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PROSECUTING MASS ATROCITIES AT THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA (ECCC)

ANDREW T. CAYLEY*

I. BACKGROUND

You have heard it called the “Extraordinary Chambers in the Courts of Cambodia” or “ECCC.” The official name is a bit of a mouthful, so I will refer to the court by its more commonly used name, which is used to describe the United Nations mission which supports the court, the Khmer Rouge Trials.

I am sure that all of you are familiar, at least in outline form, with the tragic modern history of Cambodia. In April 1975, after a bitter five-year civil war, a revolutionary movement led by the Communist Party of Kampuchea—better known as the Khmer Rouge—defeated the U.S.-backed regime of General Lon Nol and seized state power. The Khmer Rouge immediately implemented a radical transformation of Cambodian society employing a level of brutality and terror rarely seen in modern history. In their effort to construct an agrarian utopia, they effectively abolished the concepts of cities, money, religion, modern medicine, and even families. This totalitarian dictatorship brooked absolutely no opposition and so, in their search for real or imagined enemies, between 1.7 and 2.2 million people out of a population of less than 8 million died in less than four years. By proportion of the national population lost, it was perhaps the most murderous revolution in history.

After a lapse of nearly a quarter century, the United Nations and the Cambodian government agreed in 2003 to establish a hybrid internationalised domestic tribunal in an effort to address the legacy of impunity left in the wake of the Khmer Rouge regime. Several features make the Khmer Rouge Tribunal a unique experiment in international justice. It is the first internationalised court to seat a majority of judges from the affected nation. It is the first hybrid court to be established using a primarily civil law framework. Consequently, it was also the first to accord a central role to victims, who can join the proceedings as civil parties.

* International Co-Prosecutor, ECCC. Prosecutor Cayley prepared this speech and delivered it at Washington University School of Law, St. Louis, Missouri, USA on October 27, 2011.

The prosecutorial and judicial components of the Khmer Rouge Tribunal consist of the Office of Co-Prosecutors, the Office of Co-Investigating Judges, and three chambers—the Pre-Trial Chamber, the Trial Chamber, and the Supreme Chamber. In the Office of the Co-Prosecutors there is a national Co-Prosecutor and an international Co-Prosecutor. In the Office of the Co-Investigating judges there is a national Investigating Judge and an international Investigating Judge. In the Pre-Trial Chamber there are three national judges and two international judges. The same is true of the Trial Chamber. In the Supreme Court Chamber there are four national judges and three international judges. On the administrative side, another unique aspect of this court is that it has no Registrar. Rather, court management is controlled by a Cambodian Director of Administration who is supported by a UN-appointed Deputy Director, who is responsible for the UN budget and personnel.

The judicial process at the Khmer Rouge Tribunal begins with a preliminary investigation by the Office of Co-Prosecutors. The Co-Prosecutors identify crimes and/or suspects, and supporting evidence, and then transmit an Introductory Submission to the Co-Investigating Judges. The investigating judges then carry out a detailed judicial investigation of the allegations contained in the Introductory Submission. The Investigating Judges are obliged during their investigation to consider both inculpatory and exculpatory evidence. Should a dispute arise between the Co-Prosecutors regarding a proposed Introductory Submission, or if a Party (including the defence) disagrees with a decision of the Co-Investigating Judges, that issue is adjudicated by the Pre-Trial Chamber. At the conclusion of the judicial investigation the Co-Investigating Judges return the case file to the Co-Prosecutors who submit their final written submissions on the case to the Co-Investigating Judges. The Co-Investigating judges then either dismiss the case or issue a closing order, which is the equivalent of an indictment or charge sheet in the common law system. The closing order is subject to appeal in the Pre-Trial Chamber by all the parties. Once the closing order is settled by the Pre-Trial Chamber it is transmitted to the Trial Chamber for trial. Upon judgment by the Trial Chamber, the Parties may appeal to the Supreme Court Chamber, which rules with finality.

A unique challenge of the Khmer Rouge Tribunal is the long period of time between the commission of the crimes and the bringing of those crimes to justice. That time lapse has dramatic implications for evidence. Crime scenes become hopelessly contaminated or disappear altogether. Witnesses die, forget, or move on. Documents are lost or destroyed. This

creates substantial challenges for the prosecution crimes involving mass atrocities.

On the other hand, that long interval also means scholars and researchers have had a lot of time to sift through the evidence and examine the facts on the ground. This kind of information provided prosecutors with a running start on building their cases once the court initiated operations. One of these operations was a Yale University project named the Cambodian Genocide Program and an NGO it helped establish known as the Documentation Center of Cambodia. The Documentation Center of Cambodia assembled a large archive of contemporaneous documents from the Khmer Rouge regime. My office analysed more than 50,000 of those documents, and we have selected thousands of them to tender into evidence in our cases.

A thousand or so interviews were collected from previous research by scholars and NGOs. In the course of investigating Cases 001 and 002, the Office of Co-Prosecutors and the Office of Co-Investigating Judges also interviewed approximately 1,000 more persons regarding events during the Khmer Rouge regime. In addition, nearly 4,000 persons have been admitted to the proceedings as Civil Parties, and many of them submitted detailed statements. Finally, more than 4,000 individuals submitted complaints to the Office of Co-Prosecutors, and we have added those to the Case Files as well. In total, then, testimony from more than 10,000 witnesses to events during the Khmer Rouge regime is part of the evidence that is before the court, covering events in every corner of Cambodia.

This enormous trove of evidence undergirds the allegations we made in 2007 against five individuals. The Investigating Judges quickly split these allegations into two cases, which became known as Cases 001 and 002.

Case 001 involved Kaing Guek Iev, alias Duch. Duch was the chief of the Khmer Rouge secret police and commandant of the notorious torture and execution facility known as S-21. He went to trial in 2009 on charges of war crimes and crimes against humanity. Duch was convicted of persecution as a crime against humanity and five counts of Grave Breaches of the Geneva Conventions, and was sentenced to 35 years in prison. We are now awaiting the judgment of the Supreme Chamber on the various appeals in respect of his conviction. We have appealed a number of technical legal matters and also requested a life term; Duch has argued the court has no jurisdiction over him and has asked to be released.

In June of this year [2011], the Trial Chamber conducted initial hearings for the court's second case—Case 002—involving originally four (now three) defendants. All of the accused in this case are elderly, in or on the verge of their 80s. Nuon Chea was the Deputy Secretary of the

Communist Party and, the prosecution alleges, was responsible for the regime's internal security apparatus.

Ieng Sary was the Deputy Prime Minister and Minister of Foreign Affairs as well as a member of the communist party's Standing Committee. At 85, he is the eldest of the accused persons at the Khmer Rouge Tribunal—if only by a few months.

Khieu Samphan was the Head of State for Democratic Kampuchea, a member of the communist party's Central Committee. In many ways, he was the public face of the regime.

And finally, Ieng Thirith was the Minister of Social Action, and spouse of Ieng Sary. The Trial Chamber held hearings last month on the fitness of Nuon Chea and Ieng Thirith to stand trial. While Nuon was found fit to plead, the Chamber ordered a psychiatric examination for Thirith and ultimately held that she was not fit to stand trial and should be released. The Office of the Co-Prosecutors has appealed that decision, arguing that Ieng Thirith should be kept in custody, appropriately medicated, and reevaluated in six months to see if her condition has improved such that she can stand trial. We are currently awaiting the ruling from the Supreme Chamber on that appeal.

At the time of writing we have gone to trial with three individuals—Nuon Chea, Ieng Sary and Khieu Samphan.

So let us now discuss those charges, focusing on violations of international humanitarian law and customary international law. The foundation of the Khmer Rouge Trials is a domestic Cambodian statute enacted 27 October 2004 that establishes the court within the Cambodian judiciary and allows for the prosecution of violations of the Cambodian criminal code of 1956, as well as the international crimes I will now address: Grave Breaches of the Geneva Conventions, Crimes Against Humanity, and Genocide.

I will talk briefly about the jurisdictional or chapeau requirements and elements of these crimes, but mainly I want to concentrate on the evidence we are bringing to bear to prove the crimes.

II. GRAVE BREACHES

A. *Chapeau Elements*

There are, as you know, several key chapeau elements for Grave Breaches to apply. First is that grave breaches must have been committed during an international armed conflict. Both the Judgment by the ECCC Trial Chamber in Case 001 and Closing Order by the Co-Investigating

Judges in Case 002 found that a state of international armed conflict existed throughout the temporal jurisdiction of the court, and also that the other chapeau elements were satisfied: that protected persons had become victims; that a nexus existed between the armed conflict and the crimes; and that the accused persons were aware of both the armed conflict and the protected status of the victims.

B. Willful Killing

We have testimony from numerous former Khmer Rouge soldiers that they had explicit orders to kill civilians and to destroy civilian infrastructure during attacks across the border into Vietnam. The Khmer Rouge carried out attacks on Vietnam all along their 1200 kilometer border, but committed particularly heinous assaults on the towns of Tay Ninh, Chau Doc, and Ha Tien, with more than a thousand Vietnamese civilians killed in each of those attacks. This constituted willful killing and wanton destruction.

C. Willfully Causing Great Suffering or Serious Injury to Body or Health

The intentional brutality of Khmer Rouge soldiers against Vietnamese civilians resulted in great suffering and serious injury. That suffering was often followed by death, and included women and babies.

D. Torture

Vietnamese soldiers captured in combat, if they were not summarily executed in the field, faced the near-certainty of torture. These prisoners of war were often transported to the S-21 security office in Phnom Penh, where they were interrogated, tortured, and then executed.

E. Willfully Depriving a POW or Civilian of a Fair Trial

Vietnamese soldiers who were captured alive were invariably deprived of a fair trial. Indeed, the Khmer Rouge state did not even have an apparatus for conducting any trials at all. The forced confessions of POWs were tape-recorded and then played on Khmer Rouge radio as propaganda.

F. Unlawful Confinement of a Civilian

Vietnamese civilians were also captured in combat and sent to the S-21 prison, where they were unlawfully confined. These civilians, including children, were routinely declared to be “spies” and treated with the same contempt as Vietnamese soldiers. They, too, were deprived of a fair trial, tortured and executed.

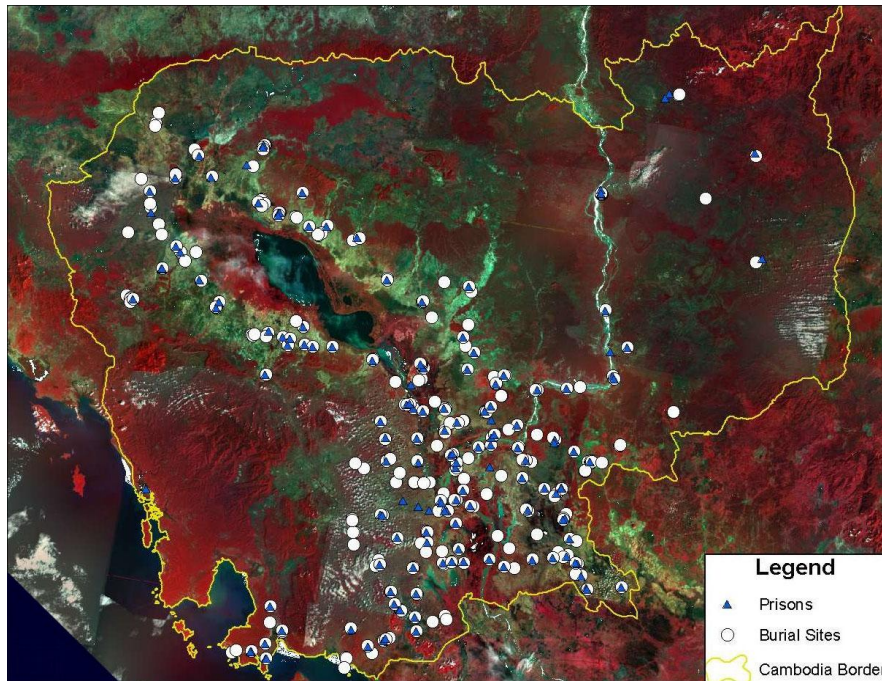
In sum, then, there is ample and compelling evidence that serious abuses were committed against Vietnamese soldiers and civilians, and that these abuses constituted Grave Breaches of the Geneva Conventions.

III. CRIMES AGAINST HUMANITY

A. Chapeau Elements

We have also alleged that the accused committed Crimes Against Humanity. In their Judgment in Case 001, the Trial Chamber found that the requirement for a nexus between Crimes Against Humanity and a state of armed conflict did not apply. Both the Trial Chamber in Case 001 and the Co-Investigating Judges in Case 002 found that the Accused committed a widespread and systematic attack against a civilian population on national, political, ethnic, racial, or religious grounds. They further found that the acts of the Accused were part of the attack and that the Accused were fully aware of this fact.

In terms of the mass or systematic criterion of Crimes Against Humanity perhaps nothing illustrates this characteristic of crimes during the Khmer Rouge regime more clearly than the Cambodian Genocide Program’s maps of Khmer Rouge prisons and mass grave sites. Such sites have been identified virtually everywhere in the country, including more than two hundred so-called “security offices” and upwards of 20,000 mass graves.



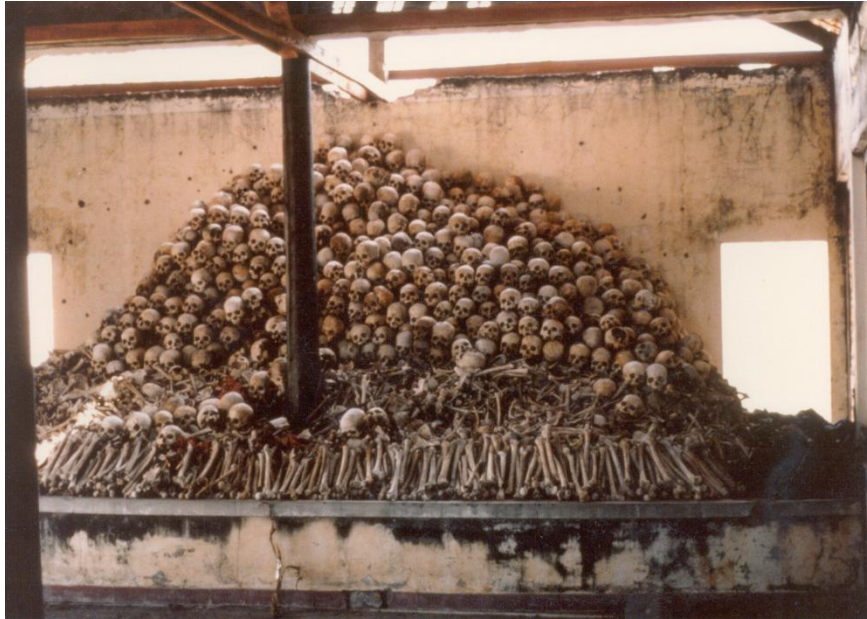
Cambodian Genocide Project Map of Prison and Mass Grave Sites.

B. Murder

Early on in the work of our office, my counterpart, National Co-Prosecutor Chea Leang, asked one of my investigators with all due humility, “How do we investigate two million murders?” The answer is, with crimes of such staggering scope over space, time, and type of criminal activity, we had to make some hard choices. We identified a small subset of typical examples. For the purposes of organising the prosecution of extermination, for example, we ultimately selected fourteen crime sites comprising security offices and execution sites.

C. Extermination

The evidence of extermination is everywhere in Cambodia today. It consists not just of the physical remains—such as this memorial at the site of the Sang Security Office—but also in surviving documentary records from the regime, as well as testimony from perpetrators, surviving victims, and witnesses who all tell consistent stories of what happened at these places.



Memorial at Sang Prison in Kandal Stung District, Kandal Province, created with remains exhumed from graves.

D. Enslavement

A central feature of life under Khmer Rouge rule was enslavement on a nationwide scale. Cambodians were treated as slaves in cooperatives, in mobile labor gangs, and at massive construction sites, such as a site in Kampong Thom Province, where they built a fifty-five kilometer long dam, named the 1st January Dam, almost entirely by hand.

E. Imprisonment

Imprisonment was also an ubiquitous feature of the Khmer Rouge state. At S-21 in Phnom Penh, and at more than 200 other such facilities around the country, people were rounded up on the flimsiest of pretexts, or sometimes none at all, detained under appalling, indeed, lethal conditions, and tortured relentlessly.

F. Torture

The catalog of tortures employed by the Khmer Rouge is so vast that I do not have time to describe them all. Instead I will simply refer to one

type. I believe that your former Vice President Dick Cheney has spoken approvingly of a technique known as “waterboarding,” and has jocularly referred to it as “dunking.”¹ Waterboarding was employed at the S-21 prison during torture sessions. The ECCC Trial Chamber found that Kaing Geuk Iev, alias Duch, was guilty of a crime against humanity for overseeing this type of torture.² We all know that in international jurisdictions, at least, “dunking” is a crime.

G. Persecution on Political, Racial, or Religious Grounds

Persecution on political, racial, and religious grounds was another feature of Khmer Rouge policy. Monks were defrocked, Buddhist believers were forbidden to worship, and temples were desecrated and destroyed. Muslim and Christian Cambodians endured the same or worse. All known or suspected members of any political movement other than the Khmer Rouge were ruthlessly hunted down and eliminated. I will mention more about persecution on racial grounds in a moment.

H. Other Inhumane Acts through “Attacks Against Human Dignity”

Depriving the population of adequate food, shelter, medical care, and hygiene has been characterized as Other Inhumane Acts through “Attacks against Human Dignity.” These conditions obtained more or less universally in what has been called the “Prison Without Walls,” during forced transfers, in ordinary cooperatives, at forced labor worksites, and in security centres. A report from cadre in the Northwest Zone of Democratic Kampuchea to the Khmer Rouge leadership in mid-1977 described the starvation deaths of 20,000 people over the previous year in a single district of a single region of the Northwest Zone.

I. Other Inhumane Acts through Forced Marriage

Another class of inhumane acts during the Khmer Rouge regime is found in the leadership’s demand to control even love, marriage, and

1. See A.G. Sulzberger, *Cheney Says Obama Has Increased Risks*, NY TIMES (Mar. 15, 2009), http://www.nytimes.com/2009/03/16/us/politics/16cheney.html?_r=2&ref=todayspaper; Neil A. Lewis, *Furor Over Cheney Remark on Tactics for Terror Suspects*, NY TIMES (Oct. 28, 2006), <http://www.nytimes.com/2006/10/28/washington/28cheney.html?fta=y>.

2. *Academic Research*, THE HAGUE JUSTICE PORTAL, <http://www.haguejusticeportal.net/index.php?id=8572> (last visited Aug. 1, 2012) (providing a summary of the proceedings and links to the court documents).

procreation. At forced marriage ceremonies, couples were assigned to one another on the wedding day, and then that night the militia monitored them from under their huts to ensure that they obeyed the order to copulate. The Co-Investigating Judges characterized this as rape within forced marriage, and that is what we have charged.

J. Other Inhumane Acts through Forced Displacement

Arguably, however, the most egregious inhumane acts perpetrated by the Khmer Rouge involved forced displacement: human beings were treated as objects to be moved about at the whim of the leadership. On their very first day in power, April 17, 1975, the Khmer Rouge evacuated every city and town in Cambodia of all its inhabitants, forcing them into the countryside where they were to hack out new settlements from the jungle. The old, the ill, and the weak fell along the way. Khmer Rouge soldiers filtered the columns of departing refugees, searching for soldiers of the defeated regime, civil servants, and businessmen, who were summarily executed in what they conceived of as a masterstroke of class warfare. The Khmer Rouge initiated another round of forced transfer involving up to a million persons later in 1975 and 1976, and then carried out a third forced transfer in 1978, when the bulk of the population of the Eastern Zone was deported to other zones and marked for extermination upon arrival.

K. Other Inhumane Acts through Forced Disappearances

It was standard procedure within the Communist Party of Kampuchea to invite a victim to a “meeting,” or to inform them that they were being sent for “study,” and then that person would never be seen again—at least not by friends or family. Instead, they were taken to one of the more than two hundred security offices in Democratic Kampuchea, where they were typically first tortured and then executed. That behavior constitutes the crime of Enforced Disappearance. This crime was committed countless times in Democratic Kampuchea.

IV. GENOCIDE

The question of whether or not events in Cambodia during the Khmer Rouge regime can be properly characterized as “genocide” has long been the subject of a lively debate among scholars and jurists. Bill Schabas, for example, in his majestic tome *Genocide in International Law* (among other places), has argued that what happened to the Cham minority in

Cambodia may be characterized as “cultural genocide,” but it does not constitute genocide according to the law. With all due respect for Bill’s unquestioned expertise in the law, I can only conclude that in this instance, he is not adequately conversant with the facts. We have alleged genocide against the Cham, as well as against Vietnamese, and we believe that the facts will support this conclusion when they are laid out in the Trial Chamber.

A. Cham

The Cham people of Cambodia are a Muslim ethnic minority that has cultural traditions and a language distinct from that of the Khmer majority. At the outset of the Khmer Rouge regime, Cham traditions and language were prohibited, as was their practice of Islam.

1. Intent to Destroy

To forestall the recurrence of rebellions, the Khmer Rouge decided to break up Cham communities and disperse the Cham population among Khmer villages. As part of the Prosecution evidence, we have a translation of a telegram dated 30 November 1975 from East Zone Secretary Sao Phim to Khmer Rouge leader Pol Pot discussing the plan to forcibly transfer Chams from their villages in the East Zone into other zones, where they could be dispersed, and more easily monitored and controlled.

2. In Whole or Part

The Khmer Rouge eventually decided that the Cham people could not be assimilated into the Khmer national group, and therefore they must be destroyed. One site of this extermination was the Wat Au Trakuon in Kang Meas District of Kampong Cham province, which was used as a Khmer Rouge security office. Cham people were gathered there to be executed en masse in late 1977 and early 1978. We have numerous witnesses who directly participated in that extermination process. We also have multiple witnesses who assert that they attended meetings where zone leaders described the plan to exterminate all Chams.

3. National, Ethnic, Racial or Religious Group

An escalating series of persecutions was imposed upon the Cham people of Cambodia. First, their distinctive cultural traditions, language and religion were forbidden, and their religious leaders were executed;

then, the Cham communities were broken up and dispersed; and finally, the Cham people were gathered together again so that they could be wiped out, men, women and children. The court's expert demographer estimates that the death rate among the ethnic Cham population during the Khmer Rouge regime was approximately double that of ethnic Khmer communities, at nearly 40%. In Cambodia's Cham people we have a clear case of genocide.

4. Acts of Killing

In a few isolated villages, there were rebellions to protest the restrictions on the Cham way of life. Those rebellions were ruthlessly suppressed, as is suggested by a mass grave on Koh Phal island, the location of one of those rebellions. The suppression of Cham culture and tradition was the first in a series of persecutions that culminated in genocide.

B. Vietnamese

Ethnic Vietnamese people have lived in Cambodia for centuries. At the outset of the Khmer Rouge regime, there were between 150,000 and 200,000 ethnic Vietnamese civilians residing in Cambodia. One month into the regime, a meeting of all CPK cadre from the district echelon and above was convened in Phnom Penh to disseminate policy instructions. Nuon Chea announced at this meeting that Vietnamese persons would no longer be permitted to live in Cambodia. From that moment, there began a persecution of ethnic Vietnamese under the DK regime which unfolded in phases and which culminated in genocide. Upon learning of this policy, many ethnic Vietnamese Cambodians rightly feared that a pogrom was in the making and voluntarily left for Vietnam. Most of those who remained were subsequently rounded up and forcibly expelled from the country. We have documented many cases where they were traded for commodities, most often salt, to Vietnamese authorities, who for their part were willing to pay ransom to spare lives. We estimate that approximately 20,000 Vietnamese people evaded this initial expulsion. Over the subsequent months of the regime, those remaining Vietnamese individuals were systematically hunted down and exterminated.

1. Acts of Killing and Intention to Destroy

Division 164 was the Democratic Kampuchea Navy. A telegram from Division 164 Secretary Meas Mut to Pol Pot and Nuon Chea shows an

interesting distinction in the treatment of captured sailors from neighboring countries. In this telegram, dated April 1978, Secretary Mut reported, without much comment, that 102 Vietnamese boat people captured over a series of four days had been executed as a matter of course. Thai boaters captured in the same period were repatriated to Thailand.

2. Intent to Destroy

Revolutionary Flag was the flagship journal of the Communist Party of Kampuchea. In the April 1977 issue of Revolutionary Flag, the Khmer Rouge exhorted their cadres to seek out Vietnamese everywhere, in the Party, in the Army, and among the People, to “smash them to bits,” and to “sweep them clean,” so as to “make things permanently clean.” Their intention to destroy all ethnic Vietnamese in Cambodia was clear and was repeatedly expressed in this publication and well as in other fora.

3. In Whole or Part

There is little occasion in the case of Cambodia’s ethnic Vietnamese population to engage in the usual academic debates about the “In Whole or in Part” requirement, or how many victims it takes to trigger the Genocide Convention. The ECCC retained professional demographers to examine this question. Of the ethnic Vietnamese who remained in Cambodia after the forced expulsion, they concluded, and I quote, “all 20,000 of them died from the hands of the Khmer Rouge during the years from April 1975 to January 1979.”

4. National, Ethnic, Racial, or Religious Group

But the Khmer Rouge were not content to destroy all the Vietnamese who lived on the national territory of Cambodia. In a policy reminiscent of Hitler’s mad pursuit of Jewish people all across Europe, the Khmer Rouge resolved to kill all of the Vietnamese in Vietnam as well.

5. Dolus Specialis

In the case of the Khmer Rouge genocide against the Vietnamese, we have a rare instance in which the special intent requirement need not be inferred. As early as January 1978, the leadership began exhorting cadres and troops to prepare to exterminate the entire Vietnamese race. The plan was summarized in the “1 against 30” slogan, which held that by

sacrificing 2 million troops, the Khmer Rouge regime would eradicate all 50 million Vietnamese on the planet. On May 10, 1978, the regime began to make public declarations of this policy, describing it in detail in national radio broadcasts. It is difficult to conceive of a more pure expression of genocidal intent.

V. CONCLUSION

Prosecuting mass atrocities at the Extraordinary Chambers in the Courts of Cambodia can fairly be characterised as one of the most daunting challenges in the history of international criminal law. Notwithstanding the troves of evidence available to the prosecution, the burden of proof to demonstrate individual criminal responsibility for such massive and heinous acts remains heavy, all the same.

In Case 001, Kaing Geuk Iev, alias Duch, confessed to his role in the crimes—after a fashion, at least, until he asked the appeals chamber to find that he lies outside the personal jurisdiction of the court. But the defendants in Case 002, it must be said, adamantly deny the charges against them. They insist that most of the violence was committed by enemies of the regime, and that all other impugned acts on their part were necessary and justified responses to oppression, internal subversion, and external aggression. They also have highly capable legal counsel assisting them in their defense. Those counsel have ensured that the defendants are taking advantage of every conceivable safeguard to their rights.

Given the civil law framework of the tribunal, it is my task to create among the judges of the Trial Chamber an “intimate conviction” that the defendants intended to commit the crimes charged, that they knew that these were criminal acts, that they committed those acts nonetheless, and that they did so according to a common plan. Those of you who have been closely following preparations for the substantive hearings in Case 002 will have noted that the Trial Chamber recently rejected JCE III as a mode of liability in existence between 1975 and 1979, but I am confident we can still rely and prove the criminal culpability under JCE I.