addition to relevant literature, it examines cases and materials from the ECCC and other international criminal proceedings. With the rapidly growing body of jurisprudence from the United Nations *ad hoc* tribunals and the International

[76] For an overview of the scope of the various legal research methodologies referred to in this part, see Caroline Morris and Cian Murphy, *Getting a PhD in Law* (Hart Publishing 2011) 30-39.

Criminal Court, this thesis primarily focuses on the case law of the ECCC. Judgments and other judicial decisions at the ECCC provide the primary sources of this research. A doctrinal analysis of other sources of international rules and principles applicable before the ECCC will also be conducted. Given that each international/hybrid tribunal is afforded a particular jurisdiction and constructed to resolve a particular conflict, pursuing consistency among these judicial bodies is also one of the goals of the doctrinal analysis.

This thesis also draws upon critical legal studies in assessing the different historical views towards the Cambodian revolution with regard to responsibilities for the mentioned crimes.[77] It is important to go beyond the positive laws provided for the ECCC in order to apply a consistent standard within international criminal law, which is an autonomous branch of international law. Critical theory often points to the unchallenged assumptions in the construction of legal norms, which further helps to reveal the limited function and impacts of international criminal trials in addressing conflicts and social upheavals. Specifically, this approach enables the current study to critique the selectivity and expansive interpretation issues, which are not unique to the ECCC but commonly shared by all judicial institutions that are set up to deal with international crimes.

Despite the considerable volume of historical and political factors addressed in the present research, the research does not intend to be social-legal or empirical in nature, which would require tools and theoretical frameworks from other disciplines, such as sociology and anthropology. The author does not directly conduct interviews, surveys and data collections, although empirical reports are cited occasionally as secondary sources.

1.4 Outline of the Study

The outline of the study summarises the main research designs and conclusions of each of the following chapters and the final conclusions of this thesis.

[77] Robert Cryer, Tamara Hervey, Bal Sokhi-Bulley and Alexandra Bohm, *Research Methodologies in EU and International Law* (Hart Publishing 2011) 72. See also Martti Koskenniemi, *The Politics of International Law* (Hart Publishing Limited 2011) 171-197.

Chapter 2 begins with key observations from theoretical studies on revolutions as social phenomena and sets out the scope of this study as one focusing on the application of international criminal law to revolutions that follow clear scripts and organisational structures.[78] It links law and revolution both at a general level and within the framework of applicable laws at the ECCC. This chapter serves to exemplify the research question in two dimensions.

Firstly, examination of the concept and treatment of political offences in domestic laws reveals the discrepancy between domestic criminal law and international criminal law. It is worth questioning what are the underlying reasons that justify the imposition of stricter responsibility for political offences in international criminal law. Secondly, this chapter considers the limited jurisdiction of the ECCC in order to demonstrate the issue of selectivity, which is repeatedly raised in debates concerning international criminal justice. The selectivity issue could potentially endanger the credibility of the ECCC in combination with the changing political environment in Cambodia. A summary of the cases at the ECCC is also provided in this chapter.

Chapter 2 also prepares for some arguments that are further developed in chapter 6. Chapter 2 shows that international law has been continuously developing to accommodate the changing reality of conflicts and violence by drawing on the changing international rules of extradition of political offenders. It features a paradox faced by states in the process of international law-making to contain excessive political violence without depriving the last resort of the individuals and groups who are deprived of legitimate means to make a change. Balanced tolerance towards excessive violence lies in the necessity and proportionality between recognised political goals and the employed violent means. The necessity to adopt certain revolutionary means will be further analysed in chapter 6 which discusses the revolutionary context and defences and sentencing.

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[78] Keith Michael Baker and Dan Edelstein (eds), *Scripting Revolution: A Historical Approach to the Comparative Study of Revolutions* (Stanford University Press 2015) 2, 325.

Chapter 3 provides an overview of events in post-colonial Cambodia and analyses the revolutionary movement led by the Communist Party of Kampuchea by putting the revolution back into the broader context of national liberation movements, armed conflict and Cold War politics at the time. This chapter prepares for one of the major defence examined in later chapters, which is the just cause defence. Just cause is a controversial element in the jurisprudence of international criminal law as demonstrated by the trial of the Civil Defence Forces (the CDF) at the Special Court for Sierra Leone.[79] In the trial of the CDF, just cause was identified as 'restoration of democracy', and the existence of just cause was not debated. It is rather the potential unequal application of international humanitarian law between the parties to the conflict that created a sense of uneasiness during the appeal if just cause was given any weight in the assessment of criminal responsibility.[80] Chapter 6 of the current study will complement the analysis of just cause's role in international criminal law by demonstrating how prosecutions of human rights violations might leave more space for just cause as a mitigating factor when elements of crimes and mode of liability are stretched to penalise more offences that are not intended by the purpose of revolution. Chapter 3 also sets out the five charged revolutionary policies at the ECCC and ends with the challenge of specificity in prosecuting mass atrocities.

Chapter 4 mainly examines the application and interpretation of crimes against humanity and genocide at the ECCC. The conviction of crimes against humanity in case 002/01 is a complex mission addressing two of the most influential policies of the CPK, namely the population movements and the operation of the co-operatives and worksites. The first part of chapter 4 breaks the Chambers' reasoning down to a step by step process and demonstrates how the Chambers interpreted the contextual element of crimes against humanity and the particularly lower threshold of mental element required for murder as a crime against humanity. It will be shown that the revolutionary context, especially the combined results from the revolutionary movements and the aftermath of a just ended civil war, provide substantial

[79] *Fofana* and *Kondewa* (SCSL-04-14-T) Judgment on the Sentencing, 9 October 2007 [86].
[80] *Fofana* and *Kondewa* (SCSL-04-14-A) Judgment, 28 May 2008 [523].

support for the findings of the systematic and widespread 'attack' and the *dolus eventualis* murder. The Chambers' interpretation shows a shifting focus of crimes against humanity from penalising violations of laws of armed conflict to penalising human rights violations. This subtle change of the concept of crimes against humanity can be seen from the Chambers' effort to reconcile the readings of 'attack' and 'civilian' in wartime and peacetime.

Chapter 4 continues to examine the influence of the revolutionary context on the conviction of genocide. It will be demonstrated that the revolutionary context plays an essential role in distinguishing genocide and crimes against humanity because of the different mental elements required by the two crimes. From a historical point of view, the revolutionary cause serves as the collective motive of all policies adopted by the Khmer Rouge. In the process of identifying international crimes within the overall situation, this revolutionary cause should override the intent to attack minority and religious groups *per se*, as reasoned in the separate opinion of the Cambodian judge, YOU Ottara, in the judgment in case 002/02. According to Judge YOU, all the victims of the CPK revolution, especially the Khmers, should be treated as victims of genocide because he interpreted genocide broadly to include crimes such as 'political genocide' and 'cultural genocide'.[81]

Coming back to the majority opinion on genocide, chapter 4 will analyse and summarise the formal approach adopted by the Chambers to deduce the genocidal intent based on explicit policies and orders, according to which the Trial Chamber convicted genocide against two particular groups while convicting offences against other groups as crimes against humanity. This formal approach might not affect the punishment of the accused at the ECCC, but it leaves the difference between genocide and crimes against humanity to a thin line depending on the formal policies conducted by the perpetrators. The formal approach risks misinterpreting the concept of genocide and diminishing the significance of the particular motive which is

[81] *NUON Chea and KHIEU Samphan* (002/19-09-2007/ECCC/TC) Case 002/02 Judgement, E465, 16 November 2018 [4468]-[4469].

often critical in proving the genocidal intent, which is the hatred against the victim group.[82]

Chapter 5 assesses the influence of the revolutionary context on the application and interpretation of the joint criminal enterprise (JCE) doctrine at the ECCC. The core of the JCE doctrine is the required common criminal purpose. The defendants at the ECCC constantly argued that the charged offences were not the purpose of the revolution, but unexpected or unavoidable results given the state of internal and external threats.[83] Leaving aside the issue as to whether or not the results of the revolution were in fact intended, the Trial Chamber and the Supreme Court Chamber have taken different approaches when seeking to identify the shared common purpose. Both approaches, however, appear problematic.

The Trial Chamber recognised the revolution as the shared common purpose but failed to demonstrate the criminal nature of that common purpose as required by the JCE doctrine. It concluded that 'this common purpose was not in itself necessarily or entirely criminal'.[84] The Supreme Court Chamber reversed the Trial Chamber's finding and took specific policies as shared criminal purposes by adopting a rationale that criminal means would render the purpose criminal regardless if the results were conceived by the shared purpose. This rationale is referred as broad JCE I in this study. Broad JCE I left a vital weak point in the reasoning of the judgment which is the lack of specificity in terms of how the accused individually contributed to the implementation of the policies with differentiated minds and personal statuses.[85] Moreover, the findings regarding the criminal means by the Supreme Court Chamber are grounded in the magnitude and gravity of the overall results of the revolution. Hence, broad JCE I is further expanded to the level that government members could be held responsible for offences

[82] William A Schabas, '"Definitional Traps" and Misleading Titles' (2009) 4(2) Genocide Studies and Prevention 177, 180.
[83] *NUON Chea* (002/19-09-2007-ECCC/SC) NUON Chea's Request for Reconsideration of the Supreme Court Chamber's Decision Not to Summons HENG Samrin and Robert Lemkin and to Admit Evidence Produced by Robert Lemkin on Appeal, F2/10, 4 February 2016 [9].
[84] *NUON Chea and KHIEU Samphan* (002/19-09-2007-ECCC-TC) Case 002/01 Judgement, E313, 7 August 2014 [778].
[85] David Cohen and others, *"A Well-Reasoned Opinion?": Critical Analysis of the Judgment in Case 002/01* (East-West Center, 2015) 38.

that they did not intend to cause and that were actually caused by other external factors.

Chapter 5 highlights a judicial reasoning that has been advanced by the Supreme Court Chamber at the ECCC which dismisses the application of JCE III on one hand but broadly interprets the requisite common purpose of JCE I on the other.[86] More importantly, it shows that the ECCC did engage with the revolutionary context yet failed, or at least struggled, to align this important historical episode with available legal norms. It is also noted that the convictions of the revolutionary leaders still face serious challenges due to the difficulty in finding each of the accused's control or contribution to the joint crimes given the internal struggles faced by the Democratic Kampuchea governing structure.[87]

Chapter 6 addresses the revolutionary cause from the perspective of defences and sentencing. Common defences for individual participation in international crimes, such as duress, can hardly apply in the trial of motivated and passionate revolutionary leaders. The major defences raised by the accused point to the necessity of the population movements and other policies to destroy perceived enemies, which in turn challenges the elements of the crimes, not the conditions in which their individual participation took place. None of the accused have claimed that they were forced to join the revolution. Given that the ECCC has rendered the revolution unlawful by deciding that the elements of crimes have been satisfied, the question moves on to sentencing. Regarding the issue of sentencing, this chapter mainly examines just cause as a mitigating factor. It is shown that the reduction of sentencing is unlikely where international crimes arising from armed conflicts because the perceived ultimate goal of affirmative prevention. However, doubts would be raised in the trials and cases that primarily focus on violations of human rights.

[86] Nina HB Jørgensen, *The Elgar Companion to the Extraordinary Chambers in the Courts of Cambodia* (Edward Elgar 2018) 326. See also, Cóman Kenny, 'Jurisprudence Continues to Evolve: The ECCC's Revision of Common Purpose Liability' (2018) 16 Journal of International Criminal Justice 623.
[87] *NUON Chea* (002/19-09-2007-ECCC/SC) NUON Chea's Request for Reconsideration of the Supreme Court Chamber's Decision Not to Summon HENG Samrin and Robert Lemkin and to Admit Evidence Produced by Robert Lemkin on Appeal, F2/10, 4 February 2016 [10].

Chapter 7 concludes the thesis with four aspects of findings regarding the impact of revolutionary context on the application of international criminal law. Firstly, the scope of the chosen five policies could not delimitate the revolution from the remit of the ECCC. The application of international criminal law at the ECCC necessarily involves and awards considerations of the revolutionary context. Secondly, the elements of crimes against humanity, especially the mental element of murder as a crime against humanity, are interpreted broadly to the extent that the accused are held responsible for results caused by external factors. Thirdly, the Chambers adopted a broad JCE I by interpreting the criteria of finding the requisite common criminal purpose according to a relatively low threshold. These broad interpretations hardly adhere to the principle of legality. Finally, the assessment of defences and sentencing brings the central debate back to the nature of the revolution itself. The whole study shows that the trial of the CPK leaders has never strayed far from the theme of revolution or refrained from questioning the validity and legitimacy of the revolution. This study argues that international criminal law cannot and should not dismiss revolutionary context. There is both validity and possibility to continue exploring and further distinguishing between legitimate and illegitimate political goals and causes in international criminal law by applying and interpreting the elements of crimes, mode of liability, defences and sentencing in a balanced and consistent way.

1.5 Limits of the Study

Due to the large scale of events in Cambodia and complicated historical facts, this study is mostly based on the events and facts touched and debated by the judicial proceedings at the ECCC. However, literature that sheds light on the nature and policies of the CPK revolution, especially the regional differences in the implementation of those policies, have been included to explore if the Chambers at the ECCC could have reached different findings in light of controversial historical views. Another limit of this doctrinal study is that the author cannot verify conflicting claims regarding how the atrocities actually unfolded in detail. Instead, the author could only conduct research and analysis to the extent of assessing whether the judicial deliberation at the ECCC is based on sufficient legal and factual basis and whether there are

conflicting facts that the court failed to sufficiently consider or engage before arriving at conclusions.

There are no accurate statistical reports on the number of the population that have been internally displaced because of the civil war in Cambodia. It is also not realistic to have a detailed report to assign the cause of deaths to specific number of victims during the CPK revolution. The judicial investigation at the ECCC's cannot even conclude on whether two or three millions of people were evacuated from Phnom Penh alone.[88] These are limits of the judicial procedures at the ECCC and also the limits of this study. It could be balanced by the fact that there is considerable amount of documentary materials available to allow judicial assessment of individual criminal responsibilities within the current legal framework. It may be also expected that the memorial projects awarded by the judgments in case 002 will start functioning and more details of life under Democratic Kampuchea are shown to the public.

The trials in case 003 and case 004 remain to be progressed by the time of the completion of this study, and the appeal in case 002/02 is still pending. These potential developments at the ECCC do not necessarily limit the current study in the way that substantial findings need to be revised, but might lead to further research to make the study more complete.

[88] *NUON Chea et al.* (002/19-09-2007-ECCC-OCIJ) Closing Order, D427, 15 September 2010 [226].

2 Revolution and the Remit of the ECCC

According to the Oxford English Dictionary, revolution, in social and political science, refers to the 'overthrow of an established government or social order by those previously subject to it'[1] or the 'forcible substitution of a new form of government'[2]. Sometimes, rebellions and social unrests may also be referred to as revolutions by their mobilisers and participants although these events do not necessarily have the same defined goal of overthrowing a government. Studies of revolutions have presented a variety of definitions highlighting different aspects of revolutions as social movements.[3] This chapter departs from broader political and sociological studies on revolutions as social phenomena, which help to shed light on different natures of revolutionary events.[4] It focuses on revolutions involving a resort to armed violence amounting to an armed conflict, and undertaken for the purpose of overthrowing an existing authority and changing society in a significant way. In interacting with international criminal law and for the purpose of the present study, such revolutions with armed conflicts may involve war crimes and acts amounting to crimes against humanity or genocide. The crime of aggression may be also committed during revolutions, but it was left out of the jurisdiction of the ECCC, which in turn demonstrates that the main purpose of the ECCC is to punish individuals, whilst also protecting the rights of individuals and providing redress to victims.[5]

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[1] *Oxford English Dictionary Online* (Oxford University Press 2018) <http://www.oed.com/view/Entry/164970?rskey=EQAw01&result=1> accessed 28 October 2019.

[2] ibid.

[3] Jack A Goldstone, 'Toward A Fourth Generation of Revolutionary Theory' (2001) 4 Annual Review of Political Science 139.

[4] David Chandler and Ben Kiernan (eds), *Revolution and Its Aftermath in Kampuchea: Eight Essays* (Monograph Series No. 25, Yale University Southeast Asia Studies 1983); Jack A Goldstone, 'Toward A Fourth Generation of Revolutionary Theory' (2001) 4 Annual Review of Political Science 139; Keith Michael Baker and Dan Edelstein (eds), *Scripting Revolution: A Historical Approach to the Comparative Study of Revolutions* (Stanford University Press 2015).

[5] Article 1 of the ECCC Law: The purpose of this law is to bring to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognised by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979. See also Rachel Killean, *Victims, Atrocity and International Criminal Justice: Lessons from Cambodia* (Routledge 2018).

This chapter bridges revolution and law both at a general level and within the framework of the applicable law at the ECCC. Bearing in mind that the present study sets out to investigate how a revolutionary context influences the application of international criminal law, this chapter further exemplifies the central research question in two dimensions. Firstly, viewing revolutions as political movements aimed at achieving social reforms, this chapter demonstrates that there is an inconsistency between the treatment of political crimes in domestic criminal laws and the treatment of revolutions in international criminal law. Politically motivated crimes have been treated with more tolerance under domestic criminal law[6] as compared with international criminal law. Theoretically speaking, domestic criminal law and international criminal law do not have to be consistent in their treatment of politically motivated crimes because they are two separate legal regimes. However, it is important to observe the reasons for this difference given both legal regimes deal with criminal matters. Particular reasons for criminalising and punishing international crimes are sought by looking at the origin and development of this particular body of law.[7]

Secondly, turning to the legal framework at the ECCC, this chapter demonstrates that the tribunal is a legal mechanism, which has been delicately designed to address crimes arising during one of the most significant socialist revolutions from the previous century. The stated goal of the tribunal is strictly confined to trying a small group of people for crimes and serious violations of both Cambodian law and international law.[8] Although the tribunal is meant to be highly selective in terms of choosing conflict parties

[6] Robert Ferrari, 'Political Crime and Criminal Evidence' (1918-19) 3(6) Minnesota Law Review 365; Robert Ferrari, 'Political Crime' (1920) 20 Columbia Law Review 308; Nicholas N Kittrie, 'Patriots and Terrorists: Human Rights with World Order' (1981) 13(2) Case Western Reserve Journal of International Law 291; *Rebels with a Cause: The Minds and Morality of Political Offenders* (Westview Press 2000); Timothy Garton Ash, 'Is There a Good Terrorist?' (2001) 48(19) The New York Review of Books 30.

[7] Gideon Boas, William A Schabas and Michael P Scharf (eds), *International Criminal Justice: Legitimacy and Coherence* (Edward Elgar Publishing 2012); Ratana Ly, 'Prosecuting the Khmer Rouge: Views from the Inside' in Susanne Buckley-Zistel, Friederike Mieth and Marjana Papa (eds), *After Nuremberg. Exploring Multiple Dimensions of the Acceptance of International Criminal Justice* (International Nuremberg Principles Academy 2017) <https://www.nurembergacademy.org/fileadmin/user_upload/Cambodia.pdf> accessed 15 February 2019.

[8] See both Article 1 of the ECCC Law and Article 1 of the Agreement between UN and Cambodia.

and responsible individuals to be prosecuted and punished,[9] the Chambers at the ECCC indeed recognise that there was a nation-wide revolutionary movement by including a lengthy section of the 'historical background'[10] in the judgments. The revolutionary context helps to lay the foundation towards final convictions.

Moreover, discussions in this chapter feature the defence's challenges against the jurisdiction of the ECCC and the applicable crimes in relation to their legal status and definitions during the 1970s when the charged offences were committed. It is concluded that the ECCC applies international criminal law retroactively towards convictions by relying on the jurisprudence of the *ad hoc* tribunals which were only established in the 1990s.[11] Even though retroactive application of international criminal law could reconcile with the principle of legality under certain conditions,[12] it deserves careful scrutiny in the case of Cambodia. The selectivity of the charged offences and individuals, the retroactive application of international criminal law, and the fact that the ECCC was established at the time when other political parties in Cambodia needed to drive the Khmer Rouge out of the political stage all suggest that the accused have been held up to a set of particular standards. Finally, a summary of the cases at the ECCC is also provided in this chapter.

2.1 Revolution, Violence and International Criminal Law

To study the impact of revolutionary context on the application of international criminal law, this thesis shall first define the word 'revolution' and the specific situations that it encompasses for the purpose of this dissertation. Literature in historical and sociological studies during the past decades has produced various theories and concepts to study revolutions around the world. These studies help to answer the questions of what

[9] Sarah Williams, 'Hybrid Tribunals: A Time for Reflection' (2016) 10 International Journal of Transitional Justice 538, 546.
[10] *NUON Chea and KHIEU Samphan* (002/19-09-2007-ECCC-TC) Case 002/01 Judgement, E313, 7 August 2014. The trial judgement spent 53 pages to cover the 'historical background' of the revolution launched by the Communist Party of Kampuchea.
[11] M Cherif Bassiouni, *Crimes against Humanity: Historical Evolution and Contemporary Application* (Cambridge University Press 2011) 262.
[12] William A Schabas, 'Retroactive Application of the Genocide Convention' (2010) 4(2) Journal of Law and Public Policy 36, 49.

revolutions are, what factors cause revolutions, and what are their results and impacts.[13]

2.1.1 Defining Revolution

The following definitions of revolution have been conceptualised for different purposes. Jack A Goldstone summarises the following three 'generations' of theories of studies on revolutions from a sociological point of view.[14] During the 1930s, early research on revolutions were mainly descriptive accounts focusing on the four major political revolutions, namely, the English Revolution of the 1640s, the American Revolution, the French Revolution, and the 1917 Russian Revolution.[15] During the 1960s and 1970s, there have been studies that analysed social conflicts for causes of revolutions but focused on broad individual factors such as 'modernisation' or 'relative deprivation'.[16] Immediately following these studies, revolutions came to be understood through a framework that combines multiple factors such as states, elites, and disadvantaged classes in addition to the changing domestic relationships among these actors faced with the international military and economic competitions.[17] This diversified framework towards understanding the causes of revolutions coined the definition of a social revolution by highlighting its mechanism and direction. According to this framework, Theda Skocpol summarised that a revolution is 'rapid, basic transformations of a society's state and class structures […] accompanied and in part carried through by class-based revolts from below'.[18]

Towards the modification of Theda Skocpol's definition, Jack A Goldstone proposed a new definition based on what he prefers to call the 'fourth generation of revolutionary theory', which departs from the focus on

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[13] See Jack A Goldstone, 'Toward A Fourth Generation of Revolutionary Theory' (2001) 4 Annual Review of Political Science 139; Keith Michael Baker and Dan Edelstein (eds), *Scripting Revolution: A Historical Approach to the Comparative Study of Revolutions* (Stanford University Press 2015).
[14] Jack A Goldstone, 'Toward A Fourth Generation of Revolutionary Theory' (2001) 4 Annual Review of Political Science 139.
[15] ibid 140, citing Crane Brinton, *The Anatomy of Revolution* (New York: Norton 1938).
[16] ibid, citing Samuel P. Huntington, *Political Order in Changing Societies* (Yale University Press 1968); and Ted Robert Gurr, *Why Men Rebel* (Princeton University Press 1970).
[17] ibid, citing Theda Skocpol, *States and Social Revolutions: A Comparative Analysis of France, Russia and China* (Cambridge University Press 1979).
[18] ibid.

'class-based revolts' and instead highlights the aspect of changing political authority through noninstitutionalized actions. Goldstone's proposed definition of revolution is,

> [A]n effort to transform the political institutions and the justifications for political authority in a society, accompanied by formal or informal mass mobilization and noninstitutionalized actions that undermine existing authorities.[19]

This definition is contested by revolutionary studies that follow a historical approach and which emphasise the revolutionary script as a guiding framework for political actions while the 'mass mobilization and noninstitutionalized actions' might not qualify as revolutions.[20] The focus on revolutionary script would divide the recent debate around the wave of revolutionary events that took place in the Middle East and North Africa during the first decade of the 21st century. For historical revolutionary studies, those events will be sitting on the other end of the spectrum as resistance or rebellions, rather than revolutions. For a movement to qualify as a revolution, it is crucial for its actors to improvise on self-conscious terms and outlines that are drawn from their knowledge of the previous revolutions and perceived contemporary realities.[21] For instance, 'Marx rewrote the script of the French Revolution; Lenin revised Marx; Mao revised Lenin; and so on and so forth.'[22] The genealogy of revolution is fundamental to the historical approach of revolutionary studies although modifications and adjustments of the previous revolutionary ideologies would not prevent future political actions from being qualified as revolutions.

This thesis does not intend to close the debate regarding which events may be labelled as revolution and which may not. It is beneficial and sufficient to borrow from revolutionary studies that scripted ideologies help to distinguish revolutions from other social resistance movements. When revolutions do possess concrete ideologies, it will be harder to dismiss those ideologies given that they provide insights into the causes and guidelines of

[19] Jack A Goldstone, 'Toward A Fourth Generation of Revolutionary Theory' (2001) 4 Annual Review of Political Science 139, 142.
[20] Keith Michael Baker and Dan Edelstein (eds), *Scripting Revolution: A Historical Approach to the Comparative Study of Revolutions* (Stanford University Press 2015) 2.
[21] ibid.
[22] ibid.

how the movements unfold. More importantly, revolutionary studies also identified that factors such as pursuing a more just order are intrinsic causes for revolutions crossing diverse societies.[23] It is only reasonable to predict the potential repetition of these social movements where similar factors or unjust social orders present themselves in the future. This makes it more important to explore the relations between revolution and international criminal law.

In summary, concrete ideology and pre-existing unjust social orders are the key elements of revolutionary moments. However, it appears that revolutionary studies assume that the social order which is often the target of revolution only refers to domestic order or a quasi-domestic order with foreign domination. This could be due to the actual limit of influence because revolutions can hardly reach social orders in foreign countries, although this could be changing in the 21st century because of the cross-broader impact of advanced technology and social media. The previously mentioned Oxford English Dictionary definitions of revolution also implies a bottom-up direction of revolutionary movement in a domestic environment. This leaves the revolutions that direct at unjust international order unclear. Due to the lack of an international authority, dominating international powers may become the targets of revolutions. Although specific policies can hardly be formed towards correcting the international order because of the revolutionary entity's lack of power, resistance against the international hegemony can still be embodied in the revolutionary ideology. A recent example may be seen in the radical strains of Arab nationalist/pan-Arab ideology that are vehemently anti-imperialist in nature and rally against the hegemonic influence of imperial states.[24]

Once revolutions directed at domestic authority have succeeded, the former revolutionaries will become the authority, but this does not necessarily lead to a change in the nature of the revolutions. In this process, the targets of revolution change from the domestic order to the international order, just like the socialist revolutions in Soviet Russia and China. Those revolutions are

[23] Jack A Goldstone, 'Toward A Fourth Generation of Revolutionary Theory' (2001) 4 Annual Review of Political Science 139, 142.
[24] Adeed Dawisha, *Arab Nationalism in the Twentieth Century: From Triumph to Despair* (Princeton University Press 2016) 3, 92.

still included in historical revolutionary studies.[25] Although the revolution advanced by the Communist Party of Kampuchea followed general lines of socialist ideology[26], it is excluded from recent revolutionary studies[27] because of its association with massive violence. The following section will focus on the evolving legal status of political violence.

2.1.2 Revolution and Violence

The paradox between just causes and excessive violence is not new to international law. It has been phrased as the 'patriots and terrorists' question by several authors.[28] According to Nicholas N Kittrie, political offences started to be treated differently in the 1830s marked by the international limitation upon the extradition of political offenders in Europe.[29] During the 20th century, the self-determination and human rights movements continued to support a tolerant attitude among states toward political offenders. However, the development of international criminal law in the post-World War II era placed more restrictions on political offences. Many offences, which might be committed for political purposes, became criminalised in international law, for example, under the Genocide Convention of 1948 and several other conventions regarding safety of civil aviation signed during the

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[25] Keith Michael Baker and Dan Edelstein (eds), *Scripting Revolution: A Historical Approach to the Comparative Study of Revolutions* (Stanford University Press 2015) 213ff, 231ff.

[26] Steve Heder, 'Communist Party of Kampuchea Policies on Class and on Dealing with Enemies Among the People and Within the Revolutionary Ranks, 1960-1979: Centre, Districts and Grassroots' (*Cambodia Tribunal Monitor*, 26 April 2012) < http://www.cambodiatribunal.org/assets/pdf/reports/Heder,%20CPK%20Policy%20on%20 Class%20and%20Enemies,%20120426.pdf > accessed 28 October 2019. See also Serge Thion, 'The Cambodian Idea of Revolution' in David Chandler and Ben Kiernan (eds), *Revolution and Its Aftermath in Kampuchea: Eight Essays* (Monograph Series No. 25, Yale University Southeast Asia Studies 1983) 10.

[27] Michael D Richards, *Revolutions in World History* (Routledge 2004); Keith Michael Baker and Dan Edelstein (eds), *Scripting Revolution: A Historical Approach to the Comparative Study of Revolutions* (Stanford University Press 2015).

[28] Nicholas N Kittrie, 'Patriots and Terrorists: Human Rights with World Order' (1981) 13(2) Case Western Reserve Journal of International Law 291; *Rebels with a Cause: The Minds and Morality of Political Offenders* (Westview Press 2000); Timothy Garton Ash, 'Is There a Good Terrorist?' (2001) 48(19) The New York Review of Books 30; Michael P Scharf, 'Book Review: Rebels with a Cause: The Minds and Morality of Political Offenders' (2002) 96(1) The American Journal of International Law 275; Martti Koskenniemi, 'Between Impunity and Show Trials' (2002) 6 Max Planck Yearbook of United Nations Law 1; *The Politics of International Law* (Hart Publishing Limited 2011).

[29] Nicholas N Kittrie, 'Patriots and Terrorists: Human Rights with World Order' (1981) 13(2) Case Western Reserve Journal of International Law 291, 294.

1970s.[30] Hence, individuals that were once perceived as noble rebels were transformed into criminals due to the shifting legal boundaries.

While more political offences are added to the list of crimes that are subject to extraditions,[31] there remains a group of 'pure' political offences still favoured and protected by international extradition law and refugee law. For example, violations of laws restricting freedom of speech will be treated as 'pure' political offences in international extradition law if there is no violence involved. Robert Ferrari observed a broad range of pure political crimes at the beginning of 20th century.

> A *purely political crime* is that which has not only as predominant characteristic, but draws along with it as an exclusive and single consequence, the destruction, modification or the troubling of the political order in one or more of its elements. This order includes: in regard to external matters, the independence of the nation, the integrity of its territory and the relations of the State with other States; in regard to internal affairs, it includes the form of the government, the organization of public powers, their mutual relations, in short, the political rights of citizens. We can recognize without dispute, purely political crimes in the following cases: communication with the enemy; the levying of arms against one's government; conspiracies and attempts to change the form of the government; affiliation with unlawful societies; press crimes (except attacks against private persons); violations of the laws relative to elections, public assemblies, etc. All these crimes offend only public law and interest.[32]

However, while the list of international crimes expands, the world increasingly faces a central question, namely, if violence is eliminated as the last resort, what may groups or individuals deprived of internationally recognised rights do to defend their rights? In different words, can states agree on a meaningful control of excessive political violence?[33] It is in this context

[30] For instance, Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons 1973; Convention to Prevent and Punish Acts of Terrorism that are of International Significance 1971; Convention for the Safety of Civil Aviation 1971; Convention for the Suppression of Unlawful Seizure of Aircraft 1970; Convention on Offenses and Certain Other Acts Committed on Board Aircraft 1963.

[31] Christine Van Den Wijngaert, 'The political offence exception to extradition: defining the issues and searching a feasible alternative' (1983) 20 (1) Revue beige de droit international 741; Vincent DeFabo, 'Terrorist or Revolutionary: The Development of the Political Offender Exception and Its Effects on Defining Terrorism in International Law' (2012) 2(2) American University National Security Law Brief 69.

[32] Robert Ferrari, 'Political Crime and Criminal Evidence' (1918-19) 3(6) Minnesota Law Review 365, 366. (emphasis added by the author)

[33] ibid 303.

that ‘patriots’ and ‘terrorists’ need to be separated, and the question is how. There have been different methods proposed.

Classifying the rebels is not an easy task. Nicholas N Kittrie’s proposal is essentially an approach based on international criminal law. That is to say persons who participate in resistance or rebellion in pursuit of just causes in manners that are not internationally proscribed are to be deemed ‘just political offenders’. He also defines ‘just causes’ based on the ‘internationally recognised rights’.[34] Nevertheless, James Forman Jr pointed out that Kittrie’s approach is inherently flawed, as if the problem lies in disagreement over the criminalisation of certain acts due to moral concerns, then it would not be a solution to look at the list of agreed international crimes.[35] Instead, a series of indexes proposed by Timothy Garton Ash to identify the ‘good terrorists’ seems more realistic. He suggests checking four characteristics of the suspected terrorists: biography, goals, methods, and context.[36] The last element, context, involves analysing whether in a given state utilising violent means is the last resort. This seems to have been the approach adopted by the Chambers at the ECCC as well. A considerable part of their judgments is devoted to debating whether the CPK’s policies, especially population movements, were necessary at the time to achieve the CPK’s claimed purposes, with the truthfulness of the claimed purposes also being assessed.[37]

2.1.3 Excessive Political Offence

This section will briefly examine the legal status of excessive political violence in domestic and international criminal law.

[34] Nicholas N Kittrie, *Rebels with a Cause: The Minds and Morality of Political Offenders* (Westview Press 2000) 343-345.
[35] James Forman Jr, ‘A Little Rebellion Now and Then Is a Good Thing’ (2002) 100(6) Michigan Law Review 1408.
[36] Timothy Garton Ash, ‘Is There a Good Terrorist?’ (2001) 48(19) The New York Review of Books 30.
[37] *NUON Chea and KHIEU Samphan* (002/19-09-2007-ECCC-TC) Case 002/01 Judgement, E313, 7 August 2014 [153]-[156].

2.1.3.1 Domestic Criminal Law

According to two established criminal law scholars of the early 20th century, Garraud and Robert Ferrari, one French and one American, the decisive element that separates political crimes from common crimes is the immorality of the latter as compared with the former. The crimes, in their opinion, are also of a different nature and driven by different motives:

> Political crimes are to a less extent directed against the very bases of social life than they are against the established order. They have not, then, the same *nature* as the ordinary crimes. The *motives* which urge to action in political crimes are most often disinterested, sometimes they are even laudable. Political crimes have not, then, the same *immorality* as the common crimes. *A rational legislation will repress these two classes of crime by different penalties, because political criminality is of an entirely distinct nature from that of ordinary criminality.*[38]

Political crimes are different from, and in fact, sometimes less punishable than common crimes because they may entail a different type of danger or sometimes less immorality. The motives which drive perpetrators of political crimes are sometimes even considered laudable as they may be perceived to be acting on a selfless conscious. They are not always conceived as reprehensible, or only reprehensible in defence of the established social order. In principle, the motives and just causes that inspired certain political crimes are not criminal in the sense that they pose any harm to other members of the society, especially the non-violent ones. Instead of attacking the bases of human life, political crimes are directed at transitory political or government order. This is especially true in the case of a 'purely political crime' which do not employ violent means.

A 'complex and connected political crime' which overlaps with penalized behaviours presents a more complicated situation. In this case, the harm is inflicted upon both the political order and the private person by the same criminal fact, for instance, the assassination of the Head of the State

[38] Robert Ferrari, 'Political Crime and Criminal Evidence' (1918-19) 3(6) Minnesota Law Review 365, citing Garraud, *Précis de droit criminel,* (*onzième* edn, 1912) 88. (emphasis added by the author)

with the object of overturning the government or the pillaging of the armorer shop by political insurgents.[39]

The primary factor that qualifies a crime as political is the motive. There are subjective and objective theories that draw on the consequences in dealing with the occurrences. The subjective theory automatically characterises a crime with a political motive as a political crime, while the objective theory suggests that the criminality of a certain act shall be decided solely on the nature of the act itself.[40] Regarding the existence of the political motive, the objective theory calls for fair consideration during the sentencing stage. Both theories award certain value to the political motive in criminalising and punishing complex and connected political crimes.

Another point to notice from the tolerant attitude towards political offences in domestic criminal law is the assumption of the imperfect or unideal status of the existing social order. Early rebellions in the 19th century often claimed that the contemporary form of governance did not accord with a 'higher law' or 'natural law'. During the 20th century, as more states have implemented democratic domestic governance models, to be a legitimate rebel, one has to prove that achieving peaceful change is not possible. As the assumed good model of social governance becomes more specific, the space for legitimate political violence become smaller. This helps explains why, in some states, where the ruling model is seen as the best or most suitable by the ruling authority, there is also zero tolerance towards political offences. In domestic laws, tolerance of political offences is based on various assumptions of domestic governance. As will be shown in the following section, the 'patriots and terrorists' narrative has taken on a different discourse which is directed at the status of the existing social order at the international level.

2.1.3.2 International Criminal Law

The previous section showed that a motive, especially a political motive, is a substantial element to consider towards affording different treatments to political crimes and non-political crimes. More importantly, the consideration

[39] Robert Ferrari, 'Political Crime and Criminal Evidence' (1918-19) 3(6) Minnesota Law Review 365, 367.
[40] ibid.

of political motives applies to all types of domestic crimes, including serious ones like murder. On the contrary, international criminal law has been reluctant to consider motives.[41]

One explanation is that the crimes coming within the realm of international criminal law have reached a supreme level of gravity so that the authors must be punished as long as they have willingly chosen to commit these crimes with full individual agency. This can be seen from the rejection of superior orders as a defence at Nuremberg. Article 8 of Nuremberg Charter provides,

> The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires.[42]

The Nuremberg Charter rejected superior orders as an absolute defence but accepted it as a mitigating factor to be considered in the sentencing stage. However, the judgement at Nuremberg went further and rejected superior orders as a mitigating factor due to the cruelty of the mass murders. Wilhelm Keitel, one defendant amongst those charged at the International Military Tribunal, admitted all of the charges against him but pleaded for mitigation of punishment based on Article 8 of the Nuremberg Charter. The Tribunal held,

> In the face of these documents Keitel does not deny his connection with these acts. Rather, his defence relies on the fact that he is a soldier, and on the doctrine of 'superior orders', prohibited by Article 8 of the Charter as a defence.
>
> There is nothing in mitigation. Superior orders, even to a soldier, cannot be considered in mitigation where *crimes as shocking and extensive*

[41] William A Schabas, *Genocide in International Law: The Crime of Crimes* (2nd edn, Cambridge University Press 2009) 294ff. Schabas' book provides a detailed review of how motive was debated and understood by member states in the process of the negioation for the Gernocide Convention. This is probably the time when motive gets nearest to the definition of international crimes.

[42] Art. 8 of the Charter of the International Military Tribunal, Annexed to the London Agreement of 8 August 1945, by the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland, and the Government of the Union of Soviet Socialist Republics ('the Signatories'), acting in the interests of the United Nations, for the Prosecution and Punishment of the Major War Criminals of the European Axis, signed at London, on 8 August 1945. (Nuremberg Charter)

> *have been committed consciously, ruthlessly, and without military excuse or justification*.[43]

The other reason that international judges decline to consider the motives underlying serious crimes such as crimes against humanity and genocide surrounds the focus on victims and the consequent calls for accountability in the transitional justice era.[44] Given the absence of a commonly recognised world order, except for the well-grounded duty of the United Nations Security Council to maintain world peace and security, it is extremely hard for international judges to weigh the often millions of lost lives caused by international crimes against the political ends of their perpetrators. Assassinating one head of state might be enough to overturn the government, but it is hard to see how many lives need to be sacrificed to achieve a reform of the world order, especially when that world order itself remains elusive and subject to many other international actors and mechanisms.

Last but not the least, identifying the political ends in a complex revolutionary situation is not always straightforward. Each case could have a particular context, being domestic or international. The legitimacy or propriety of those causes is often better evaluated in hindsight. The sincerity of the revolutionaries or freedom fighters can only clearly be seen after they have achieved results. In the 1980s, the world wondered whether Nelson Mandela and his African National Congress were fighting for a free and democratic South Africa or whether they were trying to achieve a Communist dictatorship.[45] In cases where revolutionaries lose the fight, perhaps the world will never know if they were sincerely dedicated to achieving the goals that they claimed to be advancing. Also, revolutionaries are often corrupted by power or scarred by the war effort. Hence, whereas they might have started out with genuine goals, as a result of war or ascension to power, their perspectives could change. They might not openly admit this and may simply

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[43] Judgment of the International Military Tribunal (Nuremberg), 1 October 1946, reprinted in (1947) 41(1) American Journal of International Law 172, 283. (emphasis added by the author)

[44] William A Schabas, 'Transitional Justice and the Norms of International Law' (2012) 110 Kokusaiho Gaiko Zassi, The Journal of International Law and Diplomacy 563, 564.

[45] James Forman Jr, 'A Little Rebellion Now and Then Is a Good Thing' (2002) 100(6) Michigan Law Review 1408, 1411.

instrumentalise the revolutionary cause and their original goals to further their own interests.

2.2 Jurisdiction of the ECCC

After brief observations on the theme of revolution and the applicable laws, the following part addresses four specific jurisdictions of the ECCC as prescribed by the Agreement and the ECCC Law, specifically personal jurisdiction, temporal jurisdiction, territorial jurisdiction and subject matter jurisdiction. Territorial jurisdiction is not specified in the ECCC law. But according to the negotiations to set up the court and the scope of the initial indictments, territorial jurisdiction is limited to the Cambodian territory.[46]

2.2.1 Personal Jurisdiction

Personal jurisdiction provides a tribunal with authority over a particular set of individuals. Unlike personal jurisdiction of domestic courts which is often defined according to the suspect's nationality, location of residence or age in prospective cases, the personal jurisdiction of international criminal tribunals often aims towards a pre-negotiated circle of suspects given that these tribunals are often set up to address a particular situation. The International Criminal Court might be an exception since it is the only standing permanent court dealing with atrocity crimes.[47] Regardless of the language chosen to prescribe the court's personal jurisdiction, juridical interpretation plays a crucial role in practice as the court has to decide on a case by case basis whether a particular charged individual fits in the described personal jurisdiction. The level of authority at which the suspect was acting could affect the court's decision regarding personal jurisdiction as demonstrated by the jurisprudence of the *ad hoc* tribunal.[48] Similar debate is echoed in the discussion regarding the scope of personal jurisdiction at the ECCC.

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[46] Nina HB Jørgensen, *The Elgar Companion to the Extraordinary Chambers in the Courts of Cambodia* (Edward Elgar Publishing 2018) 38.
[47] For instance, Article 12(2)(b) of the Rome Statute uses nationality of a suspect to decide on the personal jurisdiction over that particular suspect.
[48] *Boškoski & Tarčulovski* (IT-04-82-A) Judgement, 19 May 2010 [52].

Personal jurisdiction was one of the core issues debated during the negotiations to set up the ECCC.[49] The ECCC Law promulgated by the Cambodian government in 2001 defined the purpose and competence of the ECCC as to bring to trial 'senior leaders of Democratic Kampuchea' and 'those most responsible' for the alleged crimes.[50] The chosen language for personal jurisdiction remained the same in the Agreement in 2003[51] and the amended ECCC Law in 2004[52], although there was major disagreement between the United Nations and the Cambodian Government regarding whether this stated personal jurisdiction should include mid-level leaders of the Khmer Rouge that still live in the country. The Cambodian government only wished to prosecute the top-tier individual suspects such as NUON Chea, IENG Sary and KHIEU Samphan, while the United Nations had always emphasised the importance of independent and transparent investigations by the co-prosecutors and co-investigating judges.[53] The Cambodian government's proposed list was perceived by the United Nations as a lack of commitment towards a free, fair, and non-selective trial process.[54] This disagreement once led to a break in negotiations in 2002 before the

[49] Steve Heder, 'A Review of the Negotiations Leading to the Establishment of the Personal Jurisdiction of the Extraordinary Chambers in the Courts of Cambodia' (*Cambodia Tribunal Monitor*, 1 August 2011) < http://www.cambodiatribunal.org/sites/default/files/A%20Review%20of%20the%20Negotiations%20Leading%20to%20the%20Establishment%20of%20the%20Personal%20Jurisdiction%20of%20the%20ECCC.pdf> accessed 28 October 2019.

[50] Article 1 of the ECCC Law 2001: The purpose of this law is to bring to trial *senior leaders of Democratic Kampuchea* and *those who were most responsible* for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognised by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979. (emphasis added by the author)

[51] Article 1 and Article 2 of the Agreement 2003.

[52] Article 2 (new) of the ECCC Law 2004: Extraordinary Chambers shall be established in the existing court structure, namely the trial court and the supreme court to bring to trial *senior leaders of Democratic Kampuchea* and *those who were most responsible* for the crimes and serious violations of Cambodian laws related to crimes, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979. Senior leaders of Democratic Kampuchea and those who were most responsible for the above acts are hereinafter designated as "Suspects". (emphasis added by the author)

[53] Steve Heder, 'A Review of the Negotiations Leading to the Establishment of the Personal Jurisdiction of the Extraordinary Chambers in the Courts of Cambodia' (*Cambodia Tribunal Monitor*, 1 August 2011) 41 < http://www.cambodiatribunal.org/sites/default/files/A%20Review%20of%20the%20Negotiations%20Leading%20to%20the%20Establishment%20of%20the%20Personal%20Jurisdiction%20of%20the%20ECCC.pdf> accessed 28 October 2019.

[54] ibid 39.

negotiations were resumed in 2003. Eventually, an agreement on the number of suspects ranging between 5 and 10 was implicitly agreed by the two sides.[55]

The first group of suspects, the 'senior leaders' of the Khmer Rouge, is broadly understood as members of the Standing Committee of the CPK and its subordinate Central Committee. Only four of these people were still alive when the court was set up: NUON Chea, Ta Mok, IENG Sary and KHIEU Samphan.[56] The second group of suspects, 'those most responsible' for the alleged crimes, has caused the most division between the national and international components of the court. IENG Thirith was added as one of 'those most responsible' given that she served as a government minister. Duch was added given that he was in charge of the most notorious Khmer Rouge prison, the S-21. At this point, there is some divergence from the earlier implied limit of ten suspects. Although the Cambodian government did not eliminate the possibility of bringing mid-level leaders to trial, it has publicly expressed its position that case 002 shall be the last case.[57] The Cambodian prosecutor and investigating judge also followed the government's line in their rejection of the indictments against the suspects in case 003 and 004.[58]

According to Steve Heder, given the social structure advanced and implemented by the Khmer Rouge, personal jurisdiction over 'those most responsible' should encompass mid-level leaders who were heads of

[55] ibid 40.
[56] Ta Mok, meaning 'grandfather Mok', also known as Mok or Ek Choeun, is said to have ordered massacres in 1973 and 1974. He died in 2006 in hospital before being indicted by the ECCC. And Ieng Sary died in 2013 before the judgment in case 002 was delivered.
[57] Rachel Killean, *Victims, Atrocity and International Criminal Justice Lessons from Cambodia* (Routledge, Taylor & Francis Group 2018) 50.
[58] *IM Chaem* (004/1/07–09–2009-ECCC-OCIJ) Closing Order (Disposition), D308, 22 February 2017.

districts.[59] It seems to the United Nations that the Cambodian government only wanted a 'carefully monitored process under its full political control'.[60]

2.2.2 Temporal Jurisdiction

The temporal jurisdiction of the ECCC is limited to the period from 17 April 1975 to 6 January 1979.[61] This is the period during which the Democratic Kampuchea officially ruled Cambodia. Actions taken by international powers before and after this period, of which many would have been considered illegal under international law or constitute atrocity crimes, are excluded.[62] Some of these events were touched upon during the trials at the ECCC, for instance the American bombing campaign on the territory of Cambodia and other alleged crimes committed by the Khmer Rouge in the early stages of the revolution. Others were not mentioned, for instance the alleged crimes committed by the Hun Sen government after 1979. During the negotiations to establish the ECCC, there were initiatives to extend the temporal jurisdiction of the Court to cover the aforementioned crimes, but the most prominent atrocity crimes eventually dictated the choice of temporal jurisdiction.[63]

It should be noted that the narrowly defined temporal jurisdiction of the ECCC does not necessarily prevent the Chambers from relying on the events that predated 17 April 1975 in their findings of facts and application

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[59] *MEAS Muth* (003/07-09-2009-ECCC/OCIJ) Meas Muth's Request for the OCIJ's Criteria Concerning 'Senior Leaders of Democratic Kampuchea and Those Who Were Most Responsible', D87/2/1.10, 17 October 2013 [11], citing Stephen Heder, 'The Personal Jurisdiction of the Extraordinary Chambers in the Courts of Cambodia as Regards Khmer Rouge "Senior Leaders" and Others "Most Responsible" for Khmer Rouge Crimes: A History and Recent Developments (*Cambodia Tribunal Monitor*, 26 April 2012) <http://www.cambodiatribunal.org/sites/default/files/reports/Final%20Revised%20Heder%20Personal%20Jurisdiction%20Review.120426.pdf> accessed 28 October 2019.

[60] Steve Heder, 'A Review of the Negotiations Leading to the Establishment of the Personal Jurisdiction of the Extraordinary Chambers in the Courts of Cambodia' (*Cambodia Tribunal Monitor*, 1 August 2011) < http://www.cambodiatribunal.org/sites/default/files/A%20Review%20of%20the%20Negotiations%20Leading%20to%20the%20Establishment%20of%20the%20Personal%20Jurisdiction%20of%20the%20ECCC.pdf> accessed 28 October 2019, citing Sergio Vieira de Mello, 'Note to the Secretary-General: Khmer Rouge Tribunal', 2 July 2002.

[61] Article 1 and 2 (new) of the ECCC Law 2004; Article 1 of the Agreement 2003.

[62] Edward S Herman and Norm Chomsky, *Manufacturing Consent: The Political Economy of the Mass Media* (first published 1988; Pantheon Books 2002) 38.

[63] David Scheffer, 'The Extraordinary Chambers in the Courts of Cambodia' in M Cherif Bassiouni (ed) *International Criminal Law: Volume III International Enforcement* (3rd edn, Martinus Nijhoff Publishers 2008) 239.

of law. Although the accused claimed that this constituted a violation of temporal jurisdiction by the Trial Chamber, the Supreme Court Chamber has ruled that,

> From the perspective of the substantive law, therefore, it would be unnatural to break up such a protracted and complex transaction as it is only intelligible if all of its components are considered together. This approach remains valid notwithstanding any truncation in pronouncing on the responsibility for the crime as may be necessitated by limits on exercising jurisdiction, such as statute of limitation, age of the perpetrator, temporal limitations etc.[64]

The Supreme Court Chamber's view is helpful when it comes to considering the revolutionary context. It establishes that the Court's temporal jurisdiction would not bar the Chambers from considering the conditions immediately before the Communist Party of Kampuchea took power in Cambodia. The issue of whether these pre-existing conditions establish a common criminal plan or provide justifications for the revolution will be analysed later.

2.2.3 Territorial Jurisdiction

The territorial jurisdiction of the ECCC is not explicitly provided for in the ECCC Law unlike in the cases of the *ad hoc* tribunals.[65] However, it was commonly understood and perceived by the negotiators of the ECCC that the court only concerns crimes committed on the territory of Cambodia.[66] The preambular section of the Agreement between the United Nations and Cambodia also shows that the ECCC only concerns the state and people of Cambodia. The territorial jurisdiction has not been disputed at the ECCC. It is proposed that the territorial jurisdiction of the ECCC shall be assumed to

[64] *NUON Chea and KHIEU Samphan* (002/19-09-2007/ECCC/SC), Appeal Judgement, F36, 23 November 2016 [215].

[65] Article 1 of the Statute of International Tribunal for Rwanda: The International Tribunal for Rwanda shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States between 1 January 1994 and 31 December 1994, in accordance with the provisions of the present Statute.

Article 1 of the Statute of the International Criminal Tribunal for the former Yugoslavia: The International Tribunal shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the present Statute.

[66] David Scheffer, 'The Extraordinary Chambers in the Courts of Cambodia' in M Cherif Bassiouni (ed) *International Criminal Law: Volume III International Enforcement* (3rd edn, Martinus Nijhoff Publishers 2008) 241.

be limited to Cambodia due to the fact that it is considered to be part of the Cambodian judicial system and court structure.[67]

2.2.4 Subject Matter Jurisdiction

The subject matter jurisdiction of the ECCC covers a wide range of both domestic and international crimes. As provided by the ECCC Law, Article 3 (new) incriminates three domestic crimes according to the 1956 Cambodian Penal Code. These crimes are homicide, torture and religious persecution.[68] Articles 4 to 6 address three atrocity crimes: genocide, crimes against humanity and war crimes.[69] Article 7 also refers to destruction of cultural property during armed conflict pursuant to the 1954 Hague Convention for Protection of Cultural Property in the Event of Armed Conflict.[70] Article 8 specifies crimes against internationally protected persons pursuant to the Vienna Convention of 1961 on Diplomatic Relations.[71] It is innovative for the ECCC Law to incorporate the last two crimes in Articles 7 and 8 although they have not been charged or convicted by the Chambers.

It should be noted here that no accused has been convicted of domestic crimes before the ECCC although they are within the subject matter jurisdiction of the Court and have been charged by the closing orders issued by the co-investigating judges. In case 001, the Trial Chamber ruled that it was not able to consider the guilt or innocence of the accused with respect to domestic crimes due to the absence of an affirmative vote of at least four judges out of five as required by Article 14 (new) of the ECCC Law.[72] In case 002, the co-investigating judges couldn't agree with each other regarding the statutory limitation period for domestic crimes. To avoid invoking the disagreement procedure in front of the Pre-trial Chamber, they decided to include these charges in the closing order and let the Trial Chamber decide

[67] See also, Nina HB Jørgensen, *The Elgar Companion to the Extraordinary Chambers in the Courts of Cambodia* (Edward Elgar 2018) 38.
[68] Article 3 (new) of the ECCC Law 2004.
[69] Articles 4 to 6 of the ECCC Law 2004.
[70] Article 7 of the ECCC Law 2004.
[71] Article 8 of the ECCC Law 2004.
[72] *KAING Guek Eav alias 'DUCH'* (001/18-07-2007/ECCC/TC) Decision on the Defence Preliminary Objection Concerning the Statute of Limitations of Domestic Crimes, E187, 26 July 2010 [56].

during trials.[73] However, the Trial Chamber found that the closing order failed to 'clearly identify the applicable law or set out the elements of the various domestic crimes'.[74] Hence, it was impossible for the Chamber to determine the content, factual basis and legal characterisation of these charges.[75] Consequently, charges for domestic crimes in case 002 were dropped.

The revolutionary context will mostly concern the atrocity crimes. Most of these proscribed crimes are based on international conventions or domestic legislation that were already in force when the charged offences were committed with the exception of crimes against humanity. Article 9 of the Agreement briefly states that,

> The subject-matter jurisdiction of the Extraordinary Chambers shall be the crime of genocide as defined in the 1948 Convention on the Prevention and Punishment of the Crime of genocide, crimes against humanity as defined in the 1998 Rome Statute of the International Criminal Court and greave breaches of the 1949 Geneva Conventions and such other crimes as defined in Chapter II of the Law on the Establishment of the Extraordinary Chambers as promulgated on 10 August 2001.

According to the assessment made by Bassiouni, the definition of crimes against humanity in the Agreement is a violation of the principle of *nullum crimen sine lege* because it refers to the Rome Statute's definition, which in turn did not reflect the status of the law between 17 April 1975 and 6 January 1979.[76] Article 5 of the ECCC Law provides a specific definition of crimes against humanity that does not refer to the Rome Statute but resembles more closely the Statute of the International Criminal Tribunal for Rwanda by requiring 'national, political, ethnical, racial or religious grounds' for the 'attack':

> Article 5
>
> The Extraordinary Chambers shall have the power to bring to trial all Suspects who committed crimes against humanity during the period 17 April 1975 to 6 January 1979.

[73] *NUON Chea et al.* (002/19-09-2007-ECCC/TC) Decision on Defence Preliminary Objections (Statute of Limitations on Domestic Crimes), E122, 22 September 2011 [11].
[74] ibid [14].
[75] ibid [22].
[76] M Cherif Bassiouni, *Crimes against Humanity: Historical Evolution and Contemporary Application* (Cambridge University Press 2011) 262.

> Crimes against humanity, which have no statute of limitations, are any acts committed as part of a widespread or systematic attack directed against any civilian population, on national, political, ethnical, racial or religious grounds, such as:
>
> - murder;
> - extermination;
> - enslavement;
> - deportation;
> - imprisonment;
> - torture;
> - rape;
> - persecutions on political, racial, and religious grounds;
> - other inhumane acts.[77]

The prosecution of crimes against humanity has proven to be complicated and challenging at the ECCC because the crimes are mostly based on customary international law as it existed during the period in respect of which the Court enjoys temporal jurisdiction. Although it is clear that the prohibition of crimes against humanity existed in customary international law before 1975, the contour of this group of crimes, especially the listed acts and physical elements by the time of the charged offences occurred, are difficult to define.[78]

2.3 Applicable Laws at the ECCC

The following section provides a brief overview of the applicable laws at the ECCC.

2.3.1 Constitutive Documents of the ECCC

The primary governing documents of the ECCC include,

- 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 (6 June 2003) (the Agreement);

[77] Article 5 of the ECCC Law 2004.
[78] David Boyle, 'Establishing the Responsibility of the Khmer Rouge Leadership for International Crimes' (2002) 5 Yearbook of International Humanitarian Law 167, 204.

- Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, as amended and promulgated on 27 October 2004 (the ECCC Law);
- International Rules (Rev. 9) (revised on 16 January 2015).

The above three legislative documents laid the foundation of the ECCC, including by stipulating its purpose, jurisdiction, process for appointing judges, decision mechanisms and procedural arrangements.

2.3.2 International Law

The first article in the ECCC Law provides that,

> The purpose of this law is to bring to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979.[79]

Laws and customs of war are applicable due to the existence of an international armed conflict between Democratic Kampuchea and the Socialist Republic of Vietnam.[80] The Trial Chamber in Case 001 confirmed that 'at all times from April 1975 to 7 January 1979, there existed an international armed conflict between the two states' and the provisions of the Geneva Conventions 1949 shall apply.[81]

Convictions for grave breaches of the Geneva Conventions were achieved in case 001 and case 002/02 regarding the treatment of Vietnamese prisoners at the S-21 security centre (concerning 345 identified individuals).[82] Case 002 deals with broader situations of domestic population movements, which do not have direct link to the armed conflict with Vietnam. As found by the group of experts assigned by the United Nations General Assembly in

[79] Article 1 of the ECCC Law.
[80] *NUON Chea et al.* (002/19-09-2007-ECCC-OCIJ) Closing Order, D427, 15 September 2010 [152].
[81] *KAING Guek Eav alias 'Duch'* (001/18-07-2007-ECCC/TC) Judgement, E188, 26 July 2010 [64].
[82] *KAING Guek Eav alias 'Duch'* (001/18-07-2007-ECCC/TC) Judgement, E188, 26 July 2010 [71].

1999 to assess the situation in Cambodia, the larger part of the Khmer Rouge atrocities was not associated with armed conflicts.[83]

In 1979, the Sub-commission on the Prevention of Discrimination and the Protection of Minorities reported the following allegations based on the materials presented by refugees, governments, non-governmental organizations and experts:

1. The forcible and precipitate deportation immediately after 17 April 1975 from Phnom Penh and other urban centres of the country of all residents, totalling an estimated 3 to 4 million persons - without regard to age or physical condition;
2. The compulsory resettlement of the population of the country in rural areas, frequently uninhabited, and the organization of the population into collective work brigades;
3. The imposition of a draconian discipline upon the entire population with respect to their work as well as private conduct, and of strict controls over their freedom of movement;
4. The launching of a systematic programme aimed at the physical elimination of various categories of persons formerly associated with the previous régime or belonging to higher social or educational categories;
5. The launching of a sustained programme designed to destroy traditional religious and family life and previous economic or social values and practices.[84]

The same report also reviewed alleged violations of human rights as enumerated in the Universal Declaration of Human Rights.[85] The above five categories of violations largely mirror the policies and practices identified by the trials at the ECCC. Prosecuting and punishing the responsible personnel of the Khmer Rouge has to be based on a set of rules, written or customary, that define these violations as crimes. Identifying those rules is not always easy. It is useful to recall some issues faced by the *ad hoc* tribunals in their early days.

[83] Report of the Group of Experts for Cambodia Established Pursuant to General Assembly Resolution 52/135, UN Doc. A/53/850, S/1999/231, Annex, 27 January 1999 [71].

[84] Sub-Commission on Prevention of Discrimination and Protection of Minorities, 'Analysis of information materials on the situation of human rights in Democratic Kampuchea' [23] (UN Doc. E/CN.4/1335, 30 January 1979) <https://digitallibrary.un.org/record/6653/files/E_CN.4_1335-EN.pdf> accessed 28 October 2019.

[85] For similar analysis following the human rights framework, see also David Hawk, 'International Human Rights Law and Democratic Kampuchea' (Fall 1986) 16(3) International Journal of Politics 3-38.

In the first judgement delivered by the International Tribunal for the Former Yugoslavia, five judges in the appeal chamber were severely divided on the issue of how to identify a specific rule of international criminal law, known as 'whether duress could afford a complete defence to crimes against humanity and war crime that involves killing of innocent civilians'.[86] Sources used by the judges to identify the relevant rules included domestic legislation from representative states from different legal traditions, international conventions, customary rules, general principles of law and precedents from the trials following the Second World War. It is recognised that international criminal law is being applied and interpreted, perhaps even created, at the same time by the judges at the international/hybrid tribunals. The judges at the ECCC are expected to do no less.

2.3.3 Cambodian Law

Two Cambodian laws are explicitly referred to in the ECCC Law. They are the 1956 Cambodian Penal Code and the Constitution of the Kingdom of Cambodia.[87] The 1956 Penal Code proscribes three crimes that come under the subject matter jurisdiction of the ECCC, namely homicide, torture and religious persecution. The Constitution provides that the penalty for these crimes shall be limited to a maximum of life imprisonment.[88] In 2007, Cambodia adopted a Criminal Procedural Code, which the Trial Chamber in

[86] *Erdemović* (IT-96-22-A) Judgement; Separate and Dissenting Opinion of Judge Li, Separate and Dissenting Opinion Judge Cassese; Separate and Dissenting Opinion of Judge Stephen; Joint Separate Opinion of Judge McDonald and Judge Vohrah, 7 October 1997.

[87] Article 3 new of the ECCC Law 2004.
The Extraordinary Chambers shall have the power to bring to trial all Suspects who committed any of these crimes set forth in the 1956 Penal Code, and which were committed during the period from 17 April 1975 to 6 January 1979:

Homicide (Article 501, 503, 504, 505, 506, 507 and 508);
Torture (Article 500);
Religious Persecution (Articles 209 and 210).

The statute of limitations set forth in the 1956 Penal Code shall be extended for an additional 30 years for the crimes enumerated above, which are within the jurisdiction of the Extraordinary Chambers. The penalty under Articles 209, 500, 506 and 507 of the 1956 Penal Code shall be limited to a maximum of life imprisonment, in accordance with Article 32 of the Constitution of the Kingdom of Cambodia, and as further stipulated in Articles 38 and 39 of this Law.

[88] Article 32 of the Constitution, which is adopted by the Constitutional Assembly in Phnom Penh on 21 September 1993 and amended by the National Assembly of the Kingdom of Cambodia on 4 March 1999.

case 002 confirmed was applicable at the ECCC.[89] Meanwhile, the Trial Chamber also confirmed that guidance should be sought from international law in order to ensure justice, fairness and due process of law.

Moreover, according to the Cambodian Constitution, a Constitutional Council is in charge of reviewing whether the constitutive documents of the ECCC and any other law adopted by the National Assembly, are consistent with the Constitution.[90] The three constitutive documents of the ECCC have been reviewed by the Constitutional Council regarding their constitutionality, especially Article 3 of the ECCC Law which extended the statute of limitations for an additional 20 years for the domestic crimes coming under the jurisdiction of the ECCC. In reviewing this article's constitutionality, the Constitutional Council stated its opinion regarding the criminal law principle of non-retroactivity:

> Cambodia has not ruled that this fundamental principle is of equal value with its Constitution, and therefore the Constitutional Assembly, a body elected according to legal procedures and the true representative of the people, was not bound by this principle in inscribing any article of the Constitution or its Preamble. Furthermore, whatever value this principle may have, and whether or not it has been inscribed, they had also to respect another principle, namely 'every principle has its counterweight: every rule has its exception'. Whatever value a rule has, its exception will have equal value. Non-retroactivity, which is not mentioned in the Constitution, is found in the 1956 Penal Code. The fundamental principles of the 1956 Penal Code also have exceptions. Paragraph 2 of Article 6 stipulates 'but if a new law annuls any offence or reduces the penalty for any offence, offences committed prior to such law shall not be prosecuted, or the reduced penalty shall be applied, unless the sentence has been completely served'.[91]

This reasoning about retroactivity appears misplaced because it assumes that the exceptional rule that a reduced penalty could apply in respect of past

[89] *NUON Chea and KHIEU Samphan* (002/19-09-2007-ECCC-TC) Case 002/01 Judgement, E313, 7 August 2014 [21].

[90] Article 136 (new) of the Constitution:

The Constitutional Council shall have the duty to safeguard respect of the constitution, interpret the Constitution and laws adopted by the National Assembly and reviewed completely by the Senate.

The Constitutional Council shall have the right to receive and decide on disputes concerning the election of deputies and the election of members of Senate.

[91] Cambodian Constitutional Council, Case No. 038/001/2001, dated 17 January 2001, and Decision No. 040/002/2001, dated 12 February 2001 (*ECCC*, 12 February 2001) < https://www.eccc.gov.kh/sites/default/files/legal-documents/Const_Council_Res_on_KR_Law_12_Feb_2001.pdf> accessed 28 October 2019.

offences breaks the non-retroactivity principle once for all. The Constitutional Council did not directly engage in reasoning as to why the defendants should suffer the disadvantage of the extended statute of limitations apart from affirming the ultimate authority of the Constitutional Assembly as an institution formed by the representatives of the people. Nevertheless, domestic crimes proscribed in Article 3 of the ECCC Law were excluded from the judicial deliberation of the Chambers due to the absence of an affirmative majority in case 001 and the lack of specificity and defects in the closing order in case 002.[92] Coming back to the central research question of this study, crimes under the 1956 Penal Code mainly concern direct perpetrators of homicide and torture given that concepts like superior responsibility and joint criminal enterprise were not provided for in it. The impact of a revolutionary context takes place mostly on the application of international crimes.

2.4 Summary of the Cases

The following section summarises the cases tried at the ECCC featuring the selected scope and narrative of the situations that were initially indicted and subsequently convicted. The ECCC Law only provides guidance regarding the court's jurisdiction. Charged individuals and acts would have to be decided by co-prosecutors and co-investigating judges based on their impartial assessments of the applicable laws and the facts.[93] The revolutionary context forms a major part of judicial deliberations in case 002 as it deals with the senior leaders of the Democratic Kampuchea government who had allegedly designed the revolution. This aspect will be examined in more detail in later chapters also.

[92] *NUON Chea et al.* (002/19-09-2007-ECCC/TC) Decision on Defence Preliminary Objections (Statute of Limitations on Domestic Crimes), E122, 22 September 2011 [22]; *KAING Guek Eav alias 'Duch'* (001/18-07-2007/ECCC/TC) Decision on the Defence Preliminary Objection Concerning the Statute of Limitations of Domestic Crimes, E187, 26 July 2010 [56].

[93] Rules 13 and 14 of the Internal Rules of the ECCC; Chapters VI and VII of the ECCC Law. See also Nina HB Jørgensen, *The Elgar Companion to the Extraordinary Chambers in the Courts of Cambodia* (Edward Elgar 2018) 109ff.

2.4.1 Case 001: KAING Guek Eav

The Communist Party of Kampuchea adopted a policy of 're-education' of 'bad elements' and 'smashing' those who had been found to be enemies. This policy was implemented through a network of security centres which was firstly established in 1971 in the Khmer Rouge controlled region.[94] After the CPK army took over Phnom Penh on 17 April 1975, the S-21 was established in Phnom Penh. Shortly thereafter, the accused in case 001 was assigned to be in charge of the S-21 security centre. The S-21 was special among the network of security centres because it was directly under the supervision of the Central Committee of CPK and it mainly detained and executed CPK cadres.[95] There were in total around 21,000 prisoners held for interrogation and torture at the S-21, after which the vast majority of these prisoners were eventually executed. Given this unique character of the S-21 and the number of its victims, although its secretary was not among the senior leaders of the CPK, he was considered to be amongst 'those most responsible' for the alleged crimes.

Case 001 concerns only the situation at the S-21 and its subordinate units, and the responsibility of KAING Guek Eav, alias Duch.[96] Duch was the Deputy Secretary of the S-21. He was the first Khmer Rouge member tried by the ECCC and was convicted of crimes against humanity and grave breaches of the Geneva Conventions of 1949.[97] He was initially sentenced to

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[94] *NUON Chea and KHIEU Samphan* (002/19-09-2007-ECCC-TC) Case 002/01 Judgement, E313, 7 August 2014 [117].

[95] *KAING Guek Eav alias 'Duch'* (001/18-07-2007-ECCC/OCIJ) Closing Order Indicting Kaing Guek Eav alias Duch, 8 August 2008 [20].

[96] Born on 17 November 1942.

[97] *KAING Guek Eav alias 'Duch'* (001/18-07-2007-ECCC/TC) Judgement, E188, 26 July 2010 [677]. In details, Duch was convicted of crimes against humanity (persecution on political grounds) (subsuming the crimes against humanity of extermination (encompassing murder), enslavement, imprisonment, torture (including one instance of rape), and other inhumane acts) and grave breaches of the Geneva Conventions of 1949 (namely: wilful killing; torture and inhumane treatment; wilfully causing great suffering or serious injury to body or health; wilfully depriving a prisoner of war or civilian of the rights of fair and regular trial; and unlawful confinement of a civilian). The Appeal Judgment changed the conviction of crimes against humanity. The sub-crimes remain the same, but the Appeal Judgment alleviated the 'subsumed' crimes, including extermination (encompassing murder), enslavement, imprisonment, torture, and other inhumane acts, to an equal position with political persecution.

30 years' imprisonment.[98] After appeal, his sentence was extended to life imprisonment.[99]

Putting case 001 back in the context of the revolution, it demonstrates the most extreme policy adopted by the CPK in bringing about its revolutionary goals. Based on the conviction in case 001 and the testimony of Duch, members of the CPK Central Committee could be convicted on the same facts according to their superior responsibility, a mode of perpetration which is provided for in Article 29 of the ECCC Law.[100]

2.4.2 Case 002: NUON Chea, KHIEU Samphan, IENG Sary and IENG Thirith

Four individuals were initially indicted in case 002 and three of them are commonly agreed to be among the senior leaders of the CPK.[101] NUON Chea, also known as 'Brother Number Two' (after POL Pot), served as the Deputy Secretary of the Central Committee of the CPK and Chairman of the People's Representative Assembly. KHIEU Samphan was a member of the Central Committee and Chairman of the State Presidium. IENG Sary was Deputy Prime Minister for Foreign Affairs. IENG Thirith acted as Minister for Social Affairs. They all occupied positions in the standing committee of the CPK and were ministers of the Democratic Kampuchea. Among the four, IENG Thirith was removed from the trial due to her unfitness to stand trial.[102] And

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[98] *KAING Guek Eav alias 'Duch'* (001/18-07-2007-ECCC/TC) Judgement, E188, 26 July 2010 [679], [680].

[99] *KAING Guek Eav alias 'Duch'* (001/18-07-2007-ECCC/SC) Appeal Judgement, F28, 3 February 2012, 320.

[100] Article 29 of the ECCC Law:

Any Suspect who planned, instigated, ordered, aided and abetted, or committed the crimes referred to in article 3 (new), 4, 5, 6, 7 and 8 of this law shall be individually responsible for the crime.

The position or rank of any Suspect shall not relieve such person of criminal responsibility or mitigate punishment.

The fact that any of the acts referred to in Articles 3 (new), 4, 5, 6, 7 and 8 of this law were committed by a subordinate does not relieve the superior of personal criminal responsibility if the superior had effective command and control or authority and control over the subordinate, and the superior knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators.

The fact that a Suspect acted pursuant to an order of the Government of Democratic Kampuchea or of a superior shall not relieve the Suspect of individual criminal responsibility.

[101] See section 2.2.1 of this thesis for details.

[102] *NUON Chea et al.* (002/19-09-2007-ECCC-TC) Decision on IENG Thirith's Fitness to Stand Trial, E138, 17 November 2011.

the proceedings against her husband, IENG Sary, were terminated on 14 March 2013 following his death that day.

Case 002 deals with the broader situation featuring identified revolutionary policies that applied throughout the areas under the Khmer Rouge control and later national wide after Democratic Kampuchea was established. According to the closing order issued by the co-investigating judges, factual findings of crimes include four categories: movement of the population; operation of worksites and cooperatives; security centres and execution sites; and treatment of specific groups.[103]

The closing order also identified five policies as a part of the reforms to implement a rapid socialist revolution by the CPK.[104] They are:

1. The repeated movement of the population from towns and cities to rural areas, as well as from one rural area to another;
2. The establishment and operation of cooperatives and worksites;
3. The re-education of ‘bad elements’ and killing of ‘enemies’, both inside and outside the Party ranks;
4. The targeting of specific groups, in particular the Cham, Vietnamese, Buddhists and former officials of the Khmer Republic, including both civil servants and former military personnel and their families; and
5. The regulation of marriage.

Given the scale of the charged events and facts, the Trial Chamber issued a severance order in September 2011 aiming to draw on the scope of the initial trial in case 002, known as the case 002/01.[105] After an appeal in front of the Supreme Court Chamber out of concerns of uncertainty caused by the severance of the case, the Trial Chamber eventually ordered that case 002/01 only pertains to forced population movement (phases one and two) and executions committed at Tuol Po Chrey against former Khmer Republic

[103] *NUON Chea et al.* (002/19-09-2007-ECCC-OCIJ) Closing Order, D427, 15 September 2010, 60-214. The Closing Order is a document of 739 pages.
[104] *NUON Chea et al.* (002/19-09-2007-ECCC-OCIJ) Closing Order, D427, 15 September 2010 [156], [157].
[105] *NUON Chea et al.* (002/19-09-2007-ECCC-TC) Severance Order Pursuant to Internal Rule 89*TER*, E124, 22 September 2011.

officials in the aftermath of the evacuation of Phnom Penh.[106] Thus, case 002/01 only pertains to the charges of crimes against humanity. Proceedings in case 002/01 have been completed and both of the remaining two accused have been convicted and sentenced to life imprisonment. Given the complexity of crimes against humanity and the differing modes of liability adopted by the Chambers to enter into convictions, this thesis provides the following two tables to demonstrate details pertaining to convictions of crimes against humanity against the two accused in case 002/01.

Table 1: Convictions against NUON Chea in Case 002/01
(Including Trial and Appeal)

<table>
<tr><th>Related Facts</th><th>Crimes against Humanity</th><th>Modes of Liability</th></tr>
<tr><td rowspan="2">Population Movement Phase One: unlawful killings of civilians and soldiers; death due to the conditions and lack of assistance;</td><td>Murder
Political Persecution
Other Inhumane Acts:
- Forced Transfer
- Attacks against Human Dignity</td><td>JCE subsuming[107]:
- Planning
- Ordering
- Aiding and Abetting
- Instigating</td></tr>
<tr><td>Extermination
(encompassing murder)
(reversed after appeal)</td><td>Planning
Ordering
Aiding and Abetting
Instigating</td></tr>
<tr><td rowspan="3">Population Movement Phase Two</td><td>Murder
(entered after appeal)</td><td>JCE (also known as *dolus eventualis*)</td></tr>
<tr><td>Political Persecution
(reversed after appeal)
Other Inhumane Acts:
- Forced Transfer
- Attacks against Human Dignity</td><td>JCE subsuming:
- Planning
- Ordering
- Aiding and Abetting
- Instigating</td></tr>
<tr><td>Extermination
(reversed after appeal)</td><td>Planning
Ordering</td></tr>
</table>

[106] *NUON Chea and KHIEU Samphan* (002/19-09-2007-ECCC-TC) Decision on Severance of Case 002 following Supreme Court Chamber Decision of 8 February 2013, E284, 26 April 2013. See also *NUON Chea and KHIEU Samphan* (002/19-09-2007-ECCC-TC) Case 002/01 Judgement, E313, 7 August 2014 [45]-[49].

[107] The Trial Chamber judgment also found that NUON Chea was responsible as a superior for all crimes within the scope of case 002/01, but it declined to enter a conviction under the doctrine of superior responsibility because it has found the accused directly responsible for his participation in the JCE. Instead, the Chamber considered NUON Chea's superior position in sentencing. See *NUON Chea and KHIEU Samphan* (002/19-09-2007-ECCC-TC) Case 002/01 Judgement, E313, 7 August 2014 [941].

<table>
<tr><td></td><td>Other Inhumane Acts:
- Enforced disappearance</td><td>Aiding and Abetting
Instigating</td></tr>
<tr><td rowspan="2">Executions of approximately 250 former Khmer Republic soldiers and officials at Tuol Po Chrey in late April 1975.</td><td>Murder
(reversed after appeal)
Extermination (encompassing murder)
(reversed after appeal)</td><td>JCE subsuming:
- Planning
- Ordering
- Aiding and Abetting
- Instigating</td></tr>
<tr><td>Political Persecution
(reversed after appeal)</td><td>Planning
Ordering
Aiding and Abetting
Instigating</td></tr>
</table>

Table 2: Convictions against KHIEU Samphan in Case 002/01

(Including Trial and Appeal)

<table>
<tr><th>Related Facts</th><th>Crimes against Humanity</th><th>Modes of Liability</th></tr>
<tr><td rowspan="2">Movement of Population (Phase One / Phnom Penh)</td><td>Murder
Political Persecution
Other Inhumane Acts:
- Forced Transfer
- Attacks against Human Dignity</td><td>JCE subsuming:
- Planning
- Aiding and Abetting
- Instigating</td></tr>
<tr><td>Extermination
(reversed after appeal)</td><td>Planning
Aiding and Abetting
Instigating</td></tr>
<tr><td rowspan="3">Movement of Population (Phase Two / Nation Wide)</td><td>Murder
(entered after appeal)</td><td>JCE (based on dolus eventualis)</td></tr>
<tr><td>Political Persecution
(reversed after appeal)
Other Inhumane Acts:
- Forced Transfer
- Attacks against Human Dignity</td><td>JCE subsuming:
- Planning
- Aiding and Abetting
- Instigating</td></tr>
<tr><td>Extermination
(reversed after appeal)
Other Inhumane Acts:
- Enforced disappearance</td><td>Planning
Aiding and Abetting
Instigating</td></tr>
<tr><td>Tuol Po Chrey</td><td>Murder
(reversed after appeal)
Extermination</td><td>JCE subsuming:
- Planning</td></tr>
</table>

	(reversed after appeal)	- Aiding and Abetting - Instigating
	Political Persecution *(reversed after appeal)*	Planning Aiding and Abetting Instigating

The scope of the second trial in case 002, known as case 002/02, encompasses charges of crimes against humanity, grave breaches of the Geneva Conventions of 1949 and genocide. Facts that come under the scope of case 002/02 includes the four policies identified in the closing order leaving out the first policy which has been tried in case 002/01. The following Table 3 demonstrates details pertaining to convictions and their corresponding facts in case 002/02.

Table 3: Convictions against NUON Chea in Case 002/02[108]
(based on the Trial Judgment[109])

Related Facts	**Crimes**	**Modes of Liability**

Referring to the four policies	Crimes against Humanity:
	- Murder
	- Extermination
	- Deportation
	- Enslavement
	- Imprisonment
	- Torture
	- Persecution on political, religious and racial grounds
	- Other inhumane acts:
	  - Attacks against human dignity
	  - Enforced disappearances
	  - Forced transfer
	  - Forced marriage
		JCE

[108] See footnote 110 for the convictions against KHIEU Samphan.
[109] *NUON Chea and KHIEU Samphan* (002/19-09-2007/ECCC/TC) Case 002/02 Judgement, E465, 16 November 2018.

	- Rape in the context of forced marriage	
Deaths at cooperatives, worksites and security centres	Crimes against Humanity: - Murder	Aiding and Abetting (based on *dolus eventualis*)
Treatment of members of *Vietnamese* ethnic, national and racial groups	Genocide by killing	JCE (note that the Trial Chamber was only able to establish that at the very least NUON Chea had reason to know that genocide had been, or was about to be, committed against the Cham.)
Killing members of the *Cham* ethnic and religious group[110]	Genocide	Superior Responsibility (based on *dolus eventualis*)
Treatment of protected persons under the Geneva Conventions at S-21 Security Centre	Grave Breaches of the Geneva Conventions of 1949: - Wilful killing - Torture - Inhuman treatment - Wilfully causing great suffering or serious injury to body or health - Wilful deprivation of the rights of a fair and regular trial - Unlawful confinement	JCE

[110] This particular set of facts distinguish the responsibility of the two accused. Unlike the case against NUON Chea, the Trial Chamber finds that 'KHIEU Samphan is not responsible for the crime of genocide by killing members of the Cham ethnic and religious group, neither as aider or abettor nor as superior'. Because the evidence did not rise to the level of proving that KHIEU Samphan actively assisted or facilitated the execution of the genocidal policy against the Cham. The Chamber is also not satisfied that KHIEU Samphan was a superior in the sense of having had the ability to prevent or punish the commission of crimes. See *NUON Chea and KHIEU Samphan* (002/19-09-2007/ECCC/TC) Summary of Judgement Case 002/02, 16 November 2018 [62].

In 2003, it was planned by the Trial Chamber that there would be a case 002/03 dealing with the rest of the charges in the closing order after the previous two trials.[111] On 27 February 2017, the Trial Chamber terminated the proceedings concerning those charges left by Case 002/01 and Case 002/02.[112]

2.4.3 Case 003: MEAS Muth and SOU Met

Besides the individuals charged and convicted in case 001 and case 002, an additional five individuals were indicted by the International Co-Prosecutor in September 2009.[113] Offices of the Co-Prosecutors and the Co-Investigating Judges have long been divided on proceedings against these additional individuals, known as the accused in case 003 and case 004. It is the Cambodian Co-Prosecutor's position that the additional individuals are neither 'senior leaders' nor 'most responsible' for the crimes committed in Democratic Kampuchea as set out by the personal jurisdiction of the ECCC.[114] The National Co-Prosecutor also pointed to the UN General Assembly Resolution concerning the prosecutions at the ECCC,[115] which recognised Cambodia's legitimate concerns in searching for justice, national

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[111] *NUON Chea and KHIEU Samphan* (002/19-09-2007-ECCC-TC) Decision on Severance of Case 002 following Supreme Court Chamber Decision of 8 February 2013, E284, 26 April 2013.

[112] ECCC, 'Press Release: Trial Chamber Reduces Scope of Case 002' (*ECCC*, 27 February 2017) <https://www.eccc.gov.kh/sites/default/files/media/27%20Feb%20-%20Press%20Release%20Trial%20Chamber%20Reduces%20Scope%20of%20Case%20002%20English.pdf> accessed 28 October 2019.

Following this decision there will be no further proceedings in Case 002 with respect to Srae Ambel and Prey Sar worksites; Sang, Koh Kyang, Prey Damrei Srot, Wat Kirirum, North Zone, Wat Tlork, and Kok Kduoch security centres; District 12 (West Zone), Tuol Po Chrey (the Chamber notes that facts related to this location have been partially adjudicated in Case 002/01), and Steung Tauch Execution Sites; Movement of the Population from the East Zone (Phase 3); Treatment of Buddhists (nationwide); Treatment of the Cham at Kroch Chhmar Security Centre; and Crimes committed by the Revolutionary Army of Kampuchea on Vietnamese territory. However, evidence relating to the facts excluded may be relied upon to the extent it is relevant to the facts which remain in Case 002/02.

[113] ECCC, 'Statement of the Acting International Co-Prosecutor: Submission of Two New Introductory Submissions' (*ECCC*, 8 September 2009) <https://www.eccc.gov.kh/sites/default/files/media/ECCC_Act_Int_Co_Prosecutor_8_Sep_2009_%28Eng%29.pdf> accessed 28 October 2019.

[114] ECCC, 'Statement by The Office of The National Co-Prosecutor on Case 003' (*ECCC*, 30 November 2017) < https://www.eccc.gov.kh/sites/default/files/media/Press%20Release%20National%20Co-Prosecutor%20on%20Case%20003%20ENG.pdf> accessed 28 October 2019.

[115] United Nations, 'Resolution adopted by the General Assembly: Khmer Rouge Trials' (A/RES/57/228, 27 February 2003) < http://www.unakrt-online.org/sites/default/files/documents/A-Res-57-228.pdf> accessed 22 March 2019.

reconciliation, stability, peace, and security, and she indicated that bringing more individuals to trial will cause 'domestic political disruption and serious potential social unrest'.[116] Hence, in the opinion of the National Co-Prosecutor, further trials beyond the individuals tried in case 001 and case 002 will not serve the interest of justice.

That said, MEAS Muth and SOU Met were initially named as suspects in case 003. MEAS Muth was a Central Committee member, General Staff Deputy Secretary, Division 164 (including the navy) Secretary and Kampong Som Autonomous Sector Secretary. SOU Met was the air force commander of the Khmer Rouge and General Staff member. He was also a member of the Assisting Committee of the Central Committee of the CPK. The judicial investigation against SOU Met was terminated on 2 June 2015 following his death on 14 June 2013.[117]

MEAS Muth is charged with genocide, crimes against humanity, war crimes and violations of the 1956 Cambodian Penal Code by the closing order issued by the international co-investigating judge in November 2018.[118] A range of modes of liability, including JCE, planning, ordering, and superior responsibility are pleaded as alternatives. Case 003 has been transferred to the Trial Chamber.

2.4.4 Case 004: YIM Tith, IM Cheam, and AO An

The last three individuals who have been investigated by the ECCC were powerful regional figures at the district level of Democratic Kampuchea. Following a series of severance orders, case 004/01 was established against IM Cheam, case 004/02 was established against AO An, and case 004 remained the case against YIM Tith alone.

[116] ECCC, 'Statement by The Office of The National Co-Prosecutor on Case 003' (*ECCC*, 30 November 2017) < https://www.eccc.gov.kh/sites/default/files/media/Press%20Release%20National%20Co-Prosecutor%20on%20Case%20003%20ENG.pdf> accessed 28 October 2019.

[117] *MEAS Muth and SOU Met* (003/07-09-2009-ECCC-OCIJ) Dismissal of Allegations against SOU Met, D86/3, 2 June 2015.

[118] *MEAS Muth* (003/07-09-2009-ECCC-OCIJ) Closing Order, D267, 28 November 2018, 256-264.

Judicial investigation against IM Chaem was closed on 18 December 2015.[119] She allegedly oversaw a prison and worksite as secretary of Preah Netr Preah district. An estimated 40,000 people may have died from executions, starvation and overwork at the largest prison in the district, Phnom Trayoung, during the temporal jurisdiction of the ECCC. However, the Co-Investigating Judges found that IM Chaem does not fall within the jurisdiction of the ECCC because the evidence is not sufficient to establish that she was a 'senior leader' or otherwise one of the 'most responsible' officials of the Khmer Rouge regime.[120]

Judicial investigation against AO An was closed on 16 December 2016.[121] AO An is the former Deputy Secretary of the regime's Central Zone, and allegedly also oversaw more than 40,000 deaths. He is also implicated as a major responsible figure in the targeting and killing of members of the Cham. Separate closing orders were issued against him on 16 August 2018. The Cambodian co-investigating judge dismissed the case finding that he did not fall within the personal jurisdiction of the ECCC, while the international co-investigating judge indicted him for genocide, crimes against humanity and violations of the 1956 Cambodian Penal Code.[122] His case will be transferred to the Trial Chamber.

The remaining case 004 against YIM Tith is still pending the decisions of the co-investigating judges although the co-prosecutors have been divided as regards whether he falls within the personal jurisdiction of the ECCC.[123] He is suspected of having actively planned and ordered massive purges

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[119] *IM Cheam* (004/07-09-2009-ECCC-OCIJ) Notice of conclusion of judicial investigation against Im Chaem, D285, 18 December 2015.

[120] *IM Cheam* (004/1/07-09-2009-ECCC-OCIJ) Closing Order (Reasons), D308/3, 10 July 2017; *IM Cheam* (004/1/07-09-2009-ECCC-OCIJ) Closing Order (Disposition), D308, 22 February 2017.

[121] *AO An* (004/2/07-09-2009-ECCC-OCIJ) Notice of conclusion of judicial investigation against *AO An,* D334, 16 December 2016.

[122] *AO An* (004/2/07-09-2009-ECCC-OCIJ) Closing Order (Indictment), D360, 16 August 2018, 409-415.

[123] ECCC, 'Statement by the Office of the National Co-Prosecutor on Case 004' (*ECCC*, 2 July 2018) <https://www.eccc.gov.kh/sites/default/files/media/National%20Co-Pro%20Press%20Release_EN_Yim%20Tit.pdf> accessed 28 October 2019; ECCC, 'Statement by the International Co-Prosecutor on Case 004' (*ECCC*, 2 July 2018) <https://www.eccc.gov.kh/sites/default/files/media/Case%20004%20Rule%2054%20Press%20Release%2002-08-2018.pdf> accessed 28 October 2019.

against the Northwest Zone cadres besides being the party secretary of the Kirivong district and later the Northwest Zone leader.

Proceedings in case 003 and case 004 feature one contested issue upon which the ECCC has received a dozen *amicus curiae* briefs. The question is whether, under customary international law as applicable between 1975 and 1979, an attack by a state or organization against members of its own armed forces may amount to an attack directed against a civilian population for the purpose of Article 5 of the ECCC Law, i.e. crimes against humanity.[124] Final remarks on the issue at the ECCC remain to be seen.

2.5 Concluding Remarks

Although the judgment of revolutions is often left to the political sphere due to their inherent subjective worldviews and the fact that they are better judged with hindsight, they have always interacted with the law. In terms of international law, standards of extradition were modified to provide more lenient treatment to political offenders in the aftermath of the French Revolution of 1789 and throughout the 19th century.[125] During the early 20th century, the development of democratic governments around the world and the recognition of peaceful social transformation led states to adopt a less favourable position toward extra-legal measures to bring about social changes.

The treatment of political violence in the 20th century was complicated by two fields of international law which are further reflected through the changes in refugee law and extradition law.[126] By the end of the Second World War, self-determination and other human rights were recognised and protected by international law. Consequently, political violence pursuing these legitimate goals became tolerated. Meanwhile, the steady growth of international criminal law required the prosecution and punishment of acts of violence which could amount to international crimes.

[124] *MEAS Muth et al.* (004/07-09-2009-ECCC-OCIJ) Call for Submission by the Parties in Cases 003 and 004 and Call for *Amicus Curiae* Briefs, D306, 19 April 2016.
[125] Nicholas N Kittrie, 'Patriots and Terrorists: Human Rights with World Order' (1981) 13(2) Case Western Reserve Journal of International Law 291, 294.
[126] Christine Van Den Wijngaert, 'The political offence exception to extradition: defining the issues and searching a feasible alternative' (1983) 20 (1) Revue beige de droit international 741; Vincent DeFabo, 'Terrorist or Revolutionary: The Development of the Political Offender Exception and Its Effects on Defining Terrorism in International Law' (2012) 2(2) American University National Security Law Brief 69.

Among a trend of lifting barriers for extradition and prosecution, states find themselves confronted with a hard choice between controlling excessive political violence and protecting the last resort of defence of the individuals and groups who are deprived of legitimate means to make a change.

It is shown that international law has been continuously developing to accommodate the changing reality of conflicts and violence. It is also shown that tolerance towards excessive violence may be justified by the fact that violence is nessary to improve social orders and the employed violent means remain proportionate to the claimed political goals. The assessment and treatment of political offences in international law shows alignments with the studies on revolution. Revolutionary studies found that scripted ideology is the essential feature that demonstrates the nature of revolution, and the ideologies of recent revolutions often include goals such as pursuing more just social orders.

In conclusion, this chapter has three primary findings as regards the impact of the revolutionary context on the application of international criminal law at the ECCC.

Firstly, revolution for the purpose of this study refers to the Cambodian revolution and other similar movements in the world which follow a specified ideology and seek to pursue a more just social order.[127] The trials of the Khmer Rouge leaders, who once staged a major revolutionary movement in Cambodian history, provide an example for studying the interactions between revolutions and international criminal law. It is expected that the legal assessments of the revolutionary goals and means will provide useful insights and perspectives in terms of ensuring accountability and building justice in similar future events. As long as the pursuit of a more just global order continues in the future, states and judicial institutions are likely to keep facing the question of clarifying the boundary between legal and illegal revolutionary means.

Secondly, applicable laws at the ECCC incorporate multiple recognised legal regimes, including international criminal law, international

[127] See chapter 3 of this thesis for further analysis regarding the nature and causes of the Cambodia revolution.

humanitarian law and human rights law. Observers of international criminal law recognise that these different legal regimes have different underlying values and goals.[128] Transitional justice initiatives often ground their legal sources and justifications in human rights law, especially the rights of the victims.[129] Without a separate international convention to define crimes against humanity, the scope of this group of crimes is expanded by international tribunals through their judicial reasoning about the value and protection of fundamental human rights. This trend shows that international law is moving towards imposing more limits on the means of revolution. It serves to improve the protection of fundamental human rights in future cases, but also risks positioning the past cases under a set of stricter rules compared with their contemporary peers.

Thirdly, the remit of the ECCC is selective in terms of charged individuals and events, but the revolutionary context proves to be the central theme in the trial of senior leaders as in case 002. As observed by Rachel Killean, from a victimological perspective, it is doubtful whether justice is actually being achieved at the ECCC given its extremely narrow jurisdiction.[130] However, this does not prevent the Chambers from addressing the revolutionary context in a sufficient manner especially given that the Chambers have decided that the strictly defined temporal jurisdiction does not bar the Chambers from relying on the facts and events predating 17 April 1975.[131] The personal and subject matter jurisdictions are also sufficient for allowing the Chambers to assess the revolutionary context by trying core personnel and crimes evolved in the revolution.

The impact of the revolutionary context on the conviction and punishment of the charged individuals will be further analysed in chapters 4 to 6. Chapter 3 will specify the scripted ideology, revolutionary policies and

[128] M Cherif Bassiouni (ed), *International Criminal Law: Volume I Sources, Subjects, and Contents* (3rd edn, Martinus Nijhoff Publishers 2008) 3.
[129] William A Schabas, 'Transitional Justice and the Norms of International Law' (2012) 110 Kokusaiho Gaiko Zassi, The Journal of International Law and Diplomacy 563.
[130] Rachel Killean, *Victims, Atrocity and International Criminal Justice Lessons from Cambodia* (Routledge, Taylor & Francis Group 2018) 40-63.
[131] *NUON Chea and KHIEU Samphan* (002/19-09-2007/ECCC/SC), Appeal Judgement, F36, 23 November 2016 [215].

organisational structure of the Communist Party of Kampuchea against the backdrop of the waves of conflict in Cambodia.

3 The Cambodian Revolution

There were multiple claimed revolutions in Cambodia both before and after the revolution mobilized by the Communist Party of Kampuchea (CPK). The military coup that toppled the Sihanouk monarchy in March 1970 was referred as 'a revolutionary event that ended two thousand years of monarchical rule in Cambodia'.[1] The People's Republic of Kampuchea that drove the Democratic Kampuchea out of power in 1979 had also re-claimed a socialist revolution in Cambodia which is considered to be the ultimate ideology of the Cambodian People's Party that governs Cambodia nowadays.[2] It will be explained later in this chapter that the concept of democracy claimed by the Democratic Kampuchea, and the concept of socialist revolution claimed by the Cambodian People's Party both have been afforded different meanings compared with their ideological doctrines. The discrepancy between associated ideologies and contextual interpretations or applications by particular regimes might be invoked as a reason to completely dismiss the relevance of revolutionary ideologies in criminal proceedings. However, this will not automatically dismiss the legitimacy in the causes that are recognised by international law, for instance, national security and independence. The Cambodian revolution had a root built in the waves of conflicts and struggle for national independence. A more subtle issue is that the implementation of revolutionary policies might unfold contrary to the intended causes and goals given the particular context and conditions in which the policies were carried out.

This chapter starts by introducing the types of materials that have been collected and produced regarding the Cambodian revolution led by the CPK. The unresolved debate on the death toll during the Democratic Kampuchea and the causes of deaths pose challenges to the trials of the senior leaders of

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[1] Edward Kissi, *Revolution and Genocide in Ethiopia and Cambodia* (Lexington Books 2006) 39.

[2] 洪森 (HUN Sen), *柬埔寨十年：柬埔寨人民重建家园的艰辛纪录 (Ten Years in Cambodia: A Record of Homeland Re-building by Cambodian People)* (邢和平译, 顺德文化事业股份有限公司 2001) (XING Heping tr, ShunDe 2001) 234-235. See also, Evan R Gottesman, *Cambodia After the Khmer Rouge: Inside the Politics of Nation Building* (Yale University Press 2003) 34.

the CPK at the ECCC. The scope of case 002 has been significantly reduced as the trials went on since the initial indictments due to the requirement of specificity among other reasons.[3] Except for the documented executions and torture, the larger part of the death toll was caused by 'deliberate starvation', overwork and untreated illness.[4] The ECCC has categorised these deaths as 'negligent murders'.[5] Articulations of these specific violations suggest that there were wilful decisions to kill the victims, or at least those responsible had the power and control to stop the victims from dying. The assumptions and findings of conscious decisions and knowledge have to be decided by looking at the context and considerations at play. Such assumptions and findings sit in the centre towards establishing elements of crimes and modes of liability. More importantly, only by specifying these assumptions and findings, can the contours of crimes against humanity be further clarified, which will eventually benefit and contribute to international criminal justice.

A deeper issue around the responsibility of the CPK's policies of population movements and operation of co-operatives is that it is easier for the audience of the ECCC today to recognise that they were not necessary for defending and building the country. Would or should people think differently in the 1970s, immediately after a civil war and in the middle of ongoing border conflicts with a neighbouring country? The responsibility of '*dolus eventualis* murder and extermination' as confirmed by the judgment at the ECCC are mainly based on the actual scale of deaths without which the conviction could not be established.[6] In other words, the establishment of the mental elements of these two particular crimes against humanity are premised on retrospective observations of the result that large number of victims died due to severe conditions and lack of assistance.

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[3] *NUON Chea et al.* (002/19-09-2007-ECCC/TC) Decision on Defence Preliminary Objections (Statute of Limitations on Domestic Crimes), E122, 22 September 2011 [22]; *KAING Guek Eav alias 'Duch'* (001/18-07-2007/ECCC/TC) Decision on the Defence Preliminary Objection Concerning the Statute of Limitations of Domestic Crimes, E187, 26 July 2010 [56].

[4] Tom Fawthrop and Helen Jarvis, *Getting away with Genocide? Elusive Justice and the Khmer Rouge Tribunal* (Pluto Press 2004) 4.

[5] *NUON Chea and KHIEU Samphan* (002/19-09-2007/ECCC/SC) Appeal Judgement, F36, 23 November 2016 [390]-[410].

[6] *NUON Chea and KHIEU Samphan* (002/19-09-2007-ECCC-TC) Case 002/01 Judgement, E313, 7 August 2014 [556]-[562].

Does this mean that if not so many people died, those policies would have been justified? Is it the result of the policy or the manner through which the policy was formed and implemented what truly renders the CPK leaders criminally responsible? In order to address these questions, this chapter presents the historical elements which will help to understand the legal interpretations of the Chambers at the ECCC in their specific context. The aim is to grasp the ideologies that guided the Communist Party of Kampuchea since the pre-1975 period, and more importantly, the policies and practice that were advanced during the Democratic Kampuchea era.

3.1 Documentary Materials and Unresolved Demographic Debate

Documentary evidence, including forensic reports, is essential to hold perpetrators accountable for international crimes given that they are often committed on a large scale and involve a complex setting of organisational structure and chain of commands.[7] The CPK deliberately kept its existence and operation secretive to the outside world for a long time and many of its own followers were not clear about the real identity of the people in charge within the organisation. During the Democratic Kampuchea era, the CPK was often referred to as 'Angkar', which means the organisation, and its core members were often referred to by aliases.[8]

After the fall of the Democratic Kampuchea in 1979, the CPK left behind a large number of documentary materials, including official correspondence, public proclamations, and personal records of party members.[9] The Documentation Center of Cambodia (DC-Cam) together with other institutions, such as the Tuol Sleng Archives (TSL), are holding these materials and have translated a large number of them into English.[10] These documents are not as exhaustive as those left by Nazi Germany to facilitate the later trials at Nuremberg. Nevertheless, they have been accepted by the

[7] John Ciorciari and Youk Chhang, 'Documenting the Crimes of Democratic Kampuchea' in Jaya Ramji and Beth Van Schaack (eds), *Bringing the Khmer Rouge to Justice: Prosecuting Mass Violence Before the Cambodian Courts* (Edwin Mellen Publisher 2005) 223-224.

[8] *NUON Chea and KHIEU Samphan* (002/19-09-2007-ECCC-TC) Case 002/01 Judgement, E313, 7 August 2014 [37].

[9] John Ciorciari and Youk Chhang, 'Documenting the Crimes of Democratic Kampuchea' in Jaya Ramji and Beth Van Schaack (eds), *Bringing the Khmer Rouge to Justice: Prosecuting Mass Violence Before the Cambodian Courts* (Edwin Mellen Publisher 2005) 223.

[10] ibid.

ECCC and used to demonstrate the revolutionary policies and governance hierarchy within the CPK.[11]

For instance, Michelle Caswell, who has examined the online biographic database published by the DC-Cam as an archivist, found that the deliberate inclusion of ethnic identity of Khmer Rouge victims has enabled the ECCC to charge former Khmer Rouge officials with genocide.[12] Meanwhile, he also admits that 'archivists made particular descriptive choices in order to further an agenda of legal accountability in a specific context'.[13] The strategic choice to identify the ethnic identity of the Khmer Rouge victims is helpful towards discovering a systematic pattern of targeting of certain groups and also helps to provide preliminary indications for the existence of a genocidal policy.

However, documentary materials have certain limits. They can be fragmented. For instance, victims' identity alone is not sufficient to establish all of the requisite elements of crimes charged at the ECCC, especially the mental elements. As noticed by John D Ciorciari, findings at the governance structure of the CPK should seize more attention at the tribunal, and only at the structural level, it will be proved that establishing conviction of genocide is harder than establishing crimes against humanity and grave breaches of Geneva Conventions 1949.[14] In the judgment in case 002/02, genocide convictions are entered for the killing of the Cham and Vietnamese groups.[15] However, whether the CPK had a separate policy to wipe out those two particular groups other than targeting their members as threats of the revolution, which was the policy applied on all members of Cambodian

[11] *NUON Chea and KHIEU Samphan* (002/19-09-2007-ECCC-TC) Case 002/01 Judgement, E313, 7 August 2014. Among the materials from the DC-Cam and admitted by the ECCC, interviews appear to play an important role in assisting the factual findings in the judgment.
[12] Michelle Caswell, 'Using Classification to Convict the Khmer Rouge' (2012) 68(2) Journal of Documentation 162.
[13] Michelle Caswell, 'Using Classification to Convict the Khmer Rouge' (2012) 68(2) Journal of Documentation 162, 163. See also G Bowker and S Star, *Sorting Things Out: Classification and Its Consequences* (MIT Press 1999); W Duff and V Harris, 'Stories and Names: Archival Description as Narrating Records and Constructing Meanings' (2002) 2 Archival Science 263.
[14] John D Ciorciari, *The Khmer Rouge Tribunal* (Documentation Center of Cambodia 2006) 23-24, 107.
[15] *NUON Chea and KHIEU Samphan* (002/19-09-2007-ECCC-TC) Case 00202 Judgment, E465, 16 November 2018 [4200], [4329].

society without distinguishing their national, ethnical, racial or religious backgrounds, has to be examined more carefully.[16]

Research based on archives and documentary materials, such as victim demography, cannot themselves be completely accurate.[17] There are different calculations about the death tolls in Cambodia during the Democratic Kampuchea mostly based on census data conducted during colonial time in 1873, 1930s, and 1950s.[18] Estimations have to be made due to the lack of accurate demographic data in recent times. Reliable data could be generated based on the discovered mass graves, but barriers remain in cases where mass graves have been dug for the victims of hunger and disease, not execution.[19] The Chambers at the ECCC have accepted that the excess deaths due to the policies of the Khmer Rouge falls between 1.5 and 2 million without assigning any specific number to each category of victims.[20] This uncertainty makes it more difficult to understand the proceedings given the lack of specificity.

3.2 The Cambodian Idea of Revolution

The following section sets out the context and ideologies of the Cambodian revolution by introducing the conflicts in Cambodia and the evolvement of the CPK.

3.2.1 The Conflicts in Cambodia

As a protectorate of France for nearly a century, between 1863 and 1953, Cambodia's social structure and economic organisation was significantly transformed and became more connected with and vulnerable to the international market. Merchants and elites were mostly residing in Phnom Penh, while the wider society lived in rural areas depending mainly on

[16] See section 4.2 and 4.3 of this thesis for further discussion on the genocide debate.
[17] Tom Fawthrop and Helen Jarvis, *Getting away with Genocide? Elusive Justice and the Khmer Rouge Tribunal* (Pluto Press 2004) 3-4.
[18] Ben Kiernan, 'The Demography of Genocide in Southeast Asia: The Death Tolls in Cambodia, 1975-79, and East Timor, 1975-80' (2003) 35(4) Critical Asian Studies 585, 587-590.
[19] ibid 588.
[20] *NUON Chea and KHIEU Samphan* (002/19-09-2007-ECCC-TC) Case 002/01 Judgement, E313, 7 August 2014 [174].

farming and plantations.[21] The end of Second World War was followed immediately by the First Indochina War in Southeast Asia. The Vietnamese resistance movement, the Viet Minh, fought with France and its later North Atlantic Treaty Organisation (NATO) allies, while Cambodia was negotiating its independence with France. The conclusion of the Final Declaration of the Geneva Conference on the Problem of Restoring Peace in Indochina (the Final Declaration) on 21 July 1954 affirmed the independence of Cambodia, together with two other former French colonies, Vietnam and Laos. Vietnam was divided into the northern part under the control of the communist resistance and the southern State of Vietnam backed by the United States.[22] The conflict between north and south Vietnam continued after the Final Declaration as a part of the Second Indochina War, which was fought from the late 1950s to 1975 between the communist bloc, mainly with support from China and the Soviet Union, and several US-backed local governments in Vietnam, Laos, and Cambodia.

In Cambodia, King Norodom Sihanouk remained the leader until 1970 through several national elections.[23] The early underground socialist movement in Cambodia, the *Krom Pracheachon*, also participated in elections since 1950s, but its members were often subjected to repression and police harassment from Sihanouk's government. As required by the Final Declaration of 1954, Vietnam withdrew its military from Cambodia, and this left the Khmer communist vulnerable to the ruling regime. Many of the Khmer communist members had to turn underground or fled to Vietnam.[24] Sihanouk feared that the local resistance might be joined by the growing influence of the communist resistance in northern Vietnam and this would lead to threats to both his rule in Cambodia and the security of the country.[25]

[21] Serge Thion, 'The Cambodian Idea of Revolution' in David Chandler and Ben Kiernan (eds), *Revolution and Its Aftermath in Kampuchea: Eight Essays* (Monograph Series No.25, Yale University Southeast Asia Studies 1983) 13.
[22] Michael D Richards, *Revolutions in World History* (Routledge 2014) 55ff.
[23] David P Chandler, *A History of Cambodia* (first published in 1983, 4th edn, Westview Press 2008) 212.
[24] Dmitry Mosyakov, 'The Khmer Rouge and the Vietnamese Communists: A History of Their Relations as Told in the Soviet Archives' (*Eidgenössische Technische Hochschule Zürich*, MacMillan Center 2004) 46 <https://css.ethz.ch/en/services/digital-library/publications/publication.html/46645> accessed 29 October 2019.
[25] Evan R Gottesman, *Cambodia After the Khmer Rouge: Inside the Politics of Nation Building* (Yale University Press 2003) 17.

In 1970, Sihanouk was overthrown by the US-backed Lon Nol government, later named the Khmer Republic. A civil war broke out between the Khmer Republic and Sihanouk's royalist followers. Around the same time, American President Richard Nixon authorised a bombing campaign in Cambodia, which started on 18 March 1969, to confront the resistance from communist Vietnam. It was estimated that more than 2.7 million tonnes of ordinance were dropped on Cambodia, exceeding the amount that the US had dropped on Japan during WWII (including Hiroshima and Nagasaki) by almost one million tonnes.[26]

Both the coup and the war in neighbouring Vietnam helped the Khmer Rouge to gain domestic popularity and rise to power while Sihanouk sided with his former enemy, the communist Khmer Rouge. And the Khmer Rouge eventually seized control of the country, marked by the taking over of Phnom Penh on 17 April 1975 and the establishment of Democratic Kampuchea. The rule of the Democratic Kampuchea was not in total isolation from foreign interference although it was claimed to be closed and secretive by observers at the time. As the war in Vietnam also ended in 1975 and north and south Vietnam were joined together, the major conflict in the region shifted to the Third Indochina War.[27]

The Third Indochina War includes all conflicts following the Second, such as border clashes between the Democratic Kampuchea and Vietnam from 1975 to 1979, the civil war among different factions in Cambodia with support from international powers until 1991, and the short war between China and Vietnam in February and March 1979. Vietnam's invasion of Cambodia brought an end to the Democratic Kampuchea in 1979. The Khmer Rouge were forced into the jungle although the conflict in Cambodia did not end until the 1990s. The conclusion of the Paris Peace Accords in 1991 marked the end of the Third Indochina War and brought Cambodia to the long

[26] Taylor Owen, 'Bombs Over Cambodia: New Information Reveals That Cambodia Was Bombed Far More Heavily Than Previously Believed' (2006) 10 The Walrus 62.
[27] Dmitry Mosyakov, 'The Khmer Rouge and the Vietnamese Communists: A History of Their Relations as Told in the Soviet Archives' (*Eidgenössische Technische Hochschule Zürich*, MacMillan Center 2004) 64 <https://css.ethz.ch/en/services/digital-library/publications/publication.html/46645> accessed 29 October 2019.

quest for peace and reconciliation.[28] One important element of the peace and reconciliation process in Cambodia is to address the accountability of the Khmer Rouge for the atrocities committed during the Democratic Kampuchea. Thousands of execution centres and mass graves were evacuated around the whole country and pointed to individual criminal responsibilities of the Khmer Rouge leaders for crimes against humanity, genocide and war crimes.[29]

3.2.2 The Evolution of the CPK

Vietnam was the leading anti-colonial power in Southeast Asia through the influence of the Indochinese Communist Party founded by Ho Chi Minh in 1930. Besides the Indochinese Communist Party, there were also other anti-colonial initiatives in Vietnam. The Viet Minh were officially called the United Front of the Independence of Vietnam. It was firstly formed by some non-communist Vietnamese nationalist parties in China in 1935. It was not active until the Indochinese Communist Party led by Ho Chi Minh revived the anti-imperialist united front in 1941 to seek independence from French rule.[30] During the period before the Final Declaration of 1954, the anti-colonial struggle was led by the Indochina Communist Party with ideological and organizational control of the Vietnamese communists. The Khmer section of the Indochina Communist Party was initially formed based on the Khmer Issarak (meaning independent) Association which included early Khmer revolutionaries and radicals.[31] The Cambodian Communist Party, different from the CPK, was formed by Khmer revolutionary, Poc Khunin, in 1944 in Bangkok. It was a loose organization and consisted of several factions with different leadership and sponsorship.[32] It fought actively crossing the

[28] Trevor Findlay, *Cambodia: The Legacy and Lessons of UNTAC* (SIPRI Research Report No.9, Oxford University Press 1995) 8.
[29] Report of the Group of Experts for Cambodia Established Pursuant to General Assembly Resolution 52/135, UN Doc. A/53/850, S/1999/231, Annex, 27 January 1999 [71]. (the expert report)
[30] Michael D. Richards, *Revolutions in World History* (Routledge 2014) 55.
[31] Dmitry Mosyakov, 'The Khmer Rouge and the Vietnamese Communists: A History of Their Relations as Told in the Soviet Archives' (*Eidgenössische Technische Hochschule Zürich*, MacMillan Center 2004) 45 <https://css.ethz.ch/en/services/digital-library/publications/publication.html/46645> accessed 29 October 2019.
[32] Eiji Murashima, 'Opposing French Colonialism: Thailand and the Independence Movements in Indo-China in the Early 1940s' (2005) 13(3) South East Asia Research 333, 335.

country at the end of the Second World War and faded gradually after the independence of Cambodia in 1953 due to the rising communist dominance from inside the organization.

In the 1950s, those Viet Minh-controlled Issarak groups eventually transformed into communist organizations. In 1951, the Indochinese Communist Party was split into three national movements, the Khmer People's Revolution Party (the KPRP) for Cambodia, the Vietnam Workers' Party and the Lao Issara (means Free Laos, a non-communist liberation movement). The name of the KPRP was changed to the Workers Party of Kampuchea in 1960 and then to the Communist Party of Kampuchea (the CPK) in 1966.[33]

After the Final Declaration of 1954, due to the military withdrawal of Vietnam, the Khmer communists entered into a stage of independent development and faced more and more repression from the ruling authority, the King Sihanouk.[34] Some of them fled to Vietnam. Meanwhile, Vietnamese communists were preparing for continued armed struggle in the south and found Sihanouk to be a worthier ally than the KPRP because of his anti-imperialist and anti-American rhetoric.[35] The disconnection between the Vietnamese and Khmer communists at this stage was taken by the remaining Khmer communists as a 'betrayal'.[36] Hence, when the group of communists who returned from Paris including Pol Pot seized power within the party, independence and self-reliance, especially independence from the Vietnamese communists were emphasised as an essential ideology.

As concluded by Earl Alexander Carr in his research on the origin and development of the Khmer Revolution from 1945 until 1975,

> [...] the Cambodian revolutionary movement originated as early as 1946 as a nationalist anti-French, anti-monarchical organization, progressively between the years 1947 and 1954 it came under the dominating influence of the Viet Minh for reasons that held scant

[33] *NUON Chea and KHIEU Samphan* (002/19-09-2007-ECCC-TC) Case 002/01 Judgement, E313, 7 August 2014 [81].
[34] David P Chandler, *A History of Cambodia* (first published in 1983, 4th edn, Westview Press 2008) 214-216.
[35] Dmitry Mosyakov, 'The Khmer Rouge and the Vietnamese Communists: A History of Their Relations as Told in the Soviet Archives' (*Eidgenössische Technische Hochschule Zürich*, MacMillan Center 2004) 46 <https://css.ethz.ch/en/services/digital-library/publications/publication.html/46645> accessed 29 October 2019.
[36] ibid.

> interest for and were marked at the time with little interest in the Khmer people.[37]

The Khmer Rouge revolution originated from a broader Indochinese communist movement, which spread among Cambodia, Laos, and Vietnam since 1950s, in response to the French colonial rule in the region of Southeast Asia. However, independence by itself did not solve Cambodia's economic and social problems. KHIEU Samphan wrote an economics dissertation in 1959 titled 'Cambodia's Economy and Problems of Industrialization', which was partially translated by Laura Summers from the Berkeley-based Indochina Resource Center in 1976, a year after the Khmer Rouge took power in Cambodia. He wrote,

> The task of industrializing Cambodia would appear above all else a prior, fundamental decision: development within the framework of *international integration*, that is, within the framework of free external trade, or autonomous development.
>
> *International integration has apparently erected rigid restrictions on the economic development of the country.* Under the circumstances, electing to continue development within the framework of *international integration* means submitting to the mechanism whereby handicrafts withered away, precapitalist structure was strengthened and economic life was geared in one-sided fashion to export production and hyperactive intermediary trade. Put another way, agreeing to *international integration* means accepting the mechanism of structural adjustment of the now underdeveloped country to requirements of the now dominant, developed economies. *Accepting international integration amounts to accepting the mechanism by which structural disequilibria deepens, creating instability* that could lead to violent upheaval if it should become intolerable for an increasingly large portion of the population. Indeed, there is already consciousness of the contradictions embodied in world market integration of the economy.
>
> *Self-conscious, autonomous development is therefore objectively necessary……*"[38]

In this part of the economics dissertation, KHIEU Samphan mainly spoke in response to the issue of the world economy integration and the adverse effects it would bring to underdeveloped countries such as Cambodia. The economy

[37] Earl Alexander Carr, 'The Origins and Precipitating Factors of the Khmer Revolution, 1945-1975' (Doctoral thesis in Political Science, Southern Illinois University 1977) 4.
[38] Sophal Ear, 'The Khmer Rouge Canon 1975-1979: The Standard Total Academic View on Cambodia' (Undergraduate Political Science Honors Thesis, University of California, Berkeley, May 1995) 15-16, citing Laura Summers, 'Cambodia's Economy and Problems of Industrialization', Indochina Chronicle, September-November 1976. (emphasis added by the author)

was not the only reason that pointed Cambodian communist leadership to the guideline of self-conscious and autonomous development. The 'unrighteous betrayal' of the Vietnamese communists in 1954 at Geneva cannot be missed for contributing to the forming of an absolute self-conscious and autonomous revolutionary ideology.[39]

Serge Thion, a former history teacher in a Khmer lycée in 1969, made interesting observations on the development of the Cambodian idea of revolution. According to Serge Thion, 'the concept of revolution as the replacement of a ruling social stratum by another was non-existent' in pre-colonial Cambodia.[40] This is to say that the distribution of social power did not alter when the replacement of rulers occurred. Hence there was no consciousness or effort that intended to build a different kind of social order. Rebellion leaders in the nineteenth-century Cambodia mostly, if not all, claimed themselves royal descents.[41] It was not until the late 1960s that the economic reorganization in Cambodia had reached a point where the pressures from the world market would have severely disrupted the old agrarian social pattern and brought about a kind of bourgeois revolution.[42] However, the 'emerging' bourgeois revolution, supposedly similar like the French Revolution of 1789, was interrupted by the war of 1970-1975.[43]

Available experience for the revolutionaries from the colonial situations like Cambodia focuses on power struggles and nationalism, and this was how Marx's analyses of revolution as an end-product of capitalist evolution were altered or even dropped.[44] As claimed by Edward Kissi, 'the viability of the Khmer race and the Cambodian nation was a prominent feature of Khmer rouge revolutionary nationalism.'[45]

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[39] William Shawcross, *Sideshow: Kissinger, Nixon, and the Destruction of Cambodia* (Simon and Schuster 1979) 238; See also, Susan E Cook (ed), *Genocide in Cambodia and Rwanda: New Perspectives* (Fourth paperback printing, Transaction Publishers 2009).
[40] Serge Thion, 'The Cambodian Idea of Revolution' in David Chandler and Ben Kiernan (eds), *Revolution and Its Aftermath in Kampuchea: Eight Essays* (Monograph Series No.25, Yale University Southeast Asia Studies 1983) 10.
[41] ibid 11.
[42] ibid 13.
[43] ibid 14.
[44] ibid 17.
[45] Edward Kissi, *Revolution and Genocide in Ethiopia and Cambodia* (Lexington Books 2006) 36.

3.3 Revolutionary Policies Adopted by the CPK

The following section examines the policies that were adopted by the CPK and effectively charged as international crimes at the ECCC. There were five policies in particular, which the senior leaders were charged with at the ECCC, as a part of the reforms to implement a rapid socialist revolution.[46] It should be pointed out that practices according to these identified policies had been adopted before 1975.[47]

3.3.1 Movement of the Population

The first major policy of the revolution launched by the CPK that is brought to trial is the movement of the population. The Co-Investigating Judges divided the population movement policy into three major phases.[48] They are the movement of people out of Phnom Penh (Phase 1); the Central (Old North), Southwest, West and East Zones (Phase 2); and the East Zone (Phase 3). The practice of population movement had been put into practice before 1975 as a method of warfare and to gain control of certain areas. Instead of controlling the territory itself, which the CPK was unable to do with their guerrilla tactics against soldiers of the Khmer Republic during the civil war period, they 'caught people'. Already in the July 1973 issue of Revolutionary Flag, this strategy was acknowledged and also the fact that people would potentially find themselves in lack of food in areas they are sent to.

> In the evacuation of people from the areas under the control of the enemy to the liberated zones, we took strong and optimistic views of mass population to successfully send them away to the countryside with no worry that people could be fraught with difficulty due to the [lack] of everything. In addition, we were not afraid that people in the liberated areas could not help the evacuated people. With strong popular views, we believe that our people could do everything. Although we were in the situation that we were lack of rice as we are

[46] *NUON Chea et al.* (002/19-09-2007-ECCC-OCIJ) Closing Order, D427, 15 September 2010 [156], [157].

[47] Steve Heder, 'Communist Party of Kampuchea Policies on Class and on Dealing with Enemies Among the People and Within the Revolutionary Ranks, 1960-1979: Centre, Districts and Grassroots' (*Cambodia Tribunal Monitor*, 26 April 2012) < http://www.cambodiatribunal.org/assets/pdf/reports/Heder,%20CPK%20Policy%20on%20 Class%20and%20Enemies,%20120426.pdf > accessed 28 October 2019. See also Michael Vickery, *Kampuchea: Politics, Economics, and Society* (L Rienner Publishers 1986); *Cambodia: 1975-1982* (first published 1984, Silkworm Books 1999).

[48] *NUON Chea et al.* (002/19-09-2007-ECCC-OCIJ) Closing Order, D427, 15 September 2010 [160], [221]-[301].

> now, we dared to evacuate many more people. Based on our past experiences, we see that people could resolve the problems.[49]

The strategy of evacuation was further explained in the Revolutionary Flag of December 1976 and January 1977.

> Throughout the world, they never capture [or seize] the people. Our line was to capture the people: one, we took him; two, we took them; 100, we took them; 1,000, we took them, and so on until we captured the people from Phnom Penh too. The line of taking away [or drying up] the people from the enemy was very correct. This never happened in the world. When the enemy has the people, the enemy has an army and an economy. When the enemy has no people, the enemy has no military and no economic strength. Our reasoning is correct. Thus, our line is very correct. We fight to capture the people at every location.[50]

These official lines of the CPK show that decisions have been made based on simplified estimations according to past experiences and beliefs, instead of scientific investigations and measurements. It is certainly irresponsible for a ruling government to draw policies based on the power of human boldness and count on their surviving skills. However, it would be equally unrealistic to expect a government in a war-torn state to rule based on well informed data and calculations with limited resources. Based on the structure of the Closing Order, it appears that the co-investigating judges attempted to demonstrate that the population movement policies were illegal based on the reasons, planning and means of the three phases of movement. However, instead of enquiry into the complex reasons and rational of the policy, the judgments in case 002/01 reached the conviction of crime against humanity of murder mainly based on its results via the broad JCE I.[51] This is potentially problematic because it assumes that as long as a government is making policies, the individuals involved could be held criminally responsible if the policies cause deaths and suffering.[52] The implied assumption according to this rational is a relatively high standard of government capacity which cannot even be guaranteed by the ruling governments around the globe nowadays,

[49] *NUON Chea and KHIEU Samphan* (002/19-09-2007/ECCC/TC) Case 002/001 Judgement, E313, 7 August 2014 [104], citing Revolutionary Flag, which was a CPK propaganda journal admitted by the ECCC as evidence.
[50] *NUON Chea and KHIEU Samphan* (002/19-09-2007/ECCC/TC) Case 002/001 Judgement, E313, 7 August 2014 [108].
[51] *NUON Chea and KHIEU Samphan* (002/19-09-2007-ECCC-TC) Case 002/01 Judgement, E313, 7 August 2014 [556]-[562].
[52] See section 5.3.2 and 5.4 of this study for further details on the broad JCE I.

let alone a government that was caught between external and internal armed conflicts in the middle of the Cold War.

The ECCC entered convictions for the crime against humanity of forced transfer based on reported events during the evacuation of Phnom Penh because it is shown that people were forced to leave their houses under the supervision of armed soldiers. Even with the forced measure of movement, these events have shown a completely different scenario of this particular crime compared with other convictions or alleged crime against humanity of forced transfer. People were not deported out of territory or sent to be executed or tortured. During the evacuation of Phnom Penh and later other provincial capitals, it is recognised that the policy was directed at sending city dwellers to live among farmers in the rural areas to perform mostly agriculture and relevant construction labour. Crimes against humanity of forced transfer have been given a new interpretation by the judgment of case002/01 at the ECCC.[53]

Although it is not stipulated as an element of crime against humanity of forced transfer, convictions at other tribunals evolve either expelling certain group of people out of a territory or transferring for the purposes of slavery or extermination. Discussions on how the ECCC finds the elements of crimes against humanity in relation to the population movement policy of the CPK will be addressed in chapter 4 of this thesis.

Commentators have tried to distinguish between those killings that were directly and intentionally inflicted under the central command of the CPK leadership and injuries and deaths that were either an unintended effect of the implementation of the policies, or as happened on occasion, such as starvations that might have occurred irrespective of the adopted policies or because of prior conditions caused by the war.[54] The policy of population movements shows how difficult any assessment in this regard is, if one tries to consider alternative outcomes if such policies had not been carried out. In some instances, the movement might have brought actual relief to populations

[53] *NUON Chea and KHIEU Samphan* (002/19-09-2007/ECCC/TC) Case 002/001 Judgement, E313, 7 August 2014 [633]-[635].
[54] Michael Vickery, *Cambodia: 1975-1982* (first published in 1984, Silkworm Books 1999) 29ff; Edward S Herman and Noam Chomsky, *Manufacturing Consent: A Political Economy of the Mass Media* (first published in 1988, Pantheon Books 2002) 270ff.

otherwise exposed to further warfare, while in many other cases the movement may have meant certain death due to starvation.

3.3.2 Cooperatives and worksites

A book published by Hou Yuon in Phnom Penh in 1964 titled 'the co-operative question' offers important insights into the perceived socialist revolution in Cambodia then. Hou Yuon was the former Minister of the Economy and still an elected member of the National Assembly in 1964. He was a secret Communist Party member and the country's leading leftist. Hou Yuon was proposing to the government that the organisation of peasants into co-operatives is very important:

> Unless they are organized, the peasants have no power, and do not have complete capacity to defend their standard of living. With an organization, the peasants have power, and the capacity and the opportunity to defend and build their standard of living to one of happiness and dignity.[55]

Ben Kiernan commented on the expressed opinion of Hou Yuon:

> Quite possibly a distinction between Hou Yuon's socio-economic and materialistic perspective and what might be called the 'moral' standpoint of psychological rebirth, political tactics and military force, independent of material circumstances, that seems to have dominated the ideology of the Pol Pot regime, is perceptible here.[56]

In a process initiated in May 1972, the Central Committee of the CPK decided to close markets in the liberated zones and to establish cooperatives in order to 'attack the power of the classes of feudalists, land owners, and capitalists and to cut off private trading'.[57] The process of gradually establishing cooperatives varied depending on the zones and on the level of the cooperatives, but the central objective was to eliminate private ownership of land and the means of production and to replace it with a system of cooperative ownership with the state in complete control of commerce and

[55] Hou Yuon, 'Solving Rural Problems: A Socialist Programme to Safeguard the Nation' in Ben Kiernan and Chanthou Boua (eds), *Peasants and Politics in Kampuchea, 1942-1981* (Zed Press 1982) 147.

[56] ibid 135-136.

[57] *NUON Chea and KHIEU Samphan* (002/19-09-2007/ECCC/TC) Case 002/001 Judgement, E313, 7 August 2014 [113].

executing an 'absolute democratic revolution'.[58] The CPK distributed circulars prohibiting people from selling food and supplies to the enemy and assigning them to produce crops collectively. In 1972-1973, cooperatives were established in a number of regions within the control of the CPK.

This process was further developed and sometimes, as in March 1974, the town of Oudong was captured by the Khmer Rouge and an estimated 15,000 to 20,000 people were entirely forcibly moved to rural areas and resettled in cooperatives.[59] Events such as this may be seen as amounting to the crime against humanity of forced transfer because these moved people were meant to join work forces in harsh conditions. Given that people in the co-operatives, being 'old people' or 'new people', were meant to conduct same work, this context provides a new example of the crime against humanity of forced transfer. Further discussion on this will be continued in chapter 4 of this thesis on elements of crimes.

3.3.3 Security Centres and Execution Sites

One of the five policies was to secure the socialist revolution through the re-education of 'bad-elements' and the killing of 'enemies', both inside and outside the Party ranks. For that purpose, the CPK had replaced the existing legal and judicial structures with a network of security centres and execution sites. In all areas over which it had taken control, people who were suspected of engaging in activities against them were detained and either killed or 're-educated'. By the end of the CPK regime, approximately 200 security centres and countless execution sites had been established, located in every zone throughout Cambodia and at all levels of the CPK administration structure, including its centre.[60]

As said, two key objectives of security centres and execution sites were to re-educate bad-elements and 'smash' enemies. 'Smash' meant

[58] Steve Heder, 'Communist Party of Kampuchea Policies on Class and on Dealing with Enemies Among the People and Within the Revolutionary Ranks, 1960-1979: Centre, Districts and Grassroots' (*Cambodia Tribunal Monitor*, 26 April 2012) 1 < http://www.cambodiatribunal.org/assets/pdf/reports/Heder,%20CPK%20Policy%20on%20Class%20and%20Enemies,%20120426.pdf > accessed 28 October 2019.

[59] *NUON Chea and KHIEU Samphan* (002/19-09-2007/ECCC/TC) Case 002/001 Judgement, E313, 7 August 2014 [113].

[60] *NUON Chea et al.* (002/19-09-2007-ECCC-OCIJ) Closing Order, D427, 15 September 2010 [178].

ultimately to kill. However, before that, it also meant to secretly arrest, interrogate, and torture. Similarly, 'sweep' was a term used to describe arrests, typically followed by executions.[61]

The CPK was permanently concerned to protect itself and the state from subversion. This fear is even illustrated in Chapter VII of the Constitution of Democratic Kampuchea entitled 'Justice'. Article 10 of this chapter refers to two forms of activity that posed a threat.

> Article 10 Actions violating the laws of the people's State are as follows:
>
> Dangerous activities in opposition to the people's State must be condemned to the highest degree.
>
> Other cases are subject to constructive re-education in the framework of the State's or people's organisations.[62]

Any person suspected of opposing the state was deemed to be an 'enemy' who had to be 'smashed', whereas a person falling within the latter category was considered a 'bad-element' who would be re-educated. Security centres detained both 'enemies' and 'bad-elements' and usually labelled them 'serious' and 'light' prisoners respectively.[63]

3.3.4 Treatment of Targeted Groups

The Closing Order of case 002 had alleged a policy of targeting Muslim Cham and Vietnamese minorities amounting to genocide and Buddhist monkhood and former Khmer Republic officers amounting to crimes against humanity of persecution.[64] In the discussion of this allegation, one has to understand that there is an important difference of how the word 'genocide' has been

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[61] *NUON Chea et al.* (002/19-09-2007-ECCC-OCIJ) Closing Order, D427, 15 September 2010 [179].

[62] Raoul M Jennar, 'The Cambodian Constitutions (1953-1993)' (*Documentation Centre of Cambodia*) <http://www.d.dccam.org/Archives/Documents/DK_Policy/DK_Policy_DK_Constitution.htm > accessed 29 October 2019.

[63] *NUON Chea et al.* (002/19-09-2007-ECCC-OCIJ) Closing Order, D427, 15 September 2010 [179].

[64] *NUON Chea et al.* (002/19-09-2007-ECCC-OCIJ) Closing Order, D427, 15 September 2010, charges in relation to genocide and crimes against humanity include the following: [1315] for genocide; [1380] for murder; [1390] for extermination; [1396] for enslavement; [1401] for deportation; [1407] for imprisonment; [1414] for torture; [1415] for persecution on political, racial or religious grounds ; [1433] for rape; [1434] for other inhumane acts through 'attacks against human dignity'; [1442] for other inhumane acts through 'forced marriage'; [1448] other inhumane acts through forced transfer; [1470] other inhumane acts through enforced disappearances.

used colloquially in the media and its legal definition in the Genocide Convention.[65] The word 'genocide' has been used by politicians and in the media in different types of scenarios, sometimes to evoke images of the Holocaust and paint a picture of good versus evil. However, not every killing of civilians amounts to a genocide. The 'smashing of enemies of the people' as described above (section 3.3.3) will legally not suffice to constitute genocide according to its legal definition under the Genocide Convention, because the commonly accepted definition does not include mass killings for political reasons.[66] Rather, a 'genocide' as defined in the Genocide Convention and the ECCC Law is one that has the *intent* to destroy a national, ethnical, racial or religious group.[67]

In this study, the author's view is that while the intent of the Khmer Rouge revolution is a complex mix of various policy goals towards national independence, territorial security and authority and social transformation, and a constant fear of subversion, it also included racial elements, which existed to an extent but not enough to categorically place the Cambodian case on a par with previous genocides in history. In this regard, the author's view differs from conclusions by Hélène Lavoix and Edward Kissi.[68] Both of the two authors hold similar opinion that revolutionary goals and nation-building are motives that bear secondary weight in comparison with the ultimate genocidal intent. The reason for this difference lies in the narrow and broad understandings regarding the concept of genocide. It is important to note at this point that there was both an ethnic and political dimension when these groups were targeted by the CPK and the persecution against these groups were often triggered when they were considered as a threat to national security and defence. For instance, KHIEU Samphan explained that the targeting against Vietnamese was necessary given the fact that there was firm evidence showing that the Vietnamese Workers' Party had been trying to

[65] Kjell Anderson, 'Colonialism and Cold Genocide: The Case of West Papua' (2015) 9(2) Genocide Studies and Prevention: An International Journal 9, 10.
[66] William A Schabas, 'Cambodia: Was It Really Genocide?' (2001) 23(2) Human Rights Quarterly 470, 474.
[67] Article II of the Genocide Convention; and Article 4 of the ECCC Law.
[68] Hélène Lavoix, 'Nationalism and Genocide: The Construction of Nation-ness, Authority and Opposition, The Case of Cambodia (1861-1979)' (Doctoral thesis, School of Oriental and African Studies, University of London 2005); Edward Kissi, *Revolution and Genocide in Ethiopia and Cambodia* (Lexington Books 2006).

dominate over and infiltrate in Cambodian leadership.[69] Chapter 4 will further elaborate on the issue of genocide and the atrocities committed by the CPK.

3.3.5 Regulation of marriage

Already prior to 1975, and thereafter, the CPK had arranged marriages and encouraged procreation in order to increase the population of Democratic Kampuchea.[70] The Closing Order has set out two specific crimes in relation to forced marriages. One is rape as a crime against humanity that occurred within arranged marriages;[71] the other is crime against humanity of other inhumane acts through forced marriage.[72] There had been involuntary marriages arranged in the name of Angkar, although the witnesses have reported different experiences regarding the manner in which their consents were asked.[73] Michael Vickery discussed the nature of the Cambodian revolution and he demonstrated that the CPK led revolution was substantively different from other communist revolutions around the world, such as the ones that took place in Russia and China. One aspect of that difference is the regulation of marriage and family life. After dismissing a few rumours of forced marriages to cadres and soldiers based on his first-hand interviews conducted in Cambodia immediately after the revolution, he made the following comments regarding forced marriages and separated families.

> They would be, however, exceptions, the results of accidents, careless organization accompanied by lack of compassion or arbitrariness of individual cadres. The experiences related by the refugee community as a whole plus the objective evidence of their preserved family circumstances demonstrate that none of those things was DK policy.[74]

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[69] KHIEU Samphan, 'Chapter 5: Democratic Kampuchea' in the book *Considerations on the History of Cambodia from the Early Stage to the Period of Democratic Kampuchea*, filed at the ECCC with dossier number E3/16, 56-61.
[70] Steve Heder, 'Communist Party of Kampuchea Policies on Class and on Dealing with Enemies Among the People and Within the Revolutionary Ranks, 1960-1979: Centre, Districts and Grassroots' (*Cambodia Tribunal Monitor*, 26 April 2012) 46-47 < http://www.cambodiatribunal.org/assets/pdf/reports/Heder,%20CPK%20Policy%20on%20Class%20and%20Enemies,%20120426.pdf > accessed 28 October 2019.
[71] *NUON Chea et al.* (002/19-09-2007-ECCC-OCIJ) Closing Order, D427, 15 September 2010 [1430]-[1433].
[72] ibid [1442].
[73] *NUON Chea and KHIEU Samphan* (002/19-09-2007/ECCC/TC) Case 002/001 Judgement, E313, 7 August 2014 [128]-[130].
[74] Michael Vickery, *Cambodia: 1975-1982* (first published 1984, Silkworm Books 1999) 186.

Here, the Chambers would be expected to make a careful separation between organised policies and accidental exceptions beyond the control of the CPK central committee, especially the accused individuals. It will be definitely a challenge because of the issue of specific in prosecuting mass atrocities, which will be explained in the next section.

3.4 The Issue of Specificity in Prosecuting Mass Atrocities

Specificity has a significant impact in almost all trials of mass atrocities. Multiple tribunals have picked up on this issue in their proceedings. The International Criminal Tribunal for the former Yugoslavia, in one of its cases *Blaškić*, reviewed relevant articles proscribed by the Statute and the Rules of the ICTY and applicable articles and interpretations of the International Covenant on Civil and Political Rights and the European Convention on Human Rights.[75] The *Blaškić* decision concluded that 'the purpose of all the provisions is to guarantee to the accused the fundamental rights recognised as his, that is: to be informed of the charges against him and to be in a position to prepare his defence in due time'.[76] Therefore, in terms of indictments and confirmation and notification of charges against the accused, prosecutors bear the duty to be specific to keep the accused informed and allow the accused to effectively prepare his or her defence. Here, the issue of specificity of charges was addressed as a pleading standard.

Jurisprudence from the Special Court for Sierra Leone also addressed the issue of specificity by setting standards for the pleading of the joint criminal enterprise doctrine. The case against individuals from the Revolutionary United Front recognised four requirements for an unambiguous pleading. They are: (1) the nature or purpose of the joint

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[75] *Blaškić* (IT-95-14) Decision on the Defence Motion to Dismiss the Indictment Based upon Defects in the Form Thereof (Vagueness/Lack of Adequate Notice of Charges), 4 April 1997 [9]-[16]. Reviewed texts in this decision include Article 18(4) and Article 21(4)(a) of the Statute of the ICTY; Sub-rule 47(A) and (B), Sub-rule 62(ii), Sub-rule 66 of the Rules of the ICTY; Article 14(3)(a) of the International Covenant on Civil and Political Rights; Article 6(3)(a) of the European Convention on Human Rights. This decision also reviewed jurisprudences at the European Court of Human Rights, including the decision in *Kamasinsky v. Austria* of 19 December 1989 and the decision in *De Salvador Torres v. Spain* of 24 October 1996. Three previous cases from ICTY were also reviewed. They are: *Dusko Tadic*, *Dorje Djukic* and *Zejnil Delalic et al*.

[76] *Blaškić* (IT-95-14) Decision on the Defence Motion to Dismiss the Indictment Based upon Defects in the Form Thereof (Vagueness/Lack of Adequate Notice of Charges), 4 April 1997 [10].

criminal enterprise; (2) the time at which, or the period over which, the enterprise is said to have existed; (3) the identity of those engaged in the enterprise, as far as their identity is known, but at least by reference to their category as a group; and (4) the nature of the participation by the accused in that enterprise.[77]

At the ECCC, the lack of specificity concerns both procedural and substantive aspects of the trials. The pleading of the JCE doctrine has been successful, although the judgment in case 002/01 has been criticised by some international lawyers and monitoring bodies of the tribunal because of its lack of specificity in the findings relating to the JCE.[78] The assessment report by David Cohen and others points out that the lack of specificity is one of the major flaws built in the case 002/01 judgment. This is mainly because the charged senior leaders are far away from the crime scenes and the charged situations, especially the deaths caused by starvation, the lack of medical treatment and overwork were only indirectly linked to the charged policies of population movements in case 002/01. To sufficiently demonstrate the senior leaders' contribution to the charged situations, the judgment spent large portion on affirming and clarifying the government structure of the Democratic Kampuchea. In the detailed analysis report by David Cohen and others, the authors recognised that the government structure of the Democratic Kampuchea is essential to the finding of guilt in the case against senior leaders, but they also point out that the judgment failed to demonstrate the specific individual role of the accused in the commission of the charged offences.

Hence, it can be seen that a certain level of specificity is expected as a standard of applying the law. In the case against senior leaders of the Democratic Kampuchea, assuming the law as it is, this standard of applying the law primarily leads the judicial investigation into the factual aspect of the charged situation, especially the specific choices or individual agencies that

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[77] *Sesay et al.* (SCSL-04-15-A) Judgment, 26 October 2009 [99]. (hereafter RUF appeal judgment) See also, *Charles Ghankay Taylor* (SCSL-2003-01-T) Decision on 'Defence Notice of Appeal and Submissions Regarding the Majority Decision Concerning the Pleading of JCE in the Second Amended Indictment', 1 May 2009 [15]. (hereafter Taylor Appeals Chamber JCE Decision)
[78] David Cohen and others, *"A Well-Reasoned Opinion?": Critical Analysis of the Judgment in Case 002/01* (East-West Center, 2015) 38.

had been taken by the accused at a specific moment. The same requirement of specificity as a standard of applying the law should be expected in all cases against mass atrocities, particularly the ones against senior leaders and higher commanders.

At the ECCC, charged crimes have been substantively modified because of the lack of specificity. Domestic crimes were initially included in the charges in the closing order by the investigating judges. However, the Trial Chamber decided to drop those charges relating to domestic crimes because the closing order failed to 'clearly identify the applicable law or set out the elements of the various domestic crimes'[79]. In other words, the investigating judges failed to demonstrate in the indictment at which part of the broad scope of violations those domestic crimes were directed. Hence, it is impossible for the Chamber to determine the content, factual basis and legal characterisation of these charges.[80] Consequently, charges for domestic crimes in case 002 were dropped.

To sum up, trials of mass atrocities are particularly concerned with the issue of specificity, and standards have been developed to guide the pleading and adjudicating practice. The core issue in finding the guilt in the case against senior leaders of the CPK is that the Chambers are expected to provide concrete reasoning regarding their specific individual roles in the commission of the charged offences. However, as chapter 4 and chapter 5 will demonstrate respectively, expansive interpretations regarding elements of crimes and the joint criminal enterprise doctrine at the ECCC practically released the Chambers from this expected duty.

3.5 Concluding Remarks

Chapter 3 of the study provides a historical review of the CPK revolution and highlights the charged revolutionary policies at the ECCC. It is evident that the aim of the prosecutors and investigating judges is to hold the CPK leaders responsible for the broad revolutionary practice. The judicial chambers also decided that the strictly defined temporal jurisdiction does not bar the

[79] *NUON Chea et al.* (002/19-09-2007-ECCC/TC) Decision on Defence Preliminary Objections (Statute of Limitations on Domestic Crimes), E122, 22 September 2011 [11].
[80] ibid [22].

Chambers from relying on the facts and events predating 17 April 1975. The personal and subject matter jurisdictions are also sufficient for allowing the Chambers to assess the revolutionary context. The broadly set justice goal shows the ambition of the ECCC to address the responsibility of the CPK revolution, although the work of a criminal tribunal is to strictly establish the commission of crimes.

It may be also argued that the five chosen policies demonstrate that the ECCC is only charged with adjudicating whether those particular policies constitute any crime, instead of adjudicating whether the CPK revolution as a whole constitute any crime. Two observations help to dismiss this alternative understanding of the ECCC's remit. One is that the five policies in case 002 are raised as factual findings of a joint criminal enterprise which is said to embrace the revolution as a common purpose.[81] The other is that the charged offences are not strictly assigned to each particular policy and have been switched among the policies during the appeal,[82] which shows that the chosen policies are more for prosecutorial convenience instead of meant to be definitive characterisation. Therefore, the chosen policies could not differentiate the revolutionary context from the remit of the ECCC. The application of international criminal law at the ECCC necessarily involves and gives consideration to the revolutionary context. The remaining question is through what legal parameters that the revolution is assessed. Chapters 4, 5 and 6 will look at elements of crimes, modes of liability, defences and sentencing respectively.

[81] *NUON Chea et al.* (002/19-09-2007-ECCC-OCIJ) Closing Order, D427, 15 September 2010 [156]-[159].
[82] *NUON Chea and KHIEU Samphan* (002/19-09-2007/ECCC/SC) Appeal Judgement, F36, 23 November 2016 [487]-[508], [972]. See section 5.2.1 of this study for further details on this re-characterisation of charged offence during the appeal.

4 Revolutionary Context and Elements of Crimes

The following chapter addresses the revolutionary context of the Democratic Kampuchea and how it relates to elements of crimes against humanity and genocide, especially the requisite contextual and mental elements. Analysis will primarily focus on case 002 at the ECCC as it addresses the policies that have been charged to represent the overall revolutionary movement, namely the movements of population, the operation of cooperatives and worksites, targeting particular groups and the regulation of marriage.[1] War crimes were charged in case 002/02 only in relation to some offences against protected persons under the Geneva Conventions at S-21 Security Centre which have been charged in case 001. Their application is not controversial. Therefore, war crimes were not discussed in detail in this chapter.

In relation to crimes against humanity, the overall revolution is perceived by the Chambers to be the 'attack' required in the contextual element.[2] However, the interpretation and application of the contextual element shows that the Chambers struggle to balance between two sources of crimes against humanity, namely human rights law and international humanitarian law, especially when it comes to cases of 'internal purges' where members of Khmer Rouge's own army were targeted. Adopting the humanitarian law interpretation would leave the targeting and treatment of Cambodia's own citizens and military members unprotected;[3] adopting the human rights law interpretation would cast doubts on the standards of treatment. Given that the revolutionary policies were mostly implemented in a domestic setting, the ECCC has interpreted the contextual element of crimes against humanity by focusing more on its human rights implications in order

[1] *NUON Chea et al.* (002/19-09-2007-ECCC-OCIJ) Closing Order, D427, 15 September 2010 [156].
[2] *NUON Chea and KHIEU Samphan* (002/19-09-2007-ECCC-TC) Case 002/01 Judgement, E313, 7 August 2014 [193]-[198].
[3] Recent development at the International Ciminal Court shows that offences committed against one's own military members could be charged as war crimes. See, *the Prosecutor v. Bosco Ntaganda* at the ICC.

to provide as much protection as possible. This can be seen from its interpretations of 'attack' and 'civilian' population.[4]

The human rights law approach of interpretation meant that the legal reasoning regarding some of the alleged crimes against humanity at the ECCC focused on the gravity of the situation, instead of a causal relationship between the policies and the charged offences. The most appropriate example of the human rights law approach of interpretation is the adoption of the *dolus eventualis* murder as a crime against humanity in relation to the population movements. It almost appears that there is no mental element required as long as violations of human rights have reached a certain level of magnitude. Although it serves well the purpose of protecting human rights and awarding justice to the victims, this approach of interpretation is hardly convincing because the Chambers almost did not engage in the discussion of the assumed human rights 'obligation' of the Democratic Kampuchea. This symbolic justice is compromised by a failure to adhere to the necessary legal standards. Perhaps because once that discussion is opened, the court would find itself in an inconclusive position regarding what a state should or could do in a situation faced by the Democratic Kampuchea.

In relation to genocide, the revolutionary context mainly complicates the finding and interpretation of the mental element of genocide, namely the specific intent to destroy, in whole or in part, the protected groups. Meanwhile, the question of political or cultural genocide is also brought to the fore because of the specific revolutionary ideology of the CPK that abandoned all religious practice. Together with the recently-ended civil war, the conflict with Vietnam that escalated during the second half of 1977 also raises the question of finding the genocidal intent in a case where the context suggests other co-existing motives.

It will be shown in this chapter that the Trial Chamber has adopted a formalistic approach towards finding the genocidal intent, which does not engage deeply with the revolutionary context and only finds persecutions of some protected groups as genocide while leaving persecutions of other protected groups as crimes against humanity. This formalistic approach

[4] See section of 4.1.4 Findings on the Contextual Element of this thesis for details.

mostly complies with elements of these crimes on a superficial level as the Chamber concluded on the cumulative convictions between the charged crimes.

4.1 Crimes against Humanity

Despite Article 9 of the Agreement providing that the ECCC has jurisdiction over crimes against humanity as defined by the Rome Statute of International Criminal Court (Rome Statute), their definition in the ECCC Law[5] is different from the Rome Statute definition in three ways.[6] The first difference is that the ECCC Law definition includes the 'national, political, ethnical, racial or religious grounds' element in relation to the civilian population in its *chapeau*. The Rome Statute definition only includes a similar but broader wording in

[5] Article 5 of the ECCC Law:

[...]

Crimes against humanity, which has no statute of limitations, are any acts committed as part of a widespread or systematic attack directed against any civilian population, *on national, political, ethnical, racial or religious grounds*, such as:

- murder;
- extermination;
- enslavement;
- deportation;
- imprisonment;
- torture;
- rape;
- persecutions on political, racial, and religious grounds;
- other inhumane acts. (emphasis added by the author)

[6] Article 7 of the Rome Statute: Crimes against humanity

1. For the purpose of this Statute, 'crime against humanity' means *any of the following acts* when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

(a) Murder;
(b) Extermination;
(c) Enslavement;
(d) Deportation or forcible transfer of population;
(e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
(f) Torture;
(g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
(h) *Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender* as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
(i) Enforced disappearance of persons;
(j) The crime of apartheid;
(k) *Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.*

2. […]

3. […] (emphasis added by the author)

one sub-crime of crimes against humanity, namely persecution. The second difference is the omission of 'with knowledge of the attack' in the ECCC Law definition compared with the Rome Statute definition. The third difference lies with the non-exhaustive list of acts of crime against humanity in the ECCC Law. The Rome Statute definition states 'any of the *following* acts (…)', while the ECCC Law states '*any acts* (…) *such as* (…)'.[7]

Meanwhile, as shown in the following quote, the Supreme Court Chamber of the ECCC in the appeal judgment of case 001 ruled that the jurisdiction of the ECCC over crimes against humanity is limited by their definition as they existed under international law at the time when the alleged criminal conducts were committed. More importantly, the ECCC Law cannot be interpreted as a retroactive amendment to the definitions of crimes against humanity as existed between 1975 and 1979.

> The Chamber recalls that pursuant to Article 5 of the ECCC Law, the ECCC has explicit subject matter jurisdiction over crimes against humanity. In accordance with the principle of legality, however, that *enumeration of crimes against humanity is not itself a source of criminalisation of conduct and, as such, does not constitute an autonomous basis for entering convictions before the ECCC.* Whereas Article 5 grants the ECCC *a priori* jurisdiction over the acts so listed, its exercise of jurisdiction is subject to determining whether crimes against humanity were proscribed under international law from 1975-1979 at the time of the alleged criminal conduct.
>
> Second, assuming that crimes against humanity did exist under international law at the relevant time, *the exercise of jurisdiction by the ECCC is limited by the definition of crimes against humanity as it stood under international law at the time of the alleged criminal conduct.* In other words, Article 5 of the ECCC Law with its catalogue of crimes against humanity over which the ECCC has *a priori* jurisdiction may not be interpreted as a retroactive amendment to that definition.[8]

It has been repeated multiple times by the Chambers that the ECCC should comply strictly with the principle of legality and only apply crimes against

[7] Similar usage of 'such as' also appears in the definition of genocide in the ECCC Law. In case of genocide, reading together with the French version of the ECCC Law, the usage of 'such as' appears a translation problem. Comments from one of the negotiators of the ECCC Law, David Scheffer, support that explanation. However, reading together with the definition of crimes against humanity, the usage of 'such as' shows certain consistency within the English version of the ECCC Law. It seems that the drafters intend to leave the definitions non-exhaustive to capture more offences. If that is the case, the ECCC Law shows a clear violation of the principle of legality.

[8] *KAING Guek Eav alias 'Duch'* (001/18-07-2007-ECCC/SC) Appeal Judgement, F28, 3 February 2012 [99]-[100]. (emphasis added by the author)

humanity as they existed between 1975 and 1979, especially so when it comes to the contour of this group of crimes. This position leaves the definition of crimes against humanity in the ECCC Law in a state of uncertainty. It is unclear whether reference to the Rome Statute in Article 5 of the ECCC Law is consistent with the principle of legality given that the Rome Statute is obviously an *ex post facto* law for the charged offences at the ECCC. It is also unclear why the drafters of the ECCC Law bothered themselves to re-articulate the definitions or point to the Rome Statute in the first place if they meant to apply the law as it was during 1975 and 1979. The most plausible speculation for the different wordings in the ECCC Law is that mistakes were made during the translation process when the constitutive documents for the ECCC were drafted and negotiated.[9]

The Chambers' emphasis that the ECCC's jurisdiction must be limited by the definition of crimes against humanity as it stood under international law overrides the co-investigating judges' opposite opinion expressed in their Closing Order in case 002 issued in 2010.

> However, the threshold or 'chapeau' elements defining the attack for the crime against humanity under Article 5 of the ECCC Law includes the phrase *'national, political, ethnic, racial or religious grounds'*. Clearly, this aspect cannot be interpreted as adding a constitutive element to the customary definition of crimes against humanity; it only introduces a legal limitation to the jurisdiction of the ECCC. Since the introduction of this additional condition results in a narrower definition of crimes against humanity (which is thereby able to be construed as more favorable to the Charged Persons), the Co-Investigating Judges will apply the narrower definition in interpreting Article 5 of the ECCC Law. [10]

The co-investigating judges tried to reconcile the *'national, political, ethnic, racial or religious grounds'* in the *chapeau* element with the widely accepted Rome Statute definition by alleging that the ECCC definition is a narrower one. It is doubtful whether the additional element in the *chapeau* would lead to a 'narrower' definition of crimes against humanity because the 'national, political, ethnic, racial or religious grounds' could be broad enough to mirror

[9] David Scheffer, 'The Extraordinary Chambers in the Courts of Cambodia' in M Cherif Bassiouni (ed) *International Criminal Law: Volume III International Enforcement* (3rd edn, Martinus Nijhoff Publishers 2008) 241.

[10] *NUON Chea et al.* (002/19-09-2007-ECCC-OCIJ) Closing Order, D427, 15 September 2010 [1315].

the 'broader' definition of crimes against humanity, which does not have this limit in the *chapeau* element. To assess the application of crimes against humanity at the ECCC, this chapter first clarifies the elements of this group of crimes during the time between 1975 and 1979.

The origin of crimes against humanity could be traced back to the responses to the mass killings of Armenians in the Ottoman Empire and the First World War.[11] However, due to the lack of agreement and clarification on the laws and principles of humanity, crimes against humanity were not charged or convicted until the end of the Second World War. As commented by the US delegates to the Versailles Conference, while the laws and customs of war are certain, the 'laws and principles of humanity are not certain, varying with time, place and circumstance, and according, it may be, to the conscience of the individual judge.'[12] The following section of this chapter will analyse the elements of crimes against humanity in detail.

4.1.1 Contextual Element I: Armed Conflict Nexus

At the end of the Second World War, crimes against humanity was defined in the Nuremberg Charter as the following.

> Crimes Against Humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.[13]

Crimes against humanity were defined as acts *in execution of or in connection with* the other two categories of offences, crimes against peace and war crimes. Fourteen defendants were found guilty of both war crimes and crimes against humanity at Nuremberg. However, on those occasions, the judgment did not

[11] Antonio Cassese and others, *Cassese's International Criminal Law* (3rd edn, Oxford University Press 2013) 84-85. See also William Schabas, *Unimaginable Atrocities: Justice, Politics, and Rights at the War Crimes Tribunals* (Oxford University Press 2012) 30ff, 110.
[12] ibid 85, citing 'Report Presented to the Preliminary Peace Conference by the Commission on the Responsibility of the Authors of the War and on the Enforcement of Penalties' in Carnegie Endowment for International Peace, Division of International Law, Pamphlet No.32, *Violations of the Laws and Customs of War, Report of Majority and Dissenting Reports of American and Japanese Members of the Commission of Responsibilities, Conference of Paris 1919* (Oxford: Clarendon Press 1919) 73.
[13] Article 6(c) of the Nuremberg Charter.

clarify or elaborate on the specific acts of crimes against humanity, especially regarding how this category of crimes are different from war crimes.[14]

Subsequent to the jurisprudence at Nuremberg, the link between crimes against humanity and war was gradually dropped although the specific moment of this disassociation remains unclear.[15] The definition of crimes against humanity in the Control Council Law No.10 adopted by the Allies at the end of 1945 states,

> Crimes against Humanity. Atrocities and offenses, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts *committed against any civilian population*, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated.[16]

Jurisprudential developments at the United Nations *ad hoc* tribunals and national criminal legislations on crimes against humanity further confirmed that the nexus to war is not necessary for the conviction of crimes against humanity. Nowadays, it is commonly agreed that customary international law on crimes against humanity equally applies in both wartime and peacetime. This is confirmed by the interlocutory appeal decision on jurisdiction in *Tadić*. The Appeal Chamber in *Tadić* stated,

> It is by now a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict. Indeed, as the Prosecutor points out, customary international law may not require a connection between crimes against humanity and any conflict at all. Thus, by requiring that crimes against humanity be committed in either internal or international armed conflict, the Security Council may have defined the crime in Article 5 more narrowly than necessary under customary international law. There is no question, however, that the definition of crimes against humanity adopted by the

[14] Antonio Cassese and others, *Cassese's International Criminal Law* (3rd edn, Oxford University Press 2013) 88.
[15] ibid 90.
[16] Article II (1)(c) of Control Council Law No.10, in *Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council Law No. 10, Vol XV. Procedure, Practice and Administration*, *October 1946-April 1949* (Washington, DC: U.S. Government Printing Office 1949) 23-28. Available at ICC Legal Tools: <http://www.legal-tools.org/doc/ffda62/> accessed 27 July 2019. (emphasis added by the author)

> Security Council in Article 5[17] comports with the principle of *nullum crimen sine lege*.[18]

The nexus to armed conflict of crimes against humanity proves to be more complicated at the ECCC as the temporal jurisdiction of the ECCC dates back to the 1970s when crimes against humanity were gradually evolving. After the Closing Order was issued in case 002, the Pre-Trial Chamber at the ECCC ruled that a nexus between crimes against humanity and an armed conflict is necessary in response to the appeals filed by the accused.[19] However, the Trial Chamber later ruled that the nexus is not required as of 1975 in a separate decision.[20] It is the Trial Chamber's opinion that,

> [F]rom the earliest inception of crimes against humanity within the Nuremberg Charter and CCL 10, there was already a significant tendency to delink these crimes from armed conflict. This tendency to view crimes against humanity as grave international crimes not inherently connected to armed conflict gained momentum in the aftermath of the Nuremberg era and constituted settled law by 1975.[21]

Although the immediate trials after Nuremberg were not consistent regarding whether the nexus is necessary, the Trial Chamber at the ECCC is convinced that a series of development before 1975 in international law is sufficient to rule that crimes against humanity do not have to be committed in execution

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[17] Article 5 of the Statute of the International Criminal Tribunal for the former Yugoslavia: Crimes against humanity

The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:

(a) murder;
(b) extermination;
(c) enslavement;
(d) deportation;
(e) imprisonment;
(f) torture;
(g) rape;
(h) persecutions on political, racial and religious grounds;
(i) other inhumane acts.

[18] *Tadić* (IT-94-1-A) Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995 [141].

[19] *IENG Thirith and NUON Chea* (002/19-09-2007-ECCC/OCIJ (PTC145 & PTC146)) Decision on IENG Thirith and NUON Chea's Appeal against the Closing Order (PTC), D427/2/12, 13 January 2011, 6; *KHIEU Samphan* (002/19-09-2007-ECCC/OCIJ (PTC104)) Decision on KHIEU Samphan's Appeal against the Closing Order (PTC), D427/4/14, 13 January 2011, 4; *IENG Sary* (002/19-09-2007-ECCC/OCIJ (PTC75)) Decision on IENG Sary's Appeal against the Closing Order (PTC), D427/1/26, 13 January 2011, 4-5.

[20] *NUON Chea et al.* (002/19-09-2007/ECCC/TC) Decision on Co-Prosecutors' Request to Exclude Armed Conflict Nexus Requirement from the Definition of Crimes against Humanity, E95/8, 26 October 2011 [33].

[21] ibid.

or in connection with an armed conflict. These developments include Control Council Law No.10, the Genocide Convention 1948, the International Law Commission Draft Code of Offenses against the Peace and Security of Mankind 1954, the Convention on the Non-applicability of Statutory Limitations to War Crimes and Crimes Against Humanity 1968 and the International Convention on the Suppression and Punishment of the Crime of Apartheid 1973.[22]

It was the opinion of Judge Antonio Cassese that the specific moment of delinking between crimes against humanity and armed conflict took place in the 1960s due to the Convention on the Non-applicability of Statutory Limitations to War Crimes and Crimes Against Humanity.[23] The other developments of international law before 1975 cannot be said very supportive towards this break. Control Council Law No.10 was adopted as a domestic law which did not have to regard the linkage with war. And the Genocide Convention only applies on genocide, although this is arguably a most serious crime against humanity. It appears to be a far stretch to rely on the definition of genocide to draw on the elements of crimes against humanity.[24] Given that said, the jurisprudence at the ECCC have taken a broad approach in the interpretation of crimes against humanity's nexus to war and will likely become another supportive source for the future prosecution of this group of crimes committed in peacetime.

4.1.2 Contextual Element II: Widespread and Systematic Attack

A different contextual element of crimes against humanity was introduced in the *Justice* case after the Second World War, where another element of 'proof of conscious participation in systematic government organised or approved procedures' was required for crimes against humanity.[25] This was accepted by other post-war jurisprudence on Control Council Law No.10 in Germany

[22] ibid [21]-[30].

[23] Antonio Cassese and others, *Cassese's International Criminal Law* (3rd edn, Oxford University Press 2013) 90.

[24] Scholar has also argued that it is unlikely that states change their mind about the linkage to war only a few years after the Nuremberg. See, William Schabas, *Unimaginable Atrocities: Justice, Politics, and Rights at the War Crimes Tribunals* (Oxford University Press 2012) 110.

[25] Kai Ambos, *Treatise on International Criminal Law: Volume II: The Crimes and Sentencing* (Oxford University Press 2014) 51.

where crimes against humanity were said to be committed in 'context with the system of power and tyranny as it existed in the National-Socialist Period'.[26] Subsequently, the several versions of the International Law Commission Draft Code of Offences against the Peace and Security of Mankind, especially the 1954 version marked a focus of the crime being committed by states and its representatives against their citizens.[27] The 'systematic and widespread attack against any civilian population' as a contextual element of crimes against humanity was finally confirmed in Article 3 of the Statute of the International Criminal Tribunal for Rwanda[28] and was later copied into the ECCC Law[29]. The substantial legal evolvement shows a trend of incorporating more human rights violations within the contour of crimes against humanity, yet the word 'civilian' obviously carries on its historical root in the law of armed conflict. Until the Elements of Crimes were adopted for the International Criminal Court, 'a State or organizational policy' component was installed to further crystallise the requisite widespread or systematic attack.[30]

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[26] ibid.
[27] ibid.
[28] Article 3 of the Statute of the International Criminal Tribunal for Rwanda:
Crimes against Humanity

The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when *committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds*:

(a) Murder;
(b) Extermination;
(c) Enslavement;
(d) Deportation;
(e) Imprisonment;
(f) Torture;
(g) Rape;
(h) Persecutions on political, racial and religious grounds;
(i) Other inhumane acts. (emphasis added by the author)

[29] Article 5 of the ECCC Law: [...] Crimes against humanity, which has no statute of limitations, are any acts *committed as part of a widespread or systematic attack directed against any civilian population, on national, political, ethnical, racial or religious grounds*, such as: […]. (emphasis added by the author)
[30] Article 7 of Elements of Crimes for articles 6, 7 and 8 of the Rome Statute:
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[…]
3. 'Attack directed against a civilian population' in these context elements is understood to mean a course of conduct involving the multiple commission of acts referred to in article 7, paragraph 1, of the Statute against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such

4.1.3 Two Sources of Crimes against Humanity

The transformation of the contextual element shows that crimes against humanity have double characters and sources when committed in times of peace and war. Although originated in association with armed conflict, crimes against humanity has been evolving to incorporate more human rights violations. Antonio Cassese noted the following.

> To a large extent many concepts underlying this category of crimes [crimes against humanity] derive from, or overlap with, those of human rights law (the right to life, not to be tortured, to liberty and security of the person, etc.), laid down in provisions of international human rights instruments (e.g. the Universal Declaration of Human Rights, the UN Covenant on Civil and Political Rights). Indeed, while ICL concerning war crime largely derives from, or is closely linked with, IHL, ICL concerning crimes against humanity is to a great extent predicated upon international human rights law. IHL (which traditionally regulates warfare between or within states), and international human rights law (which regulates what states may do to their own citizens and, more generally, to individuals under their control), are in essence two distinct bodies of law, each arising from separate concerns and considerations.[31]

Kai Ambos also noted that a transforming development of crimes against humanity from requiring a war nexus to requiring a policy demonstrated a conceptual shift towards human rights approach.[32] After analysing developments in several versions of the Draft Code of Offenses against the Peace and Security of Mankind, he noted the following.

> Surprisingly, the 1954 Draft Code of Offenses against the Peace and Security of Mankind replaced the nexus by the more '*Justice case*'-like policy requirement that the perpetrator act 'at the instigation or with toleration of [state] authorities'. The implicit return to the alternative link to authority mentioned in the previous section puts the focus, again, on the relationship between the state and its representatives, vis-à-vis the citizens, that is, a situation that is governed by international human rights law (HRL). With this it becomes clear that the classical laws of war had been increasingly displaced by the then-new HRL, which constitutes the alternative international element of crimes against humanity. The only reminder of the Draft Code's *humanitarian law*

attack. The acts need not constitute a military attack. It is understood that 'policy to commit such attack' requires that the State or organization actively promote or encourage such an attack against a civilian population.

[31] Antonio Cassese and others, *Cassese's International Criminal Law* (3rd edition, Oxford University Press 2013) 92. See also, William A Schabas, *An Introduction to the International Criminal Court* (5th edn, Cambridge University Press 2017) 101-107.

[32] Kai Ambos, *Treatise on International Criminal Law: Volume II: The Crimes and Sentencing* (Oxford University Press 2014) 52-53.

> *origin of crimes against humanity is its definition of possible victims as the 'civilian population'.* But this term also disappeared in subsequent ILC Drafts.[33]

These fragmented and poorly regulated[34] developments of crimes against humanity was destined to cause confusions and uncertainties especially when it is applied at the ECCC in a situation which occurred forty years ago. While more and more human rights violations are alleged to trigger or prosecuted as crimes against humanity, the extensive implications of this process has not been sufficiently explored or articulated.

Not all human rights violations trigger individual criminal responsibility, and certainly not all human rights violations could constitute crimes against humanity. On one hand, the criminalisation of human rights violations means prosecuting individuals through criminal trials, therefore, the development of laws relating to individual criminal responsibility is the key to prosecute and punish human rights violations; on the other hand, human rights law rarely mentions individual liability in cases of human rights violations. Only violations of the most fundamental human rights should be prosecuted and convicted.[35] In the post-World War II era, human rights violations have been prosecuted in pursuit of individual criminal responsibility since late 1970s. According to the database compiled by Kathryn Sikkink, Greece and Portugal were the first countries to hold their own state officials criminally accountable for past human rights violations.[36] On the scope of individual criminal responsibility in relation to human rights violations, Sikkink notes the following.

> This new individual criminal accountability model does not apply to the whole range of civil and political rights but, rather, to a small subset of rights sometimes referred to as '*physical integrity rights,*' the 'rights of the person,' or, when violated, 'core crimes.' These include prohibitions on torture, summary execution, and genocide, as well as on war crimes and crimes against humanity. This model involves an important convergence of international law (human rights law,

[33] ibid. (emphasis added by the author)
[34] Alexander Zahar and Göran Sluiter, *International Criminal Law: A Critical Introduction* (Oxford University Press 2008) 218.
[35] Kai Ambos, *Treatise on International Criminal Law: Volume II: The Crimes and Sentencing* (Oxford University Press 2014) 48-49.
[36] Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics* (WW Norton & Company 2011) 31.

humanitarian law or the laws of war, and international criminal law) and domestic criminal law.[37]

It is argued by Kathryn Sikkink based on her database that 'the emergence of the individual criminal accountability model for basic human rights violations means that the huge disjuncture between the treatment of crime in the domestic and the international realms has started to narrow.'[38] This observation brings us back to the discrepancy between the treatment of political violence in domestic and international criminal laws noted in chapter 2 of this study. Kathryn Sikkink's database on prosecuting human rights violations shows that domestic and international criminal laws are merging and standards of measuring criminal responsibility in the two realms have to be explored and regulated according to a consistent rational, although barriers lie on the way.

One possible barrier is to reconcile the different meanings of some terms shared by human rights law and humanitarian law.[39] Sometimes, the two bodies of laws use the same term but with different meanings due to different contexts in which they have been developed. For example, the word proportionality denotes a balancing relationship between completely different sets of concerns in the two legal regimes. Under human rights law, the proportionality principle measures the state force against the effect on the individual himself. While under international humanitarian law, proportionality requires an assessment of the effect on the surrounding people and objects assuming that targeting on a specific individual is lawful.[40] This example appears more obvious as the term has been defined in both legal regimes clearly enough. The different meanings of the term 'attack' when it is used to describe a military action and non-military action would appear less obvious because the attack out of a military context can be very broad. The previously mentioned 'State or organizational policy' component in the Elements of Crimes for the Rome Statute could be an example of attack in a non-military context and it indeed brings out the human rights dimension of

[37] ibid 16.
[38] ibid 17-18.
[39] Noam Lubell, 'Challenges in Applying Human Rights Law to Armed Conflict' (2005) 87 International Review of the Red Cross 737, 745.
[40] ibid 745-746.

crimes against humanity applicable under the Rome Statute because it focuses on the duty of the authority in charge. However, defining the 'attack' as a state or organisational policy would draw on a very vague range of practices. Countries like China have expressed their concerns that crimes against humanity under the Rome Statute are defined too broadly and they fear that the International Criminal Court will become a world human rights court with large discretionary power.[41]

The Nuremberg definition of crimes against humanity did not include the term 'attack' such that the contextual element was different at that time. After the term 'attack' is introduced into crimes against humanity, this group of crimes cover a wide range of offences. When they are committed in the context of armed conflict, they often refer to military actions or operations of similar nature, but not always or necessarily. When they are committed in peacetime, they could refer to some forms of organised violence, such as abusive use of law enforcement measures or discriminative policies in social and economic governance etc. It will be very hard to draw on a definitive description of the attack once it is detached from military context because it could be carried out through various policies. As policies are normally carried out on a broad social scale according to a systematic manner, the contextual element of 'widespread or systematic attack directed against any civilian population' embedded in Article 5 of the ECCC Law is rendered containing neither substantial nor specific standards. Therefore, the disassociation of crimes against humanity with war has greatly broadened the scope of this particular group of crimes which need to be further defined and clarified.[42]

The following analysis demonstrates how crimes against humanity in peacetime are applied at the ECCC. At times, the Chambers try to reconcile the standards of attack during wartime and peacetime but the effort is not very fruitful. This is mostly due to the unexpected challenge brought up by the revolutionary context and widespread human rights violations contained thereof. The fragmented and problematic developments of crimes against

[41] Dan Zhu, 'China, Crimes against Humanity and the International Criminal Court' (2018) 16 Journal of International Criminal Justice 1021, 1038-1039.
[42] Kai Ambos, *Treatise on International Criminal Law: Volume II: The Crimes and Sentencing* (Oxford University Press 2014) 54.

humanity up until today were tested through the ECCC's findings of their contextual and mental elements.

4.1.4 Findings on the Contextual Element

The Trial Chamber at the ECCC interpreted 'attack' as the following,

> An attack is a course of conduct involving the commission of a series of acts of violence. It is not limited to the use of armed force, encompassing any mistreatment of the civilian population including that reflected by the underlying offences in Article 5 of the ECCC law. An attack on a civilian population is a separate concept from that of an armed conflict. An attack may precede, outlast or continue through an armed conflict, without necessarily being part of it.[43]

Hence, 'attack' refers to a wide range of violence which are not necessarily connected with the use of armed force. This shows a tendency towards human rights approach of interpretation by distinguishing the concept from armed conflicts. However, elsewhere in the same section of the judgment, the Chamber stated that the attack should be directed at the 'population' instead of 'a limited and randomly selected number of individuals', which implies a violation of the principle of distinction rooted in the law of armed conflict.[44] If this is not clear enough, both the Trial Chamber and the Supreme Court Chamber confirmed that 'civilian population' should be understood as of a 'predominantly civilian nature' as opposite to combatants but may include an unsubstantial number of former combatants.[45] Therefore, after the human rights interpretation of the 'attack' was confirmed, the humanitarian law approach was brought back via the understanding of 'civilian'.

Perhaps due to this lack of concrete legal standards for attack in peacetime, the Trial Chamber had to refer to a wide range of underlying offences to establish the requisite attack. Case 002/01 judgment provides a summary of the legal findings regarding the contextual element of crimes against humanity in relation to the CPK revolution. It is helpful to give a complete quote of the relevant part.

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[43] *NUON Chea and KHIEU Samphan* (002/19-09-2007-ECCC-TC) Case 002/01 Judgement, E313, 7 August 2014 [178].
[44] ibid [182].
[45] ibid [183]. See, *NUON Chea and KHIEU Samphan* (002/19-09-2007/ECCC/SC) Appeal Judgement, F36, 23 November 2016 [738].

4.1.2 *Legal Findings*

The Chamber is satisfied that beginning by 17 April 1975 and continuing at least until December 1977, the temporal period at issue in Case 002/01, there was a widespread and systematic attack against the civilian population of Cambodia. *The attack took many forms, including forced transfer, murder, extermination, enforced disappearance and persecution. This attack victimised millions of civilians throughout Cambodia and resulted in a large number of refugees fleeing to neighbouring countries.* The attack was carried out in furtherance of, and pursuant to, Party policies and plans to build socialism and defend the country. *The Chamber is satisfied that the attack was widespread in both its geographical scope and number of victims. The Chamber also finds that the attack was systematic insofar as crimes of such scope and magnitude could not have been random and were carried out repeatedly and deliberately in furtherance of, and pursuant to, Party policies.*

The Chamber finds that this attack was directed against the civilian population of Cambodia. The armed conflict between the Khmer Republic and Khmer Rouge ended on 17 April 1975 when the Khmer Rouge captured Phnom Penh and the Khmer Republic forces surrendered. Thereafter, all Khmer Republic soldiers not taking a direct part in hostilities were civilians or, at minimum, *hors de combat*, thereby enjoying the same protections as civilians. In any event, former Khmer Republic soldiers only formed part of the millions of civilians attacked.

The Chamber further finds that the attack against the civilian population was carried out on political grounds, pursuant to the plans and policies of the Party to build socialism and defend the country. In order to accomplish this goal, the Party considered that the feudalist and capitalist classes had to be eliminated. *These 'New People' were perceived as political and social enemies of the revolution and the collective system. Further, all Cambodians were to be part of the revolution and the collective system. Any who opposed, or were perceived to oppose, the revolution and collective system were targets for mistreatment and acts of violence.* The Chamber is therefore satisfied that the attack was carried out on political grounds.

According to the Closing Order, parts of the attack also targeted Buddhists, the Chams and the Vietnamese on the basis of their nationality, ethnicity, race and/or religion. These portions of the attack fall outside the scope of Case 002/01. Having already determined that the widespread attack was carried out against the civilian population on political grounds, the Chamber therefore declines to make findings as to whether parts of the attack were also done on national, ethnical, religious and/or racial grounds, as this will be examined in future trials.

The Chamber is further satisfied that there is a nexus between the acts of the Accused and the attack. The acts of the direct perpetrators and the Accused during movement of population (phases one and two) and during executions of former Khmer Republic officials at Tuol Po Chrey

> were committed between 17 April 1975 and December 1977 and were done pursuant to, and in furtherance of, the Party's policies and plans to defend and build socialism. Finally, considering the scale and scope of the attack and the fact that it was undertaken in furtherance of, and pursuant to, Party policies and plans, the Chamber is satisfied that both the direct perpetrators and the Accused knew of the attack on the civilian population and that their acts formed part of this attack.
>
> The Chamber is thus satisfied that all the chapeau requirements for the application of Article 5 of the ECCC Law are met.[46]

Statements such as 'the attack took many forms', 'the attack was carried out in furtherance of […]' and 'this attack victimised millions of civilians […]' demonstrate that the widespread or systematic attack recognised by the Trial Chamber refers to an abstract and broad movement. It is not clear whether the revolution to build socialism and defend the country as a whole constitutes the attack or only the key actions taken in giving effect to the revolution constitute the attack. Then the Chamber goes on stating that 'considering the scale and scope of the attack and the fact that it was undertaken in furtherance of, and pursuant to, Party policies and plans'. It appears that the Chamber is making a distinction between the 'Party policies and plans' and the attack. It would have been extremely helpful for the Chamber to name one or two policies that do not fall within the scope of the attack to substantialise this distinction. But it fails to do so.

What is clear is that the Trial Chamber draws on the revolutionary context to build on its finding of the requisite attack. Since the attack does not have a substantial standard, it seeks to establish the scope and the magnitude based on an accumulation of various abuses. More importantly, to combine the various abuses under the same umbrella would help to satisfy the contextual element when it comes to offences that were not actively pursued by the revolution, for instance, insufficient supplies of food, lack of access to medical treatment, overwork at the co-operatives and worksites.[47] In other words, the broadly recognised attack helps to cover the gap between intended attack and unintended results, which enables the Chamber to incorporate more human rights violations as crimes against humanity.

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[46] *NUON Chea and KHIEU Samphan* (002/19-09-2007-ECCC-TC) Case 002/01 Judgement, E313, 7 August 2014 [193]-[198]. (emphasis as originally appeared)

[47] *NUON Chea and KHIEU Samphan* (002/19-09-2007/ECCC/TC) Case 002/02 Judgement, E465, 16 November 2018, 600-632.

If the previous approach appears more suitable to reconciling the standards of identifying an attack during wartime and peacetime, the international co-investigating judge in case 003 and case 004 is more explicit in highlighting the human rights concern in the findings of crimes against humanity. There is one specifically charged policy of targeting the military members that once fought for the former Khmer Republic in case 003. These military members would have found themselves not protected by international law because they were neither combatants taking part in the ongoing armed conflict nor considered as *hors de combat* and in the hands of an opposing belligerent party. The international co-investigating judge identified legal sources for their protection based on some post-Nuremberg but pre-*ad hoc* tribunals' jurisprudence.[48] Judge Michael Bohlander insisted on the broad interpretation of 'civilian population' as the entire population of a certain country by identifying the purpose of crimes against humanity in international law as being 'the protection against human rights violations perpetrated on a large scale against individuals including a state's own nationals, who were not otherwise protected by the existing laws and customs of war'.[49] Judge Bohlander's approach is indeed an interpretation that highlights a human rights law rational regardless of the existence of armed conflicts, although his legal basis includes only three cases from the German Supreme Court in the British Zone after the Second World War hence appears not convincing enough. It remains to be seen how this approach continues to evolve in the up-coming jurisprudence at the ECCC.

4.1.5 Findings on Mental Elements: *Dolus Eventualis* Murder

Due to the requirement of a contextual element, each crime against humanity ends up requiring two mental elements. One is the mental element proper to the particular underlying offence, which is *intent* or recklessness; the other is the level of awareness or *knowledge* of the accused regarding the existence

[48] Nina HB Jørgensen, *The Elgar Companion to the Extraordinary Chambers in the Courts of Cambodia* (Edward Elgar 2018) 223-229.
[49] *MEAS Muth* (003/07-09-2009-ECCC-OCIJ) Notification on the Interpretation of 'Attack against the Civilian Population' in the Context of Crimes against Humanity with regard to a State's or Regime's Own Armed Forces, 7 February 2017 [26]. Eleven *Amicus Curiae* briefs were submitted on this issue before the international co-investigating judge made his final decision.

and nature of the contextual element, i.e. the widespread and systematic attack against any civilian population.[50] For instance, Article 30(1) of the Rome Statute states that 'a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with *intent and knowledge*.' However, it is noted by commentators that no coherent assessment has persisted through the different tribunals concerning the mental elements of crimes against humanity and 'intuitive selectivity became a common method in international criminal justice'.[51]

The first mental element in most of the cases is often the intention to bring about certain underlying offences, with one exception of murder.[52] In the case of murder, the required mental element is not necessarily the intent to kill. 'The intent to inflict serious injury in reckless disregard of human life' could also fulfil the mental element of murder.[53] In other words, it is sufficient for the accused to be aware of the risk that his action might bring about serious consequences for the victim, given the violence or conditions to which the victim would be exposed.[54] This lesser than intentional mental element (also known as recklessness or *dolus eventualis*) of murder is critical to the conviction of population movements as crimes against humanity in case 002/01 at the ECCC and has been appealed by the accused.[55]

Now, this chapter will turn to explain how the ECCC has adjusted the standards of both mental elements and contextual element in its case 002/01. Citing the *Kordić and Čerkez* Appeal Judgement at the International Criminal Tribunal for the former Yugoslavia, the Trial Chamber at the ECCC finds that the elements of murder are:

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[50] Antonio Cassese and others, *Cassese's International Criminal Law* (3rd edn, Oxford University Press 2013) 98.
[51] Alexander Zahar and Göran Sluiter, *International Criminal Law: A Critical Introduction* (Oxford University Press 2008) 210-211.
[52] Antonio Cassese and others, *Cassese's International Criminal Law* (3rd edn, Oxford University Press 2013) 98.
[53] ibid.
[54] ibid 99.
[55] *NUON Chea and KHIEU Samphan* (002/19-09-2007-ECCC-TC) Case 002/01 Judgement, E313, 7 August 2014 [553]-[559], [683], [940]-[941], [1053]; *KHIEU Samphan* (002/19-09-2007-ECCC-SC) Mr KHIEU Samphan's Defence Appeal Brief against the Judgement in Case 002/01, F17, 29 December 2014 [59]-[62]; *NUON Chea* (002/19-09-2007-ECCC-SC) NUON Chea's Appeal against the Judgement in Case 002/01, F16, 29 December 2014, 111ff.

> (i) An act or omission of the accused, or of one or more persons for whose acts or omissions the accused bears criminal responsibility, that caused the death of the victim; and
>
> (ii) The intent of the accused or of the person or persons for whom he is criminally responsible to either to kill or to cause serious bodily harm in the reasonable knowledge that the act or omission would likely lead to death.[56]

After the appeal by both of the defendants, the Supreme Court Chamber reviewed extensively the practice at international tribunals and domestic jurisdictions across all continents and legal traditions worldwide.[57] And it concluded that,

> The review of the practices in the above-mentioned jurisdictions thus discloses that, while there is no uniformity as to whether killings with less than direct intent to kill are considered as 'murder' (or the equivalent term in the relevant language), the causing of death with less than direct intent but more than mere negligence (such as *dolus eventualis* or recklessness) incurs criminal responsibility and is considered as intentional killing. Given that the crime of murder, in international law, is defined as intentional killing, it must be understood that it encompasses direct intent as well as killing with *dolus eventualis*/reckless killing.[58]

This finding appears formalistic in the sense that it only examined the wordings or formal regulations, but ignored the substantial rationale behind *dolus eventualis* responsibility, which is well demonstrated by the French Criminal Code and was also noted by the Supreme Court Chamber, although very briefly. Here, it affirmed:

> The French Criminal Code requires direct intent for the crime of '*meurtre*'. Nevertheless, it is not required that the perpetrator had a precise intent to kill; it is sufficient that the perpetrator wilfully committed acts in the knowledge that they *should normally* cause the death of the victim. The Supreme Court Chamber notes that, depending on the circumstances, this comes close to the notion of *dolus eventualis*. In addition, in France, the crime of '*homicide praeter intentionnel*' covers situations in which the perpetrator intentionally commits acts of violence against the victim, which, in turn, lead, as an unintended result, to the victim's death.[59]

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[56] *NUON Chea and KHIEU Samphan* (002/19-09-2007/ECCC/TC) Case 002/01 Judgement, E313, 7 August 2014 [412].
[57] *NUON Chea and KHIEU Samphan* (002/19-09-2007/ECCC/SC) Appeal Judgement, F36, 23 November 2016 [392]-[410].
[58] ibid [409].
[59] ibid [392]. (emphasis as originally appeared in the Appeal Judgement)

The *dolus eventualis* murder in case 002/01 encompasses the deaths in the process of population movements due to conditions and the lack of assistance.[60] It is expected that the Chambers should assess whether the population movement policy *should normally* cause the death of the victims. This point is indeed where the Chambers should consistently apply its human rights approach of interpretation and also assess the overall conditions vis-à-vis the state's obligations in that circumstances. The revolutionary context would become more relevant and important when a human rights approach is adopted in the finding of crimes against humanity. The result of deaths shall not be the only decisive element towards responsibility. It is rather inflicting or engaging in a *normally* life-endangering situation that should be punished as murder. Moreover, according to the previously quoted *Kordić and Čerkez* from the International Criminal Tribunal for the former Yugoslavia, when the Trial Chamber claims that murder can be committed by an act or omission, it emphasises at the same time that 'conduct of the accused must be a substantial cause of the death of the victim'.[61] This commands the Chambers at the ECCC to contextualise and specify how the population movements were the substantial cause of the deaths, especially in comparison with other external factors, if the concept of *dolus eventualis* murder is adopted.

Meanwhile, it will be very difficult to compile a systematic study of all cases that apply *dolus eventualis* murder as a crime against humanity and find out what kind of omissions were involved in those cases. It suffices to note at this point that the contextual element bears significant weight in the application of *dolus eventualis* murder as a crime against humanity. To be more specific, quoting the following findings in *Stakić* at the ICTY, it is the likelihood of death and level of indifference towards the victim's death that justifies the responsibility for *dolus eventualis* murder.

> The technical definition of *dolus eventualis* is the following: if the actor engages in life-endangering behaviour, his killing becomes intentional if he 'reconciles himself' or 'makes peace' with the likelihood of death. Thus, if the killing is committed with 'manifest indifference to the value

[60] *NUON Chea and KHIEU Samphan* (002/19-09-2007/ECCC/TC) Case 002/01 Judgement, E313, 7 August 2014 [553]-[559].

[61] *Kordić and Čerkez* (IT-95-14/2-T) Judgement, 26 February 2001 [229].

of human life', even conduct of minimal risk can qualify as intentional homicide.[62]

If *dolus eventualis* murder is to be applied in a revolutionary context, the assumed likelihood of deaths and the knowledge or indifferent attitude towards that risk will have to be assessed carefully. The mental elements and the contextual element of crimes against humanity are deeply linked and co-related. The standard of mental elements cannot be 'transplanted' into different cases without considering the difference in the contextual element, or at least it calls for extreme caution when both of them show modifications and departure from customary status.

4.2 Genocide

The following section will briefly set out elements of genocide and then enter into detailed analysis of its application at the ECCC. Two issues sit in the centre of the application of genocide at the ECCC in relation to the revolutionary context. One issue is whether political persecution of 'protected groups' may constitute genocide. This question relates to the potential overlap between genocide and crimes against humanity, especially given that the ECCC has adopted a definition of crimes against humanity which includes 'on national, political, ethnical, racial or religious grounds' in the *chapeau*. Scholars hold different opinions regarding whether certain cases of political persecution also constitute genocide as defined by the Genocide Convention 1948, and sometimes the question is posed as 'whether the Holocaust is unique'.[63]

The revolutionary cause of the CPK is ultimately a political one and directed at the whole nation, although people belonging to particular groups

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[62] *Stakić* (IT-97-24-T) Judgement, 31 July 2003 [587]. Cited in *NUON Chea and KHIEU Samphan* (002/19-09-2007/ECCC/SC) Appeal Judgement, F36, 23 November 2016 [390].

[63] William A Schabas, 'Problems of International Codification: Were the Atrocities in Cambodia and Kosovo Genocide?' (2001) 35(2) New England Law Review 287; Helen Jarvis, 'Trials and Tribulations: The Latest Twists in the Long Quest for Justice for the Cambodian Genocide' (2002) 34(4) Critical Asian Studies 607; Edward Kissi, 'Rwanda, Ethiopia and Cambodia: Links, Faultlines and Complexities in a Comparative Study of Genocide' (2004) 6(1) Journal of Genocide Research 115; William A Schabas, 'Genocide Law in a Time of Transition: Recent Developments in the Law of Genocide' (2008) 61(1) Rutgers Law Review 162; Ben Kiernan, 'Hitler, Pol Pot, and Hutu Power: Common Themes in Genocidal Ideologies' in Alan S Rosenbaum (ed), *Is the Holocaust unique? Perspectives on Comparative Genocide* (3rd edn, Westview Press 2009) 223-230; David L Nersessian, *Genocide and Political Groups* (Oxford University Press 2010).

encountered varying types of persecution. The answer to the question of 'political genocide' may be sought in the second question, which falls on the mental element of genocide, known as the 'genocidal intent'. In other words, are the offences against 'protected groups' separable by nature from the offences of crimes against humanity, especially given the broadly recognised attack? Although both groups of offences belong to the same attack, given the specific identities of the victim groups, an objective approach could still be adopted to deduce a genocidal intent. In that case, should the proportionality between 'genocidal acts' and the overall offences be considered as a substantial factor towards finding the (lack of) genocidal intent? When the overall offences demonstrate a stronger pattern of political persecution, it is arguably more difficult to find the genocidal intent based on the objectively genocidal acts. Antonio Cassese summaries the following:

> When the objectively genocidal act is part of a whole pattern of conduct taking place in the same state (or region or geographical area), or, *a fortiori*, of a policy planned or pursued by the governmental authorities (or by the leading officials of an organised political or military group), then it may become easier to deduce not only the intent but also *lack* of intent from the facts of the case.[64]

It is not unusual to see convictions of both genocide and crimes against humanity in the same case. The cases at the ECCC are noteworthy because the revolutionary context illustrates a prioritisation between motive and intent of crimes which may not be separable at all in the case of genocide.

4.2.1 Definition of Genocide at the ECCC

Given the adoption in 1948 of the Convention on the Prevention and Punishment of the Crime of Genocide (the Genocide Convention), the law of genocide appears much more concrete than the law of crimes against humanity. Both Article 9 of the Agreement and Article 4 of the ECCC Law refer to the Genocide Convention for the definition of this crime and the

[64] Antonio Cassese and others, *Cassese's International Criminal Law* (3rd edn, Oxford University Press 2013) 126. (emphasis as originally appeared)

punishable acts.[65] However, Article 4 of the ECCC Law specified the definition and punishable acts of genocide with slightly different wordings.[66]

Regarding the physical elements of genocide, the list in the Genocide Convention appears exhaustive by stating that 'genocide means any of the *following* acts committed (…), *as such*'. While the list provided in the ECCC Law appears non-exhaustive by stating that 'the acts of genocide (…) mean *any acts* committed (…), *such as* (…)'. It is not clear whether the drafters of the ECCC Law meant to distinguish the definition in the ECCC Law from the Genocide Convention. But it is very unlikely that the drafters wanted to distinguish the two because both Article 4 of the ECCC Law and Article 9 of the Agreement explicitly refer to the Genocide Convention.

Other observers of the ECCC have attributed this difference to the errors made during translation, especially in the parliamentary process in Cambodia, considering that the French version of the ECCC Law does not

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[65] Article II of the Genocide Convention:

In the present Convention, genocide means *any of the following acts* committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, *as such*: (emphasis added by the author)

(a) Killing members of the group;
(b) Causing serious bodily or mental harm to members of the group;
(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(d) Imposing measures intended to prevent births within the group;
(e) Forcibly transferring children of the group to another group.

Article III: The following acts shall be punishable:

(a) Genocide;
(b) Conspiracy to commit genocide;
(c) Direct and public incitement to commit genocide;
(d) Attempt to commit genocide;
(e) Complicity in genocide.

[66] Article 4 of the ECCC Law:

The Extraordinary Chambers shall have the power to bring to trial all Suspects who committed the crimes of genocide as defined in the Convention on the Prevention and Punishment of the Crime of Genocide of 1948, and which were committed during the period from 17 April 1975 to 6 January 1979.

The acts of genocide, which have no statute of limitations, mean *any acts* committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, *such as*: (emphasis added by the author)

- killing members of the group;
- causing serious bodily or mental harm to members of the group;
- deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- imposing measures intended to prevent births within the group;
- forcibly transferring children from one group to another group.

The following acts shall be punishable under this Article:

- attempts to commit acts of genocide;
- conspiracy to commit acts of genocide;
- participation in acts of genocide.

contain this difference.[67] David Scheffer reported that the mentioned differences did not appear in early drafts of the ECCC law in 1999 and 2000. Until then, the texts were mostly adapted from the Statute of the ICTR. Over the years of negotiation, documents were translated back and forth among three languages, Khmer, French and English. Scheffer also predicted that genocide will not be resorted to frequently by the prosecutors given that it would be hard to establish the strict requirements of genocide with the facts of how atrocities unfolded in Cambodia.[68]

Similar with mental elements of crimes against humanity, mental elements of genocide also include two levels: one is the requirement of an intent, which renders that genocide by negligence will be impossible; the other is the specific mental element that is required by the *chapeau* in the definition, namely the intent to destroy, in whole or in part, a national, ethnical, racial or religious group.[69]

The accused has raised the discrepancy between the wordings of ‘as such’ and ‘such as’ as an illegal attempt to lower the mental element required for genocide in the ECCC Law. Ieng Sary argued the following.

> The phrase ‘as such’ is of particular significance to the definition of genocide: it must be demonstrated that the alleged perpetrator not only sought to kill individuals belonging to a particular group, but did so while possessing the intent to destroy, in whole or in part that group *as such*. Indeed, this is where genocide differs particularly from persecution as a crime against humanity. The *Sikirica* Trial Chamber at the ICTY noted that ‘[t]he evidence must establish that it is the group that has been targeted, and not merely specific individuals within that group. That is the significance of the phrase ‘as such’ in the *chapeau*’.[70]

It is also the defence’s opinion that the unique mental element to destroy the protected groups *as such*, implying a collective dimension of the crime, is the

[67] Nina HB Jørgensen, *The Elgar Companion to the Extraordinary Chambers in the Courts of Cambodia* (Edward Elgar 2018) 47. See similar opinion of Judge YOU Ottara, *NUON Chea and KHIEU Samphan* (002/19-09-2007/ECCC/TC) Case 002/02 Judgement, E465, 16 November 2018 [4473], [4474].
[68] David Scheffer, ‘The Extraordinary Chambers in the Courts of Cambodia’ in M Cherif Bassiouni (ed) *International Criminal Law: Volume III International Enforcement* (3rd edn, Martinus Nijhoff Publishers 2008) 241-42.
[69] Antonio Cassese and others, *Cassese’s International Criminal Law* (3rd edn, Oxford University Press 2013) 118.
[70] *NUON Chea and KHIEU Samphan* (002/19-09-2007/ECCC/OCIJ) Ieng Sary’s Supplemental Alternative Submission to His Motion against the Applicability of Genocide at the ECCC, D240/2, 21 December 2009 [13].

key to distinguish genocide from another set of 'less serious' crimes against humanity.[71] Leaving the controversial gravity hierarchy among the atrocity crimes aside, there is an extensive debate regarding the protected groups, especially the political group.[72]

4.2.2 Political Genocide

It is widely accepted that the definition of genocide does not cover 'political genocide' although initiatives and arguments have been made to widen the concept of genocide for the protection of political groups.[73] Charges of genocide at the ECCC were addressed in case 002/02 and relate to the attack and treatment of ethnic minority and religious groups.[74]

The trial judgment of case 002/02 is a document of 2,268 pages, including 22 sections from introduction to disposition and a 23rd section of Judge YOU Ottara's separate opinion on genocide (*prolai pouch-sas*[75]). Findings of genocide only included two groups of victims, the Cham and Vietnamese. Civil parties at the ECCC have requested that broader genocide charges should be investigated in relation to the Khmer national group. The co-investigating judges rejected that request. Similar genocide investigation request in relation to the *Khmer Krom* was also not given significant attention in the Closing Order. Judge YOU Ottara's separate opinion is mostly an objection to the restrictive approach to genocide adopted by the co-investigating judges.[76] Judge YOU admits that the Trial Chamber is limited to the charged scope of offences set out in the Closing Order. It would have required different factual examinations during the court hearings to confirm his proposed genocide approach. Therefore, he is only setting out his legal interpretation, according to which the ECCC could have considered the CPK

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[71] ibid [15]. See also, Antonio Cassese and others, *Cassese's International Criminal Law* (3rd edn, Oxford University Press 2013) 123.
[72] William A Schabas, *Genocide in International Law: The Crime of Crimes* (2nd edn, Cambridge University Press 2009) 154-165.
[73] Beth Van Schaack, 'The Crime of Political Genocide: Repairing the Genocide Convention's Blind Spot' (1997) 106 The Yale Law Journal 2259; David L Nersessian, *Genocide and Political Groups* (Oxford University Press 2010) 1-2.
[74] *NUON Chea et al.* (002/19-09-2007-ECCC-OCIJ) Closing Order, D427, 15 September 2010 [156], [157].
[75] *Prolai pouch-sas* is the word for genocide in Khmer.
[76] *NUON Chea and KHIEU Samphan* (002/19-09-2007/ECCC/TC) Case 002/02 Judgement, E465, 16 November 2018 [4468].

targeting policy actually endangered the survival of the Cambodian national group, hence a genocide encompassing political, economic, social and cultural reasons in the name of societal purification.[77]

According to Judge YOU's interpretation, the perpetrators and victims of genocide could belong to the same group. In the finding of the 'group' within the definition of genocide, both subjective and objective methods should be applied. Here the Judge noted:

> This Chamber has found in its Judgement that such an approach, one that is looking both to objective and subjective features when identifying protected groups, accords with the object and purpose of the Convention. I agree. Indeed, the various references in the case law to the relevance of subjective perceptions, and other features such as the particular political, social and cultural context, are highly instructive in my view. The overall effect is to caution against too rigid or narrow an approach when deciding whether a group falls within the protection of Article 2 of the Convention.[78]

However, this study would note that identifying the protected group by looking at political, social and cultural factors should not be confused with extending the protected groups to cover purely political, economic and social groups. The interpretation of Judge YOU might be stretching the definition of genocide too far. The incorporation of 'auto-genocide'[79] as genocide does not reconcile with the requisite intent primarily because it would be absurd to claim that the CPK policies aimed to destroy the Khmer nation. In that regard, Judge YOU further holds two interpretations on the 'intent to destroy' and 'in whole or in part'.

His first interpretation on the 'intent to destroy' is to consider acts of non-physical destruction as intended to destroy the group. This would enable the court to convict cultural genocide, given that one or more of the listed acts in the definition exist at the same time. Here the Judge affirmed:

> I am therefore satisfied that Article 2 of the Genocide Convention requires proof of an intention to physically destroy the protected group, in whole or in part, but *this intention may be evidenced by a range of*

[77] ibid [4469].
[78] ibid [4482].
[79] The term 'auto-genocide' was firstly used by Jean Lacouture in March 1977 in his review of François Ponchaud's just published book *Cambodia: Year Zero*. Judge YOU rejected in his separate opinion the usage of 'auto' in front of genocide, because that would imply a difference between killing one's own group members and killing members of a different group, a difference that he argues to not exist.

> *factors – including conduct which does not necessarily entail the physical or biological destruction* of individual persons. It would be unnecessary and unwise to seek to set out a predetermined list of the conduct relevant in this regard. Notwithstanding this, I find that this broader interpretation is entirely consistent with Article 2 of the Convention because the underlying test remains the intent to destroy, in whole or in part. What is more, the underlying acts which may themselves lead to criminal liability remain those which are specifically enumerated elsewhere in Article 2. This approach keeps Article 2 within specific bounds, while *directing our attention to the whole range of relevant circumstances in order to properly evaluate genocidal intent.* The key point that I take from this analysis is that *the ECCC could have considered a range of conduct as having been relevant to an intention to destroy a part of the Cambodian national group.*[80]

The second interpretation of Judge YOU is that destroying a significant section of the group, even that section does not constitute quantitative majority of the group, would also trigger genocide. And he mainly relies on the *Krstić* Appeals Chamber judgement and the minority's views expressed in *Vasiliauskas v. Lithuania* at the Grand Chamber of the European Court of Human Rights. His concluding remarks on interpreting the 'in whole or in part' is that:

> […] Indeed, whether a substantial part of a national group has been targeted for destruction will depend upon a full assessment of that national group, or what some of the dissenting judges in *Vasiliauskas v. Lithuania* described as the fabric of the nation. *I see no reason why the law should fail to give such realities their proper meaning.* Moreover, the phrase 'in part' was included in drafts (of the Genocide Convention) at a time when the drafters were also discussing including 'political groups' and even cultural genocide. I therefore find it inconceivable to suggest, as the *Vasiliauskas* majority seems to have done, that the purpose of the reference to 'in part' was to imply a numerical requirement alone.[81]

This passage is based on these two important interpretations that Judge YOU proposed that the CPK could have committed genocide against the Khmer national group if court hearings could be conducted to verify relevant facts. Briefly speaking, Judge YOU finds that genocide can be established if only it can be shown that the CPK has intended to destroy 'in part' the Khmer national group for political, economic and social reasons. However, this

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[80] *NUON Chea and KHIEU Samphan* (002/19-09-2007/ECCC/TC) Case 002/02 Judgement, E465, 16 November 2018 [4491]. (emphasis added by the author)
[81] ibid [4506]. (emphasis added by the author)

admittedly broad approach to genocide appears to confuse the mental and physical elements at some crucial points. To the extent that political genocide and cultural genocide could be covered according to the definition in the Genocide Convention, those political and cultural genocidal acts were considered to help to establish the genocidal intent against the specifically listed groups.[82] It does not elevate some purely political and cultural discrimination as genocide. Exactly as Judge YOU noted himself, 'the underlying acts which may themselves lead to criminal liability remain those which are specifically enumerated elsewhere in Article 2'.[83] At this point, the extended physical element of genocide is mistaken to be mental element by Judge YOU to convict political genocide.

Similar confusion between mental and physical elements appears in his interpretation of the 'in whole or in part' element. In the debate between the quantitative and qualitative approaches, he correctly notes that what matters is to find a *substantial* part of the group has been targeted. However, this only extends the physical element of genocide in the sense that targeting a small number, but the leadership of a group could satisfy as destroy 'in whole or in part'. This does not change the requisite intent to destroy the group. In fact, alleging the perpetrators have to target the *substantial* or leadership part of the group exactly reflects that Judge YOU also agrees that the victim should be the group as a whole, not merely the part being targeted. As confirmed by the majority opinion in case 002/02 judgment,

> The Chamber concurs with the finding of the ICJ, based in part on the *travaux préparatoires* of the Genocide Convention, that the scope of that Convention was limited to the physical or biological destruction of the group to the exclusion of cultural genocide. Even when underlying acts of genocide do not 'directly concern the physical or biological destruction of members of the group [such as causing serious mental harm or forcible transfer of children]', those acts must be carried out 'with the intent of achieving the physical or biological destruction of the group, in whole or in part'.[84]

[82] *Krstić* (IT-98-33-A) Judgement, 19 April 2004 [25]. See also, *Bosnia and Herzegovina v. Serbia and Montenegro*, ICJ, Judgement, 26 February 2007 (ICJ Reports 2007) [344]; *Croatia v. Serbia*, ICJ, Judgement, 3 February 2015 (ICJ Reports 2015) [136].
[83] *NUON Chea and KHIEU Samphan* (002/19-09-2007/ECCC/TC) Case 002/02 Judgement, E465, 16 November 2018 [4491].
[84] *NUON Chea and KHIEU Samphan* (002/19-09-2007/ECCC/TC) Case 002/02 Judgement, E465, 16 November 2018 [800].

Moreover, applying Judge YOU's interpretation of 'in whole or in part' to the facts that the CPK targeted its political opponents or the so-called 'class enemies' as a method of purification, it still does not reconcile the dilemma raised earlier in this section that the CPK as the governing authority of the state aimed to destroy the nation. It is indeed a pity that Judge YOU did not elaborate further his legal discourse and apply on more specific facts.

To sum up, the previous analysis of Judge YOU's separate opinion helps to clarify some debate regarding political, economic and cultural genocide claims in relation to the offences charged at the ECCC. Given a revolutionary context in which the CPK drew its policies primarily based on political and economic factors, a conviction of genocide against the Khmer nation hardly sustains. However, the genocide convictions against the Vietnamese and Cham groups in the context of a revolution might have been found to be so on certain grounds if a formal legal approach is adopted to identify the requisite genocidal intent.

4.2.3 Intent vs. Motive

Looking at the particular offences against non-Khmer national and religious groups, the specific intent to destroy those groups as required by the definition of genocide might be fulfilled. Gregory Stanton has been an active advocate to call for the Khmer Rouge accountability for committing genocide since the 1980s.[85] He was the founder and director of the Cambodian Genocide Project at Yale University since 1981. He was also the President of the International Association of Genocide Scholars from 2007 to 2009. His early initiative was to bring Cambodia to the International Court of Justice in 1980 using the available mechanism for state responsibility provided in the 1948 Genocide Convention.[86] His initiative did not succeed because the Democratic

[85] Gregory H Stanton, 'Kampuchean Genocide and the World Court' (1987) 2 Connecticut Journal of International Law 341; 'Blue Scarves and Yellow Stars: Classification and Symbolization in the Cambodian Genocide' (*Genocide Watch*, 1987) < http://www.genocidewatch.org/images/AboutGen89BlueScarvesandYellowStars.pdf> accessed 20 October 2019; 'The Cambodian Genocide and International Law' in Ben Kiernan (ed), *Genocide and Democracy in Cambodia: the Khmer Rouge, the United Nations, and the International Community* (Monograph Series No. 41, Yale University Southeast Asia Studies 1993) 141-161.

[86] Gregory H Stanton, 'The Cambodian Genocide and International Law' in Ben Kiernan (ed), *Genocide and Democracy in Cambodia: the Khmer Rouge, the United Nations, and the*

Kampuchea government was the only legal representative of Cambodia in the United Nations until 1986, and after that they were joined by the other parties to the Coalition Government of Democratic Kampuchea (CGDK) which represented Cambodia at the United Nations until 1990.[87]

Gregory Stanton's finding of Cambodian genocide was substantially supported by a classification and symbolisation system adopted by the CPK to force the 'new people' to wear blue scarfs.[88] According to the field experience of Gregory Stanton and Ben Kiernan in Cambodia:

> The Khmer Rouge committed genocide when they classified the Cham Muslims, the Buddhist monks, Christians, and other groups as class enemies and then destroyed them. *They may also have committed legal genocide, and certainly committed politicide, a crime against humanity*, by classifying part of the Democratic Kampuchean national group, the people of the Eastern Zone, as enemies, marking them with [possibly a misspelling for the word wear] blue scarves, and marching them to their deaths.[89]

The blue scarfs resembled the yellow stars used by Nazi Germany to mark the Jewish. Although classification and symbolisation are often the first steps in genocide processes,[90] a genocidal intent should not be taken as the same as discrimination. Judgment in case 002/02 at the ECCC confirmed that,

> In order to infer specific intent, the Chamber needs to consider 'whether all of the evidence, taken together, demonstrated a genocidal mental state'. *Where an inference of specific intent is drawn, it must be the only reasonable inference available on the evidence. Factors relevant to this analysis may include the general context, the perpetration of other culpable acts systematically directed at the same group, the scale of atrocities committed, the systematic targeting of victims on account of their membership in a particular group, or the repetition of destructive and discriminatory acts.* A Chamber can have regard to speeches made in public or in meetings to support a finding of specific intent. The existence of a plan or policy, while not a requirement of the crime of

International Community (Monograph Series No. 41, Yale University Southeast Asia Studies 1993) 141-161.

[87] Suellen Ratliff, 'UN Representation Disputes: A Case Study of Cambodia and a New Accreditation Proposal for the Twenty-First Century' (1999) 87(5) California Law Review 1207-1264, 1208.

[88] Gregory H Stanton, 'Blue Scarves and Yellow Stars: Classification and Symbolization in the Cambodian Genocide' (*Genocide Watch*, 1987) <http://www.genocidewatch.org/images/AboutGen89BlueScarvesandYellowStars.pdf> accessed 20 October 2019.

[89] ibid. (emphasis added by the author)

[90] Gregory H Stanton. 'The Ten Stages of Genocide' (*Genocide Watch*, 1987) <http://genocidewatch.org/genocide/tenstagesofgenocide.html> accessed 20 October 2019.

> genocide, may support the inference that the perpetrator has the requisite specific intent.[91]

In this finding, the Trial Chamber confirms that an inference of specific intent must be the only reasonable inference available on the evidence. As noted by William Schabas on the mental element of genocide:

> [I]t should be necessary for the prosecution to establish that genocide, taken in its collective dimension, was committed 'on the grounds of nationality, race, ethnicity, or religion'. The crime must, in other words, be motivated by hatred of the group. The purpose of criminalizing genocide was to punish crimes of this nature, not crimes of collective murder prompted by other motives. In the classic cases of genocide – Nazi Germany and Rwanda – the existence of motive cannot be gainsaid.[92]

The previous section's analysis regarding political genocide shows that the legal basis for a genocide against Khmer national group alleged by Gregory Stanton and Judge YOU is rather thin. However, that does not mean the genocide charge has no stand at all. In relation to the treatment of the Cham, the accused were charged with multiple crimes of genocide and crimes against humanity. The genocide charge includes genocide by killing members of the group from 1977, and the scope of Case 002/02 encompasses all facts relevant to the treatment of Cham nationwide.[93] In the judgment in case 002/02, the targeting policy was as follows:

> The Chamber finds that the CPK, in the effort to establish an atheistic and homogenous society without class divisions, targeted the Cham as an ethnic and religious distinct group throughout the DK period. This policy evolved over time and was characterised by an escalation of the means used to implement such policy. In the early years of the DK period, the CPK, in an initial attempt to *assimilate* them, specifically targeted the Cham *by restricting their cultural and religious practices*. When the Cham resisted abandoning their ethnic and religious identity, 'rebellions' were brutally suppressed, leaders of the rebellions were executed and Cham communities dispersed. *A final shift occurred between 1977 and 1978, when purges of all Cham were ordered. This coincided with the escalation of the conflict with Vietnam when the need to preserve the Khmer race and to protect Cambodian population from*

[91] *NUON Chea and KHIEU Samphan* (002/19-09-2007/ECCC/TC) Case 002/02 Judgement, E465, 16 November 2018 [803]. (emphasis added by the author)
[92] William A Schabas, *Genocide in International Law: The Crime of Crimes* (2nd edn, Cambridge University Press 2009) 306.
[93] *NUON Chea and KHIEU Samphan* (002/19-09-2007/ECCC/TC) Case 002/02 Judgement, E465, 16 November 2018 [3171], [3184].

> *all enemies was considered as a top priority.* The Chamber will now turn to the implementation of this policy.[94]

Noting that there is a significant policy shift in 1977 in the Eastern Zone and explicit order was given to exterminate all Cham in the country, the Chamber finds that 'specific genocidal intent had crystallised by at least 1977, when orders to kill all Cham were disseminated by CPK cadre and systematic mass arrests and killings started'.[95] It is the policy of targeting and destroying all Cham nationwide that triggers genocide. According to the Trial Chamber, previous assimilating and restricting cultural and religious practices were convicted as crime against humanity of persecution on religious ground.[96] It should be understood that the genocide conviction in the judgment refers to the same offences convicted as crime against humanity of persecution on religious ground in the sense that those offences assist to prove the genocide intent.[97] The Chamber claimed that its finding of genocide by killing members of the group encompasses facts from 1977 because of the charges brought up by the Closing Order.[98] It is not clear how the Chamber will deal with the cumulative convictions if pre-1977 events were also charged as genocide. What is certain is that the Chamber appears reluctant to find genocide if it is not for the 'crystallised' orders to kill all Cham nationwide.

The Trial Chamber's judgment reveals two scenarios in which intent and motive of genocide may be prioritised or have a sort of hierarchy. In the first scenario, genocidal acts could be committed by the perpetrators, such as restricting cultural and religious practices or adopting other assimilating measures. There is not necessarily an inferred genocidal intent given that the context could entail other motives of classification or targeting. For instance, the Chamber did not convict the persecution of the Cham occurring before 1977 as genocide although it recognised that the CPK intended to establish an atheistic and homogenous society and no religious practice was tolerated. In this scenario, the genocidal intent is not the only reasonable inference

[94] ibid [3228]. (emphasis added by the author)
[95] ibid [3347].
[96] ibid [3332].
[97] ibid [3343]-[3346].
[98] ibid [3184].

available on the evidence, hence cannot be established.[99] In the second scenario where there is explicit order to destroy or annihilate the targeted group, genocidal intent could be established regardless of the context. For instance, the Chamber convicted post-1977 persecutions of Cham as genocide even though it found that those persecution coincided with the escalation of the conflict with Vietnam.[100]

In summary, the Chamber's approach of finding the genocidal intent affirms the following two situations: in case there are multiple motives or merely one non-genocidal motive, the genocidal intent cannot be inferred; in case the policies or orders explicitly call for the annihilation of the group, genocidal intent is established. Whatever motives that might co-exist become secondary or non-decisive. This approach leads to a very thin line between genocidal and non-genocidal events by primarily relying on the formal policy lines of the perpetrators. A similar approach is applied on the genocide conviction in relation to the targeting of the Vietnamese group. The Chamber finds that genocide by killing was committed against the Vietnamese group onwards from April 1977.[101]

> The Chamber finds that CPK internally and publicly targeted the Vietnamese as a group through contemporaneous documents and speeches identifying them as 'poisonous foreigners' from the early stages of the DK regime and calling for their expulsion from Cambodia until late 1976, as well as, from April 1977, their destruction; […][102]

This formalistic approach does not recognise the targeting of Buddhist group in Cambodia as genocide. One reason could be that the Closing Order only charged the accused with crimes against humanity of murder and persecution on religious grounds with respect to this group.[103] The fact that

[99] This is the scenario where Judge YOU Ottara disagree with the majority of the Chamber. In his opinion, as long as the genocide intent is checked, then regardless if there are other motives, genocide can be triggered. Note that his interpretation of genocide intent is a broad one. See *NUON Chea and KHIEU Samphan* (002/19-09-2007/ECCC/TC) Case 002/02 Judgement, E465, 16 November 2018 [4512].

[100] *NUON Chea and KHIEU Samphan* (002/19-09-2007/ECCC/TC) Case 002/02 Judgement, E465, 16 November 2018 [3228].

[101] The temporal frame was due to the limit of the Closing Order as well. It is not clear why the Chamber did not change this given that it has claimed, on multiple occasions, authority to modify both the legal and factual characterisations of the Closing Order.

[102] *NUON Chea and KHIEU Samphan* (002/19-09-2007/ECCC/TC) Case 002/02 Judgement, E465, 16 November 2018 [3518].

[103] ibid [3169].

the Chamber did not change this legal characterisation shows certain mutual agreement between the Chamber and the co-investigating judges on this formalistic approach. The difference in legal findings regarding different groups only confirms that the Chamber did not give significant weight to the reasons of targeting the groups. It is rather the means of targeting that decide whether genocide was committed. More importantly, it is indeed the expressed orders that lead the Chamber to different convictions in relation to different groups, although the Chamber recognises at the same time that persecutions against these groups demonstrate a consistent policy of the CPK to abolish any religion whatsoever. The formalistic approach shows a substantial departure from the requisite intent of genocide by its definition which focuses on the reason to target instead of the means. It also contravenes the Chamber's own previous finding that the general context shall be considered in the inference of genocide intent.[104] The focus on the means of targeting leads the judgment onto prolonged factual descriptions, which shows a lack of focus and consistent legal reasoning.

Instead, if one adopts a more substantive approach to the genocidal intent that coincides with a genocidal motive, it would become clear that fulfilling the revolutionary ideology of the CPK is the single overall motive of all policies adopted accordingly. A similar approach can be seen in the report of the International Commission of Inquiry on Darfur set up by the United Nations. The report held that attacks by Sudanese government militias on villages inhabited by African tribes showed a lack of genocidal intent.

> This case clearly shows that the intent of the attackers was not to destroy an ethnic group as such, or part of the group. Instead, the intention was to murder all those men they considered as rebels, as well as forcibly expel the whole population so as to vacate the villages and prevent rebels from hiding among, or getting support from, the local population.
>
> Another element that tend to show the Sudanese Government's lack of genocidal intent can be seen in the fact that persons forcibly dislodged from their villages are collected in IDP camps. In other words, the populations surviving attacks on villages are not killed outright, so as to eradicate the group; they are rather forced to abandon their homes and live together in areas selected by the Government. While this attitude of the Sudanese Government may be held to be in breach of international legal standards on human rights and international criminal

[104] ibid [803].

> law rules, it is not indicative of any intent to annihilate the group. This is all the more true because the living conditions in those camps, although open to strong criticism on many grounds, do not seem to be calculated to bring about the extinction of the ethnic group to which the IDPs belong. Suffice it to note that the Government of Sudan generally allows humanitarian organisations to help the population in camps by providing food, clean water, medicines and logistical assistance (construction of hospitals, cooking facilities, latrines, etc.)[105]

The more substantive approach would indeed give weight to the context in finding the genocidal intent, for instance the motive to suppress 'rebels', which can be easily found in the offences committed by the CPK especially in relation to the significant events in eastern areas near Vietnam such as Kroch Chhmar District, Prey Veng and Svay Rieng Provinces where Cham and Vietnamese were killed in a collective manner. The Trial Chamber has decided that these collective killings constitute genocide based on the formal approach of identifying the genocidal intent.[106] It can be argued that a more substantive approach should have been taken and it would indeed award valid consideration to the revolutionary context in finding the genocidal intent.

4.3 Crimes against Humanity vs. Genocide

Based on the previous analysis of elements of crimes against humanity and genocide, the following section further clarifies two questions: 1) whether genocide has been committed under the Democratic Kampuchea and to what extent; 2) whether it is possible to reach cumulative convictions between the two. After giving some insights on the legal characterisation of the Khmer Rouge atrocities, it will be also shown that the debate about Cambodian genocide is very likely to continue.

4.3.1 Legal Characterisation of the Khmer Rouge Atrocities

In terms of the legal characterisation of the Khmer Rouge atrocities, the first trial of Khmer Rouge leaders held in 1979 by then newly established government of the People's Republic of Kampuchea should be mentioned. In

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105 Antonio Cassese and others, 'Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General' (Office of the United Nations High Commissioner for Human Rights, 25 January 2005) [514]-[515] <https://www2.ohchr.org/english/darfur.htm> accessed 1 July 2019.

106 *NUON Chea and KHIEU Samphan* (002/19-09-2007/ECCC/TC) Case 002/02 Judgement, E465, 16 November 2018 [3347]-[3348], [3518]-[3519].

1979, the invasion of Vietnam destroyed the rule of the CPK in Cambodia and supported another communist regime, the People's Republic of Kampuchea (PRK). It was renamed as the State of Cambodia (SOC) in May 1989. A People's Revolutionary Tribunal was established in Phnom Penh 'to try the Pol Pot–Ieng Sary Clique for the Crime of Genocide' according to Decree Law No.1 passed by the government.[107] The trial lasted for five days from 15th to 19th August 1979 and was conducted *in absentia* of the accused. Foreign lawyers and observers were invited to participate. The judgment was made by one Presiding Judge and ten 'people's assessors'.

Apart from legal shortcomings, this trial was also criticised because of its political motives. The verdict was predetermined. The Presiding Judge spoke about the objectives of the trial as exposing the criminal acts to the whole world on the eve before the trial started.[108] Five days were very short considering the scale of the alleged criminal acts, hearing testimonies from 39 witnesses, and even showing films about the sites of destruction. The verdict was delivered after a brief adjournment at the end of the trial. The defence lawyers were 'arranged' to accept all the charges without any real attempt of defence. [109]

The People's Revolutionary Tribunal was the first trial that applied the Genocide Convention since its adoption on 9 December 1948 and entered into force on 12 January 1951. The newly formed government may have also hoped for certain deterrence effect against the Khmer Rouge followers after the conviction and sentence to death of the two leaders. Given the events that followed, the trial did not help in this regard. But it did help to preserve certain evidence and documents.

According to the only international law expert among all the invited foreign experts, John Quigley, the two accused Khmer Rouge leaders, Pol Pot and Ieng Sary had indeed committed genocide. Regarding the absence of a racial animus between the victims and perpetrators because as both were Khmers, John Quigley gave two reasons for this conclusion. First that the

[107] Tom Fawthrop and Helen Jarvis, *Getting away with Genocide? Elusive Justice and the Khmer Rouge Tribunal* (Pluto Press 2004) 41.
[108] ibid 44.
[109] ibid 40-51.

Genocide Convention does not exclude targeting members of one's own national, ethnic, racial, or religious groups. Second, genocide may be present even if the effort is not directed against the entire group.[110] This resembles Judge YOU's separate opinion in case 002/02 and Gregory Stanton's opinion as mentioned earlier in this chapter.

The majority opinion in the current trials of the Khmer Rouge leaders recognised two genocides against Cham and Vietnamese respectively. It is much more specific than the findings at the People's Revolutionary Tribunal and adopts a significantly narrower interpretation of genocide. Although the finding of the genocidal intent and the handling of cumulative convictions[111] between genocide and crimes against humanity appears formalistic, it cannot be said to contravene the international law of genocide.

4.3.2 Labelling the Khmer Rouge Atrocities as Genocide

Two arguments stand out to label the situation under the Democratic Kampuchea as genocide. The first argument is put forward by genocide scholars that the situation should be legally recognised as genocide, based on a broad definition of genocide, and not as other international crimes. The second argument is advanced by policy makers that the rhetorical power of the word genocide would help to motivate and mobilise political actions. On 30 April 1994, the US Congress passed an Act titled 'Cambodian Genocide Justice Act'. This Act includes four sections after being classified into the American public law code.[112] The Act states that 'it is the policy of the United

[110] Howard J De Nike and others (eds), Genocide in Cambodia: Documents from the Trial of Pol Pot and Ieng Sary (University of Pennsylvania Press 2000) 2-7.

[111] *NUON Chea and KHIEU Samphan* (002/19-09-2007/ECCC/TC) Case 002/02 Judgement, E465, 16 November 2018 [4334]-[4336].

[112] Cambodian Genocide Justice Act, 22 U.S.C. 2656, Part D, Sections 571-574, 30 April 1994. (Hereafter Cambodian Genocide Justice Act)

Sec. 571. Short Title.

This part may be cited as the 'Cambodian Genocide Justice Act'.

Sec. 572. Policy.

a. In General. -- Consistent with international law, it is the policy of the United States to support efforts to bring to justice members of the Khmer Rouge for their *crimes against humanity* committed in Cambodia between April 17, 1975, and January 7, 1979.

b. Specific Actions Urged. -- To that end, the Congress urges the President --

1. to collect, or assist appropriate organizations and individuals to collect relevant data on *crimes of genocide* committed in Cambodia;

States to support efforts to bring to justice members of the Khmer Rouge for their crimes against humanity'.[113] However, shortly after the statement on the general policy goal, the Congress urges the President to take actions in regard to 'assist appropriate organizations and individuals to collect relevant data on crimes of genocide committed in Cambodia'.[114] The word genocide and crimes against humanity appear to be used interchangeably in the required acts on the parts of the President and the Office of Cambodian Genocide Investigation established within the Department of State.

The Cambodian Genocide Justice Act is not the only time when the US law and policy tends to use genocide and crimes against humanity interchangeably. The Genocide Prevention Task Force at Washington DC issued a report in 2008 titled 'Preventing Genocide: A Blueprint for US Policymakers'.[115] The Genocide Prevention Task Force was co-chaired by former Secretary of State Madeleine Albright and former Secretary of Defense William Cohen. The report proposed to the US government a series

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2. in circumstances which the President deems appropriate, to encourage the establishment of a national or international criminal tribunal for the prosecution of those accused of *genocide* in Cambodia; and

3. as necessary, to provide such national or international tribunal with information collected pursuant to paragraph (1).

Sec. 573. Establishment of State Department Office.

a. Establishment. […]

b. Purpose. -- The purpose of the Office shall be to support, through organizations and individuals with whom the Secretary of State may contract to carry out the operations of the Office, as appropriate, efforts to bring to justice members of the Khmer Rouge for their *crimes against humanity* committed in Cambodia between April 17, 1975, and January 7, 1979, including--

1. to investigate *crimes against humanity* committed by national Khmer Rouge leaders during that period;

2. to provide the people of Cambodia with access to documents, records, and other evidence held by the Office as a result of such investigation;

3. to submit relevant data to a national or international penal tribunal that may be convened to formally hear and judge the *genocidal acts* committed by the Khmer Rouge; and

4. to develop the United States proposal for the establishment of an international criminal tribunal for the prosecution of those accused of *genocide* in Cambodia.

c. Contracting Authority. […]

d. Notification to Congress. […]

Sec. 574. Reporting Requirement. […] (emphasis added by the author)

[113] Section 572 (a), Cambodian Genocide Justice Act.

[114] Section 572 (b) (1), Cambodian Genocide Justice Act.

[115] Madeleine K Albright and William S Cohen (co-chairs), *Preventing Genocide: A Blueprint for U.S. Policymakers* (Washington, DC: Genocide Prevention Task Force 2008) <https://www.usip.org/sites/default/files/files/genocide_taskforce_report.pdf> accessed 26 March 2019.

of warning and preventing mechanisms to respond to the emerging crisis situations, which are generally addressed as genocide in the report and actually include both genocide and other atrocity crimes.[116]

In the middle of the trials at the ECCC, Cambodia's ruling party, the Cambodian People's Party (CPP), pushed the Parliament to pass a Law Against Non-Recognition of Khmer Rouge Crimes Committed During the Democratic Kampuchea Period, which criminalises the 'non-recognition, downplaying or denial' of Khmer Rouge crimes.[117] Prime Minister Hun Sen has sought to situate the law in relief of some of the European states' criminalisation of Holocaust denial. Although the law has been criticised by local human rights advocates, including the director at the Documentation Center of Cambodia,[118] due to its potential threat to the freedom of speech, Khmer Rouge atrocities will continue being associated and compared with the Holocaust and other genocides.

To sum up, adopting the narrow definition of genocide, this thesis holds the opinion that the Khmer Rouge atrocities against the targeted protected groups are mostly crimes against humanity, although it is justifiable that genocide was committed when the court only looks at specific incidents in which particular orders were made. The judgment in case 002/02 has taken this formal approach. This chapter argues that a more substantive approach should have been taken and it would indeed award valid consideration to the revolutionary context in finding the genocidal intent. In other words, the revolutionary context has a potential role in distinguishing crimes against humanity from genocide. Moreover, it will not be proportionate to label the overall atrocities under the Democratic Kampuchea by referring to a few selected events. Despite the legal characterisation of the Khmer Rouge atrocities, the public will probably continue using the genocide label either due to the perceived extraordinary gravity carried by this particular crime or the interchangeable usage between genocide and crimes against humanity. In

[116] William A Schabas, '"Definitional Traps" and Misleading Titles' (2009) 4(2) Genocide Studies and Prevention 177, 181.
[117] Peter Manning, 'Recognising Rights and Wrongs in Practice and Politics: Human Rights Organisations and Cambodia's Law Against the Non-Recognition of Khmer Rouge Crimes' (2019) 23(5) The International Journal of Human Rights 778, 780.
[118] ibid 781.

any case, the political agenda behind the genocide label ought to be scrutinised carefully.

4.4 Concluding Remarks

This chapter examined the impact of the revolutionary context during the Democratic Kampuchea on the ECCC's application and interpretation of crimes against humanity and genocide. The charged offences took place at a time when crimes against humanity were transforming but not adequately codified. The changing contextual element of crimes against humanity from a nexus to war to the systematic and widespread attack was not explicitly confirmed in international instrument until the establishment of the International Criminal Tribunal for Rwanda. Even after the new contextual element was explicitly regulated in international law, its interpretation was still haunted by crimes against humanity's two competing legal sources, namely humanitarian law and human rights. Adopting the humanitarian law interpretation would leave the targeting and treatment of the state's own citizens and military members unprotected; adopting the human rights law interpretation would cast doubts on the standards of treatment, especially in relation to the population movements, cooperatives and worksites. Eventually, convictions of crimes against humanity were grounded in the scope and magnitude of the attack. Just as the Trial Chamber concludes, 'the attack was systematic insofar as crimes of such scope and magnitude could not have been random and were carried out repeatedly and deliberately in furtherance of, and pursuant to, Party policies'.[119]

The interpretation of crimes against humanity at the ECCC raises two further issues. One is in relation to the principle of legality when the Chambers try to reconcile the interpretations of the attack during wartime and peacetime, especially its broad and general finding of the attack committed by the CPK; the other is in relation to the jurisprudential value of the Chambers' interpretation. Without addressing the illegality of the attack *per se*, the Chambers' conviction is primarily based on the magnitude of results. The newly interpreted crimes against humanity might help to prosecute and

[119] *NUON Chea and KHIEU Samphan* (002/19-09-2007/ECCC/TC) Case 002/001 Judgement, E313, 7 August 2014 [193].

punish potential perpetrators but hardly provide any benefit towards prevention, because crimes require a certain level of magnitude in order to be triggered. These issues will be further explored in chapter 6 of this study, which focuses on the importance of the illegality of the attack in the definition of crimes against humanity. Given that the Chambers adopted the human rights approach, it is expected that the circumstances, for instance, the fear of bombing, lack of food in the cities, treatments of the 'new people' in the cooperatives and worksites would be assessed according to human rights standards. And these circumstances should be considered in light of defences raised by the accused.

The genocide debate around the atrocities committed by the Khmer Rouge demonstrates that the revolutionary context substantially engages with the definition and the finding of its mental element, especially when the context suggests multiple co-existing motives. Due to the revolutionary context that features armed conflict and oppressing domestic rebellions, jurisprudence at the ECCC demonstrates new contributions to the issues of political and cultural genocide. Detailed analysis and critique have been made regarding Judge YOU Ottara's separate opinion on genocide.

This chapter finds that the Chamber's approach of finding the genocidal intent is essentially a formalistic one. In case there are multiple motives or merely one non-genocidal motive, the genocidal intent cannot be inferred; in case the policies or orders explicitly call for the annihilation of the group, genocidal intent is established. Other co-existing motives suggested by the context become secondary or non-decisive. This approach leads to a very thin line between genocidal and non-genocidal events by primarily relying on the formal policy lines of the perpetrators. For instance, the Trial Chamber only finds the persecutions against Cham and Vietnamese constitute genocide, while convicting the persecutions against Buddhists as persecution on religious ground. On the other hand, if a more substantial approach were to be adopted, the revolutionary context would make a significant difference on the legal characterisation of the offences committed against particular groups and could be used to distinguish between crimes against humanity and genocide.

5 Revolutionary Context and the Mode of Liability

To link a wide range of crimes to a handful of senior individuals at trial, international criminal law requires certain particular mechanisms for guilt attribution. James Stewart pointed out that if everyday rules of criminal attribution were to be applied at the trials at Nuremberg, Hitler maybe only convicted as an accomplice to the Holocaust.[1] This result would be morally unsupportable because it fails to attribute the guilt to the perpetrator who deserves it the most.[2] Similar moral assumption is admitted at the ECCC which is established to 'bring to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations'.[3] It is assumed that the responsibility of the charged senior leaders carries more weight compared with the foot soldiers and other lower cadres of the CPK. The main challenge for the Chambers in this context is to establish the link between the charged offences and the accused who are likely to have been remote from the crime scenes and did not directly participate in the implementations of the revolutionary goals they have drafted.[4]

To attribute the guilt among a group of perpetrators, two major theories are currently in use at international criminal courts and tribunals. They are joint criminal enterprise (JCE) and co-perpetration.[5] The ECCC has followed one of the legacies from the *ad hoc* tribunals and adopted the JCE doctrine, which is primarily a subjective approach to joint perpetration.[6] This chapter addresses the revolutionary context as it relates to the JCE doctrine

[1] James G Stewart, 'The End of "Modes of Liability" for International Crimes' (2012) 25 Leiden Journal of International Law 165.
[2] ibid 167.
[3] Article 2 new of the ECCC Law.
[4] David Cohen and others, *'A Well-Reasoned Opinion?': Critical Analysis of the Judgment in Case 002/01* (East-West Center, 2015) 38.
[5] Antonio Cassese and others, *Cassese's International Criminal Law* (3rd edn, Oxford University Press 2013) 162.
[6] *Tadić* (IT-94-1-A) Judgement, 15 July 1999 [178]-[237]. For an earlier analysis of the establishment of the JCE doctrine with exhaustive references to relevant cases at the *ad hoc* tribunals and the Special Court for Sierra Leone in light of post-WWII jurisprudence, see Shane Darcy, *Collective Responsibility and Accountability under International Law* (The Procedural Aspects of International Law Monograph Series, Koninklijke Brill NV 2007) 226-253.

and other modes of liability applied at the ECCC. Regarding individual responsibility, the ECCC Law states:

> Chapter VIII Individual Responsibility
>
> Article 29 new
>
> Any Suspect who planned, instigated, ordered, aided and abetted, or committed the crimes referred to in article 3 new, 4, 5, 6, 7 and 8 of this law shall be individually responsible for the crime.
>
> The position or rank of any Suspect shall not relieve such person of criminal responsibility or mitigate punishment.
>
> The fact that any of the acts referred to in Articles 3 new, 4, 5, 6, 7 and 8 of this law were committed by a subordinate does not relieve the superior of personal criminal responsibility if the superior had effective command and control or authority and control over the subordinate, and the superior knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators.
>
> The fact that a Suspect acted pursuant to an order of the Government of Democratic Kampuchea or of a superior shall not relieve the Suspect of individual criminal responsibility.[7]

Convictions in both case 001 and case 002 at the ECCC are primarily based on the JCE and several other modes of liability, including planning, ordering, aiding and abetting, instigating, and superior responsibility.[8]

The JCE doctrine has received a wide range of critiques since its initial use by the International Criminal Tribunal for the former Yugoslavia.[9]

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[7] Chapter VIII Individual Responsibility, Article 29 new of the ECCC Law.

[8] It should be noted here that the inconsistency between English and French versions of the ECCC Law happens again regarding the translation of aiding and abetting. The French version adopted the word *complicité*, although *aidé et encouragé* would have been more accurate to reflect the nature of aiding and abetting liability in customary international law. See, *KAING Guek Eav alias 'Duch'* (001/18-07-2007-ECCC/TC) Judgement, E188, 26 July 2010 [532]; *NUON Chea and KHIEU Samphan* (002/19-09-2007-ECCC-TC) Case 002/01 Judgement, E313, 7 August 2014 [703].

[9] Allison Marston Danner and Jenny S Martinez, 'Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law' (2005) 93(1) California Law Review 75; Mohamed Elewa Badar, 'Just Convict Everyone – Joint Criminal Enterprise: From Tadić to Stakić and Back Again' (2006) 6 International Criminal Law Review 293; Jens David Ohlin, 'Joint Criminal Confusion' (2009) 12(3) New Criminal Law Review 406; James G. Stewart, 'The end of 'modes of liability' for international crimes' (2012) 25(1) Leiden Journal of International Law 165; Simon M Meisenberg, 'Joint Criminal Enterprise at the Special Court for Sierra Leone' in Charles Chernor Jalloh (ed), *The Sierra Leone Special Court and Its Legacy: The Impact for Africa and International Criminal Law* (Cambridge University Press 2014) 69; Miles Jackson, 'The Attribution of Responsibility and Modes of Liability in International Criminal Law' (2016) 29 Leiden Journal of International Law 879.

The ECCC has made significant decisions regarding this particular doctrine's application, especially about the so-called extended form of JCE (JCE III).[10] However, questions remain regarding the interpretation of JCE I. It will be demonstrated in this chapter that the revolutionary ideology and subsequent policies of the CPK play an important role in the finding of the common criminal purpose, which is critical in the JCE doctrine's application and has caused disagreements among the Chambers at the ECCC. For instance, the Supreme Court Chamber corrected the Trial Chamber's finding in its appeal judgment in case 002/01 and stated the following.

> [I]n order to give rise to criminal liability, the common purpose has to be criminal, in the sense that it either *amounted to* or *involved* the commission of a crime. […] *Elsewhere, the Trial Chamber stated that the common purpose was 'to implement a socialist revolution in Cambodia', which was 'not criminal in itself'.* As such, however, it would have been inapt to constitute a common purpose giving rise to *criminal* liability. Similarly, taken on its own, the Trial Chamber's finding that the socialist revolution was to be implemented 'by whatever means necessary' would be an insufficient basis for identifying a *criminal* common purpose as it is not clear from this formulation whether this would include the commission of crimes and, if so, which.[11]

This chapter will start by introducing the JCE doctrine as it stands in international criminal law, in particular its requisite objective and subjective elements. The next section will provide an overview of the application of the JCE doctrine in case 001 and case 002 at the ECCC featuring important legal and factual findings regarding the objectives and means of the CPK revolution. Different criteria have been identified and discussed by the Chambers at the ECCC to define what common purpose is criminal and what is not. Analysis of the applied criteria in case 002 at the ECCC shows a paradox that the Supreme Court Chamber appears unable to avoid. On one hand, the Supreme Court Chamber confirmed that JCE III was not a part of customary international law by 1975 and the common purpose has to be criminal to establish JCE I liability; on the other hand, it accepted a non-

[10] Katrina Gustafson, 'ECCC Tackles JCE: An Appraisal of Recent Decisions' (2010) 8 Journal of International Criminal Justice 1323; Jared L Watkins and Randle C DeFalco, 'Joint Criminal Enterprise and The Jurisprudence of the Extraordinary Chambers in the Courts of Cambodia' (2010-2011) 63 Rutgers Law Review 193.

[11] *NUON Chea and KHIEU Samphan* (002/19-09-2007/ECCC/SC) Appeal Judgement, F36, 23 November 2016 [814]. (emphasis added by the author)

criminal common purpose by accepting *dolus eventualis* murder as a crime against humanity and deducing the criminality of common purpose based on the gravity of the overall situation. The latter constitutes an expansive interpretation of JCE I by accepting that a common purpose need not necessarily encompass or contemplate the commission of crimes.[12] Critics also point out that this broadened JCE I risks of violating the principle of culpability and collapsing the distinction between *jus ad bellum* and *jus in bello* by lowering the threshold of criminal liability to hold government leaders responsible for the unavoidable and uncontainable chaos and violence at the time of crisis.[13]

5.1 The Concept of Joint Criminal Enterprise

The concept of JCE was initially introduced to modern international criminal law by the *Tadić* appeal judgement at the International Criminal Tribunal for the former Yugoslavia although its legal origins can be traced back to earlier customary international law.[14] The accused, *Duško Tadić*, was one of the first persons to be tried by an international criminal tribunal since the trials at Nuremberg and Tokyo after the Second World War. *Tadić* was a member of the Serb forces that carried out an attack in the Prijedor region in Bosnia and Herzegovina during the Bosnian war. Charges against him mainly included murdering and participating in the collection and forced transfer of Muslim civilians in the detention camps.[15] In relation to the JCE doctrine, *Tadić* was convicted of murder as a crime against humanity for the killing of five men in the attack in the village of Jaskići located in the Prijedor area. Although there was no evidence showing that *Tadić* fired the shots and killed the victims, he was convicted based on his participation in a common purpose,

[12] Nina HB Jørgensen, *The Elgar Companion to the Extraordinary Chambers in the Courts of Cambodia* (Edward Elgar 2018) 293, 316.
[13] Simon M Meisenberg, 'Joint Criminal Enterprise at the Special Court for Sierra Leone' in Charles Chernor Jalloh (ed), *The Sierra Leone Special Court and Its Legacy: The Impact for Africa and International Criminal Law* (Cambridge University Press 2014) 69, 89.
[14] *Tadić* (IT-94-1-A) Judgement, 15 July 1999 [178]-[237]. See also Luke Marsh and Michael Ramsden, 'Joint Criminal Enterprise: Cambodia's Reply to *Tadić*' (2011) 11 International Criminal Law Review 139; Simon M Meisenberg, 'Joint Criminal Enterprise at the Special Court for Sierra Leone' in Charles Chernor Jalloh (ed), *The Sierra Leone Special Court and Its Legacy: The Impact for Africa and International Criminal Law* (Cambridge University Press 2014) 69.
[15] *Tadić* (IT-94-1-T) Opinion and Judgement, 7 May 1997 [38]-[51].

namely attempting to achieve the creation of a Greater Serbia by committing inhumane acts against the non-Serb civilian population of the territory.[16]

The Trial Chamber and the Appeals Chamber at the ICTY in this case were divided regarding the accused's responsibility as to this particular event. The Trial Chamber found that there was not enough evidence to show that the victims were killed by the accused because: firstly, there was no direct eye-witness of the killing; secondly, the accused also took part in another action in a different village on the same day, and nobody was killed in that action. Hence, the Trial Chamber concluded that killing was not a standard policy in the execution of the common purpose and it cannot be proved beyond reasonable doubt that the accused killed the victims. The killing might well have been committed by other Serb forces in the region or an 'unauthorized and unforeseen act of one of the force' to which the accused belongs.[17] Therefore, the Trial Chamber decided that the accused could not be held responsible.

The Appeals Chamber overturned the previous finding and held the opinion that it is proved beyond reasonable doubt that the accused and his fellowmen killed the five victims given the facts that shots were heard when they were leaving the village and the dead bodies of the victims were found later on the same day.[18] It could be said that the Appeals Chamber has arrived at a different factual finding regarding whether the accused executed the act of killing, but his actual conduct would soon become insignificant because the judges would attribute his responsibility based on the notion of common purpose.[19]

Article 7(1) of the ICTY Statute sets out the following modes of criminal liability:

> A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.[20]

[16] *Tadić* (IT-94-1-A) Judgement, 15 July 1999 [230].
[17] *Tadić* (IT-94-1-T) Opinion and Judgement, 7 May 1997 [373].
[18] *Tadić* (IT-94-1-A) Judgement, 15 July 1999 [178]-[184].
[19] Shane Darcy, *Collective Responsibility and Accountability under International Law* (The Procedural Aspects of International Law Monograph Series, Koninklijke Brill NV 2007) 246.
[20] Art. 7(1) of the ICTY Statute.

Relying on the forms of individual liability provided by Article 7(1) and in combination with the object and purpose of the Statute explained in the report of the UN Secretary-General on the establishment of the tribunal,[21] the Appeals Chamber concluded that the Statute 'does not exclude the modes of participating in the commission of crimes which occur where several persons having a common purpose embark on criminal activity that is then carried out either jointly or by some members of this plurality of persons'.[22] Thus, the common purpose liability was established in principle although it was not yet specifically defined with requisite elements.[23] To establish the common purpose liability, the Appeals Chamber investigated the post-World War II judgements and domestic criminal legislations and identified three different categories of JCE liability, namely the basic form (JCE I), the systemic form (JCE II), and the extended form (JCE III).

Eventually, the Appeals Chamber was convinced that the killing of the five men in Jaskići village formed a part of the attack in execution of 'a policy to commit inhumane acts against the non-Serb civilian population of the territory in the attempt to achieve the creation of a Greater Serbia'.[24] The accused had actively taken part in the common criminal purpose by committing other crimes. Therefore, whether the accused had been specifically involved or presented himself at the killing of the five men became insignificant to the finding of his criminal liability.

After *Tadić*, the JCE liability has been broadly adopted by the *ad hoc* tribunals as a mode of liability, although there have been ongoing debates and interpretations by the Chambers regarding its scope and requisite elements.[25] Similar liability based on participation in a common purpose is also provided

[21] *Tadić* (IT-94-1-A) Judgement, 15 July 1999 [187].
[22] ibid [189], [190].
[23] ibid [194].
[24] ibid [230].
[25] For cases at the ICTY, see *Čelebići* (IT-96-21-T) Judgement, 16 November 1998; *Blaškić* (IT-95-14-T) Judgement, 3 March 2000; *Kordić and Čerkez* (IT-95-14/2-T) Judgement, 26 February 2001; *Stakić* (IT-97-24-T) Judgement, 31 July 2003; *Kvočka et al.* (IT-98-30/1-A) Judgement, 28 February 2005; *Brđanin* (IT-99-36-A) Judgement, 3 April 2007; *Karadžić* (IT-95-5/18-AR72.4) Decision on Prosecution's Motion Appealing Trial Chamber's Decision on JCE III Foreseeability, 25 June 2009; *Popović et al.* (IT-05-88-A) Judgement, 30 January 2015. For cases at the ICTR, see *Rwamakuba* (ICTR-98-44-AR72.4) Decision on Interlocutory Appeal Regarding Application of Joint Criminal Enterprise to The Crime of Genocide, 22 October 2004; *Nizeyimana* (ICTR-00-55C-A) Judgement, 29 September 2014.

in Article 25(3)(d)[26] of the Rome Statute of the International Criminal Court[27] (Rome Statute), which is said to be the most authoritative codification of the JCE theory.[28] The Rome Statute was signed in 1998 and it did not become effective until 2002. Its codification regarding criminal liability based on participation in a common purpose provided support for the *Tadić* Appeals Chamber's finding that the JCE doctrine is a part of customary international law. However, subsequent jurisprudential development within the International Criminal Court adopted a different approach towards the attribution of liability in the case of joint perpetration. For instance, the Pre-Trial Chamber I in *Lubanga* explained that,

> Not having accepted the objective and subjective approaches for distinguishing between principals and accessories to a crime, the Chamber considers, as does the Prosecution and, unlike the jurisprudence of the Ad hoc tribunals, that the Statute embraces the third approach, which is based on the concept of control of the crime.[29]

The third approach mentioned by the Pre-Trial Chamber should not be confused with the JCE III. This interpretation of Article 25(3)(d) does not necessarily negate the JCE doctrine to the extent that both models need to be applied by examining a whole set of *mens rea* and *actus reus*. Opting for different approaches to interpret joint liability means the judges will prioritise certain angles and parameters over the others to assess the accused's

[26] Article 25 (3)(d) of the Rome Statute: Individual Criminal Responsibility
[…]
3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

> […]
> (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
>
> > (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
> > (ii) Be made in the knowledge of the intention of the group to commit the crime.

[27] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90.
[28] William A Schabas, 'Expert Opinion on Joint Criminal Enterprise', 13 November 2007 in *Charles Ghankay Taylor* (SCSL-2003-01-T) Urgent Defence Motion Regarding a Fatal Defect in the Prosecution's Second Amended Indictment Relating to the Pleading of JCE, 14 December 2007.
[29] *Thomas Lubanga Dyilo* (ICC-01/04-01/06-679) Pre-Trial Chamber I Decision on the Confirmation of Charges, 29 January 2007 [338].

involvement in the charged offences.[30] For instance, the objective approach focuses on the actual control and foreseeability of the crimes, while the subjective approach focuses on the common purpose and knowledge of the crimes. What is more, in a given case, the test of foreseeability could be further divided into prioritising the state of mind of the accused or prioritising the contextual facts towards evaluating a course of acts that would normally follow. Different approaches towards joint liability are hardly exclusive of each other, but merely different combinations of a range of factors. James Stewart argued that all modes of liability, including ordering, instigation, superior responsibility, joint criminal liability, and complicity, should collapse 'into a single broad notion of perpetration', which 'promises to transcend a long-endured fixation on modes of liability within the discipline' of international criminal law.[31] Before that theoretical proposal is confirmed in law, a set of factors will be separately assessed in light of the trials at the ECCC in this chapter, including both subjective and objective elements of JCE liability. The following part will clarify the three categories of JCE liability and their respective elements to provide a holistic view on the JCE doctrine and its application in a revolutionary context.

5.2 Categories and Elements of Joint Criminal Enterprise

The *Tadić* appeal judgement laid down three categories of common purpose liability, which have been called JCE. These are the basic form, the systemic form and the extended form. The basic form (JCE I) applies in cases where all co-defendants act pursuant to a common design and possess the same criminal intention;[32] The systemic form (JCE II) applies in cases where the offences charged were alleged to have been committed by members of military or administrative units such as those running concentration camps; i.e., by groups of persons acting pursuant to a concerted plan;[33] The extended form (JCE III) applies in cases where participants have agreed to a common

[30] Jens David Ohlin, Elies Van Sliedregt and Thomas Weigend, 'Assessing the Control-Theory' (2013) 26 Leiden Journal of International Law 725, 738.
[31] James G Stewart, 'The End of "Modes of Liability" for International Crimes' (2012) 25 Leiden Journal of International Law 165, 167.
[32] *Tadić* (IT-94-1-A) Judgement, 15 July 1999 [196].
[33] ibid [202].

purpose to pursue one course of conduct where one of the perpetrators commits an act which, while outside the common design, was nevertheless a natural and foreseeable consequence of the effecting of that common purpose.[34] As the doctrine attributes liability, all three categories of the JCE have specified objective and subjective elements.[35]

5.2.1 Objective Elements

The accused's participation in a common purpose has to take certain physical forms. Objective elements of the JCE liability include considerations of all objective aspects in a given case. Firstly, objective elements include but not limited to the physical elements of the crimes as provided by their definitions. Since the JCE liability deals with joint perpetration, penalised acts do not have to match the requisite physical elements of crimes and often include a wide range of acts or omissions. If the accused did not fulfil any of the objective elements, the conviction cannot be solely based upon his or her thinking. In the case of omission, abstaining from taking acts by the defendants is considered as an objective element.[36]

Secondly, as the physical elements of the crimes can be interpreted in a broad manner, the causal relationship between the acts of the accused and the charged offences should be assessed more carefully as a safeguard of the principle of culpability. Thirdly, in the absence of an intent towards the charged offences, foreseeability has been brought to the front to assess the JCE members' liability, although conclusions on the foreseeability substantially depend on the understanding and recognition of relevant facts and contexts in a given case. Foreseeability is a subjective element of the JCE liability. The co-perpetration doctrine adopted at the ICC would assess the

[34] ibid [204].

[35] Some authors also use physical and mental elements of the JCE liability. See, *KAING Guek Eav alias 'Duch'* (001/18-07-2007-ECCC/OCIJ (PTC 02)) *Amicus Curiae* Brief Submitted by the Centre for Human Rights and Legal Pluralism, McGill University, D99/3/25, 27 October 2008.

This study uses objective and subjective elements in order to differentiate with the physical and mental elements of the crimes, which are discussed in the previous chapter. It should be noted that the Latin expressions of the two sets of terms are the same according to popular scholars on this topic: *actus reus* for objective and physical elements, and *mens rea* for subjective and mental elements.

[36] Antonio Cassese and others, *Cassese's International Criminal Law* (3rd edn, Oxford University Press 2013) 165.

effective control of the accused towards the charged offences, instead of foreseeability.[37] It will be shown later in this chapter that in the case of JCE III or a broad JCE I, penalised acts are actually broader than what fall within the accused' effective control as long as those offences are foreseeable.

The Appeals Chamber in *Tadić* set out the objective elements of the common purpose liability. These objective elements include,

> i. *A plurality of persons.* […]
>
> ii. *The existence of a common plan, design or purpose which amounts to or involves the commission of a crime provided for in the Statute.* […]
>
> iii. *Participation of the accused in the common design* involving the perpetration of one of the crimes provided for in the Statute. This participation need not involve commission of a specific crime under one of those provisions (for example, murder, extermination, torture, rape, etc.), but may take the form of assistance in, or contribution to, the execution of the common plan or purpose.[38]

Objective elements required for the JCE liability include both the conditions for a criminal enterprise and the acts of the accused. The item (iii) is related to the acts taken by the accused. 'Assistance' and 'contribution' could be interpreted broadly by the judges depending on the presented case. Once a joint criminal enterprise is identified, penalised acts can be well detached from physical elements of charged crimes. Indeed, the Appeals Chamber in subsequent *Kvočka et al.* case observed that 'the Tribunal's case-law does not require participation as co-perpetrator in a joint criminal enterprise to have been significant' and 'it is sufficient for the accused to have committed an act or an omission which contributes to the common criminal purpose'.[39] This 'significant but not necessarily substantial' standard has been followed and confirmed by subsequent jurisprudence at the ICTY.[40] It appears that all three categories of the JCE liability apply the same standard in assessing the objective elements since the Appeals Chamber did not further differentiate

[37] *Thomas Lubanga Dyilo* (ICC-01/04-01/06-679) Pre-Trial Chamber I Decision on the Confirmation of Charges, 29 January 2007 [338].
[38] *Tadić* (IT-94-1-A) Judgement, 15 July 1999 [227]. (emphasis as originally appeared)
[39] *Kvočka et al.* (IT-98-30/1-A) Judgement, 28 February 2005 [187]; *Brđanin* (IT-99-36-A) Judgement, 3 April 2007 [430].
[40] Antonio Cassese and others, *Cassese's International Criminal Law* (3rd edn, Oxford University Press 2013) 164.

between them.[41] It should be noted that objective elements of the JCE liability set out by the Appeals Chamber at the ICTY, especially the third one regarding the contribution of the accused, could draw on a broad range of acts, but subject to certain limits.

A quick look at the facts in the *Kvočka et al*. case shows that the 'significant but not necessarily substantial' standard should exclude 'opportunistic' acts from the JCE. In the *Kvočka et al*. case, the Omarska camp in the Prijedor region was found to constitute a JCE II. One of the defendants, *Zoran Žigić*, a local taxi driver, was found to have visited the camp on multiple occasions and mistreated the detainees. The Appeals Chamber found that although there is no requirement that a JCE II member has to hold official position in the organization, *Žigić*'s 'opportunistic' contribution to the JCE was insufficient to qualify him as a member of the JCE and cannot be held responsible for the crimes committed by the JCE.[42]

Kvočka et al. incorporated certain objective consideration to limit the application of the JCE liability. If one holds an official position at the Omarska camp, he will be held responsible for JCE II; but if one is neither an official member of the JCE nor makes substantial contribution to the JCE's common purpose, he should be excluded from the JCE liability. Although the particular behaviours of the latter could be held liable as ordinary crimes in a different setting, they do not fit in the JCE liability at the present trial. The reach of the JCE liability is not without limit, although further question may still be raised about the standard of contribution set out by *Kvočka et al*. For instance, if the Omarska camp employed a sympathetic cook who never agreed with any of the wrong-doings at the camp and was brought to trial as a member of the JCE, would he or she satisfy the 'significant but not necessarily substantial' contribution test or be excused like *Žigić*?

Citing the *Ponzano* case, the *Tadić* Appeals Chamber repeated that the accused's acts must form a link in the chain of causation, and 'it is not

[41] *KAING Guek Eav alias 'Duch'* (001/18-07-2007-ECCC/OCIJ (PTC 02)) *Amicus Curiae* from Professor Kai Ambos, D99/3/27, 27 October 2008, 6. Professor Kai Ambos's *amicus curiae* was later published as, Kai Ambos, "*Amicus Curiae* Brief in The Matter of The Co-Prosecutors' Appeal of The Closing Order Against Kaing Guek Eav 'Duch' Dated 8 August 2008" (2009) 20 Criminal Law Forum 353.
[42] *Kvočka et al.* (IT-98-30/1-A) Judgement, 28 February 2005 [599].

necessary that his participation be a *sine qua non*, or that the offence would not have occurred but for his participation'.[43] The Appeals Chamber referred to *Ponzano* case during the discussion of JCE I. But there were no indications of different or contrary findings in the discussions of the other two JCE categories. Hence, the required level of causal link should be construed as being the same for all three categories.

In light of the facts in the *Tadić* case that the court cannot identify exactly which individual in the armed group fired the shot, once the JCE is identified as an overarching 'umbrella', the responsibilities of its members will be established. They all have to be responsible for the group's criminality. Thus, the causal relationship between the defendant's acts and the charged offences was actually set aside by the application of the JCE. In other words, the causal relationship that needs to be assessed is between the enterprise's common plan and the charged offences, instead of between the accused's acts and charged offences as required by the principle of culpability. Then, what is exactly the standard of individual contribution to the JCE that will establish the JCE member's responsibility? *Kvočka et al*. suggests that it should be 'significant but not necessarily substantial'. The decision in *Tadić,* citing *Ponzano*, suggests that the contribution is not necessarily a *sine qua non* of the charged offences, but must form a link in the chain of causation.

It should be emphasised here that the causal relationship, which is normally assessed between the acts of the accused and the charged offences, is diverted once the JCE is introduced in a given case. The principle of culpability requires that the charged offences should be caused by the acts of the accused, with command responsibility as an exception.[44] Causation becomes even more important in a broad mode of liability like JCE. This causal relationship is interrupted by the introduction of the JCE in the way that the court actually turns to assess the causal relationship between the common purpose of the JCE and the charged offences. Considering the bar to assess the accused's acts and his association with the offences has been lowered by the 'significant but not necessarily substantial' and 'not

[43] *Tadić* (IT-94-1-A) Judgement, 15 July 1999 [199].
[44] Harmen van der Wilt, 'Joint Criminal Enterprise: Possibilities and Limitations' (2007) 5 Journal of International Criminal Justice 91, 95-102.

necessarily a *sine qua non*' standards, the causal relationship between the common purpose and the charged offences should be assessed carefully as a safeguard to the adherence to the principle of culpability. However, jurisprudence at the *ad hoc* tribunals shows that this causal relationship between the common purpose and the charged offences also tends to be interpreted expansively.[45] In the case of a JCE III is applied, even the offences that fall out of the common purpose could lead to liability of the JCE members.

A limit has been made regarding the common purpose of the JCE in order to avoid violating the principle of culpability. The objective elements of the JCE liability set out by *Tadić* require 'the existence of a common plan, design or purpose which *amounts to or involves* the commission of a crime provided for in the Statute'.[46] The common purpose in *Tadić* is said to be the creation of a Greater Serbian State within the former Yugoslavia by committing inhumane and violent acts to rid the region of the non-Serb population, which was later confirmed by *Kvočka et al.*[47] The Appeals Chamber at the Special Court for Sierra Leone in the case of *Brima et al.* (the Armed Forces Revolutionary Council or the AFRC case) held that the common plan, design or purpose of a JCE must either have as its *objective* a crime or *contemplate* crimes as the *means of achieving its objective*.[48] It concluded:

> [A]lthough the objective of gaining and exercising political power and control over the territory of Sierra Leone may not be a crime under the Statute, the actions contemplated as a means to achieve that objective are crimes within the Statute.[49]

It is well-established now that the common purpose of the JCE has to be criminal. However, standards to find that criminality remain to be unsettled.[50] By reasoning as above, the common plan or purpose of a JCE could be inferred from the charged offences, if not always. Concerns have been raised

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[45] ibid.
[46] *Tadić* (IT-94-1-A) Judgement, 15 July 1999 [227].
[47] ibid [175]; *Kvočka et al.* (IT-98-30/1-A) Judgement, 28 February 2005 [46].
[48] *Brima et al.* (SCSL-2004-16-A) Judgment, 22 February 2008 [77]-[80].
[49] ibid [84].
[50] Simon M. Meisenberg, 'Joint Criminal Enterprise at the Special Court for Sierra Leone' in Charles Chernor Jalloh (ed), *The Sierra Leone Special Court and Its Legacy: The Impact for Africa and International Criminal Law* (Cambridge University Press 2014) 69.

by the Croatian government in a debate at the United Nations on the mechanism for international criminal tribunals.

> [A]ny attempt to impose individual criminal responsibility without requiring a sufficient causal relationship between alleged criminal purpose and actual crimes, or even without requiring a specific intent to commit those crimes, which is the extended form of the joint criminal endeavour, also known as JCE III, is inconsistent with the current state of international humanitarian law and has the potential to seriously damage international criminal law – and not only international criminal law.
>
> Indeed, if mere foreseeability of illegal violence, which always and inevitably looms over any military operation, automatically engages liability of all military or civilian officials with any kind of authority over the forces engaged, then all military and civilian officials with de jure or de facto authority over those forces would automatically be held liable for all criminal acts committed by any member of those forces. *According to this concept, State and political leaders could be held responsible for offenses committed by others who may share their goals, regardless of whether those leaders shared an intent to commit specific criminal offenses as means of achieving those goals.* [*emphasis added*] This novum in international criminal law and international humanitarian law, if confirmed, would seriously jeopardize, if not disable, States, including those whose representatives are sitting around this table, from conducting any kind of legal military operations, peacekeeping operations included, and would turn these into unpredictable endeavours.[51]

The Croatian government's concern may be exaggerated in light of the required criminality in the common purpose. Head of states and political leaders would be excluded if they are deploying legitimate missions. What truly worries the Croatian government is the risk that accumulated results may be taken as executions of certain inferred policy which could be in turn used to prove the criminality of the common purpose. In case of inferred policies based on the magnitude or scale of violence in a given situation, the foreseeability standard could barely bar any defendant from conviction. It is perhaps this reversed course of judicial deliberation that have caused uneasiness among states.

The *dolus eventualis* murder conviction of the CPK leaders at the ECCC for the deaths during the population movements stands as an example

[51] Statement by Croatia at the Security Council Debate on Reports of the ICTY and Mechanism for International Criminal Tribunals, UN Doc. S/PV.7960, 7 June 2017, 23-24. (emphasis added by the author)

of the reversed course of judicial deliberation primarily based on foreseeability because the Court cannot establish that there existed a policy of killing civilians during the population movements. Although case 002/01 appeal judgment reversed the Trial Chamber's conviction of crimes against humanity based on the JCE doctrine in respect of the events at Tuol Po Chrey due to the lack of a policy contemplating the execution of former Khmer Republic soldiers and officials,[52] the same facts were moved to support the crimes against humanity of murder conviction together with other gathered events of killings during the population movement.[53] This flexibility might not be legally wrong but casts doubts on the certainty of criminal liability in international criminal law.

The third and fourth sections in this chapter regarding the application of the JCE doctrine at the ECCC will further elaborate on this course of judicial reasoning by the Supreme Court Chamber. It suffices now to demonstrate the standard of policy inference by quoting the following statement of the Supreme Court Chamber.

> […] The first issue relates to the question of whether the Trial Chamber was entitled to make generalised findings about the experience of all or the majority of the evacuees based on the testimony of a relatively small number of witnesses. The Supreme Court Chamber considers that in cases involving alleged mass criminality, it will often be impossible to call all witnesses that could testify to the set of events in question. *In such situations, the fact finder may be called upon to make inferences from the evidence as to the broader experience. Such an approach is not per se erroneous; to the extent, however, that the conviction depends on such a generalised finding, it has to be established beyond reasonable doubt. Nevertheless, the burden remains on the appellant alleging a factual error to demonstrate that the extrapolation made by the first-instance chamber in reaching the finding was unreasonable*.[54]

5.2.2 Subjective Elements

Besides setting out objective elements of the JCE liability, *Tadić* appeal judgment also set out its subjective elements. Unlike objective elements, subjective elements of the JCE liability vary according to different categories of the JCE. JCE I requires that 'all participants in the common design possess

[52] *NUON Chea and KHIEU Samphan* (002/19-09-2007/ECCC/SC) Appeal Judgement, F36, 23 November 2016 [972].
[53] ibid [487]-[508].
[54] ibid [598]. (emphasis added by the author)

the same criminal intent to commit a crime';[55] JCE II requires the 'knowledge of the nature of the system of ill-treatment and intent to further the common design of ill-treatment';[56] and JCE III requires the 'intention to take part in a joint criminal enterprise and to further the criminal purpose of that enterprise' in combination of 'the foreseeability of the possible commission by other members of the group of offences that do not constitute the object of the common criminal purpose'.[57] Several aspects require judicial assessment in the application of the JCE doctrine, including intent, knowledge and foreseeability. Although these are subjective elements, their assessments could involve objective considerations. For instance, the foreseeability test requires that the accused should have predicted that offences would normally take place if the common purpose were put into acts. Considerations should be objective to include comparisons with similar situations or the actual context.

Regarding the subjective elements of intent and knowledge in the application of the JCE doctrine, proposals have been made to bring them in line with mental elements of specific crimes. Mohamed Elewa Badar suggests that a unified approach shall be adopted for the concept of *mens rea* in international criminal law and his extensive research has concluded that the 'reasonably foreseeable' test of the extended form of JCE is fundamentally unjust.[58]

An issue worth noting regarding the subjective elements of the JCE liability is that its application concerns both the assessment of the JCE and *mens rea* of the accused. In a given case, the purpose of the JCE needs to be assessed in relation to its aim towards the charged offences. Meanwhile, the accused should be linked to the JCE by findings of his or her *mens rea* in light of the definition of the charged crimes. These two assessments are often mixed together in the way that the court would investigate the individual's

[55] *Tadić* (IT-94-1-A) Judgement, 15 July 1999 [220]. See also, *Krnojelac* (IT-97-25-A) Judgement, 17 September 2003 [32]; *Vasiljević* (IT-98-32-A) Judgement, 25 February 2004 [101]; *Stakić* (IT-97-24-A) Judgement, 22 March 2006 [65]; *KAING Guek Eav alias 'Duch'* (001/18-07-2007-ECCC/OCIJ (PTC 02)) *Amicus Curiae* from Professor Kai Ambos, D99/3/27, 27 October 2008, 6.
[56] ibid.
[57] ibid.
[58] Mohamed Elewa Badar, *The Concept of Mens Rea in International Criminal Law: The Case for a Unified Approach* (Bloomsbury Publishing 2013) 431.

mens rea towards the charged offences. Ideally, the two tests should be separated. Firstly, the court has to find a JCE strictly according to the requisite objective and subjective elements, especially the criminal common purpose. Then, the court turns to assess the *mens rea* of the accused according to the requisite elements of crimes. Mixing the two tests risks lowering the criteria of finding the JCE by replacing the elements of JCE with elements of crimes especially in the case when the common purpose is not criminal in itself.[59]

The conviction of *Augustine Gbao* in *Sesay et al.* (the Revolutionary United Front or the RUF case) at the Special Court for Sierra Leone provides an example for the mixed assessments of subjective elements in cases where the JCE doctrine is applied. The Trial Chamber, upheld by the Appeals Chamber, in *Sesay et al.* ruled that *Augustine Gbao* intended for the crimes to be committed in Kailahun District so he was a participant in the joint criminal enterprise, and it followed that the charged crimes happened in three other districts in Sierra Leone were reasonably foreseeable by *Augustine Gbao* because they are committed by the members of the same JCE.[60] The misapplication of the mental element for JCE III, which is foreseeability, in the conviction for JCE I in this case has been picked up by observers of the court.[61] Some scholars even concluded that the 'reasonably foreseeable' test is out of step with the originally applied JCE III in *Tadić* which requires that the achievement of the common purpose necessarily involve crimes and not merely foreseen or tacitly involve crimes.[62] Assuming the distinguished application of mental elements for JCE I and III is adjusted, the responsibility of *Augustine Gbao* as to the charged offences in the three districts where he was not present will have to be assessed by opening more specific enquires, such as whether *Augustine Gbao* had any knowledge about those offences

[59] *Sesay et al.* (SCSL-04-15-A) Appeal Judgement, Partially Dissenting and Concurring Opinion of Justice Shireen Avis Fisher, 26 October 2009 [18].
[60] *Sesay et al.* (SCSL-04-15-T) Trial Judgement, 26 March 2009 [2109]; *Sesay et al.* (SCSL-04-15-A) Appeal Judgement, 26 October 2009 [493].
[61] Jennifer Easterday, 'Obscuring Joint Criminal Enterprise Liability: The Conviction of Augustine Gbao by the Special Court of Sierra Leone' (2009) 3 Berkeley Journal of International Law Publicist 36, 45.
[62] Lachezar Yanev, 'The Theory of Joint Criminal Enterprise at the ECCC: A Difficult Relationship' in Simon M Meisenberg and Ignaz Stegmiller (eds) *The Extraordinary Chambers in the Courts of Cambodia: Assessing Their Contribution to International Criminal Law* (International Criminal Justice Series Vol 6, TMC Asser Press 2016) 203, 220.

about to be committed or whether *Augustine Gbao* had any actual control over those events.

The Chambers at the ECCC have made a similar mistake. Although it is pledged that the accused agreed and shared the revolutionary goals as the common purpose of the JCE,[63] but it cannot be said that the accused have aimed to reduce the population or worsen the life conditions because that would be contradictory with the revolutionary goals to improve population and productivity. Moreover, witnesses have reported different experience of being transferred to different zones. The Chambers could not establish a consistent policy as to the exact means of moving populations that inherently encompass commission of crimes but to draw on some common results, i.e. deaths caused by severe conditions and the lack of support.[64] The liability in those regards were eventually grounded in the reason that the results should have been foreseen when the accused agreed to the revolutionary goals.[65] Hence, the mental element of *dolus eventualis* murder is mixed together with the subjective element of the JCE. In other words, that the accused should have expected the results was construed as the reason to render the common purpose criminal. It is a broad interpretation of JCE I.

The incorporation of foreseeability may cause confusion between the broad JCE I and JCE III because the subjective element of JCE III also include a foreseeability test. It is not straightforward as to how these two can be further distinguished. To trigger a JCE III, it should be proved that the accused should foresee the possible commission by other members of the group of offences that do not constitute the object of the common criminal purpose.[66] The broad JCE I as applied in the case 002/01 seems even broader than JCE III because it not only enlarges the penalised offences, but also broaden the common purpose to include not inherently or necessarily criminal policies. As noted by Nina HB Jørgensen, the broad JCE I shifts the focus

[63] *NUON Chea et al.* (002/19-09-2007-ECCC-OCIJ) Closing Order, D427, 15 September 2010 [160]-[167].
[64] *NUON Chea and KHIEU Samphan* (002/19-09-2007/ECCC/TC) Case 002/01 Judgement, E313, 7 August 2014 [553]-[559].
[65] ibid [558].
[66] *Tadić* (IT-94-1-A) Judgement, 15 July 1999 [220]. See also, *KAING Guek Eav alias 'Duch'* (001/18-07-2007-ECCC/OCIJ (PTC 02)) *Amicus Curiae* from Professor Kai Ambos, D99/3/27, 27 October 2008, 6.

back to the criteria for determining which crimes were encompassed by the common purpose.[67]

5.3 The Application of Joint Criminal Enterprise at the ECCC

The following section of this chapter will closely analyse the factual and legal findings at the ECCC regarding the application of the JCE doctrine. The reasoning of each trial and appeal judgment will be summarised to provide a comprehensive view of the judicial deliberation at the ECCC. When it comes to different modes of liability applied at the *ad hoc* tribunals and the ICC dealing with joint perpetration, scholars have noted that the ultimate question of fairness involves more than formal elements or legal labels.[68] The actual process of applying a given doctrine in a particular case by different judges might lead to different results for the accused. Judicial judgments often play a more important role in ensuring a fair trial than the formal legal doctrine that is chosen. The following analysis will highlight the debate on the requisite elements that have been set out in the previous section and will be followed by further discussion in light of the revolutionary context during the Democratic Kampuchea.

5.3.1 Case 001

The JCE doctrine has been applied at the ECCC since its first case against the Chief of the S-21 security centre, KAING Guek Eav, alias Duch. In this case, only JCE I and II were applied. The findings of the nature, purpose and existence period of the identified JCE in case 001 is somehow buried in the footnote 879 of the judgment, which repeated the claims of the prosecutors' submission.

> The evidence before the Chamber establishes that the Accused committed the crimes described as a participant in a JCE. The JCE came into existence on 15 August 1975 when Son Sen instructed In Lorn *alias* Nat, and the Accused to establish S-21. The JCE existed until at least 7 January 1979 when the DK regime collapsed and S-21 was abandoned.

[67] Nina HB Jørgensen, *The Elgar Companion to the Extraordinary Chambers in the Courts of Cambodia* (Edward Elgar 2018) 316.

[68] Alexander KA Greenawalt, 'Foreign Assistance Complicity' (2016) 54 Columbia Journal of Transnational Law 531; Jonathan Hafetz, *Punishing Atrocities through a Fair Trial: International Criminal Law from Nuremberg to the Age of Global Terrorism* (Cambridge University Press 2018).

> *The purpose of the JCE was the systematic arrest, detention, ill-treatment, interrogation, torture and execution of 'enemies' of the DK regime by committing the crimes described in this Submission.* An organised system of repression existed at S-21 throughout the entirety of the duration of the JCE. All crimes occurring in S-21 were within the purpose of this JCE.[69]

After this reference, the Trial Chamber did not form its own statement regarding those aspects. Subsequent factual findings regarding Duch's culpability of participating in a systemic form of JCE (JCE II) all referred to the S-21 as the criminal enterprise.[70] It should be noted here that the accused was also convicted for other forms of liability, including planning, instigating, ordering, aiding and abetting, and superior responsibility.[71] Regarding the applicability of the JCE doctrine, the Trial Chamber rendered the following in its judgment,

> The Chamber further considers that, in light of the Nuremberg Charter, Control Council Law No. 10 and the subsequent international jurisprudence discussed above, *the systemic form of joint criminal enterprise, along with the basic form from which it derives, were part of customary international law* during the 1975 to 1979 period.[72]

Based on the previous finding, the Trial Chamber concluded that the accessibility and foreseeability requirements regarding the basic and systemic forms of JCE were also satisfied. Moreover, the extended form of JCE (JCE III) was not relied on by the prosecutors in the initial hearings. Therefore, the Trial Chamber did not find it necessary to pronounce on the customary status of JCE III during the 1975 to 1979 period.[73] The Supreme Court Chamber generally followed the conclusions of the Trial Chamber on the JCE in its appeal judgment in case 001. The debate on JCE III started later at the Pre-Trial Chamber triggered by the accused's appeals in case 002.

The common purpose of the JCE in case 001 included systematic arrest, detention, ill-treatment, interrogation, torture and execution, which

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[69] *KAING Guek Eav alias 'Duch'* (001/18-07-2007-ECCC/TC) Judgement, E188, 26 July 2010 [501], citing *KAING Guek Eav alias 'Duch'* (001/18-07-2007-ECCC/TC) Co-Prosecutors' Final Trial Submission with Annex 1-5, E159/9, 11 November 2009 [331]. (emphasis added by the author)

[70] *KAING Guek Eav alias 'Duch'* (001/18-07-2007-ECCC/TC) Judgement, E188, 26 July 2010 [514]-[517].

[71] ibid [518]-[549].

[72] ibid [512]. (emphasis added by the author)

[73] ibid [513].

were evidenced and identified by the prosecutors. However, establishing security centres was merely one of the five CPK policies aimed at achieving the revolutionary goal that have been identified in the Closing Order. Case 002 proves to be more complicated and challenging for the application of the JCE doctrine.

5.3.2 Case 002

Before the trials in case 002 began, the accused made an appeal on the applicability of the JCE doctrine to the Pre-Trial Chamber.[74] After reviewing extensively the sources cited by *Tadić*, the Pre-Trial Chamber disagreed with the prior decision of the ICTY Appeals Chamber, and declared that the customary law status of JCE III in 1975-1979 had not been established.[75] The international case law relied upon by *Tadić*, namely *Borkum Island* and *Essen Lynching*, may be relevant to JCE III, but there is an absence of a reasoned judgment in these cases. After reviewing facts and pleadings in these cases, the Pre-Trial Chamber was convinced that the accused in those cases may as well have been convicted because they possessed the intent to kill the victims rather than having merely foreseen this possible outcome.[76] This position was later upheld by the Supreme Court Chamber which found that there is a lack of 'sufficient firm basis' to identify the extended form of JCE as a customary international law rule, and *Borkum Island* and *Essen Lynching* were not clear or explicit enough to specify which doctrines were applied in those cases.[77]

Returning to the JCE in case 002, the charged JCE and its common purpose and members were presented as follows:

> The common purpose of the CPK leaders was to implement rapid socialist revolution in Cambodia through a 'great leap forward' and defend the Party against internal and external enemies, by whatever means necessary.

[74] *NUON Chea et al.* (002/19-09-2007-ECCC/OCIJ) Order on the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise, 8 December 2009 [21].
[75] *IENG Thirith, IENG Sary and KHIEU Samphan* (002/19-09-2007-ECCC/OCIJ (PTC38)) Decision on the Appeals against the Co-Investigative Judges Order on Joint Criminal Enterprise, D97/15/9, 20 May 2010 [78].
[76] ibid [80].
[77] *NUON Chea and KHIEU Samphan* (002/19-09-2007/ECCC/SC) Appeal Judgement, F36, 23 November 2016 [791]-[792].

> To achieve this common purpose, the CPK leaders inter alia designed and implemented the five following policies:
>
> - The repeated movement of the population from towns and cities to rural areas, as well as from one rural area to another;
> - The establishment and operation of cooperatives and worksites;
> - The re-education of 'bad-elements' and killing of 'enemies', both inside and outside the Party ranks;
> - The targeting of specific groups, in particular the Cham, Vietnamese, Buddhists and former officials of the Khmer Republic, including both civil servants and former military personnel and their families; and
> - The regulation of marriage.
>
> The common purpose came into existence on or before 17 April 1975 and continued until at least 6 January 1979. The five policies designed to achieve this common purpose were implemented within or before these dates. These policies evolved and increased in scale and intensity throughout the regime. *One of the consequences of these policies was the collectivisation of all aspects of society. This collectivisation involved the suppression of markets, currency and private property, the prohibition of peoples' freedom of movement, and generally forcing everyone to live in communal units according to their categorisation. This resulted in the implementation of a system* which Cambodians have subsequently described in the following way: the entire country had become a 'prison without walls'.
>
> The persons who shared this common purpose included, but were not limited to: members of the Standing Committee, including Nuon Chea and Ieng Sary; members of the Central Committee, including Khieu Samphan; heads of CPK ministries, including Ieng Thirith; zone and autonomous sector secretaries; and heads of the Party Centre military divisions.[78]

This general part of the co-investigating judges' finding of the JCE recognised that the policies to achieve the common purpose evolved in scale and intensity throughout the Democratic Kampuchea and it specially pointed out that one of the consequences of these policies was a collectivised social system which imposed sever prohibitions of people's freedom of movement and individual and family interests.[79] In relation to the unfolding of specific policies, the Closing Order briefly explained how the CPK party centre was involved in ordering these policies and how these policies were seen to serve the revolution.

[78] *NUON Chea et al.* (002/19-09-2007-ECCC-OCIJ) Closing Order, D427, 15 September 2010 [156]-[159]. (footnote omitted) (emphasis added by the author)

[79] ibid [158], see also [169] on cooperatives and worksites.

Regarding the movements of population, it was implemented to serve the objectives of fulfilling labour requirements of the cooperatives and worksites, providing food supplies to the population, and more importantly, depriving the city dwellers and former civil servants of their economic and political status and transform them into peasants.[80] As the co-investigating judges described, '[p]opulation movements were therefore a key means used by the CPK to achieve "*whatever can be done that is a gain for the revolution*".'[81]

Regarding the cooperatives and worksites, the Closing Order pointed out that it was physically impossible to meet the revolutionary objectives set by the CPK leaders, especially the unrealistic agricultural and industrial goals, such as paddy production rations, constructing irrigation networks, airfields and dams. More importantly, the production activities at the cooperatives and worksites were seen as a matter of defending national security and were later used as means to re-educate or destroy internal 'enemies'.[82] Eventually, it concluded that 'although serious health and food problems arose following the establishment of the CPK regime, the CPK leaders had not provided for adequate systems to respond to these problems and did not accept international aid, except for the limited support primarily available from China. On the contrary, the CPK policies were focused on isolation and the self-sufficiency of the national economy.'[83]

Regarding security centres and execution sites, the Closing Order noted that the function of these places were mostly carried out against the military and security forces of the CPK, but also expand to other members of the society. For instance, intellectuals living abroad were suspected to be agents of the CIA, KGB and Vietnamese;[84] having intimate relationships outside of marriage were considered to be 'immoral' and against the collectivist approach of the CPK.[85] It was also recognised that the severity of

[80] ibid [160]-[167].
[81] ibid [161].
[82] ibid [168]-[176].
[83] ibid [177].
[84] ibid [190].
[85] ibid [191].

purges varied among different regions with the East Zone being the worst since mid-1978.[86]

And the treatment of targeted groups referred to both religious and ethnic groups and former Khmer Republic officials. It was alleged that immediately after the seizure of Phnom Penh, there was a policy to execute former Khmer Republic officials.[87] All religions were deemed reactionary and constituted threats to the revolution.[88] And it appeared that the Cham and Vietnamese were under the most serious attacks of mass executions, expulsion and internal displacements.[89] Except for assimilating the Cham people, security concerns were also motives for a particular tactical policy of dividing and moving the Chamber population, especially after two rebellions in the East Zone.[90]

Finally, it was also alleged that the CPK adopted a policy to force couples to marry to serve the purposes of controlling political status of family members and promoting population growth. Reported incidents show that results of disobedience of the party authorities' decisions varied and it could lead to punishment or death in extreme cases.[91]

The previous articulation of the common purpose of the JCE, both the ultimate socialist revolution and identified policies, should be examined carefully in the court's reasoning of the corresponding liability. Some of the previous factual findings of the JCE touch on crimes under the ECCC's jurisdiction, but not all of them, especially the population movements and cooperatives and worksites. A common term used by the CPK and also noted by the Closing Order is that the revolutionary goals were meant to be achieved 'by whatever means necessary'[92] which is an inherently broad and unspecific expression.

After introducing the factual findings relating to the JCE, the Closing Order spent more than 150 pages presenting its factual findings of crimes.[93]

[86] ibid [178]-[204].
[87] ibid [209]
[88] ibid [210]
[89] ibid [205]-[215].
[90] ibid [282].
[91] ibid [216]-[220].
[92] ibid [156], [169], [172], [205], [216].
[93] To give a complete view, the Closing Order includes 402 pages for the main text. After adding the references, the document includes 772 pages in total.

An overview of these extensive descriptions of five groups of policies and their relating regions and personnel leads to two general observations. One is that the co-investigating judges do not refer to specific charged crimes when they describe the unfolding of each policy; the other is that the means and results of general 'by whatever means necessary' policies often include witness testimonies that shows conflicting experiences. Different experiences were reported in terms of population movements, cooperative and worksites and regulation of marriage.[94] This lack of consistency in the reported experiences of the victims and witnesses creates challenges in terms of proving consistent policies, which in turn further opens doubts on the criminality of the JCE's common purpose.

As was stated by the Trial Chamber in case 002/01 judgment,

> [A]t the latest, by June 1974 until December 1977, there was a plurality of persons who *shared a common purpose to "implement rapid socialist revolution through a 'great leap forward' and defend the Party against internal and external enemies, by whatever means necessary"*. Members of the Standing and Central Committees, government ministers, and Zone and Autonomous Sector secretaries, including NUON Chea, KHIEU Samphan, POL Pot, IENG Sary, SON Sen, VORN Vet, Ta Mok, SAO Phim, ROS Nhim, KOY Thuon, KE Pauk, CHANN Sam, CHOU Chet, BOU Phat, YONG Yem, BORN Nan, IENG Thirith and MEY Prang, were part of this group with the specified common purpose. The evidence establishes that *this common purpose to rapidly build and defend the country through a socialist revolution, based on the principles of secrecy, independence-sovereignty, democratic centralism, self-reliance and collectivisation, was firmly established by June 1974 and continued at least until December 1977.*
>
> *This common purpose was not in itself necessarily or entirely criminal.* The Closing Order, however, alleges that participants implemented the common purpose through the Population Movement Policy and Targeting Policy which *resulted in and/or involved* crimes.[95]

Therefore, the JCE in case 002 extends to members of the Standing and Central Committees of the CPK, government ministers, and Zone and Sector leaders. While recognising the identified group's common purpose is not in itself necessarily or entirely criminal, the Trial Chamber found that 'the

[94] *NUON Chea et al.* (002/19-09-2007-ECCC-OCIJ) Closing Order, D427, 15 September 2010 [238], [857].

[95] *NUON Chea and KHIEU Samphan* (002/19-09-2007/ECCC/TC) Case 002/01 Judgement, E313, 7 August 2014 [777]-[778]. (footnotes omitted) (emphasis added by the author)

policies formulated by the Khmer Rouge *involved* the commission of a crime as a *means* of bring the common plan to fruition'.[96] In the case of the population movement, the Trial Chamber holds that the policies 'resulted in and/or involved the commission of crimes, including forced transfers, murders, attacks against human dignity and political persecution'.[97] More, importantly, the Chamber's finding of criminal policies was based on 'a consistent pattern of conduct in each case including and involving the commission of crimes'.[98]

On the contrary, the Supreme Court Chamber, after examining in detail the jurisprudence since the post-World War II period until the *ad hoc* tribunals dealing with joint perpetration,[99] held that 'the common purpose is at the core of this mode of liability [the JCE doctrine]',[100] and 'it is not enough that those who agree to act in concert merely agree to pursue any common purpose'.[101] The Supreme Court Chamber explicitly pointed out that 'what is required is that they agree to a common purpose of a criminal character'.[102] Hence, the Supreme Court Chamber considered that the Trial Chamber erred in both recognising a common purpose that is not fully criminal and implicitly applying the JCE III that has been decided not applicable.

As the Supreme Court Chamber stated in case 002/01 appeal judgment:

> As noted by the Accused, unlike in the cases cited above, when applying the law to the facts of the case, the Trial Chamber found that the policy of population movement 'resulted in and/or involved' the commission of crimes, *without pronouncing that the crimes had been intended, contemplated or otherwise encompassed by the common purpose.* This suggests that the Trial Chamber was of the view that crimes that had generally resulted from the implementation of the common purpose could be imputed on the Accused, rather than crimes that were intended or contemplated by it. *In the view of the Supreme Court Chamber, such liability would essentially amount to what, since Tadić, has been termed extended JCE or JCE III liability.* Accordingly, the next question to be addressed is whether an accused may be held

[96] ibid [804]; same wordings are repeated in [835].
[97] ibid.
[98] ibid.
[99] *NUON Chea and KHIEU Samphan* (002/19-09-2007/ECCC/SC) Appeal Judgement, F36, 23 November 2016 [773]-[804].
[100] ibid [789].
[101] ibid.
[102] ibid.

> liable based on JCE for crimes whose *actus reus* he or she did not commit and which were not encompassed by the common purpose.[103]
>
> […]
>
> The Supreme Court Chamber recalls its finding that, in order to give rise to criminal liability, the common purpose has to be criminal, in the sense that it either *amounted to* or *involved* the commission of a crime. As regards the case at hand, the Trial Chamber, when setting out the applicable law, correctly noted that 'there must be a common purpose which amounts to or involves the commission of a crime'. The Trial Chamber, in keeping with the Closing Order (D427), identified the implementation of "rapid socialist revolution through a 'great leap forward'" and the defence of the CPK 'against internal and external enemies, by whatever means necessary' as the common purpose. According to the Trial Chamber, this common purpose was 'not in itself necessarily or entirely criminal'. Elsewhere, the Trial Chamber stated that the common purpose was 'to implement a socialist revolution in Cambodia', which was 'not criminal in itself'. As such, however, it would have been inapt to constitute a common purpose giving rise to *criminal* liability. Similarly, taken on its own, the Trial Chamber's finding that the socialist revolution was to be implemented 'by whatever means necessary' would be an insufficient basis for identifying a *criminal* common purpose as it is not clear from this formulation whether this would include the commission of crimes and, if so, which.[104]

It appears that the Supreme Court Chamber is reasoning towards a JCE I in case 002. On many occasions, it has explicitly rejected the reasoning of the Trial Chamber because it applied JCE III by mistake. Section 5.2.2 of this study has noted the difference between the broad JCE I and JCE III. Both strictly require criminal common purpose, but the broad JCE I adopts a foreseeability test in rendering criminality of the common purpose while JCE III adopts a foreseeability test to incorporate more penalised acts that are not originally encompassed by the common purpose. Therefore, if the Supreme Court Chamber meant to point out that the Trial Chamber erred in accepting an incomplete criminal common purpose, then the Trial Chamber would not be applying JCE III because JCE III also require a criminal common purpose. Accepting a non-criminal common purpose would be a violation of the JCE doctrine. Instead, the Supreme Court Chamber's proposed criterion of 'amount to or involve' the commission of a crime in the finding of a criminal purpose actually constitutes a mode of liability that is similar to JCE III,

[103] ibid [790]. (footnotes omitted) (emphasis added by the author)
[104] ibid [814]. (footnotes omitted) (emphasis added by the author)

especially when the 'amount to or involve' standard is inferred from consistent patterns drawn from the charged offences in a given case and articulated through the foreseeability standard. As previously noted, it was the concern of the Croatian Government that, during times of armed conflict, government leaders can easily be held responsible if their liability can be inferred from offences that are committed by members of armed forces against their wills or rising from the uncontainable chaos during violent situations.

When it comes to the revolutionary context in the case of the CPK, the immediate aftermath of armed conflicts necessarily *involve*, borrowing the term from the Supreme Court Chamber, offences committed by individuals that do not share the same purpose with the accused. Especially when the policy goals were ordered to be achieved by 'whatever means necessary', a phrase that is very broad and cannot be said to contemplate any particular crime. The following section will analyse if the Supreme Court Chamber's proposed criterion of finding a criminal purpose is properly applied, together with other proposed criteria or subjective elements of the JCE doctrine, such as knowledge and foreseeability.

5.4 Criteria of Finding a Common Criminal Purpose

Previous section has provided an overview of the JCE doctrine's application at the ECCC in relation to each case. Pending the appeal judgment in case 002/02 and further trials in case 003 and case 004, the following section will demonstrate how the Chambers have actually applied JCE III by broadly interpreting JCE I to attribute some of the charged offences to the accused.[105] This part of the charged offences is closely linked to the revolutionary context during the Democratic Kampuchea, including deaths and inhumane treatments during the population movements and the operation of co-operatives and worksites. On one hand, it is doubtful whether those charged offences were intended by the CPK. On the other hand, it is also questionable whether those offences were caused by the CPK policies and to what extent there is a causal relationship. The following discussion will be centred on the

[105] Nina HB Jørgensen, *The Elgar Companion to the Extraordinary Chambers in the Courts of Cambodia* (Edward Elgar 2018) 293.

criteria of finding the criminality in the common purpose, which sets the threshold of the JCE liability.

The usage of the word 'contemplated' appears to come from the Appeals Chamber judgment in *Brima et al.* (the AFRC case) at the Special Court for Sierra Leone.[106] According to the Appeals Chamber, 'the criminal purpose underlying the JCE can derive not only from its ultimate objective, but also from the means *contemplated* to achieve that objective. The objective and the means to achieve the objective constitute the common design or plan'.[107] Therefore, 'the common plan, design, or purpose of a joint criminal enterprise is inherently criminal means that it must either have as its objective a crime within the Statute, *or contemplate* crimes within the Statute *as the means* of achieving its objective'.[108]

The Supreme Court Chamber at the ECCC rejected the standard applied by the Trial Chamber according to which the common purpose is criminal if the implementation 'resulted in' commission of the crimes because the 'result' criterion resembles a JCE III. However, its reasoning in relation to the accepted mental element of crime against humanity of murder, known as *dolus eventualis*, shows a similar paradox.[109]

> In case 002/01 appeal judgment, it stated:
>
> Thus, the Supreme Court Chamber finds that criminal liability based on making a contribution to the implementation of a common criminal purpose was, at the time relevant to the charges in the case at hand, limited to crimes that were actually encompassed by the common purpose. In light of this conclusion, *the criteria for deciding which crimes are encompassed by a common purpose are of great relevance.* As noted above, the jurisprudence since *Tadić* requires that the common purpose 'amounts to' or 'involves' the commission of a crime. The Supreme Court Chamber finds in this regard that *the common purpose 'amounts to' the commission of a crime if the commission of the crime is the, or among the, primary objective(s) of the common purpose. This would, for example, be the case in a situation where the common purpose is to kill a group of political enemies.* In such a scenario, there

[106] Jennifer Easterday, 'Obscuring Joint Criminal Enterprise Liability: The Conviction of Augustine Gbao by the Special Court of Sierra Leone' (2009) 3 Berkeley Journal of International Law Publicist 36, 43.
[107] *Brima et al.* (SCSL-2004-16-A), Appeal Judgement, 22 February 2008 [76].
[108] ibid [80],
[109] Nina HB Jørgensen, *The Elgar Companion to the Extraordinary Chambers in the Courts of Cambodia* (Edward Elgar 2018) 280. See also, Cóman Kenny, 'Jurisprudence Continues to Evolve: The ECCC's Revision of Common Purpose Liability' (2018) 16 Journal of International Criminal Justice 623, 636-639.

> would be no doubt that the members of the joint criminal enterprise acted with direct intent to kill.[110]

However, the Supreme Court Chamber probably also realised that the direct intent to kill could only be found in regards of a minor part of the charged offences. Immediately after the previous finding, it reflects on more variations of the 'criteria for deciding which crimes are encompassed by a common purpose'.[111] It primarily adopted the view of appeal judgment in *Brima et al.,* which declared that criminal means would render the ends criminal.

The relevant part of the Supreme Court Chamber's finding stated:

> In contrast, the common purpose 'involves' the commission of a crime if the crime is a *means* to achieve an ulterior objective (which itself may not be criminal). In such a scenario, it is not necessary that those who agree on the common purpose actually *desire* that the crime be committed, as long as they recognise that the crime is to be committed to achieve an ulterior objective. This may include crimes that are foreseen as means to achieve a given common purpose, even if their commission is not certain. For instance, if a gang agrees to break into a house to steal and to use, if necessary, deadly force to overcome any resistance that they may encounter, it would be unconvincing to conclude that the eventual murder was not encompassed by the common purpose because it was not certain that murder would actually be committed in the course of the break-in. Rather, in such scenario, the crime of murder was a constituent element of the plan that was conceived, even if the members of the gang did not know whether it would actually be committed. Thus, *if attaining the objective of the common purpose may bring about the commission of crimes, but it is agreed to pursue this objective regardless, these crimes are encompassed by the common purpose because, even though not directly intended, they are contemplated by it.* Whether a crime was contemplated by the common purpose is primarily a question of fact that – absent an express agreement – has to be assessed taking into account all relevant circumstances, including the overall objective of the common purpose and the likelihood that it may be attained only at the cost of the commission of crimes. What is of note is that the common purpose may encompass crimes in which the commission is neither desired nor certain, just as it is sufficient for the commission of certain crimes that the perpetrator acted with *dolus eventualis* and therefore neither desired that the crime be committed nor was certain that it would happen.[112]

[110] *NUON Chea and KHIEU Samphan* (002/19-09-2007/ECCC/SC) Appeal Judgement, F36, 23 November 2016 [807]. (emphasis added by the author)
[111] ibid [808].
[112] ibid. (footnote omitted) (emphasis added by the author)

Thus, the Supreme Court Chamber followed the interpretation in *Brima et al.* by stopping at the example of murder committed in the course of break-in, as quoted above. However, it went on to accept a non-criminal common purpose, which may or may not be attained through commission of crimes. The implied non-criminal common purpose become clearer when the Chamber explained that the commission of crimes is neither desired nor certain looking at the overall objective of the common purpose. This position is in contradiction with previously confirmed element of the JCE doctrine, which must have a criminal common purpose. Nina Jørgensen also noted this contradiction in the Supreme Court Chamber's reasoning.[113] A critical difference between the elements of JCE liability and *dolus eventualis* murder is that JCE liability requires a criminal purpose while the *dolus eventualis* murder could flow from criminal or non-criminal purpose. By broadly interpreting the criteria of finding a criminal purpose, the Supreme Court Chamber substantially changed one of the key subjective elements of the JCE doctrine, the requisite common criminal purpose.

Although the Supreme Court Chamber corrected the 'result in' criterion articulated by the Trial Chamber, it has adopted a similar approach that resembles JCE III. This explains why the two Chambers hold different opinions regarding the requisite common purpose of the JCE doctrine as it exists in law, and at the same time arrived at mostly consistent findings of the responsibility of the accused. The difference is that the 'result in' criterion proves to be broader than 'contemplate or involve' criterion in light of the facts in case 002/01. In the trial judgment, the Chamber only has to establish there is a repetitive pattern of violence, namely some Khmer Republic soldiers and officials were said to be taken away to be executed. The repetitive pattern of commission of crimes, for instance, discovering of the dead bodies, would have been sufficient to prove a policy of criminal nature. This was overruled by the appeal judgment. According to the stricter 'contemplate' criterion, the same facts are not sufficient to infer a policy to execute targeted

[113] Nina HB Jørgensen, *The Elgar Companion to the Extraordinary Chambers in the Courts of Cambodia* (Edward Elgar 2018) 280.

victims, as some of them might have been taken elsewhere and were not executed.

In this light, the appeal judgment incorporated the same facts to support the conviction of crime against humanity of murder during the population movements together with other gathered events of killings when it employed a broad interpretation of the common criminal purpose in that regard.[114] Here, it should be recalled that the allegation in the Closing Order in case 002 regarding the common purpose states the following:

> The common purpose of the CPK leaders was to implement rapid socialist revolution in Cambodia through a 'great leap forward' and to defend the Party against internal and external enemies, by whatever means necessary. The purpose itself was not entirely criminal in nature but its implementation resulted in and/or involved the commission of crimes within the jurisdiction of the ECCC.[115]

The decisive question to establish the JCE liability is to investigate which crimes were indeed encompassed by the common purpose.[116] The Supreme Court Chamber started by adopting a strict subjective approach according to which the JCE liability has to be based on a criminal common purpose. However, it then turns to an objective approach in the identification of a criminal purpose by stating 'whether a crime was contemplated by the common purpose is primarily a question of fact'.[117] Accepting *dolus eventualis* murder as a crime against humanity opens the door to bring a non-criminal common purpose to the JCE liability and constitutes a broad interpretation of JCE I which resembles the foreseeability element of JCE III but potentially broader in capturing offences.

5.5 Concluding Remarks

The ECCC is presented with a 'mega' case that has inspired a considerable amount of judicial deliberation and opinions surrounding the JCE doctrine. As observed by the Pre-Trial Chamber in its land-marking decision, 'the

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[114] *NUON Chea and KHIEU Samphan* (002/19-09-2007/ECCC/SC) Appeal Judgement, F36, 23 November 2016 [487]-[508].
[115] *NUON Chea et al.* (002/19-09-2007-ECCC-OCIJ) Closing Order, D427, 15 September 2010 [1524].
[116] Nina HB Jørgensen, *The Elgar Companion to the Extraordinary Chambers in the Courts of Cambodia* (Edward Elgar 2018) 316.
[117] *NUON Chea and KHIEU Samphan* (002/19-09-2007/ECCC/SC) Appeal Judgement, F36, 23 November 2016 [808].

development of the forms of responsibility applicable to violations of international criminal law has to be seen in light of the very nature of such crimes, often carried out by groups of individuals acting in pursuance of a common criminal design', and 'the moral gravity of such [indirect perpetrators'] participation is often no less – or indeed no different – from that of those actually carrying out the acts in question'.[118] This comment reveals a moral dilemma faced by criminal tribunals dealing with mass atrocities. The collective nature of mass atrocities determines that modes of liability have to be interpreted in an expansive manner to 'catch' the individuals that are perceived to be more responsible. However, an over-stretched mode of liability risks holding government members up to a higher standard of responsibility when the uncontainable violence is not intended or avoidable during times of crises.

The focus of the cases at the ECCC, in particular case 002, is to assess the liability of leaders who planned revolutionary policies that may or may not necessarily involve commission of crimes. The ECCC's finding that JCE III is not part of customary international law is said to be limited to the status of this particular doctrine of criminal liability in the 1970s. But the Chambers diligently examined similar cases that have been reviewed by the *ad hoc* tribunals, especially the cases referred in *Tadić* and arrived at different conclusions. This makes the ECCC fall on the opposite side of the jurisprudence from other international and mixed tribunals regarding the legal status of JCE III in a post-1990 era. But this is only on the surface. At a closer look, the ECCC actually brought back JCE III by interpreting JCE I in a relatively broad manner. The Chambers declared that common purpose needs not to be criminal *per se* as long as it 'amounts to or involves' crimes without clearly articulating the subjective element in the case of this broad JCE I at the same time.[119]

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[118] *IENG Thirith, IENG Sary and KHIEU Samphan* (002/19-09-2007-ECCC/OCIJ (PTC38)) Decision on the Appeals against the Co-Investigative Judges Order on Joint Criminal Enterprise, D97/15/9, 20 May 2010 [55], citing *Tadić* (IT-94-1-A) Judgement, 15 July 1999 [191].
[119] Nina HB Jørgensen, *The Elgar Companion to the Extraordinary Chambers in the Courts of Cambodia* (Edward Elgar 2018) 326.

This chapter concludes with finding that the rationale and elements of the JCE doctrine applied at the ECCC, especially the broad JCE I, attempt to punish the broad violence occurred during the CPK revolution but at the same time are kept at distance with the revolutionary ideology and specific challenges arising from the context. The reasoning process conducted by the Supreme Court Chamber demonstrates that the mental element of *dolus eventualis* murder is mixed together with the subjective element of the JCE. The key standard of foreseeability to convict *dolus eventualis* murder is mistaken by the Chamber to render the JCE's common purpose criminal. Moreover, the incorporation of foreseeability may cause confusion between the broad JCE I and JCE III because the subjective element of JCE III also include a foreseeability test. The broad JCE I as applied in the case 002/01 proves to be broader than JCE III because it not only enlarges the penalised offences, but also broaden the common purpose to include not inherently or necessarily criminal policies. The liability in those regards were eventually grounded in the finding that the results should have been foreseen when the accused agreed to the revolutionary goals.[120]

Hence, chapter 5 highlights a judicial reasoning that has been advanced by the Supreme Court Chamber at the ECCC which dismisses the application of JCE III on one hand but broadly interprets the requisite common purpose of JCE I on the other.[121] It should be admitted that the critique of the application of the JCE doctrine at the ECCC does not necessarily challenge the convictions of the accused if the Chambers have adopted a different legal reasoning. It is rather that if different legal reasoning has been adopted, the trials and court hearings would have been directed along different discourses.

The broad JCE I enables the Chambers to conveniently avoid further engaging with the revolutionary ideology of the CPK and separating the intended violence from the unintended. This reasoning arguably holds the CPK leaders up to a stricter liability in comparison with other cases in

[120] *NUON Chea and KHIEU Samphan* (002/19-09-2007/ECCC/TC) Case 002/01 Judgement, E313, 7 August 2014 [558].
[121] Cóman Kenny, 'Jurisprudence Continues to Evolve: The ECCC's Revision of Common Purpose Liability' (2018) 16 Journal of International Criminal Justice 623, 636-639.

international criminal law. Chapter 6 will continue exploring the revolutionary context and defences and sentencing, and it will be argued that the broadly interpreted JCE I should be applied in combination of consideration awarded to defences and sentencing to satisfy the ultimate goal of substantial justice.

6 Revolutionary Context and Defences and Sentencing

Observers of the ECCC have noted that government actions and the subjective intentions of the people in power might not always be blamed for 'excess deaths' under their control. Tom Fawthrop and Helen Jarvis spoke about this rationale of causation in a general sense.

> While it may be argued that those holding power in a country are responsible for all 'excess deaths' in the population under their control, *it is clear that the subjective intentions and actions of the government are not always to blame, as objective and external factors can play an even stronger part.* What is far clearer, however, is the direct responsibility of the authorities for executions, torture and deliberate starvation.[1]

By questioning the impact of external factors on the blameworthiness of the individuals holding power, the aforementioned authors recognise a separation between direct and indirect responsibility. In their view, the difference between direct and indirect responsibility depends on whether the said conditions were caused intentionally. For instance, if starvation was caused deliberately, then the individuals in power should be held for direct responsibility. A similar example may be seen in the Swiss proposal to add starvation as a war crime to the Rome Statute.[2] If deaths were not caused intentionally, then they would be categorised as 'excess deaths'[3] and the individuals in power could be held for indirect responsibility, although one could also argue for the opposite. Upon a closer look, the indirect responsibility could be further divided into two categories. One is when deaths were caused purely by objective and external factors; the other is that

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[1] Tom Fawthrop and Helen Jarvis, *Getting away with Genocide? Elusive Justice and the Khmer Rouge Tribunal* (Pluto Press 2004) 4. (emphasis added by the author) For further discussion on deliberate starvation, see also, Solomon Bashi, 'Prosecuting Starvation under the Khmer Rouge as a Crime against Humanity' (*Documentation Centre of Cambodia*, 2 June 2008) <http://www.d.dccam.org/Abouts/Intern/Solomon_Bashi_Starvation.pdf> accessed 9 September 2019.

[2] War Crimes Committee of the International Bar Association, 'Report on the Swiss proposal to amend the Rome Statute to include the war crime of starvation in non-international armed conflicts' (*International Bar Association*, November 2019) < https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=4f20c382-9c36-46b9-bd24-e1f432396ccc> accessed 23 January 2020.

[3] Tom Fawthrop and Helen Jarvis, *Getting away with Genocide? Elusive Justice and the Khmer Rouge Tribunal* (Pluto Press 2004) 4.

deaths were caused by government's policies in response to objective and external factors. The chain of causation in the latter situation is more complex.

Some of the CPK policies examined by the ECCC lead to complex indirect responsibility, such as deaths caused by population movements and running of cooperatives and worksites. These policies were designed in response to objective and external factors towards achieving the ultimate revolutionary goals. Chapters 4 and 5 of this study demonstrated that the ECCC adopted broad interpretations of crimes against humanity and joint criminal enterprise doctrine to establish crimes in those failed policies. According to the same rationale, failed environmental policies or the handling of other humanitarian crisis by some governments nowadays could also trigger crimes against humanity if the results reach certain level of gravity in terms of deaths or other serious injuries. In other words, the broad interpretations adopted by the ECCC could potentially carry international criminal justice into a more complex policy-making field. Judging with hindsight, it is easier to see that conventional regulations, such as violations of the laws of armed conflict, slavery, racial discrimination and genocide, do not respond adequately to serious policy failures such as the CPK revolution. Questions remain if judgments were made at the time when those policies were drafted and implemented. Would those policies have turned out differently if not for some objective and external factors? Or were the CPK leaders obliged to act according to some rules of criminal law nature?

One of the accused former leaders of the Democratic Kampuchea, KHIEU Samphan, pointed out that researchers of the situation in Cambodia during the 1970s failed to recognise the 'incredibly difficult and violence filled situation that the young and immature state authority faced'.[4] This particular context raises the defences of necessity and just cause. By invoking that context, the defendants are claiming that they were left with no alternatives or they were doing their best to improve the overall situation as stated in their revolutionary goal.[5] Recalling the challenge and dilemma in

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[4] KHIEU Samphan, 'Chapter 5: Democratic Kampuchea' in the book *Considerations on the History of Cambodia from the Early Stage to the Period of Democratic Kampuchea*, filed at the ECCC with dossier number E3/16, 81.
[5] ibid, 1-2.

containing excessive political violence mentioned in chapter 2, states face a paradox in the process of international law-making.[6] If excessive political violence is to be outlawed, the individuals and groups who are deprived of legitimate means to make a change would be further deprived of their last resort to violence. Faced with that dilemma, legitimate tolerance towards excessive political violence is built on necessity and proportionality which can only be justified by the balance between political goals and the employed violent means.

This chapter continues to examine how specific features of the revolutionary context during the Democratic Kampuchea could potentially interrupt the established elements of crimes and the joint criminal enterprise doctrine from the defence point of view. In light of the particular context faced by the Democratic Kampuchea, the essential question to investigate is whether the degree to which the CPK may have been ‘forced’ by objective and external factors to adopt those policies can play a role under international criminal law. More importantly, the examination of the necessity defence should be conducted by looking at potential alternatives. Different historical views about the revolutionary context provides arguments towards complete defence. For instance, the actual conflict with Vietnam dated back as early as 1973 and the CPK had to face a hard struggle to remove the Vietnamese military presence in Cambodia at the same time of resisting the political influence and dominance of the Vietnamese communist party.[7] Hence, this chapter also touches on factual findings in relation to some of the revolutionary policies by the judgments at the ECCC.

The separation of direct and indirect responsibilities mentioned at the beginning of this chapter also provides more insights to the division between moral and legal responsibilities. All the accused at the ECCC have shown different forms of remorse to the victims and survivors of the Democratic Kampuchea.[8] NUON Chea and KHIEU Samphan also expressed that they

[6] See section 2.1.3 of this thesis for details.
[7] Michael Vickery, *Cambodia: 1975-1982* (first published 1984, Silkworm Books 1999) 202.
[8] Alexander Laban Hinton, *Man or Monster? The Trial of A Khmer Rouge Torturer* (Duke University Press 2016) 44; *The Justice Façade: Trials of Transition in Cambodia* (Oxford University Press 2018) 194ff; Françoise Sironi, ‘Chapter 9 the Psychological Evaluation of Duch, A Criminal against Humanity in Cambodia’ in Christian Delage and Peter Goodrich

would take moral responsibility for the sufferings and hardship that Cambodian people have gone through under the CPK rule but denied that they have committed any crime.[9] On the one hand, this admission of moral responsibility is an outright denial and rejection of criminal intent; on the other, it seeks for mitigation of the sentences if not complete defence.

This chapter concludes that the ECCC failed to sufficiently address the alternatives if the CPK had not adopted the policies of population movements and running co-operatives and worksites. Although with the revolutionary context sufficiently examined, the Chambers would not necessarily arrive at different legal findings, but they could deliver and foster better reasoned justice by fully engaging with different views. That would indeed fulfil the advocated purpose of the ECCC to recognise past atrocities by upholding a set of truly universal standards.

6.1 Revolutionary Context and Defences

Generally speaking, there are two categories of defences raised in trials of atrocity crimes. One category directs at the establishment of elements of crimes and modes of liability; the other directs at reasons to exclude or mitigate responsibilities assuming that the charged crimes have been established. Chapters 4 and 5 of this study have assessed the impact of revolutionary context on the application of elements of crimes and the JCE doctrine at the ECCC and concluded that, among other findings, the ECCC interprets the elements of crimes against humanity and the JCE doctrine in a broad manner to penalise the results of the CPK revolution. This section continues examining how specific features of the revolutionary context during Democratic Kampuchea could potentially deconstruct the established elements of crimes and modes of liability from the defence point of view. It also looks at the second category of defences that direct at excluding responsibilities.

(eds), *The Scene of the Mass Crime: History, Film, and International Tribunals* (Routledge 2013) 131; François Roux, 'Chapter 10 Pleading Guilty before the International Criminal Courts: the Case of Duch before the Khmer Rouge Tribunal' in Christian Delage and Peter Goodrich (eds), *The Scene of the Mass Crime: History, Film, and International Tribunals* (Routledge 2013) 155.

[9] KHIEU Samphan, 'Letter from Khieu Samphan: Appealing to All My Compatriots' sent to all Cambodian newspapers, filed at the ECCC with dossier number E3/205, August 16 2001.

International criminal law provides certain defences for excluding and limiting criminal responsibility. These defences have not been developed as a uniform system, and their interpretations tend to be restrictive and narrow.[10] Moreover, there is a 'gap' between proscribed statutory defences and the defences raised in practice.[11] Looking at the practice of international tribunals, defences that are often raised include the following: 1) *in dubio mitius* and *nullum crimen sine lege* defences challenging the jurisdiction of the tribunal; 2) non-proof of elements of crimes. Examples of the targeted elements include the contextual element of crimes against humanity, being it the qualification of armed conflict or the widespread or systematic attack, and the actual control of the accused over the charged offences; 3) uncorroborated, unreliable, or incredible witness testimony; 4) non-production of physical or documentary evidence; 5) invalid inferences from circumstantial evidence; 6) relativising conduct to extreme circumstances and the defence of good character; 7) alibi, impossibility, and mistaken identity; 8) superior orders; 9) duress and force of circumstances (necessity); 10) military necessity; 11) self-defence, provocation, reprisals, and the defence of reciprocity; 12) diminished mental responsibility; 13) plea of insanity; 14) politically motivated, ostentatious or injudicious prosecution.[12] Some of these defence have been extensively debated and articulated by the tribunals, such as those directed at the jurisdiction and elements of crimes. Others appear not clearly articulated but also not completely rejected, such as the defence of good character. There are also defences that have been clearly rejected as defence, such as superior orders at the International Criminal Tribunal for the former Yugoslavia. As international criminal law is rapidly progressing, rules of defences deserve cautious deliberation. There are multiple angles where the revolutionary context could be potentially raised as a defence. This chapter

[10] Robert Cryer, 'The Boundaries of Liability in International Criminal Law, or "Selectivity by Stealth"' (2001) 6(1) Journal of Conflict and Security Law 3, 4; Geert-Jan Alexander Knoops, *Defences in Contemporary International Criminal Law* (2nd edn, International and Comparative Criminal Law Series, Martinus Nijhoff Publishers 2008) 1; Shane Darcy, 'Defences to International Crimes' in William A Schabas and Nadia Bernaz (eds) *Routledge Handbook of International Criminal Law* (Routledge 2010) 231.

[11] Alexander Zahar and Göran Sluiter, *International Criminal Law: A Critical Introduction* (Oxford University Press 2008) 443.

[12] ibid 396-443, chapter 11 titled 'Defence Practice at the International Tribunals'.

will mainly focus on defences of necessity and just cause raised by the accused at the ECCC.

Defences in international criminal law could also be divided into substantive ones directing at the nature of the conduct itself, and the procedural ones that challenge the courts' jurisdiction, such as immunity, amnesty, *ne bis in idem* or statutory limit.[13] Some discussion takes the procedural angle and focus on the broader fair trial rights of the accused.[14] This study addresses a series of substantive defences in international criminal law and analyse how the revolutionary context has been raised by the accused as a defence at the ECCC or could have potentially supported those defences if the ECCC had investigated and examined those relevant factual aspects of the cases primarily in relation to the considerations and external factors that lead to the charged offences.

6.1.1 Substantive Defences in International Criminal Law

Substantive defences include both complete and incomplete defences. Complete defences maybe further divided into justifications and excuses due to different rationales and consequences.[15] A justification would make the disputed acts appropriate or permissible compared with their worse alternatives, and the accused does not bear liability; an excuse does not make the disputed acts right, but negates the blameworthiness of the accused. In brief, justifications include self-defence, necessity, belligerent reprisals; Excuses include duress, mistake of law, mistake of fact, and cases of mental incapacity.[16] Incomplete defences could reduce the blameworthiness of the accused and are normally considered mitigating factors in the process of sentencing.

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[13] Robert Cryer, Hakan Friman, Darryl Robinson and Elizabeth Wilmshurst, *An Introduction to International Criminal Law and Procedure* (Cambridge University Press 2007) 331-348; Steve R Ratner, Jason S Abrams and James L Bischoff, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy* (3rd edn, Oxford University Press 2009) 150-158; Alexander Zahar and Göran Sluiter, *International Criminal Law: A Critical Introduction* (Oxford University Press 2008) 396-443.

[14] Wolfgang Schomburg, 'The Role of International Criminal Tribunals in Promoting Respect for Fair Trial Rights' (2009) 8(1) Northwestern Journal of International Human Rights 1.

[15] Antonio Cassese and others, *Cassese's International Criminal Law* (3rd edn, Oxford University Press 2013) 209-210.

[16] ibid 210-227.

The Rome Statute of the International Criminal Court is the first treaty that attempts to address defences in international criminal law in a systematic way.[17] According to the Rome Statute, insanity, intoxication, self-defence, duress and necessity are formally codified as defences; mistake of fact and law, superior orders and prescription of law are formally recognized under certain circumstances as defences; unlisted defences like alibi, military necessity, abuse of process, consent may be considered by the International Criminal Court according to other sources of applicable law; certain defences including official capacity, immunity, lack of knowledge (in the case of command responsibility), superior orders (in cases of genocide and crimes against humanity) are formally excluded as defences.[18]

In assessing the responsibility of revolutionary policies that have constituted crimes in international criminal law, some of the previously mentioned defences are practically not applicable. For instance, mental incapacity or intoxication would not be raised because the disputed policies would have been consciously and purposefully planned and the planning and implementation of those policies would have taken a relatively long period of time.[19] Perhaps those defences could be raised in the trial of a direct perpetrator who is brought to trial for his or her one-time offence in a situation that lasted for a short time. But that would be hardly relevant to the designing and making of revolutionary policies and hence falls out of the scope of this study.

Some scholars suggest that defences provided by constitutive documents of international tribunals are largely irrelevant in practice and it is the jurisdiction and proof of legal elements, such as witness credibility and the moral disintegration and chaos caused by armed conflicts that are often

[17] Robert Cryer, Hakan Friman, Darryl Robinson and Elizabeth Wilmshurst, *An Introduction to International Criminal Law and Procedure* (Cambridge University Press 2007) 331.

[18] Rome Statute, Articles 21(1), 27, 28, 31, 32, 33, 67(1)(e). For a systematic analysis on the defences codified by the Rome Statute, see William A Schabas, *An Introduction to the International Criminal Court* (5th edn, Cambridge University Press 2017) 224-230.

[19] Steve Heder, 'Communist Party of Kampuchea Policies on Class and on Dealing with Enemies Among the People and Within the Revolutionary Ranks, 1960-1979: Centre, Districts and Grassroots' (*Cambodia Tribunal Monitor*, 26 April 2012) 46-47 < http://www.cambodiatribunal.org/assets/pdf/reports/Heder,%20CPK%20Policy%20on%20Class%20and%20Enemies,%20120426.pdf > accessed 28 October 2019.

targeted by the defence.[20] The previously mentioned 'incredibly difficult and violence filled situation'[21] surrounding the Democratic Kampuchea falls in line with the moral disintegration and chaos caused by armed conflicts. In international criminal law, applicable defences have to be assessed on a case by case basis. The Appeals Chamber at the International Criminal Tribunal for the former Yugoslavia touched on the concept of 'true' defence, and it has been claimed that alibi is not a true defence.[22] What was meant by the Appeals Chamber by the 'false' defence is probably directed at the practical irrelevance of the ordinary criminal law defences. The nature of international crimes determines that defences of atrocity crimes would be inherently different, if there is any such defence. Especially in the trials of government leaders, the charged revolutionary policies were drafted according to a particular hierarchy of interests with the ultimate revolutionary goal prioritising over individual freedoms and the lives of perceived 'enemies'. Consequently, it is expected that the judicial analysis should demonstrate whether there is any justification or excuse for that particular hierarchy of interests and what alternatives could or should have been adopted. Any defence that calls for such a deliberation is a true defence. The concepts of justification and excuse in criminal law are yet to be grounded in international criminal law, and further articulation and clarification of the 'true' defence will be a critical part of that effort.

The accused at the ECCC, especially in case 002, have raised a wide range of defences before the Chambers.[23] Most of these grounds are directed at the court's jurisdiction, applicable definition of crimes, modes of liability and disputes in relation to facts or individual's role and participation. In

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[20] Alexander Zahar and Göran Sluiter, *International Criminal Law: A Critical Introduction* (Oxford University Press 2008) 443.

[21] KHIEU Samphan, 'Chapter 5: Democratic Kampuchea' in the book *Considerations on the History of Cambodia from the Early Stage to the Period of Democratic Kampuchea*, filed at the ECCC with dossier number E3/16, 81.

[22] *Delalić et al.* (IT-96-21-A) Judgment, 20 Feb 2001[581], [590]; *Kunarac et al.* (IT-96-23 & 23/1) Judgment, 22 February 2001 [463].

[23] *NUON Chea and KHIEU Samphan* (002/19-09-2007-ECCC-SC) NUON Chea's Response to Co-Prosecutors' Appeal against the Trial Judgement in Case 002/01, F11/2, 28 January 2015; *NUON Chea and KHIEU Samphan* (002/19-09-2007-ECCC-SC) NUON Chea's Appeal against the Judgement in Case 002/01, F16, 29 December 2014; *NUON Chea and KHIEU Samphan* (002/19-09-2007-ECCC-SC) Mr KHIEU Samphan's Defence Appeal Brief against the Judgement in Case 002/01, F17, 29 December 2014.

relation to the revolutionary context during the Democratic Kampuchea, necessity and just cause have been brought to the front as substantive defences. Both of the accused have raised that the complex roots of conflict in Cambodia and the CPK's need to defend itself against Vietnamese domination and infiltration actually put the country in a situation that faced eminent threat although not engaging in larger scale of armed conflict.[24]

The ECCC is not the first forum where necessity and just cause have been raised as defences. In the case against the members of the Civil Defence Forces in front of the Special Court for Sierra Leone, the majority of the Trial Chamber stated the following.

> [V]alidating the defence of Necessity in International Criminal Law would create a justification for what offenders may term and plead as a 'just cause' or a 'just war' even though serious violations of International Humanitarian Law would have been committed.[25]

Considering the varying legal sources and thresholds that would be involved in the application of necessity and just cause, the following paragraphs briefly set out the definitions and scopes of these two defences as they stand in international criminal law. Then, they are followed by the analysis in light of the revolutionary context during the Democratic Kampuchea.

6.1.1.1 Necessity

Necessity is adopted in almost all legal systems to allow exceptional measures which may be conflicting with normally applicable norms in order to protect basic values and fundamental interests, and it has been afforded with different meanings depending on the specific areas of law.[26] In international humanitarian law, necessity refers to the principle of military necessity. Acts that cannot be justified by military necessity would trigger war crimes. The

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[24] *NUON Chea and KHIEU Samphan* (002-19-09-2007-ECCC-TC) NUON Chea's Closing Brief in Case 002/02, E457/6/3, 2 May 2017; *NUON Chea and KHIEU Samphan* (002-19-09-2007-ECCC-TC) KHIEU Samphan's Closing Brief (Case 002/02), E457/6/4/1, 2 May 2017, amended on 2 October 2017; *NUON Chea and KHIEU Samphan* (002/19-09-2007-ECCC-SC) NUON Chea's Appeal against the Judgement in Case 002/01, F16, 29 December 2014; *NUON Chea and KHIEU Samphan* (002/19-09-2007-ECCC-SC) Mr KHIEU Samphan's Defence Appeal Brief against the Judgement in Case 002/01, F17, 29 December 2014.

[25] *Fofana and Kondewa* (SCSL-04-14-T) Judgement on the Sentencing of Moinina Fofana and Allieu Kondewa, 9 October 2007 [79].

[26] Tarcisio Gazzini, Wouter G Werner and Ige F Dekker, 'Necessity across International Law: An Introduction' (2010) 41 Netherlands Yearbook of International Law 3, 4.

jurisprudence of the *ad hoc* tribunals has established that necessity cannot be raised as a defence to excuse grave breaches of the 1949 Geneva Conventions.[27] It has to be noted here that violations of international humanitarian law triggers two levels of responsibility, namely state responsibility and individual criminal responsibility. Different standards will be applied when different levels of responsibility are being assessed. For instance, objective approach such as proportionality will be applied to examine whether a state has violated the principle of necessity, while subjective approach such as how the defendant has perceived the conditions will be applied to examine whether he or she had seen the acts taken as necessary, which is normally assessed against the requisite mental element of the charged crime.[28]

Moreover, these two levels of responsibility are not completely separated because state responsibility and government members' individual criminal responsibility usually go hand in hand. This is especially true given that more and more prosecutions of crimes against humanity target violations of human rights by government members in execution of their official powers.[29] The removal of the nexus to armed conflict from the contextual element of crimes against humanity will continue facilitating more prosecutions of human rights violations for crimes against humanity. When necessity is raised as a defence for human rights violations, it is often directed at the validity of governmental policies.[30] It is also noted that although there is no general list of conditions upon which necessity may be raised as a valid defence, it is the exceptional circumstances that enable a state to resort to what is normally unlawful 'in order to protect its essential interests against a grave and imminent danger'.[31]

Therefore, in the absence of rules explicitly outlawing a particular practice, the court often has to turn to general sources of international law to

[27] ibid 5.

[28] Gabriella Venturini, 'Necessity in the Law of Armed Conflict and in International Criminal Law' (2010) 41 Netherlands Yearbook of International Law 45, 65-69.

[29] Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics* (WW Norton & Company 2011) 109ff.

[30] Cedric Ryngaert, 'State Responsibility, Necessity and Human Rights' (2010) 41 Netherlands Yearbook of International Law 79, 81.

[31] Tarcisio Gazzini, Wouter G Werner and Ige F Dekker, 'Necessity across International Law: An Introduction' (2010) 41 Netherlands Yearbook of International Law 3, 4.

comprehensively assess the exact obligations and responsibilities of the accused. The following example of *Furundžija* demonstrates the process through which such a comprehensive assessment of obligations and responsibilities could be conducted. It is expected that the ECCC would engage in similar analysis in the conviction of the CPK policies that have affected almost all of the Cambodian population. Because of the varying standards and measurements of the necessity defence raised in different contexts, the ECCC could reach consistent and self-contained conclusions only by engaging with the broader sources of international law

In its deliberation of the international prohibition of torture, the International Criminal Tribunal for the former Yugoslavia has stated that necessity cannot be used to justify non-compliance of *erga omnes* obligations, which are 'obligations owed (mostly by state actors) towards all the other members of the international community […] the violation of such obligation simultaneously constitutes a breach of the correlative right of all members of the international community and gives rise to a claim for compliance accruing to each and every member'.[32] Meanwhile, the Chamber continued to emphasise that some norms such as the prohibition of torture 'enjoys a higher rank in the international hierarchy' than treaty law and even 'ordinary' customary rules because of the critical values that they protect.[33] These peremptory norms are also referred as *jus cogens*. According to observations made in *Furundžija*,

> The most conspicuous consequence of this higher rank is that the principle at issue cannot be derogated from by States through international treaties or local or special customs or even general customary rules not endowed with the same normative force.[34]

Owing to these features of obligations *erga omnes* and *jus cogens* norms, individual criminal responsibility and state responsibility are grounded together in the gravity and inexcusable nature of violations of either. Scholars identified four examples of obligations *erga omnes* provided by the jurisprudence of the International Court of Justice, including outlawing acts of aggression and genocide, protection from slavery and racial

[32] *Furundžija* (IT-95-17/1-T) Judgement, 10 December 1998 [151].
[33] ibid [153].
[34] ibid.

discrimination.[35] It is also found that norms of *jus cogens* character largely coincide with those of obligations *erga omnes*.[36] A delicate test to clarify the identifiable content of *jus cogens* lies in Article 53 of the Vienna Convention on the Law of Treaties, which provides two conditions to be fulfilled for a norm to be recognised as a *jus cogens* rule, i.e. 'accepted and recognised by the international community of States as a whole' and 'from which no derogation is permitted'.[37]

According to the previously set out observations, necessity as a defence in international criminal law should be assessed according to different parameters from different legal regimes. In the case where charged offences are associated with armed conflicts, Geneva Conventions of 1949 and the proportionality test would apply unless there are prohibitive rules. For instance, torture will be prohibited in all cases. In the case where human rights law is applied, obligations *erga omnes* and *jus cogens* could be undertaken as guidelines in clarifying the contours of crimes in international law, in particular, crimes against humanity. In addition, there remains the question of the sources of crimes against humanity, especially when a court engages in their interpretation and seeks for broader basis beyond the formal definitions provided by its statute.

Furundžija is one example through which the international tribunal examined the specific obligations and responsibilities flowing from the international prohibition of torture, which is indeed an examination looking beyond the formal definition of torture as a crime provided by the tribunal's statute. The ECCC is expected to conduct the same test especially to balance against its broad interpretations of the elements of crimes and joint criminal enterprise doctrine according to the ultimate goal of justice. In other words, whether the accused in case 002 are entitled to the necessity defence depends on the nature and scope of obligations flowing from the law governing crimes against humanity. If the law governing crimes against humanity, such as its elements and mode of liability, is open to interpretation, validity of the

[35] Maurizio Ragazzi, *The Concept of International Obligations Erga Omnes* (Oxford University Press 1997) 49.
[36] ibid.
[37] ibid 51, 58.

necessity defence will be affected accordingly. Moreover, the goal of justice requires considerations of justifications and excuses. Justice Bankole Thompson in the judgment of Civil Defence Forces case concluded the following.

> In sum, I cannot judicially see my way clear to holding the Accused liable for their acts as charged in the Counts of the Indictment. I hold that, on a reasonable interpretation of the evidence, as a whole, their legal guilt in respect of Counts on which they have been convicted is *excusable in the eyes of the law on the grounds of the defence of necessity*. I recognise that there may be *valid legal reasons for adopting a restrictive approach to the application of the defence of necessity in the context of international humanitarian law transgressions but it is equally valid that to adopt a hyper-restrictive approach may lead to injustice.*[38]

It will be shown in the next section that the challenge faced by the ECCC is that the charged offences in the process of population movements and the operation of co-operatives and worksites are not assigned to a specific legal regime which could point to concrete applicable legal parameters unless the Chambers turn to the gravity and scale of the overall situation. More importantly, the Court is expected to address the necessity of these policies in light of the specific conditions faced by the Democratic Kampuchea, for instance, the claimed 'incredibly difficult and violence filled situation' that the researchers of the situation in Cambodia during the 1970s fail to recognise.[39] To examine those charged policies in light of the revolutionary context, the Chambers would have to face the just cause defence because those policies have been advanced to realise a revolutionary goal which is arguably non-criminal.[40]

[38] *Fofana and Kondewa* (SCSL-04-14-T) Judgement, Annex C – Separate Concurring and Partially Dissenting Opinion of Hon. Justice Bankole Thompson Filed Pursuant to Article 18 of the Statute, 2 August 2007 [92]. (emphasis added by the author)

[39] KHIEU Samphan, 'Chapter 5: Democratic Kampuchea' in the book *Considerations on the History of Cambodia from the Early Stage to the Period of Democratic Kampuchea*, filed at the ECCC with dossier number E3/16, 81.

[40] The Trial Chamber and the Supreme Court Chamber are divided on the criminality of the revolutionary goal of the CPK based on the trial judgment and appeal judgment in case 002/01. See section 5.4 of this thesis for details.

6.1.1.2 Just Cause

Another relevant but separate defence to necessity is the existence of a just cause. Necessity could be brought up as a defence to excuse the charged acts as a last resort. Just cause could also be brought up by States or perpetrators as a moral or political claim to justify the charged acts as a preferred course of acts in comparison with its alternatives. The just cause defence associates closer with motives. The beginning of chapter 2 in this study noted that offences purely motived by political reasons have received different treatment in domestic and international criminal laws. This is mostly due to the rationale that international crimes are outlawed because of their particularly serious level of gravity and destruction. Although it cannot be said that international crimes are always more serious than political offences in domestic law, situations of genocide and aggression are generally more destructive than domestic cases of civil disobedience. It is morally more difficult to justify the commission of international crimes than domestic offences. In other words, the gravity of international crimes leaves very limited sympathy towards defendants. As noted by Albin Eser, there are 'certain psychological reservations toward defences' in atrocity cases.[41] 'By providing perpetrators of brutal crimes against humanity […] with defences for their offences, we have effectively lent them a hand in finding grounds for excluding punishability'.[42]

Moreover, certain norms in relation to international crimes flow from other sources of international law. For instance, the prohibition of genocide has been recognised as a *jus cogens* rule, which means no excuse or justification could be raised to commit genocide and states bear the duty to prosecute and punish its perpetrators. Therefore, there is indeed limited space for the defence of just cause when one looks at the origin and rationale of international criminal law.

Just cause has been dismissed by majority opinions at other tribunals that apply international criminal law. In the case against the members of the

[41] Albin Eser, 'Defences in War Crimes Trials' in Yoram Dinstein and Mala Tabory (eds), *War Crimes in International Law* (Martinus Nijhoff Publishers 1996) 251.
[42] ibid.

Civil Defence Forces in front of the Special Court for Sierra Leone, the majority of the Trial Chamber stated the following.

> [V]alidating the defence of Necessity in International Criminal Law would create a justification for what offenders may term and plead as a 'just cause' or a 'just war' even though serious violations of International Humanitarian Law would have been committed.[43]

The Appeals Chamber in the same case affirmed the view that fighting for a 'just cause' cannot be considered as a defence but it could be considered as a motive for the purpose of sentencing.

> The Appeals Chamber is of the view that consideration of motive for the purposes of sentence is not to regard motive as a defence. *Although motive may shade the individual perception of culpability, it does not amount to a legal excuse for criminal conduct.* Therefore, any consideration here of Fofana's and Kondewa's 'just cause' as a motive for the purposes of sentencing should not be considered as a defence against criminal liability for their conduct.[44]

According to the dissenting opinion of Judge King, fighting 'for the restoration of democracy' is a material consideration only in deciding whether the attack was directed at civilian population.[45] This is to say that the just cause maybe of material consideration in the assessment of elements of crimes. Once the elements of crimes are fulfilled, the just cause cannot be of material consideration in assessing the responsibility. This is a rationale based on the strict distinction between *jus ad bellum* and *jus in bello*. One of the fundamental rationale of humanitarian law is that conducts of hostilities have to be upheld as universally applicable regardless for whom or what the combatting activities were initiated or conducted. For instance, it is considered by the judges at the international criminal tribunals that the protection of civilians is the primary goal of legal protection in armed conflict, so that even duress cannot be treated as a complete defence for the killing of innocent civilians, but only a mitigating factor towards sentencing.[46]

[43] *Fofana and Kondewa* (SCSL-04-14-T) Judgement on the Sentencing of Moinina Fofana and Allieu Kondewa, 9 October 2007 [79].
[44] *Fofana and Kondewa* (SCSL-04-14-A) Judgment, 28 May 2008 [523]. (emphasis added by the author)
[45] *Fofana and Kondewa* (SCSL-04-14-A) Partially Dissenting Opinion of Honourable Justice George Gelaga King, 28 May 2008 [28]-[29].
[46] See *Erdemović* (IT-96-22-A) Separate and Dissenting Opinion of Judge Li, 7 October 1997.

The above rationale assumes that the whole of charged offences are acts directly involved in armed conflict. This can be seen from the Appeals Chamber's statement.

> *International humanitarian law* specifically removes a party's political motive and the 'justness' of a party's cause from consideration. (…) Any trial chamber considering punishment must weigh its obligations to the individual accused in light of its responsibility to ensure that it is upholding the *purposes and principles of international criminal law*. Consideration of political motive by a court applying international humanitarian law not only contravenes, but would undermine a bedrock principle of that law. [47]

This helps to explain why the Special Court for Sierra Leone did not have to engage with the situation where human rights violations were caused by more complex reasons other than acts of armed conflict. Incorporation of more human rights violations into the scope of crimes against humanity requires a renewed thinking of defences, which the *ad hoc* tribunals were not equipped to do due to the nature of jurisdictions. Both of the two *ad hoc* tribunals were set up to prosecute 'serious violations of international humanitarian law'[48] although the actual charges also included genocide and crimes against humanity.

The ECCC has been afforded with a jurisdiction that could potentially bring crimes against humanity in wartime and peacetime to a coherent system of law. The collapse of the distinction between wartime and peacetime is predicated especially given that the temporal jurisdiction of the ECCC explicitly targets the existential period during which the CPK was officially governing the country.[49] Substantial justice requires further deliberation as to how crimes against humanity and their defences can be regulated to capture more serious violations of human rights both in times of peace and war. The just cause defence cannot be easily dismissed when norms of international crimes are being modified or even expanded. In other words, it is exactly

[47] *Fofana and Kondewa* (SCSL-04-14-A) Judgment, 28 May 2008 [530]-[531].

[48] Preambles of the Statutes of the International Criminal Tribunals for the Former Yugoslavia and Rwanda.

[49] Article 1 of the ECCC Law 2001: The purpose of this law is to bring to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognised by Cambodia, that were committed *during the period from 17 April 1975 to 6 January 1979*. (emphasis added by the author)

because of the ECCC's broad interpretations of key aspects of the criminal responsibility so that the just cause defence should be given more careful consideration as a part of a comprehensive assessment of obligations and responsibilities.

Except for the moral and psychological reservations and higher status of certain norms in international law, there is another reason why just cause is often dismissed in the assessment of criminal responsibility. Just cause defence is more associated with motives, and political motives tend to be biased and value loaded. After reviewing some American jurisprudence, Nicholas Kittrie made the following observation.

> Intent is less personal, less complex, less value-loaded, and at the same time more universally normative than the subjective standard of motive. Permitting courts and particularly juries to hear and be swayed by evidence of individual and subjective drives, emotions, and reactions is feared and rejected as a concession to individual and populist justice.[50]

However, at the same time, Kittrie also showed that the boundary between criminal responsibility and blameworthiness of the offender had been elusive and worth to explore in the American judicial theatre. He concluded that, 'one must also acknowledge that the oft-repeated textbook assertion that criminal law looks to intent and never to motive or individual belief is not totally accurate.'[51] This is exactly the reason why space for consideration of just cause should be allowed in international criminal law, especially given its immature state of development.

6.1.2 Defences at the ECCC

The ECCC Law did not predict reasons that could potentially exclude or reduce responsibilities of the accused, except that Article 40 new of the ECCC Law mentioned 'the scope of any amnesty or pardon that may have been granted prior to the enactment of this Law is a matter to be decided by the Extraordinary Chambers'.[52] The Trial Chamber has decided in 2011 that these procedural defences are inapplicable to charges of grave breaches of the 1949 Geneva Conventions, genocide and crimes against humanity brought up

[50] Nicholas N Kittrie, *Rebels with a Cause: The Minds and Morality of Political Offenders* (Westview Press 2000) 271.
[51] ibid 273.
[52] Article 40 new of the ECCC Law.

by the Closing Order in case 002.[53] Substantive defences raised by the accused in relation to the revolutionary context are set out below.[54]

KHIEU Samphan claimed that the population movements could be partially justified by military necessity given the existence of armed conflict in the pre-1975 context.[55] Transferring the population could help to destabilise the Khmer Republic army at the same time of moving the population to places where food and supplies could be obtained more easily.[56] Meanwhile, justifications for the evacuation of Phnom Penh (population movement phase I) and the evacuation of other cities nationwide (population movement phase II) are not exactly the same. The nationwide population movement shows more consistency with the revolutionary ideology of the CPK and coordinates with the other policies to reform social structure and improve agricultural productivity towards building a state of independence and self-reliance, which Cambodia, especially its revolutionaries, has taken with the highest regard after their interests were completely ignored at the Geneva Conference of 1954.[57]

According to the revolution designed by the CPK, it is necessary and practically effective to focus on the countryside as a base to rebuild the social and economic structure because the party was supposed to liberate the peasantry class which would be mobilised and became the major force of the revolution.[58] Before the CPK took power in Cambodia, it was a party that presented an anti-colonialist and anti-imperialist cause. 'The policy of building the Party in the countryside as well as in the cities was to build a

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[53] *NUON Chea et al* (002/19-09-2007-ECCC-TC) Decision on IENG Sary's Rule 89 Preliminary Objections (*Ne bis in idem* and Amnesty and Pardon), E51/15, 3 November 2011.

[54] Mostly based on the following documents filed by the defence: *KHIEU Samphan* (002/19-09-2007-ECCC-SC) KHIEU Samphan's Defence Appeal Brief against the Judgement in Case 002/01, F17, 29 December 2014; *NUON Chea* (002/19-09-2007-ECCC-SC) NUON Chea's Appeal against the Judgement in Case 002/01, F16, 29 December 2014; *NUON Chea* (002/19-09-2007-ECCC-SC) NUON Chea's Response to Co-Prosecutors' Appeal against the Trial Judgement in Case 002/01, F11/2, 28 January 2015.

[55] *KHIEU Samphan* (002/19-09-2007-ECCC-SC) KHIEU Samphan's Defence Appeal Brief against the Judgement in Case 002/01, F17, 29 December 2014 [232]-[233].

[56] ibid.

[57] Evan R Gottesman, *Cambodia After the Khmer Rouge: Inside the Politics of Nation Building* (Yale University Press 2003) 17; KHIEU Samphan, 'Chapter 5: Democratic Kampuchea' in the book *Considerations on the History of Cambodia from the Early Stage to the Period of Democratic Kampuchea*, filed at the ECCC with dossier number E3/16, 14.

[58] Alex Laban Hinton, *Man or Monster? The Trial of A Khmer Rouge Torturer* (Duke University Press 2016) 73.

resistance movement.'[59] Meanwhile, more labour was needed to work on food production and agricultural facilities in selected areas.[60] The population movements and the establishment of co-operatives were substantial steps according to the same revolutionary goals.

This is an argument falling in line with the necessity defence. The judgments, especially the appeal judgment of case 002/01, dismissed this argument based on a perceived legal standard that only the accused's knowledge of the policy needs to be proven.[61] This finding is arrived based on the application of the broad JCE I and the interpretation of the corresponding common criminal purpose.[62] Chapter 5 has analysed the potential flaws built in the broad interpretations in relation to the JCE doctrine. They dismiss the application of JCE III on the one hand but broadly interpret the requisite common purpose of JCE I on the other to penalise results that were neither intended nor necessarily caused by the common purpose.[63] Chapter 5 of this study also notes that the critique of the application of the JCE doctrine at the ECCC does not necessarily challenge the convictions of the accused if the Chambers have adopted a different legal reasoning. It is rather that if different legal reasoning had been adopted, the trials and court hearings would have been directed along different discourses. In terms of the necessity defence, the Chambers should have enquired more carefully into the causal link between the population movements and the charged offences, especially when the charged offences in the process of population movements and the operation of co-operatives and worksites are not assigned to specific legal regime which could point to concrete applicable legal parameters unless the Chambers turn to the gravity and scale of the overall situation.

[59] KHIEU Samphan, 'Chapter 5: Democratic Kampuchea' in the book *Considerations on the History of Cambodia from the Early Stage to the Period of Democratic Kampuchea*, filed at the ECCC with dossier number E3/16, 14. See also Michael Vickery, *Cambodia: 1975-1982* (first published 1984, Silkworm Books 1999) 270ff.

[60] Steve Heder, 'Communist Party of Kampuchea Policies on Class and on Dealing with Enemies Among the People and Within the Revolutionary Ranks, 1960-1979: Centre, Districts and Grassroots' (*Cambodia Tribunal Monitor*, 26 April 2012) 46-47 < http://www.cambodiatribunal.org/assets/pdf/reports/Heder,%20CPK%20Policy%20on%20 Class%20and%20Enemies,%20120426.pdf > accessed 28 October 2019.

[61] See section 5.2.2 of this thesis for further details.

[62] See section 5.2.2 and 5.4 of this thesis for further details.

[63] See section 5.5 of this thesis for further details. See also, *IENG Thirith, IENG Sary and KHIEU Samphan* (002/19-09-2007-ECCC/OCIJ (PTC38)) Decision on the Appeals against the Co-Investigative Judges Order on Joint Criminal Enterprise, D97/15/9, 20 May 2010 [55].

From the defence point of view, instead of focusing on the issue whether there is sufficient evidence to prove or extrapolate that the accused were present at the relevant meetings where the decision to evacuate Phnom Penh was made,[64] the Chambers should have given more attention to specify how the population movements and the operation of co-operatives have been unnecessary or less preferable in comparison with other alternatives. For instance, if those policies were not put in place, would the situation in Cambodia be better off after the CPK took over Phnom Penh? Or, if the fate of a country could hardly ever be predicted on such scale, the Chambers should at least engage in the challenges and threats faced by a young government that was dealing with a just ended civil war and considerable presence of political influence from a recently united neighbouring state whose domination that it was eager to get rid of. Sufficient investigations and reasoning on these mentioned points would bring the judgments significantly closer towards achieving substantial justice.

Another major consideration that convinces the Trial Chamber to dismiss the justification to evacuate Phnom Penh is that the claimed American bombing was a practical lie aiming to intimidate the public so that they were willing to cooperate and leave the capital.[65] The Trial Chamber also found that the evacuation decision was made a long time previously at a meeting in June 1974.[66] Therefore, the Trial Chamber fount it unconvincing to examine a 'false alarm' as a justification for the evacuation of Phnom Penh. However, the pre-decided evacuation of Phnom Penh, together with evacuations of other cities, is exactly the policy that should be taken seriously and examined carefully, because it is the necessity of evacuation that lies in the centre of the defence argument, not how the policy was implemented. This study argues that the Chambers at the ECCC should have continued assessing the necessity defence, especially given the particularly devastated conditions in most parts of Cambodia immediately after the war.

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[64] *NUON Chea and KHIEU Samphan* (002/19-09-2007-ECCC-TC) Case 002/01 Judgement, E313, 7 August 2014 [133]-[142].
[65] ibid [153]-[156].
[66] ibid [133].

There is potentially another explanation for the reason why the Chambers refrained from engaging further in the necessity defence drawing on the revolutionary context. If the Chambers engage in the necessity defence, it could contravene the finding of the criminal common purpose. To examine if the CPK policies are necessary and whether better alternatives existed, the Chambers would have to recognise that the ultimate revolutionary purpose is legitimate. Since the revolutionary purpose has been rendered criminal based on the judicial interpretation that it *amounted or involved* commission of crimes, the Chambers, especially the Supreme Court Chamber, managed to free themselves from debating what alternative policies could be adopted to achieve the common purpose. Hence, the necessity defence is not compatible with the approach of finding the common criminal purpose according to the gravity and scale of the situation which is not contemplated in the purpose itself. Since the Supreme Court Chamber has adopted a mode of liability like the broad JCE I, it practically closed the door for further consideration of the necessity defence. Following the same rationale, it appears that there is still limited space to consider the just cause defence in sentencing.

6.2 Revolutionary Context and Sentencing

In the previously mentioned case against the Civil Defence Forces at the Special Court for Sierra Leone, the majority of the Trial Chamber concluded that necessity does not constitute a complete defence in international criminal law. However, the majority did consider as mitigating factors that the accused were fighting 'to support a legitimate cause which […] was to restore the democratically elected Government',[67] and the crimes were committed 'in defending a cause that is palpably just and defendable'.[68] Therefore, in the sentencing of members of the other parties in the conflict, the Revolutionary United Front and Armed Forces Revolutionary Council, the Trial Chamber did not give consideration to their motives to fight.

After reviewing cases from the International Criminal Tribunal for Rwanda, including *Simba* and *Media*, and the jurisprudence from the

[67] *Fofana and Kondewa* (SCSL-04-14-T) Judgement on the Sentencing of Moinina Fofana and Allieu Kondewa, 9 October 2007 [83].
[68] ibid [86].

International Criminal Tribunal of former Yugoslavia, especially *Kordić* and *Čerkez*, in which the Appeals Chamber mostly dismissed the request for mitigation on factual basis, the Appeals Chamber at the Special Court for Sierra Leone opined that, as a general principle, 'a convicted person's motives can be considered for sentencing purposes'.[69] However, at the same time, the Appeals Chamber also concluded the following:

> Allowing mitigation for a convicted person's political motives, even where they are considered by the Chamber to be meritorious, undermines the purposes of sentencing rather than promotes them. In effect, it provides implicit legitimacy to conduct that unequivocally violates the law – the precise conduct this Special Court was established to punish.[70]

Based on this reasoning, the Appeals Chamber reversed the Trial Chamber's decision of reducing the sentence of the accused. The approach of dismissing just cause in sentencing to uphold the goal of affirmative prevention is consistent with the decisions at the International Criminal Tribunal of former Yugoslavia. For instance, the Appeals Chamber in *Kordić and Čerkez* stated the following:

> The sentencing purpose of affirmative prevention appears to be particularly important in an international criminal tribunal, not the least because of the comparatively short history of international adjudication of serious violations of international humanitarian and human rights law. The unfortunate legacy of wars shows that until today many perpetrators believe that violations of binding international norms can be lawfully committed, because they are fighting for a 'just cause'. Those people have to understand that international law is applicable to everybody, in particular during times of war. Thus, the sentences rendered by the International Tribunal have to demonstrate the fallacy of the old Roman principle *of inter arma silent leges* (amid the arms of war the laws are silent) in relation to the crimes under the International Tribunal's jurisdiction. [71]

This study notes that dismissing the just cause in sentencing in cases that primarily focus on the violations of laws of war should be treated separately with the cases that primarily addressing human rights violations. This difference brings the question back to the different sources of crimes against humanity mentioned earlier in this study (section 4.1.3). When the

[69] *Fofana and Kondewa* (SCSL-04-14-A) Judgment, 28 May 2008 [524].
[70] *Fofana and Kondewa* (SCSL-04-14-A) Judgment, 28 May 2008 [534].
[71] *Kordić and Čerkez* (IT-95-14/2-A) Judgement, 17 December 2004 [1082].

expansive interpretation of elements of crimes against humanity and the JCE doctrine has gone beyond concerns of laws of armed conflict, the ECCC cannot simply rely on the reasoning provided in the previously mentioned cases but has to bring its broad interpretive approach to a consistent level in each step of the criminal adjudication. The just cause defence alleges that the policies were not meant to be implemented through violence. The revolutionary mind-set was focusing more on the will and strength of people in the time of great struggles. Violence on a large scale was unexpected or uncontrollable results of these policies. As KHIEU Samphan stated in his letter to the public in Cambodia:

> I would like to avail myself of this opportunity to express my deepest respect to the souls of our innocent countrymen who were victims of the killings and heinous acts during the Democratic Kampuchea regime To those who lost their loved ones to the regime I am sorry. It was my fault to be too foolish and failed to keep up with the real situation I tried my best for the sake of our nation's survival so that we might enjoy development and prosperity like other nations I am so surprised that this turned out to be mass murder.[72]

Without taking the words of the accused as granted, KHIEU Samphan's statement points directly to the core issue in the debate regarding the criminality or the wrongfulness of the shared revolutionary goal. In other words, what is the true 'evilness' that should be punished and prevented in the CPK's revolutionary ideology? James Tyner concluded in his comments on the killing of Cambodia as the following and pointed at the way forward if claims for justice are to be substantialised.

> Social justice is contextual and its meanings are constantly contested. In other words, claims to social justice are *political*. Claims to social justice are historically and geographically contingent and therefore cannot be based on appeals to universal laws. The quest for social justice is an ongoing *political process*. However, part-and-parcel of this political process, I suggest, is a greater engagement with morality and violence. Namely, if we are to condemn the Khmer Rouge for their actions, we must condemn all acts of violence.[73]

[72] KHIEU Samphan, 'Letter from Khieu Samphan: Appealing to All My Compatriots' sent to all Cambodian newspapers, filed at the ECCC with dossier number E3/205, August 16 2001.
[73] James A Tyner, *The Killing of Cambodia: Geography, Genocide and the Unmaking of Space* (Ashgate 2008) 171-172. (emphasis as originally appeared)

This comment brings the debate back to exactly whether criminal justice could remain free from adjudicating claims that are supposedly belonging to political sphere. James Tyner's answer is a negative one. Any claim of justice is inherently a political one, and incorporating that political agenda of the CPK revolution within the trials will only serve the benefit of justice. Therefore, the revolutionary context should be given valid consideration in the assessment of defences and sentencing.

6.3 Concluding Remarks

After briefly reviewing the defences in international criminal law, this chapter looked at the two substantial defences raised by the defence at the ECCC and directed at the broader context of the CPK revolution. The first is necessity. As discussed in this chapter, necessity as a defence in international criminal law should be assessed according to different parameters from different legal regimes. In the case where human rights law is applied, obligations *erga omnes* and *jus cogens* could be undertaken as guidelines in clarifying the contours of crimes in international law, especially crimes against humanity. In the presence of the necessity defence, the ECCC would also be expected to assign concrete applicable legal parameters from a specific legal regime to the charged offences that allegedly happened during population movements and the operation of co-operatives and worksites. Moreover, the court is expected to address the necessity of these policies in light of the specific conditions faced by the Democratic Kampuchea, for instance, the claimed 'incredibly difficult and violence filled situation' that the researchers of the situation in Cambodia during the 1970s fail to recognise.[74] However, the necessity defence, in other words, the justifications of the revolutionary policies are dismissed by the Chambers after only brief enquiry into the 'false' reason to evacuate Phnom Penh.

In combination of the findings in previous chapters, this chapter notes that another potential and practical reason why the Chambers refrained from engaging further in the necessity defence is the 'convenience' provided by

[74] KHIEU Samphan, 'Chapter 5: Democratic Kampuchea' in the book *Considerations on the History of Cambodia from the Early Stage to the Period of Democratic Kampuchea*, filed at the ECCC with dossier number E3/16, 81.

the broad interpretations regarding elements of crimes against humanity in chapter 4 and the broad JCE I in chapter 5. It will be inconvenient and contradictory to investigate if there is any justification or necessity for a *criminal* purpose. To be more precise, the necessity defence is not compatible with the approach of finding the common criminal purpose according to the gravity and scale of the situation which is not contemplated in the purpose itself. Since the Supreme Court Chamber has adopted a mode of liability like the broad JCE I, it practically closed the door for further consideration of the necessity defence.

Regarding the second defence that was related with the revolutionary context, the just cause defence, it is accepted as a general rule that the just cause can be considered as a mitigating factor towards sentencing, but none of the tribunals have actually recognised this general rule by mitigating sentences. This chapter notes that the general rule to consider just cause as mitigating factor is often dismissed in the name of upholding the affirmative prevention goal of international criminal justice. This may be well justified in the cases that primarily focus on the violations of laws of war. In the cases that focus on human rights violations, especially when both the elements of crimes and mode of liability are interpreted broadly to capture offences that are not intended by the revolution, the ECCC cannot simply rely on similar goals such as affirmative prevention to dismiss the just cause defence. It will only serve to provoke more sceptical attitudes towards international criminal justice by casting doubt over their adherence to substantial justice. Adopting more strict interpretations or allowing more space for the defence of necessity and just cause could be substantially helpful to ease the sceptical concerns towards international criminal law.

Finally, in light of the central research question of this study, this chapter concludes that the revolutionary context does have a role to play in the application of international crimes by raising the defences of necessity and just cause, especially when more human rights violations that are not contemplated by the revolutionary goal are convicted as crimes against humanity. At the ECCC, the broad interpretations in regard to elements of crimes against humanity and the joint criminal enterprise doctrine practically prevented further consideration about the necessity and just cause defences.

This study argues that, in the presence of a revolutionary context, the court is expected to engage with and reason around the validity of those defences as required by substantial justice, which the ECCC has refrained from doing for various reasons. Future development in the debate around the impact of revolutionary context on defences and sentencing is likely to give more considerations to morality and violence as argued by James Tyner.[75] Claims of justice is fundamentally a political process and has to be assessed according to historical and geographical contingencies.[76]

[75] James A Tyner, *The Killing of Cambodia: Geography, Genocide and the Unmaking of Space* (Ashgate 2008) 169-170.
[76] ibid 171.

7 Conclusions

This study sought to examine how a context of revolution impacts the application of international criminal law through a case study of the revolutionary context during the Democratic Kampuchea era in Cambodia, in particular through the jurisprudence generated at the ECCC. The revolutionary context in this study refers to the complex roots of conflict in Cambodia and the prominent internal and external threats and challenges faced by the regime. One significant contribution and broader relevance of this study is to explore the seemingly unavoidable violence for certain political causes and the subsequent criminal responsibility mechanisms that may flow given the development of international criminal justice.

Firstly, it is important to recognise in the conclusions that the ECCC has been established to fulfil its advocated purposes, which is a combination of building accountability in Cambodia and 'contributing to global deterrence through the increased expectation of prosecutions for mass atrocity crimes'.[1] Holding the Khmer Rouge leaders responsible has been taken as an extremely important milestone and symbol towards ending the culture of impunity in Cambodia and a critical step towards ending impunity worldwide.[2] Regardless of the critics about Cambodian government's intervention in the ECCC and the larger issue of the lack of judicial independence in Cambodia,[3] it is certainly beneficial to have the ECCC as a forum to deal with the past rather than completely ignoring it.[4] Empirical studies in transitional justice have shown that demands for justice can be remarkably resilient, which explains why the ECCC satisfies a substantial demand even though it takes place nearly three decades after the commission of crimes.[5] However, the same observation regarding the resilient pursuit for justice alerts us that even

[1] Rebecca Gidley, *Illiberal Transitional Justice and the Extraordinary Chambers in the Courts of Cambodia* (Palgrave Macmillan US 2019) 159.
[2] ibid 161.
[3] ibid 168.
[4] David Scheffer, *All the Missing Souls: A Personal History of the War Crimes Tribunals* (Princeton University Press 2012) 341-405, 342.
[5] Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics* (WW Norton & Company 2011) 226.

a slight doubt about the credibility of the ECCC in terms of achieving justice could potentially undermine its long-term impact.

This study adopts a criminal law framework and examines the impact of revolutionary context respectively on the application of elements of crimes, modes of liability, defences and sentencing at the ECCC. The conclusions chapter summarises the key findings from each of the previous chapters. More importantly, combining the key findings together presents a clearer picture of the complex challenge faced by the ECCC. Case 002 at the ECCC has been called the most complex trial since Nuremberg.[6] In dealing with the 'mega-trial', the Chambers have to broadly interpret some aspects of international criminal law and at the same time announce their own recognised version of historical truth. The flaws and potential risks of those interpretations become clearer when examined together and raise doubts about the attainable influence of the ECCC's jurisprudence on future cases of excessive political violence that could trigger international crimes.

The critiques of the jurisprudence at the ECCC raised from this study do not mean to argue against the effectiveness or value of transitional justice as a whole. Instead, this study attempts to assess the legal component of transitional justice mechanisms in light of a specific historical context. Some recent contributions to the transitional justice literature have assessed the impact of the ECCC in light of the broader contemporary political and social landscape in Cambodia.[7] As noted by Rebecca Gidley, Cambodia is still in the middle of transition.[8] Although she considers the ECCC as a part of illiberal transitional justice movement due to its limited impact on liberalising Cambodia's domestic politics and promoting democracy and rule of law, the contribution of the ECCC towards future global justice campaign should be recognised. From that point of view, it is only more important to analyse and assess the jurisprudence of the ECCC according to the standard that it is built on a well-reasoned legal foundation and will stand the test of time.

[6] John D Ciorciari and Anne Heindel, *Hybrid Justice: the Extraordinary Chambers in the Courts of Cambodia* (The University of Michigan Press 2014) 134.
[7] See, Alexander Hinton, *The Justice Façade: Trials of Transition in Cambodia* (Oxford University Press 2018); Rebecca Gidley, *Illiberal Transitional Justice and the Extraordinary Chambers in the Courts of Cambodia* (Palgrave Macmillan US 2019).
[8] Rebecca Gidley, *Illiberal Transitional Justice and the Extraordinary Chambers in the Courts of Cambodia* (Palgrave Macmillan US 2019) 215.

Briefly speaking, this study finds that the jurisprudence of the ECCC shows that a revolutionary context could influence the application of international criminal law through the elements of crimes against humanity and genocide and the joint criminal enterprise doctrine. Moreover, the ECCC has dismissed the consideration of the revolutionary context in defences and sentencing, but this study argues that this dismissal could be interpreted as showing biases of a pre-determined assumption of guilt and being mostly driven by the tribunal's goal of punishing the accused. Broad interpretations of international criminal law adopted by the ECCC are not without flaws, especially given that it is a retroactive justice mechanism. That being said, the jurisprudence of the ECCC remains a valuable contribution to the development of international criminal law and to more effective prosecutions of human rights violations in the future, especially politically motivated violence. International criminal law cannot and should not dismiss revolutionary context. There is both validity and the possibility to continue exploring and further distinguishing between the recognised and unrecognised political goals and causes in international criminal law. A primary indicator to distinguish the two as stated by the Supreme Court Chamber at the ECCC is that criminal means would render the purpose criminal. A significant part of this thesis has sought to analyse and demonstrate how this seemingly brief principle has been applied in a complex situation and the subsequent limits and contradictions.

Specific findings and arguments of this study are set out in the following section. Then, this thesis ends with some concluding remarks.

7.1 Findings on the Impacts of Revolutionary Context

7.1.1 Impact on the Scope of Trials

This study began with a brief examination of the concept of revolution and excessive political violence. Treatment of political violence in international law has been constantly shifting according to several important waves of world events. The beginning of chapter 2 described that standards of extradition in some European countries had been modified to provide more lenient treatment to political offenders in the aftermath of the French

Revolution of 1789 and throughout the 19th century.[9] After that, due to the development of democratic governments around the world and the recognition of peaceful social transformation, states became harsher toward extra-legal measures to bring about social changes. Then, the treatment of political violence in the second half of the 20th century was further complicated by two fields of international law. By the end of the Second World War, self-determination and other human rights were recognised and protected by international law. Consequently, political violence pursuing these legitimate goals became tolerated. Meanwhile, the steady growth of international criminal law required the prosecution and punishment of acts of violence which could amount to international crimes. This study looks at a case set in the middle of the developing era for both human rights and international criminal law. The need for a narrative to reconcile the two fields and at the same time overcome the barriers between domestic and international laws cannot be ignored given that more and more human rights violations are prosecuted as crimes against humanity. As long as the pursuit of a more just global order continues in the future, states and judicial institutions are likely to keep facing the question of clarifying the boundary between legitimate and illegitimate political violence.

This study recognises that domestic criminal law and international criminal law have been built on different values and purposes which have been often raised to support the claim that international criminal law cannot show the same level of tolerance towards political violence as domestic criminal law does. However, the previous findings of the shifting in international law's treatment of political violence crossing different fields of law highlighted a common concern of a paradox that brings the two into the same debate on pursuing justice. International criminal law cannot stay free from distinguishing between offences that are adopted for laudable political causes and offences adopted to advance goals that are categorically wrong or immoral, such as aggression. The paradox is that, when violence is adopted as a last resort to bring social changes, states either condemn violence or

[9] Nicholas N Kittrie, 'Patriots and Terrorists: Human Rights with World Order' (1981) 13(2) Case Western Reserve Journal of International Law 291, 294.

choose to tolerate violence. The former would deprive the individuals and groups of their last resort of action, and the latter would fail the direct victims of the violence. Neither of the two is just.

Therefore, this study argues here that a balanced approach towards political violence should depend on necessity and proportionality between recognised political goals and the employed violent means. Of course, challenges remain in complex cases that it is not always convenient to bring the trials to a certain level of specificity. The scope of the trials at the ECCC cannot be clearly delimitated from the violence that was not intended or foreseen by the accused. Cases of excessive violence face one common challenge which is the distinction between necessary violence which can be justified by the cause and excessive violence which cannot be justified. But the challenge is not the reason to dismiss this difference. Balance between the two can be complemented by fully engaging in the causes of the violence and the broader context during the trial and taking the causes into account as mitigating factors to show certain level of sympathy as domestic criminal law often does.

Until here, this study finds that international criminal law cannot and should not dismiss revolutionary context. There is both validity and possibility to continue exploring and further distinguishing between legitimate and illegitimate political goals and causes in international criminal law. Chapter 2 concluded that international law had always been developing to accommodate the changing reality of conflicts and violence. Recognising certain moral values while penalise the immoral ones is an important part of that legal evolution. Moreover, chapter 2 also provided an introductive analysis of the remit of the ECCC, covering its jurisdiction, applicable laws and summaries of cases. It found that the contemporary influence of the revolution plays an important factor in the adoption of a justice mechanism and its jurisdictional settings. In other words, there is a potential risk that the justice mechanism could be biased or even seriously interfered with by world powers. This study argues that this is the most important reason to adopt a balanced approach in the trial and give valid consideration to the revolutionary context in defences and sentencing.

Chapter 3 of the study provided a historical review of the CPK revolution and highlighted the charged revolutionary policies at the ECCC. It is evident that the aim of the prosecutors and investigating judges is to hold the CPK leaders responsible for the broad revolutionary practice. The judicial chambers also decided that the strictly defined temporal jurisdiction could not bar the Chambers from relying on the facts and events predating 17 April 1975. The personal and subject matter jurisdictions are also sufficient for allowing the Chambers to assess the revolutionary context. The broadly set justice goal shows the ambition of the ECCC to address the responsibility of the CPK revolution, although the work of a criminal tribunal is to strictly establish the commission of crimes.

It may also be argued that the five chosen policies demonstrate that the ECCC is only charged with adjudicating whether those particular policies constitute any crime, instead of adjudicating whether the CPK revolution as a whole constitutes any crime. Two observations help to dismiss this alternative understanding of the ECCC's remit. One is that the five policies in case 002 is raised as factual findings of a joint criminal enterprise which is said to embrace the revolution as a common purpose.[10] The other is that the charged offences are not strictly assigned to each particular policy and have been switched among the policies during the appeal to support different convictions,[11] which shows that the chosen policies are more for prosecutorial convenience instead of categorical classification. Therefore, the chosen policies could not delimitate the revolutionary context from the remit of the ECCC. The application of international criminal law at the ECCC necessarily involves and gives consideration to the revolutionary context. The remaining question is through what legal parameters that the revolution is assessed. Chapters 4, 5 and 6 provided analysis on those legal parameters respectively.

[10] *NUON Chea et al.* (002/19-09-2007-ECCC-OCIJ) Closing Order, D427, 15 September 2010 [156]-[159].

[11] *NUON Chea and KHIEU Samphan* (002/19-09-2007/ECCC/SC) Appeal Judgement, F36, 23 November 2016 [487]-[508], [972]. See section 5.2.1 of this study for further details on this re-characterisation of charged offence during the appeal.

7.1.2 Impact on Definitions and Elements of Crimes

Chapter 4 assessed the impact of the revolutionary context during the Democratic Kampuchea on the ECCC's application and interpretation of crimes against humanity and genocide. The definition of crimes against humanity was undergoing a transition during the temporal jurisdiction of the ECCC. The changing contextual element of crimes against humanity from a nexus to war to the systematic and widespread attack was not explicitly confirmed in international instruments until the establishment of the International Criminal Tribunal for Rwanda. The revolutionary context, to be more specific, the regime's struggle in the just-ended civil war plotted by foreign powers and the imminent threat of influence from its neighbouring country, made the CPK believe that certain measures have to be taken, including violence, to maintain its national security and domestic governance. The domestic governance setting requires an interpretation of crimes against humanity to tie the liability to a government that was not directly engaging in a war for the most part of the ECCC's temporal jurisdiction but facing a situation that was as dangerous as if it was in a war. This is the more subtle reason why the ECCC concludes that the nexus to war in the definition of crimes against humanity was not required based on several indirect legal sources, such as the Control Council Law No.10, the Genocide Convention, and International Law Commission Draft Code of Offences against the Peace and Security of Mankind, especially its 1954 version.[12]

The change in the contextual element of crimes against humanity greatly expands the scope of this group of crimes and requires new interpretation of some concepts contained in the elements. Chapter 4 continued to analyse the Chambers' application of two concepts in the new contextual element of crimes against humanity, known as 'attack' and 'civilian'. Both of the two concepts take root in the law of armed conflict and need to be redefined when used outside the context of armed conflict. The Trial Chamber at the ECCC interpreted 'attack' as the following:

[12] *NUON Chea et al.* (002/19-09-2007/ECCC/TC) Decision on Co-Prosecutors' Request to Exclude Armed Conflict Nexus Requirement from the Definition of Crimes against Humanity, E95/8, 26 October 2011 [33].

> An attack is a course of conduct involving the commission of a series of acts of violence. It is not limited to the use of armed force, encompassing any mistreatment of the civilian population including that reflected by the underlying offences in Article 5 of the ECCC law. An attack on a civilian population is a separate concept from that of an armed conflict. An attack may precede, outlast or continue through an armed conflict, without necessarily being part of it.[13]

This interpretation of attack in peacetime is still very broad and fails to assign concrete legal standards to particular actions, especially to the unspecified causes of deaths in relation to population movements and the operation of cooperatives and worksites. Eventually, convictions of crimes against humanity were grounded in the scope and magnitude of the attack. Just as the Trial Chamber concluded, 'the attack was systematic insofar as crimes of such scope and magnitude could not have been random and were carried out repeatedly and deliberately in furtherance of, and pursuant to, Party policies'.[14]

The revolutionary context requires a broader reading of the contextual element of crimes against humanity. Before the Trial Chamber reached its finding on the contextual element, the Pre-Trial Chamber had an earlier decision which found the nexus to war was necessary for crimes against humanity.[15] While both the Pre-Trial Chamber and Trial Chamber provide legal basis of their findings, this study argues that it is very hard to dismiss that the Trial Chamber's finding is made out of convenience towards capturing broad human rights violations, which is indeed an indicator of the impact of the revolutionary context and its domestic governance setting on the application of international criminal law.

Another indicator is the adoption of *dolus eventualis* murder as a crime against humanity and the convergence of the Chambers' finding in *dolus eventualis* murder's mental element and the contextual element of

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[13] *NUON Chea and KHIEU Samphan* (002/19-09-2007-ECCC-TC) Case 002/01 Judgement, E313, 7 August 2014 [178].

[14] *NUON Chea and KHIEU Samphan* (002/19-09-2007/ECCC/TC) Case 002/001 Judgement, E313, 7 August 2014 [193].

[15] *IENG Thirith and NUON Chea* (002/19-09-2007-ECCC/OCIJ (PTC145 & PTC146)) Decision on IENG Thirith and NUON Chea's Appeal against the Closing Order (PTC), D427/2/12, 13 January 2011, 6; *KHIEU Samphan* (002/19-09-2007-ECCC/OCIJ (PTC104)) Decision on KHIEU Samphan's Appeal against the Closing Order (PTC), D427/4/14, 13 January 2011, 4; *IENG Sary* (002/19-09-2007-ECCC/OCIJ (PTC75)) Decision on IENG Sary's Appeal against the Closing Order (PTC), D427/1/26, 13 January 2011, 4-5.

crimes against humanity. The rationale of *dolus eventualis* murder is that inflicting or engaging in a *normally* life-endangering situation should be punished as murder. This commands the Chambers at the ECCC to contextualise and specify how the population movements were the substantial cause of the deaths, especially in comparison with other external factors. If *dolus eventualis* murder is to be applied in a revolutionary context, the assumed likelihood of deaths and the knowledge or indifferent attitude towards that risk will have to be assessed carefully. Chapter 6 returned to this point and advance further critique of the ECCC's reasoning.

Chapter 4 argued that the contextual element bears significant weight in the application of *dolus eventualis* murder as a crime against humanity. The mental elements and the contextual element of crimes against humanity are deeply linked and co-related. The standard of mental elements of ordinary murders cannot be 'transplanted' into murders as crimes against humanity without considering the latter's contextual element, or at least it calls for extreme caution when both of them show modifications and departure from customary status. Looking at the future, accepting *dolus eventualis* murder as a crime against humanity might be preferable to build more prosecutions of human rights violations, but it also risks holding government members up to a high standard of responsibility if the '*normally* life-endangering situation' is judged according to hindsight.

Without addressing the illegality of the attack *per se*, the Chambers' conviction is primarily based on the magnitude of results. The newly interpreted crimes against humanity might help to prosecute and punish potential perpetrators but hardly provide any benefit towards prevention, because crimes require a certain level of magnitude in order to be triggered. These issues were further explored in chapter 6 of this study, which focuses on the importance of the illegality of the attack in the definition of crimes against humanity. Given that the Chambers adopted the human rights approach, it is expected that the circumstances, for instance, the fear of bombing, lack of food in the cities, treatments of the 'new people' in the cooperatives and worksites would be assessed according to standards from human rights law perspective. And these circumstances should be considered in light of defences raised by the accused.

Chapter 4 also closely examined the genocide debate around atrocities committed by the Khmer Rouge and finds that the revolutionary context substantially influences the findings of the mental element of genocide, especially when the context suggests multiple co-existing motives. Jurisprudence at the ECCC demonstrates new contributions to the issues of political and cultural genocide. Judge Ottara's separate opinion in case 002/02 judgment is particularly enlightening in this regard. He argues that the Khmer victims of political persecution should also be recognised as victims of genocide. His arguments support that the ultimate revolutionary ideology of the CPK overshadowed all the tactical reasons to attack targeted groups, be it Khmer, Vietnamese, or Cham etc. That radical ideology is a collectivisation of social governance and total disregard of individual and family interest, as set out by the Closing Order.[16]

Chapter 4 found that the Chamber's approach of finding the genocidal intent is essentially a formalistic one. In case there are multiple motives or merely one non-genocidal motive, the genocidal intent cannot be inferred; in case the policies or orders explicitly call for the annihilation of the group, genocidal intent is established. Other co-existing motives suggested by the context become secondary or non-decisive. This approach leads to a very thin line between genocidal and non-genocidal events by primarily relying on the formal policy lines of the government. For instance, the Trial Chamber only finds the persecutions against Cham and Vietnamese constitute genocide, while convicting the persecutions against Buddhists as persecution on religious ground. On the other hand, if a more substantial approach were to be adopted, the revolutionary context would make a significant difference on the legal characterisation of the offences committed against particular groups and could be used to distinguish between crimes against humanity and genocide.

7.1.3 Impact on the Mode of Liability

Chapter 5 examined the concept of the JCE doctrine and its application at the ECCC. The Supreme Court Chamber notably corrected the Trial Chamber in

[16] *NUON Chea et al.* (002/19-09-2007-ECCC-OCIJ) Closing Order, D427, 15 September 2010 [158].

case 002/01 regarding its finding of the common criminal purpose required by the JCE doctrine. The Trial Chamber stated the following:

> [A]t the latest, by June 1974 until December 1977, there was a plurality of persons who shared a common purpose to "implement rapid socialist revolution through a 'great leap forward' and defend the Party against internal and external enemies, by whatever means necessary". [...] The evidence establishes that *this common purpose to rapidly build and defend the country through a socialist revolution,* based on the principles of secrecy, independence-sovereignty, democratic centralism, self-reliance and collectivisation, was firmly established by June 1974 and continued at least until December 1977.
>
> *This common purpose was not in itself necessarily or entirely criminal.* The Closing Order, however, alleges that participants implemented the common purpose through the Population Movement Policy and Targeting Policy which *resulted in and/or involved* crimes.[17]

The Supreme Court Chamber considered that the Trial Chamber erred in both recognising a common purpose that is not fully criminal and implicitly applying the JCE III that had been deemed not applicable, because the above mentioned reasoning showed that the accused were 'held liable based on JCE for crimes whose *actus reus* he or she did not commit and which were not encompassed by the common purpose'.[18]

In order to correct the Trial Chamber's error, the Supreme Court Chamber emphasised that "the Trial Chamber's finding that the socialist revolution was to be implemented 'by whatever means necessary' would be an insufficient basis for identifying a *criminal* common purpose".[19] Instead, the Supreme Court Chamber adopted a foreseeability test to incorporate more penalised acts that are not originally encompassed by the common purpose. The Supreme Court Chamber's proposed criterion of 'amount to or involve' the commission of a crime in the finding of a criminal purpose actually constitutes a mode of liability that is similar to JCE III, especially when the 'amount to or involve' standard is inferred from patterns drawn from the charged offences in a given case and articulated through the foreseeability standard. When it comes to the revolutionary context in the case of the CPK,

[17] *NUON Chea and KHIEU Samphan* (002/19-09-2007/ECCC/TC) Case 002/01 Judgement, E313, 7 August 2014 [777]-[778]. (footnotes omitted) (emphasis added by the author)
[18] *NUON Chea and KHIEU Samphan* (002/19-09-2007/ECCC/SC) Appeal Judgement, F36, 23 November 2016 [790]. (footnotes omitted) (emphasis added by the author)
[19] ibid [814]. (footnotes omitted) (emphasis added by the author)

the immediate aftermath of armed conflicts necessarily *involve*, borrowing the term from the Supreme Court Chamber, offences committed by individuals that do not share the same purpose with the accused. Especially when the policy goals were ordered to be achieved by 'whatever means necessary', a phrase that is very broad and cannot be said to contemplate specific crimes. Therefore, Chapter 5 found that the Supreme Court Chamber actually applied a JCE I that was even broader than JCE III.

After reviewing the application of the JCE doctrine at the ECCC, Nina Jørgensen argued that the JCE doctrine is 'uniquely capable of providing the right framework for joint criminal responsibility in cases involving systematic crimes orchestrated at the highest level of decision-making' because 'the concept allows for greater remoteness between the accused and physical commission of the crime'.[20] At the same time, she also pointed out that the jurisprudence at the ECCC reveals that the real issue surrounding the JCE doctrine is indeed 'the potential for the gradual expansion of the scope of individual criminal responsibility under international law'.[21]

Chapter 5 of this study welcomed that the ECCC rightly dismissed the customary law status of the extended form of JCE, known as JCE III, by the time of the alleged crimes committed by the accused. Meanwhile, it was also highlighted in chapter 5 that the ECCC interpreted the JCE I expansively by demonstrating its applied criteria of finding the common criminal purpose. The discourses at the ECCC prove that the revolutionary context, including the revolutionary goal, actual power and control of the accused over the unfolding of the policies to move the population and run co-operatives and worksites, especially the causal relationship between the revolutionary goal and results, have been positioned in the centre of the judges' mind.

Looking at the currently functioning criminal tribunals dealing with atrocity crimes in international law, the ECCC is the only one that applies the JCE doctrine except for the International Residual Mechanism for Criminal Tribunals. The permanent International Criminal Court has dismissed the JCE doctrine and opted for co-perpetration instead. Although on the surface, the

[20] Nina HB Jørgensen, *The Elgar Companion to the Extraordinary Chambers in the Courts of Cambodia* (Edward Elgar 2018) 323-324.
[21] ibid 325.

JCE doctrine appears to be falling from the mainstream of international criminal law, it is merely one mechanism to address the structural attribution of liability in international criminal law. Future trials might reject the name of the JCE doctrine, but the legal reasoning and adherence to the general principles of legality and culpability surrounding the JCE doctrine will remain valuable and helpful to assess other mechanisms to attribute guilty in the cases of mass political violence, especially to the assessment of leaders' responsibility.

7.1.4 Impact on Defences and Sentencing

Chapter 6 examined two of the substantial defences in international criminal law in relation to the revolutionary context faced by the CPK. The necessity defence is a complex concept in international criminal law and it features a range of legal regimes and specific legal parameters. In the case where human rights violations are prosecuted, obligations *erga omnes* and *jus cogens* could be undertaken as guidelines in clarifying the contours of crimes in international law, especially crimes against humanity. In the presence of the defence of necessity, the ECCC would be also expected to assign concrete applicable legal parameters from a specific legal regime to the charged offences that allegedly happened during population movements and the operation of co-operatives and worksites. Moreover, the court is expected to address the necessity of these policies in light of the specific conditions faced by the Democratic Kampuchea, for instance, the claimed 'incredibly difficult and violence filled situation' that the researchers of the situation in Cambodia during the 1970s fail to recognise.[22] However, the necessity defence, in other words, the justifications of the revolutionary policies are dismissed by the Chambers after only brief enquiry into the 'false' reason to evacuate Phnom Penh.

In connection with the findings in previous chapters, this chapter notes that another potential and practical reason why the Chambers refrained from engaging further in the necessity defence is the 'convenience' provided by

[22] KHIEU Samphan, 'Chapter 5: Democratic Kampuchea' in the book *Considerations on the History of Cambodia from the Early Stage to the Period of Democratic Kampuchea*, filed at the ECCC with dossier number E3/16, 81.

the broad interpretations regarding elements of crimes against humanity in chapter 4 and the broad JCE I in chapter 5. It will be inconvenient and contradictory to investigate if there is any justification or necessity for a criminal purpose. To be more precise, the necessity defence is not compatible with the approach of finding the common criminal purpose according to the gravity and scale of the situation which is not contemplated in the purpose itself. Since the Supreme Court Chamber has adopted a mode of liability like the broad JCE I, it practically closed the door for further consideration of the necessity defence.

Regarding the second defence that was related with the revolutionary context, the just cause defence, it has been claimed that just cause can be considered as a mitigating factor towards sentencing, but none of the tribunals have actually endorsed this by mitigating sentences. This chapter notes that the general rule to consider just cause as mitigating factor is often dismissed in the name of upholding the affirmative prevention goal of international criminal justice. This may be well justified in the cases that primarily focus on the violations of laws of war. In the cases that focus on human rights violations, especially when both the elements of crimes and mode of liability are interpreted broadly to capture offences that are not intended by the revolution, the ECCC cannot simply rely on similar goals such as affirmative prevention to dismiss the just cause. It will only serve to provoke more sceptical attitudes towards international criminal justice by casting doubt over their adherence to substantial justice. Adopting more strict interpretations or allowing more space to the defence of necessity and just cause could be substantially helpful to ease the sceptical concerns towards international criminal law.

7.2 Concluding Remarks

To summarise this study and return to the central research question, the ECCC is a valuable case study to demonstrate the impact of a revolutionary context on the application of international criminal law. First, the CPK revolution and the charged offences largely present a case of domestic political violence which was further complicated by conflicts and external threats. When a tribunal is set up to deal with a situation as such by applying international

criminal law, it cannot avoid assessing the validity of the revolution itself. The Trial Chamber at the ECCC attempted an approach that avoided assessing the nature of the revolution by finding the ends illegal based on illegal means. However, this approach was not supported by the Supreme Court Chamber, which rightly stated that the criminal purpose is the core element that justifies criminal liability. Unfortunately, the jurisprudential development by the Supreme Court Chamber was also not flawless because it has interpreted the elements of crimes against humanity and the joint criminal enterprise too broadly to the extent that it could be applied to hold government leaders criminally responsible for failed policies and a wide range of human rights violations that occur at times of crisis regardless of whether those violations are contemplated by the policies. The continuous collapse of the distinction between crimes against humanity at wartime and peacetime requires a more comprehensive and balanced reconstruction of all components of the criminal liability assessment, including elements of crimes, modes of liability, defences and sentencing.

The theme of this study highlights two overlapping fields, revolutionary studies and international criminal law. Revolutionary studies reveal that political violence motivated by justifiable causes could take various forms and structures and often is seen as the last resort to bring about social changes. The CPK revolution in Cambodia bears particular characters, especially the historical and political context, that distinguish it from other violent situations that have been addressed through international criminal law. The war in Sierra Leone demonstrated similar narratives of violence for just cause, as did the early years of the 'Arab Spring' movement across northern African and middle eastern states. Although it is unlikely that more revolutionary movements from the past will be put to criminal trials, the world is facing an increasing number of violent events and movements motivated by political causes. Simply dismissing the political causes in the assessment of criminal responsibility would either lead to unattainable or delayed justice. With the assistance of other peace and reconciliation mechanisms available besides criminal justice, it is important to continue engaging and incorporating considerations about the causes of conflicts into the legal framework of international crimes.

The originality and contribution of this thesis to the existing scholarship in the field of international criminal justice is to uncover the peculiarities of applying international criminal law to conduct carried out in a revolutionary context. These identified peculiarities include: 1) the broader reading of the contextual element of crimes against humanity in the context of the temporal jurisdiction of the ECCC, which was over four-decades ago; 2) the convergence of the mental element *dolus eventualis* and the contextual element of crimes against humanity in their factual findings, which shows a convenient combination of revolutionary goals and consequences; 3) the broad interpretation of the basic form of joint criminal enterprise liability which covers an even broader range of conduct in comparison with its extended form that the Court had decided was not applicable; 4) while adopting the previous broad interpretations towards convictions, the Court dismisses the necessity defence and the just cause as a mitigating factor without actually engaging the challenges and external threats that the CPK had to address. These peculiarities do not render the Court's decisions mistaken, but rather point out the ambiguities and limits of the current international legal framework dealing with crimes committed in a revolutionary context.

An important and cautious effort towards engaging and incorporating considerations relating to the causes of conflict into the legal framework of international crimes is the proposed Convention on the Prevention and Punishment of Crimes Against Humanity.[23] Important conceptual issues regarding the scope and definition of crimes against humanity have been raised by states such as China, India, Indonesia, Israel and Russia.[24] Taking China as an example, it has not fully embraced the concept of crimes against humanity in peacetime or during internal armed conflict.[25] Fears include the potential risk of using broadly alleged crimes against humanity to justify

[23] Claus Kreß and Sévane Garibian, 'Laying the Foundations for a Convention on Crimes Against Humanity: Concluding Observations' (2018) 16 Journal of International Criminal Justice 909, 912-914.
[24] Morten Bergsmo and Tianying Song, 'A Crimes Against Humanity Convention: After the Establishment of the International Criminal Court' in Morten Bergsmo and Tianying Song (eds), *On the Proposed Crimes Against Humanity Convention* (Torkel Opsahl Academic EPublisher, 2014) 7, 13.
[25] Dan Zhu, 'China, Crimes against Humanity and the International Criminal Court' (2018) 16 Journal of International Criminal Justice 1021, 1039.

interventions into states' domestic governance. The future of the proposed Convention remains to be seen. Efforts of genuine and serious engagement with the broader context, such as attempted by this study, in the process of moving international criminal law forward would be essential to ease reservations of sceptical states. Although countries with reservations towards the proposed Convention do not always clearly articulate their concerns within the framework of international law. Case by case studies of past or ongoing situations in those countries following similar holistic and balanced criminal law structure like the present one would be potentially helpful to identify and specify those concerns.

Despite the fact that the judgment of revolutions is often left to the political sphere due to their inherent subjective worldviews and the fact that they are better judged with hindsight, they have always interacted with the law. Any claim of social justice is inherently a political one.

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