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Exploring the Curious Lenience of International Criminal Law: Case Comment on Case 001 of the Extraordinary Chambers in the Courts of Cambodia

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The decision of the Extraordinary Chambers in the Courts of Cambodia to sentence Duch, the brutal Chairman of S-21 and the Killing Fields at Choeung Ek, to a mere nineteen years in prison exemplifies the disturbing tendency of international criminal tribunals to issue sentences of pedestrian severity to the world's very worst criminals. This article examines the sociopolitical roots of this phenomenon. Drawing on insights from the political science literature to engage in a comparative analysis of the relationship between democracy and punishment, the article concludes that international criminal tribunals' lenience likely stems, at least in part, from excessive insulation from, and insensitivity to, democratic pressures. The experiences of the United States—where democratic participation in the machinery of punishment and excessively punitive sentencing have gone hand in hand—counsel against allowing popular sentiment to directly dictate the terms of punishment. Yet international jurists could arrive at a more just sentencing framework by incorporating popular preferences and values into their decision-making processes.

I. INTRODUCTION

In the late fall of 1995, Leandro Andrade walked into a local K-Mart near his home in the eastern suburbs of Los Angeles to pick up a few Christmas gifts for his nieces. Instead of heading for the cash register, however, Andrade slipped the four children's videocassettes he had selected—*Free Willy 2*, *Cinderella*, *The Santa Clause*, and *Little Women*—down his pants and strode toward the exit.[1] This was the second time in as many weeks that Andrade had attempted to shoplift children's videos from K-Mart, and in both instances he was stopped at the door.[2]

Six months later, in Los Angeles Superior Court, Andrade watched as a state judge sentenced him to two concurrent sentences of twenty-five years to life.[3] Under California's draconian "three-strikes" law—whose constitutionality was famously upheld by the U.S. Supreme Court in 2003[4]—any defendant found guilty of two "serious" felonies receives an automatic life sentence (with parole eligibility kicking in after twenty-five years) upon commission of *any* subsequent felony.[5] Thirty-seven years old at the time of his bumbling, Disneyfied crime spree, with two non-violent burglary convictions already on his record, Andrade will be eligible for parole in 2046. If alive, he will be eighty-seven.[6]

Twenty years earlier, in the fall of 1975, a gaunt, ethnic Chinese mathematics schoolteacher accepted a position heading S-21, a newly-established detention facility in Cambodia's newly-established Khmer Rouge regime.[7] Over the next three years,

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1 Brief of Respondent at 1–2, Lockyer v. Andrade, 538 U.S. 63 (2003) (No. 01-1127).

2 *Id.*

3 Andrade, 538 U.S. at 65–66.

4 *See id.*; *see also* Ewing v. California, 538 U.S. 11 (2003).

5 This includes so-called "wobbler" offenses, like petty theft, that can be charged as misdemeanors at either the prosecutor's or trial court's discretion. Andrade, 538 U.S. at 67.

6 Andrade, 538 U.S. at 79 (Souter, J., dissenting). Given widespread public criticism of California's three-strikes law, it is possible that the law will be reformed in such a way that Andrade's sentence is commuted before 2046. *See* Rebecca Cathcart, *Judge Orders Man Freed in Three-Strikes Case*, N.Y. TIMES, Aug. 17, 2010, at A18. Yet the 2004 failure of Proposition 66, a ballot initiative which would have reformed California's three-strikes law to require the "third strike" be "serious" and thus avoid cases like Andrade's, suggests that reform of the law is far from inevitable. Because the initial measure was enacted via ballot initiative, any reform of the law must be achieved through similar means. *See* Elsa Y. Chen, *Impacts of "Three Strikes and You're Out" on Crime Trends in California and Throughout the United States*, 24 J. CONTEMP. CRIM. JUST. 345, 351, 366 n.12 (2008).

7 Co-Prosecutor v. Kaing Guek Eav *alias* Duch, Case No. 001/18-07-2007/ECCC/TC, Judgment, ¶¶ 119–21, 128–32 (July 26, 2010) [hereinafter Case 001]; *see also* DAVID CHANDLER, VOICES FROM S-21: TERROR AND HISTORY IN POL POT'S SECRET PRISON 3 (1999) (describing the name S-21 as derived from "Sala"—Khmer for "hall"—and the

until the fall of the Khmer Rouge, Kaing Guek Eav—better known by his revolutionary name "Duch"—presided over the torture, enslavement, and murder of as many as 16,000 innocent men, women, and children at S-21.[8] Like Auschwitz and Dachau before them, S-21 and the Killing Fields at Choeung Ek (where most of the S-21 detainees were executed) are the most tangible and poignant representations of the unconscionable brutality and unmitigated horror of Khmer Rouge rule.[9] The facility's main purpose was to forcefully extract confessions from the regime's perceived "enemies" and subsequently "smash"[10] them by striking "the base of the neck with a metal bar," slitting open "their throats or stomachs . . . and [pushing] their bodies . . . into pits."[11] Duch alone had the authority to order the "smashing" of S-21 detainees and he exercised this authority to personally order the killing of virtually every detainee (and many of the staff) who entered S-21's gates.[12] To facilitate the efficient execution of S-21 detainees, Duch—on his own authority, and without the knowledge of his superiors—established the Killing Fields at Choeung Ek, where a tower filled with thousands of skulls unearthed in nearby mass graves now memorialize his brutal handiwork.[13]

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numbering system for Khmer Rouge security facilities). For a comprehensive account of the Khmer Rouge regime, see for example, BEN KIERNAN, THE POL POT REGIME (3d ed. 2008).

[8] The Extraordinary Chambers in the Courts of Cambodia (ECCC) officially found the number detained at S-21 to be at least 12,273. *See* Case 001, *supra* note 7, at ¶¶ 141–43. The actual number was "considerably greater," but because of incomplete documentary records, only 12,273 victims could be verified. *Id.* The tentative scholarly consensus is that roughly 16,000 people perished at S-21. *See* Kenneth M. Quinn, *Pattern and Scope of Violence*, *in* CAMBODIA, 1975–1978: RENDEZVOUS WITH DEATH 198 (Karl D. Jackson ed., 1992).

[9] During their brief rule from 1975 to 1979, the regime killed an estimated 1.7 to 3.3 million Cambodians—out of a population of only 7.1 million. ROBERT D. KAPLAN, THE ENDS OF THE EARTH 406 (1996) (discussing a range of sources). A precise determination of the death toll is impossible, and each "expert" seems to arrive at a different number, ranging from 800,000 to several million. In one notable effort, one scholar arrived at a statistical estimate of 1.17 to 3.42 million excess deaths in Cambodia from 1970 to 1979. *See* Patrick Heuveline, *Between One and Three Million*, 52 POPULATION STUD. 49, 56 (1998).

[10] As Duch explained to the Court, "to smash . . . means to arrest secretly [, to interrogate] with torture employed, and then [to execute] secretly" without judicial process. Case 001, *supra* note 7, at ¶ 100. The term also encompasses "psychological smashing . . . dehumanization and debasement of the individual psyche." *Id.*

[11] *Id.* at ¶ 220.

[12] *Id.* at ¶¶ 140–41, 148, 171. Only ten detainees of S-21 are known to have survived. *See* ADAM JONES, GENOCIDE: A COMPREHENSIVE INTRODUCTION 199 (2006). Of the eight people who sought the ECCC's recognition as survivors of S-21 or S-24 (a sub-branch of S-21, *see* Case 001, *supra* note 7, at ¶ 190), only four could be confirmed as such. Case 001, *supra* note 7, at ¶ 645.

[13] Case 001, *supra* note 7, at ¶ 186.

The Extraordinary Chambers in the Courts of Cambodia (ECCC)[14] found in Case 001 that Duch "willingly and zealously"[15] established and executed a streamlined apparatus of torture to ensure that all detainees at S-21 confessed to betraying the regime, thus justifying their subsequent "smashing."[16] Moreover, by his own admission, Duch personally ordered and oversaw the torture of detainees,[17] which routinely included beatings, electrocution, asphyxiation with plastic bags, and water-boarding.[18] Torturers tore off and punctured prisoners' fingernails and toenails, inserted needles into them, and force-fed them their own excrement and urine.[19] The torture included psychological abuse, with detainees forced to pay homage to images of dogs—which "in the Cambodian cultural context . . . caused victims extreme humiliation and severe emotional distress."[20] Further, Duch personally ordered that certain detainees be subjected to medical experiments between their interrogation and their deaths at the Killing Fields.[21] Despite his admitted awareness that "much of the information [offered] in the confessions" elicited from such brutal interrogation techniques "was fabricated,"[22] Duch authorized these atrocities under the circular logic of "justify[ing] the decision to arrest the [confessing] detainee" in the first place.[23] Moreover, detainees were forced to reveal an imagined "network of traitors . . . in the[ir] confession" who were then "investigated and eventually arrested,"[24] thus implicating the detainees themselves in perpetuating the cyclical horror of S-21.

For these crimes—which it deemed "crimes against humanity . . . [and] grave breaches of the Geneva Conventions of 1949"[25]—the ECCC Trial Chamber

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[14] The ECCC is a "hybrid tribunal" in which the court's "institutional apparatus and the applicable law consist of a blend of the international and the domestic." Laura A. Dickinson, *The Promise of Hybrid Courts*, 97 AM. J. INT'L L. 295, 295 (2003). For a comprehensive overview of the ECCC, see John D. Ciorciari, *History and Politics Behind the Khmer Rouge Trials*, *in* ON TRIAL: THE KHMER ROUGE ACCOUNTABILITY PROCESS 33 (John D. Ciorciari & Anne Heindel eds., 2009).

[15] *Id.* at ¶ 393.

[16] *See id.* at ¶ 155 (noting that detainees were forced to confess to conspiratorial allegiances with the Central Intelligence Agency, KGB, or Vietnamese Communist Party—entities of which many detainees had never heard).

[17] *See id.* at ¶ 176 (recounting Duch's admission that "[i]f the prisoners did not give satisfactory confessions, then I would annotate on the confessions that they had to use more torture in order to get the confessions, and I was the one to decide to order the interrogators to torture more").

[18] *Id.* at ¶ 241.

[19] *Id.* at ¶¶ 242–44, 249–50.

[20] *Id.* at ¶ 243.

[21] *See id.* at ¶¶ 182, 275.

[22] *Id.* at ¶ 179.

[23] *Id.* at ¶ 254.

[24] *Id.*

[25] *Id.* at ¶ 567. In particular, the ECCC found Duch guilty of "the following offences as crimes against humanity: murder, extermination, enslavement, imprisonment, torture, persecution on political grounds, and other inhumane acts" and "the following grave breaches of the Geneva

sentenced Duch to less than nineteen years in prison.[26] The ECCC considered that his offenses merited a thirty-five year sentence, but granted him a five-year reduction for his previous illegal detention by the Cambodian government, and gave him credit for the over eleven years he had already spent in custody.[27] If the Trial Chamber's sentence is upheld on appeal, Duch will walk free in 2029 at the age of eighty-six,[28] a year Leandro Andrade's junior. For one brief news cycle, headlines glimmered across the world: "19 Years for Killing 16,000"[29]; "Less than one day for every person killed!"[30]

II. THE IMPORTANCE OF SENTENCING

Critics of the United States' "broken" criminal justice system[31] and the "naïve" project of international criminal law[32] find no warmer companion than the polar absurdities in sentencing illustrated above. After all, a dispassionate gaze over this disjointed landscape by Justice Holmes' proverbial "bad man"—who is concerned with the relative lawfulness of his conduct only insofar as it "enables him to predict" the "material consequences" thereof[33]—would suggest that the Californian petty thief is worthy of greater social disapprobation than the Cambodian mass murderer. Sentencing is where legal rhetoric meets practical reality. It is with good reason,

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Conventions of 1949: 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 a fair and regular trial, and unlawful confinement of a civilian." *Id.*

[26] *See id.*, at ¶¶ 631–33.

[27] *See id.*

[28] Both the prosecution and the defense have sought to appeal the sentence. *See* Co-Prosecutors' Notice of Appeal Against the Judgment of the Trial Chamber in the Case of Kaing Guek Eav *Alias* Duch at ¶¶ 4–5, Case 001 (Aug. 16, 2010) (Case No. 001/18-07-2007/ECCC/TC) (arguing that the ECCC's sentence was "arbitrary and manifestly inadequate" relative to Duch's "particularly shocking and heinous" crimes); Notice of Appeal by the Co-Lawyers for Kaing Guek Eav Alias Duch Against the Trial Chamber Judgment of 26 July 2010, Case 001 (Aug. 24, 2010) (Case No. 001/18-07-2007/ECCC/TC).

[29] Jonathan Gurwitz, *19 Years for Killing 16,000*, PHILA. INQUIRER, Aug. 10, 2010, http://www.philly.com/inquirer/opinion/100324639.html.

[30] *See* Robin McDowell, *For Most Cambodians, 'Justice' has Little Meaning*, ASSOCIATED PRESS, Aug. 8, 2010, *available at* http://abcnews.go.com/International/wireStory?id=11353172.

[31] *See* Henry Weinstein, *Justice System is 'Broken,' Lawyers Say*, L.A. TIMES, June 24, 2004, at A14 (quoting Dennis Archer, then-President of the American Bar Association); *see also* AM. BAR ASS'N JUSTICE KENNEDY COMM'N, REPORTS WITH RECOMMENDATIONS TO THE ABA HOUSE OF DELEGATES, 11–25 (Aug. 2004), http://www.abanet.org/crimjust/kennedy/JusticeKennedyCommissionReportsFinal.pdf.

[32] *See* John R. Bolton, *Why an International Criminal Court Won't Work*, WALL ST. J., Mar. 30, 1998, at A19 (describing the International Criminal Court as "a product of fuzzy-minded romanticism" that is "not just naïve, but dangerous").

[33] Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897).

therefore, that "sentencing . . . means more to victims, the accused, and the public at large than almost any other issue that arises during trial." [34]

Predictably, then, Duch's sentence dominated post-mortem discussion of Case 001. Public outcry was swift and dramatic, channeling shock and dismay with elegantly simple retributivist logic: "People lost . . . their wives, their husbands, their sons and daughters . . . they are dead now," one Cambodian woman recalled, "so why should [Duch] be able to get out in 19 years and spend time with his grandchildren?"[35] While no systematic analyses have yet been conducted on Cambodian popular reactions to the Duch verdict, all indications suggest widespread disaffection and anger.[36]

In lieu of confronting this wave of anger head on, public supporters of the ECCC have urged the Cambodian public to look beyond the lenience of Duch's sentence and reflect on Case 001's broader, abstract significance. As noted by Youk Chhang, Director of the Documentation Center of Cambodia,[37] the ECCC "could sentence [Duch] to more than 14,000 years . . . and even that wouldn't make it fair."[38] Despite the inevitable inadequacy of the ECCC's sentencing mechanisms, which do not allow for imposition of the death penalty,[39] Chhang argues that:

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[34] Mark B. Harmon & Fergal Gaynor, *Ordinary Sentences for Extraordinary Crimes*, 5 J. INT'L CRIM. JUST. 683, 707 (2007).

[35] Seth Mydans, *Prison Term for Khmer Rouge Jailer Leaves Many Dissatisfied*, N.Y. TIMES, July 27, 2010, at A4; *see also* Kuong Ly, *Justice Denied for Cambodians*, N.Y. TIMES, Aug. 2, 2010, http://www.nytimes.com/2010/08/03/opinion/03iht-edkuong.html.

[36] *See, e.g.*, Miranda Leitsinger, *Khmer Rouger Survivors Angry over Duch Jail Sentence*, CNN.COM, July 26, 2010, http://articles.cnn.com/2010-07-26/world/cambodia.khmer.rouge.verdict_1_duch-kar-savuth-kaing-guek-eav (recounting survivors of the Khmer Rouge describing the ECCC as a "sham," and the verdict as "an insult"); *Survivors Angry at Khmer Rouge Verdict*, N.Z. HERALD, July 27, 2010; Guy De Launey, *Tears and Disbelief at Duch Verdict*, BBC NEWS, July 26, 2010, http://www.bbc.co.uk/news/world-asia-pacific-10763409; Theary Seng, *Khmer Rouge Victim's Shock Turns to Bitterness After 'Light' Duch Sentence*, FRANCE 24, July 29, 2010, http://observers.france24.com/content/20100729-cambodia-khmer-rouge-victim-shock-turns-bitterness-after-light-duch-sentence.

[37] The Documentation Center of Cambodia serves as a central repository of documentary evidence against the Khmer Rouge. It has collected and catalogued hundreds of thousands of pages of documents from the Khmer Rouge era. *See DC-Cam Khmer Rouge History Database*, DOCUMENTATION CTR. OF CAMBODIA, http://www.dccam.org/Database/Index1.htm (last visited Nov. 14, 2010).

[38] DOCUMENTATION CTR. OF CAMBODIA, THE DUCH VERDICT: KHMER ROUGE TRIBUNAL CASE 001 (2010), *available at* http://www.dccam.org/Archives/Protographs/Exhibition_Khmer_Rouge_Tribunal_Case_001--The_Duch%27s_Verdit.pdf.

[39] *See* Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, art. 3, Oct. 27, 2004, NS/RKM/1004/006.

> By recognizing the illegality of Duch's pre-trial detention and reducing his sentence accordingly, the verdict . . . provides . . . a model for fair trials in Cambodia. [Further, it offers] official accountability. This is the most important Court legacy: a final judgment recognizing the crimes committed by the Khmer Rouge.[40]

In short, even if the punishment was inadequate, the verdict against Duch ends impunity—i.e., "exemption or freedom from punishment"[41]—for the Khmer Rouge's crimes. Judicial cognizance of Duch's cruelty and his victims' resultant suffering was the true goal of Case 001, and that has been realized.

While Chhang is surely right that the ultimate objective of the ECCC is to achieve official condemnation of the Khmer Rouge's crimes, lenient sentences necessarily dilute that condemnation, at least in the public mind. The lenience of Duch's sentence therefore undermines the symbolic significance attendant to judicial recognition of his crimes. Further, there are real risks that the Cambodian public's anger at Duch's sentence could develop into broader disenchantment with the ECCC itself. After all, this is a country where "low-level drug dealers" are given sentences of equivalent severity.[42] This is a tribunal that has been subject to persistent accusations of corruption and political influence, leading one-third of Cambodians to doubt its neutrality *prior to* the commencement of Case 001.[43] And this is a form of justice that has failed to garner the support of victim communities due to its lenient sentencing practices in the past.[44]

Despite such consequences, the international criminal tribunals charged with delivering justice with respect to "the most serious crimes of concern to the international community as a whole,"[45] have generally been either unable or unwilling

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[40] DOCUMENTATION CTR. OF CAMBODIA, *supra* note 38.

[41] MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 585 (10th ed. 1993).

[42] McDowell, *supra* note 30. In fact, the most high profile legal collaboration between the United Nations and the Cambodian government other than the ECCC recently yielded drug laws subjecting heroin possession to life imprisonment. Khoun Leakhana & Sarah Whyte, *New Law to Tighten Drug Controls*, PHNOM PENH POST, Jan. 21, 2009, *available at* http://www.ncpd.gov.kh/index.php?option=com_content&view=article&id=199:new-law-to-tighten-drug-controls&catid=62:population-and-health&Itemid=58.

[43] Anne Barrowclough, *Corruption Fears Cast Shadow over Khmer Rouge Trial*, THE TIMES, Feb. 16, 2009, *available at* http://www.timesonline.co.uk/tol/news/world/asia/article5745438.ece.

[44] In Rwanda, for example, "most victims preferred local adjudicatory measures to ICTR [International Criminal Tribunal for Rwanda] prosecutions for the simple reason that local tribunals were more likely to be responsive to victims' preferences." Julian Ku & Jide Nzelibe, *Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities?* 84 WASH. U. L.R. 777, 796 (2006) (citing José E. Alvarez, *Crimes of States/Crimes of Hate: Lessons from Rwanda*, 24 YALE J. INT'L L. 365, 410–12 (1999)). In simpler terms, victims of the Rwandan genocide preferred domestic courts because of the harsher punishments—including the death penalty—available in those courts. Alvarez, *supra* note 44, at 406–07.

[45] Rome Statute of the International Criminal Court art. 5, U.N. Doc. A/CONF.183/9*.

to articulate a satisfying theoretical rationale for the remarkable lenience displayed in their sentencing jurisprudence. Several commentators despair at the "perfunctory" manner in which international courts address sentencing, treating it as "little more than an afterthought."[46] The ECCC, for example, spent a mere 18 pages of its 281-page opinion discussing the appropriate punishment for Duch's crimes, even though the factual and legal issues with which it dealt were relatively straightforward, given that Duch "did not dispute a significant number of facts" presented at trial and openly "acknowledged his 'legal and moral' responsibility for the crimes committed at S-21."[47] This neglect of sentencing pervades international criminal justice. Observers of the International Criminal Tribunal for the former Yugoslavia (ICTY) have noted, for example, that amidst voluminous discussion of abstract legal concepts "which may hardly register among the public . . . [i]n a long trial, submissions concerning sentencing may occupy less than 0.1% of total courtroom time."[48]

Filtering its analysis through the ECCC's ruling in Case 001, this article seeks to disentangle the sociopolitical roots of the troubling state of international sentencing jurisprudence. Punishment is curiously deprioritized, and therefore woefully under-theorized, by international criminal tribunals. Without an adequate theoretical foundation to guide their sentencing decisions, international tribunals have shaped a sentencing jurisprudence that is unprincipled in its calculation and *ad hoc* in its execution. Sentencing decisions by international tribunals seem driven largely by fallacious logical heuristics, unexamined psychological proclivities, and shockingly uncritical importation of domestic European norms. Moreover, the gap between public expectation and official deliberation regarding Duch's sentence seems to reflect a broader disconnect between international criminal practitioners and the communities on whose behalf they purportedly toil.

In seeking to explain the oddly unprincipled lenience of the ECCC in Case 001, this article compares it with the recent experiences of the United States—where modalities of punishment have simultaneously drifted toward being more Kantian (i.e., rigidly

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[46] Harmon & Gaynor, *supra* note 34, at 708.

[47] Case 001, *supra* note 7, at ¶¶ 47, 570 (citing Transcript of Proceedings—"Duch" Trial Public at 69, Case 001 (Mar. 31, 2009) (Case No. 001/18-07-2007/ECCC/TC)). In an odd and surprising turn of events, however, on the last day of the trial, Duch's domestic co-counsel appeared to withdraw Duch's presumed guilty plea on the basis that he was not a "senior leader" within the jurisdiction of the ECCC. *See* Transcript of Trial Proceedings—Kaing Guek Eav "Duch" Public at 51, Case 001 (Nov. 27, 2009) (Case No. 001/18-07-2007/ECCC/TC). Adding to the confusion, Duch's international co-counsel seemed to disavow his domestic counterpart's position later in the day. *See id.* at 52. Nevertheless, Duch cooperated with the prosecution throughout the trial and—other than raising issues of the ECCC's jurisdiction, which the Court summarily rejected as untimely, *see* Case 001, *supra* note 7, at ¶¶ 13-15—fully admitted that he was "responsible for [the] crimes without denial." *See* Transcript of Trial Proceedings—Kaing Guek Eav "Duch" Public at 56.

[48] Harmon & Gaynor, *supra* note 34, at 707–08 (discussing the ICTY).

retributivist)[49] in substance and more democratic in process. A comparative analysis suggests one intriguing possibility: the roots of international tribunals' lenience may lie in the insulation of their decision-making processes from popular will. This article thus posits, and briefly explores the international implications of, a potential causal correlation between the sociological legitimacy[50] of a criminal justice system's sentencing apparatus and the severity of that apparatus' output. In other words, international criminal tribunals may be lenient in part *because* they are democratically unresponsive.

III. THE COURT'S REASONING

The ECCC's discussion of sentencing in Case 001 is brief, unsatisfying, and vacant. It begins with a dry recitation of applicable law, moves onto a cursory survey of international sentencing principles, and then makes the following findings.[51] First, the Court noted that relevant ECCC law is largely "silent as regards the principles and factors to be considered at sentencing."[52] Further, the Court ruled that "there is no . . . international sentencing regime directly applicable before the ECCC" and that "the international nature of the crimes for which [Duch] has been convicted, and the uncertainties and complexities [of relevant Cambodian criminal law] rule[] out the direct application of Cambodian sentencing provisions.[53] As such, the Court concluded that it "must exercise its own discretion in determining the sentence it considers justified."[54]

Following "established" international precedent that "the gravity of the crime committed is 'the litmus test for the appropriate sentence,'"[55] the Court noted that Duch's "shocking and heinous . . . crimes are extremely grave."[56] The Court then observed that it "will consider all relevant aggravating and mitigating factors in determining a sentence,"[57] and identified several of each.[58] Finally, the Court

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[49] *See* B. Sharon Byrd, *Kant's Theory of Punishment: Deterrence in its Threat, Retribution in its Execution*, 8 L. & PHIL. 151, 151 (1989) (noting that "Kant's theory of punishment is commonly regarded as purely retributive in nature" but arguing that it has a deterrent component as well).

[50] That is, that which secures public acceptance. *See* Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1795–96 (2005).

[51] *See* Case 001, *supra* note 7, at ¶¶ 571–85.

[52] *Id.* at ¶ 575.

[53] *Id.* at ¶¶ 576–77.

[54] *Id.* at ¶ 578.

[55] *Id.* at ¶ 582 (citing Prosecutor v. Aleksovski, Case No. IT-95-14/1-A, Judgment, ¶ 182 (Mar. 24, 2000)).

[56] Case 001, *supra* note 7, at ¶¶ 597, 600.

[57] *Id.* at ¶ 583.

[58] Four aggravating circumstances—(1) Duch's "abuse of power," (2) his "cruelty," (3) his "discriminatory intent," and (4) "the defencelessness of the victims"—must be balanced against five mitigating circumstances—(1) his "cooperation with the ECCC" which "facilitated

concluded that Duch deserved "full credit for the entirety of his [pre-trial] detention" and an additional sentencing credit for the period which was "unlawful and in violation of his rights to a trial within a reasonable time."[59]

Entering all these inputs into the nebulous black box of its "consideration" without any additional discussion, the ECCC somehow settled on a sentence of roughly nineteen years.[60] On its face, the ECCC's proportionality determination seems to have suffered from the confluence of several logical defects.[61] First, given that the upper-limit on sentencing (life in prison) is itself a grossly inadequate punishment for Duch's horrific crimes,[62] any practically significant sentencing discount will result in appalling disproportionality between his crimes and his sentence. Thus, under the ordinary conception of proportionality, whereby a defendant's punishment should reflect the gravity of his or her offense—i.e., "offence-gravity proportionality"[63]—life in prison is an inappropriately lenient baseline for a proportionality calculation. If the ECCC had imposed a modest fifteen-year penalty for every individual Duch tortured and murdered,[64] for example, his sentence would have amounted to over 180,000 years.

Duch's sentence, in contrast, exemplifies the troubling phenomenon by which—in an effort to differentiate defendants of varying culpability—international tribunals appear

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the proceedings before the Chamber" and "assisted . . . national reconciliation," (2) his "[e]xpressions of remorse," (3) his "propensity for rehabilitation," (4) his "admission of responsibility," and (5) "the coercive environment . . . in which he operated." *Id.* at ¶¶ 601, 609–11, 629. The ECCC noted further that "the mitigating impact of his remorse is undermined by his failure to offer a full and unequivocal admission of his responsibility" pointing in particular to his belated "request . . . for acquittal." *Id.* at ¶ 610. With regard to rehabilitation, the ECCC pointed to his stable psychological profile, see *id.* at ¶ 616, and seemed to rely on his pre-S-21 days as a "well-respected student and teacher" and post-S-21 days as a Christian "lay pastor." *See id.* at ¶¶ 617–22. The ECCC also appeared to reject Duch's arguments that duress and superior orders be considered further mitigating factors, see *id.* at ¶¶ 606–08, yet then curiously re-introduced the issue of Duch's "coercive environment" when laying down its sentence, *id.* at ¶ 629. *See also* Harmon & Gaynor, *supra* note 34, at 699–705 (describing the types of mitigating circumstances taken into account at the ICTY).

[59] Case 001, *supra* note 7, at ¶ 624; *see also id.* at ¶¶ 623–27. Duch's illegal detention of roughly eight years was prior to the establishment of the ECCC and was under the auspices of the Cambodian Military Court. *See id.* at ¶¶ 623–24.

[60] *See id.* at ¶¶ 631–33.

[61] Given the near complete absence of any substantive discussion on this matter by the ECCC, one can only guess at its reasoning.

[62] *See* Prosecutor v. Krajisnik, Case No. IT-00-39-T, Judgment, ¶ 1146 (Sept. 27, 2006) (noting that, given the gravity of the crimes facing international tribunals, "a sentence, however harsh, will never be able to rectify the wrongs" committed by guilty defendants).

[63] Jens David Ohlin, *Towards a Unique Theory of International Criminal Sentencing*, *in* INTERNATIONAL CRIMINAL PROCEDURE: TOWARDS A COHERENT BODY OF LAW 381, 408 (Göran Sluiter & Sergey Vasiliev eds., 2009).

[64] Perhaps in an attempt to obscure its miniscule sentence "per offense," the ECCC in its discretion decided to issue a "single sentence that reflects the totality of [Duch's] criminal conduct." Case 001, *supra* note 7, at ¶ 590.

to unwittingly apply "defendant-relative proportionality."[65] Under this conception of proportionality—which often drives sentencing decisions within closed, domestic systems[66]—"defendants receive sentences that are proportional to other defendants who are more or less culpable, such that the worst defendants get the highest sentences and the least culpable defendants get the lowest."[67] Given the upper-level constraint of life in prison, however, applying defendant-relative proportionality in the international context results in sentencing absurdities like that witnessed in Case 001. There is not a domestic jurisdiction in the world in which a court would find a lucid defendant guilty of a "heinous" and "cruel" intentional murder to merit a sentence of less than a day in prison. Yet that is exactly the absurd result reached by the ECCC in Case 001.

This can be fairly characterized as exhibiting logical error (rather than merely a questionable value judgment) in that applying defendant-relative proportionality in the international context ultimately results in punishments that are in obvious tension with the underlying retributivist impulse upon which the proportionality calculation is based.[68] These outcomes seem to emanate from international tribunals' unthoughtful commitment to the internal coherence of the international criminal sentencing regime—whereby commentators quibble nonsensically over whether *génocidaires* should be given harsher sentences than a mere mass murderer[69]—in lieu of a broader focus on ensuring coherence *between* international sentencing and relevant domestic practice. While promoting reasonable consistency in sentencing across defendants is a laudable goal, such efforts are distorted when the group of criminal defendants within which consistency is sought is defined at an inappropriate level of generality.[70] Ensuring defendant-relative proportionality within the closed system of international sentencing, in other words, results in sentences that—in addition to being excessively lenient in the abstract, retributivist sense—flagrantly offend defendant-relative proportionality writ large, that is, viewed from the perspective of the entire universe of criminal punishment, both international and domestic.

Second, Duch's lenient sentence likely also stems from a psychological infirmity known as "the anchoring and adjustment heuristic, under which people tend to 'anchor' at an externally offered reference point . . . and then merely 'adjust' [these

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[65] Ohlin, *supra* note 63, at 407–08.
[66] *See* Richard S. Frase, *Punishment Purposes*, 58 STAN. L. REV. 67, 74 (2005) (discussing the importance of uniformity in sentencing).
[67] Ohlin, *supra* note 63, at 407–08.
[68] *See* Richard A. Posner, *Retribution and Related Concepts of Punishment*, 9 J. LEG. STUD. 71, 71 (1980). *But see* Frase, *supra* note 66, at 68 (noting that proportionality can also be premised on utilitarian grounds).
[69] *See* Andrea Carcano, *Sentencing and the Gravity of the Offence in International Criminal Law*, 51 INT'L & COMP. L.Q. 583, 588–90 (2002).
[70] *See* Frase, *supra* note 68, at 67.

initial] determinations according to their personal thoughts and proclivities."[71] Despite ruling that the "ECCC legal framework does not indicate any maximum sentence in instances where life imprisonment is not imposed"[72] and giving no indication that its decision-making process was driven by the co-prosecutors' submission, the ECCC seems to have subconsciously "anchored" at the *forty* years requested by the prosecution and the *thirty* year maximum under the Rome Statute of the International Criminal Court,[73] and then "adjusted" inward to arrive at its initial *thirty-five* year sentence. In the absence of any alternative guidance from the ECCC as to how it arrived at this seemingly random number, this is as plausible a theory as any.

Given the unenviable blankness of the slate upon which the ECCC was forced to write, the Court can be forgiven for failing to construct a holistic and theoretically coherent doctrinal regime of punishment in Case 001. Yet the ECCC's insipid effort to elucidate the reasoning behind its sentencing decision, and the logical flaws inherent in any reasoning we might attempt to construct for it, leaves one fairly wondering if there was any. Situated between the abstract principles purportedly guiding the ECCC's decision-making process—"equality before the law, proportionality and individualisation of penalties"[74]—and Duch's resulting sentence of thirty-five years in prison unfortunately lies very little in terms of substance.

IV. COMPARATIVE THEORIES OF PUNISHMENT

The vast divergence between the United States and the rest of the developed world with respect to sentencing is well established.[75] The United States imposes more severe criminal sentences, and subjects a wider range of crimes to criminal sanction, than any other major developed democracy in the world—from France to Germany, Australia to Canada, and Japan to South Korea.[76] These disparities in sentencing are,

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[71] *See* Ryan Y. Park, *The Globalizing Jury Trial*, 58 AM. J. COMP. L. 525, 567 (2010) (citing Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCIENCE 1124 (1974)).

[72] Case 001, *supra* note 7, at ¶ 591; *see also id.* at ¶ 569.

[73] The ECCC wrestled with the legal import of the fact that both the 2009 Cambodian Penal Code and the Rome Statute establishing the International Criminal Court "envisage[] no intermediate term of imprisonment between 30 years imprisonment and life." *Id.* at ¶¶ 592–94. *See also* Case 001, Separate and Dissenting Opinion of Judge Jean-Marc Lavergne on Sentence, at ¶¶ 2–9 (July 26, 2010) (Case No. 001/18-07-2007/ECCC/TC) (arguing that the ECCC is proscribed from issuing any sentence between thirty years and life in prison).

[74] Case 001, *supra* note 7, at ¶ 581.

[75] *See*, *e.g.*, JAMES Q. WHITMAN, HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE 70–71 (2003); FRANKLIN E. ZIMRING, GORDON HAWKINS, & SAM KAMIN, PUNISHMENT AND DEMOCRACY: THREE STRIKES AND YOU'RE OUT IN CALIFORNIA 17–18 (2001) (noting, *inter alia*, that California imprisons more people than Germany and France combined).

[76] *See* INT'L CTR. FOR PRISON STUD., KING'S COLLEGE LONDON, WORLD PRISON BRIEF, http://www.kcl.ac.uk/depsta/law/research/icps/worldbrief/index.php?search=All (last

at least in part, rooted in differing underlying theoretical justifications for punishment.[77] Most notably, the American conception of punishment is primarily predicated on retributivist notions of making criminal offenders "pay their debt to society" through lengthy prison terms,[78] while other developed democracies place a heavier emphasis on "rehabilitating prisoners and returning them to productive society."[79] While the gap in sentencing between the United States and the rest of the developed world—both in theory and practice—is narrowing to some extent, the chasm remains pervasive and persistent.[80]

In examining these trends, Jens David Ohlin argues that there is a direct and powerful relationship between the Europeanized state of international legal practice and the curious lenience of international criminal sentencing. According to Ohlin, "the split [between European and American theories of punishment] has had a huge effect on international criminal justice."[81] This is because:

> [I]nternational criminal justice is dominated by Europeans, both at the institutional level and at the individual level. The major institutions are Hague-centric . . . the vast majority of lawyers at [international] tribunals are non-American . . . the number of European scholars working in [international criminal law] far outnumbers the relatively few Americans . . . .[82]

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visited Nov. 13, 2010); *see also* Arie Freiberg, *What's it Worth? A Cross Jurisdictional Comparison of Sentence Severity, in* SENTENCING AND SOCIETY: INTERNATIONAL PERSPECTIVES 237, 237–38 (2002); *see also* WHITMAN, *supra* note 75, at 56.

[77] *See* Ohlin, *supra* note 63, at 384; WHITMAN, *supra* note 75, at 73 (noting the enduring commitment amongst Western Europeans to rehabilitative models of punishment despite disenchantment therewith).

[78] *See* Ohlin, *supra* note 63, at 385. Less prominently, punishment in America is based on expressivist and deterrent rationales—both of which militate toward severity in sentencing (so as to express moral condemnation and disincentivize criminal behavior, respectively). *See id.* at 384–85; *see also* Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 593 (1996) (discussing the importance of moral condemnation as an aspect of punishment); *see also* Paul H. Robinson & John M. Darley, *The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best*, 91 GEO. L.J. 949, 956 (2003) (discussing the "traditional view," held by "criminal lawmakers of the past four decades," that criminal law can be justified by its significant deterrent effect).

[79] *See* Ohlin, *supra* note 63, at 384–85 (citing WHITMAN, *supra* note 75, at 73).

[80] *See* Alfred Blumstein, *The Roots of Punitiveness in a Democracy*, 8 J. SCAND. STUD. CRIMINOLOGY & CRIME PREVENTION 2, 12–14 (2007) (describing the trend of increased incarceration across the developed world from 1992–2004, especially among those nations with the lowest incarceration rates like the Netherlands and Japan); WHITMAN, *supra* note 75, at 71–73 (noting the partial retreat of Western Europeans from rehabilitative models of punishment).

[81] *See* Ohlin, *supra* note 63, at 388.

[82] *Id.* at 388–89.

According to Ohlin, the current European domination of international criminal law inhibits the development of a rational framework for international sentencing because the European rehabilitative model of punishment is ill-suited to the types of crimes before international tribunals. European models of sentencing—which emphasize reeducation and rehabilitation over retribution and deterrence—very well might work in the domestic context. But they are decidedly "inappropriate for crimes of genocide, crimes against humanity, and war crimes."[83] Ohlin urges, instead, that the most coherent theoretical rationale for the punishment of international criminals—i.e., the one that best accords with the goals and functions of international criminal justice—is retributivism.[84] Without a critical mass of retributivist Americans participating in international legal forums, however, European jurists appear to unthinkingly import "domestic [European] penal practices" wholesale into the fabric of international criminal justice "without consideration of their suitability" thereto.[85]

Perhaps to placate those European critics unmoved by Kantian impulses to punish the morally blameworthy, even a figure as reprehensible as Duch, Ohlin advances a subtle consequentialist defense of adopting a retributivist perspective for international punishment. The "central premise [of retributivism is] that the guilty deserve to be punished" due to the "inherent moral worth" of doing so.[86] It is therefore conceptually detached from any of punishment's alleged incidental instrumental benefits (i.e., deterrence or incapacitation). Nevertheless, since "victims are frequently motivated by retributivist sentiments" and "the point of international criminal tribunals is, in many cases, to convince victims to put down their arms and . . . submit their grievances to the rule of law," Ohlin argues that international law cannot achieve its fundamental, consequentialist goal of promoting international peace and security without respecting the retributivist impulses of victims.[87]

V. PUNISHMENT AND POPULAR WILL

Ohlin is likely right that the roots of international criminal law's lenience lie, in large part, in international jurists' instinctive, unreflective importation of European sentencing mores into the international sphere. It is difficult to argue with the simple demographic observation that most agents of international legal formation are raised, educated, and trained in Europe. The majority of active international judges and

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[83] *Id.* at 391. International criminal jurisprudence, in fact, recognizes that the propensity of a defendant for rehabilitation "should not be given undue weight" in sentencing. Case 001, *supra* note 7, at ¶ 611 (quoting Prosecutor v. Delalic et. al., Case No. IT-96-21-A, Judgment, ¶ 806 (Feb. 20, 2001) (discussing the limited import of rehabilitation)).

[84] Ohlin, *supra* note 63, at 396–401.

[85] *Id.* at 391.

[86] *Id.* at 396–97.

[87] *Id.* at 398–99.

prosecutors at the ECCC, for example, are European.[88] None are American,[89] despite the U.S. government's prominent role in establishing, funding, and sustaining the ECCC.[90]

Yet the explanatory reach of Ohlin's appealingly simple logic is limited. The ECCC, after all, is a hybrid tribunal where the majority of judges are Cambodian, and each international prosecutor is paired with a formally equal domestic counterpart.[91] Though Cambodian judges on the ECCC may feel influenced by international case law established by their European predecessors, the one concrete doctrinal nugget related to sentencing arising from the ECCC's decision in Case 001 is that the ECCC retains extremely broad discretion to sentence defendants as it sees fit.[92] Hence, even accepting Ohlin's cogent analysis, the question remains: why did a Cambodian-majority panel of judges at the ECCC demonstrate such lenience to Duch?[93] In this section, I suggest a supplementary explanation for the emergence and endurance of international sentencing lenience: the lack of popular participation in international modalities of punishment.

In contrast to classically liberal conceptions of the relationship between punishment and democracy,[94] recent evidence from the United States suggests a direct and

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[88] *See* ECCC, Official List of National and International Judges and Prosecutors for the Extraordinary Chambers in the Courts of Cambodia as selected by the Supreme Council of the Magistracy on 4 May 2006 and appointed by Preah Reach Kret (Royal Decree) NS/RKT/0506/214 of His Majesty Norodom Sihamoni, King of Cambodia on 7 May 2006, ECCC, *available at* http://www.eccc.gov.kh/english/judicial_officers.aspx (last visited Nov. 19, 2010).

[89] *Id.*

[90] Ciorciari, *supra* note 14, at 67–70 (discussing key interventions by U.S. government officials in the negotiations establishing the ECCC); *see* Stephen J. Rapp Ambassador-at-Large for War Crimes Issues, Press Briefing at the United Nations Office at Geneva, Switzerland (Jan. 22, 2010), *available at* http://geneva.usmission.gov/2010/01/22/stephen-rapp/; *see also* Cambodian Genocide Justice Act, 22 U.S.C. § 2656 note (1994) (establishing the Office of Cambodian Genocide Investigation at the State Department).

[91] Ciorciari, *supra* note 14, at 74. The pre-trial investigators at the ECCC, who perform what are viewed as prosecutorial functions in the Anglo-American system, are officially termed "co-investigating judges."

[92] *See supra* text accompanying notes 51–54.

[93] The actions of the Cambodian judges on the ECCC also suggest the limited nature of the purely cultural arguments that comparative legal scholars generally advance to explain differences in sentencing between the United States and the rest of the world. *See* WHITMAN, *supra* note 75, at 6. Despite having much respect for Whitman's careful study, I am skeptical that cultural forces have the overwhelming explanatory force to dictate legal outcomes that many comparativists like Whitman assume. Though fully engaging the topic of the relative import of culture on legal structures is beyond the scope of this article, it is my hope to obliquely weigh in on the debate by advancing an institutional rationale for the prevalence of lenience in international criminal law.

[94] BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS, BOOK VI (1762) (arguing that democracies will tend toward lenience in their punishment practices).

substantial relationship between popular participation and harsh, punitive sentencing of criminal defendants. Scholars observing this trend point specifically to the partisan political origins of the exponential growth—six to eight percent *per year*—of American incarceration rates between 1973 and 1999.[95] "An important characteristic of the growth period," Alfred Blumstein notes, was the recognition among politicians that:

> being 'tough on crime' . . . provided great political advantage in a nation that was becoming increasingly concerned about the crime problem . . . . There are not many ways in which a politician can demonstrate that toughness other than by calling for greater use of imprisonment . . . [and] demanding longer sentences . . . .[96]

Even more illustrative of the connection between popular participation and sentencing severity is California's three-strikes rule, discussed above. California's rule is distinctive not only for its excessive (and sometimes absurd) harshness,[97] but also for the distinctively democratic manner in which it was adopted. With seventy-two percent of those voting in support, in 1994 the three-strikes rule was enacted via ballot initiative[98]—perhaps the most direct form of popular policymaking available in a mass democracy. This rule demonstrates the retributive impulse that can prevail when ordinary citizens are granted direct authority to craft a sentencing regime unmediated by either elected representatives, administrative bureaucrats (like parole boards), or judicial magistrates. And in seeming confirmation that the rule was not simply an aberration or an unhappy instance of unintended consequences, a decade later, Californian voters returned to the polls after a spirited public debate and reaffirmed their support for the rule.[99]

Of course, the nations whose penal practices appear lenient in contrast to those of the United States are also political democracies (as, of course, was the United States prior to 1973). And issues of crime and punishment occupy a comparably prominent place in the political discourse of those nations,[100] with democratically elected bodies vested with full authority to determine the general framework of the nation's criminal sentencing apparatus—i.e., which types of sanctions are available for wrongdoing and which types of criminal offenders are eligible for a given sanction.[101]

But unlike every other major developed democracy, the United States vests the *particular application* of those general rules in institutional actors subject to popular

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[95] *See* Blumstein, *supra* note 80, at 2.
[96] *Id.* at 4.
[97] *See supra* text accompanying notes 1–6.
[98] *See* Emily Bazelon, *Arguing Three Strikes*, N.Y. TIMES, May 21, 2010, http://www.nytimes.com/2010/05/23/magazine/23strikes-t.html.
[99] *See id.; see also supra* note 6.
[100] *See* WHITMAN, *supra* note 75, at 76.
[101] *See* ZIMRING ET AL., *supra* note 75, at 182–85.

election or, in many cases, the people themselves.[102] Democratically-elected legislatures in the United States, for example, routinely impose mandatory penalties for certain offenses, thus stripping sentencing discretion from judicial magistrates.[103] Moreover, nearly ninety percent of state judges in the United States—who oversee the vast majority of criminal cases[104]—are subject to democratic removal in a popular election.[105] By contrast, in the world's other developed democracies, individual sentencing decisions are made by "institutions effectively removed from representative democracy," and are thus largely insulated from direct democratic control.[106]

The result of this distinctively American practice of "relocat[ing] the control of retail punishment" in the hands of the electorate, and away from "nonelected judges and commissioners who are insulated from [electoral] removal or discipline," is a distinctively severe regime of criminal sentencing.[107] While one cannot discount the possibility that "cultural" differences play a role in accounting for the divergent sentencing practices of the United States and other developed democracies,[108] the evidence demonstrates that criminal sentencing in the United States more closely tracks popular sentiment than in Europe—which suggests that the difference is less one of culture than institutional arrangement.[109] For example, roughly three-quarters of Europeans support the death penalty, despite its universal abolition among all forty-seven Council of Europe member states.[110] Similarly, a majority of Europeans believe that criminal sentences are too lenient and that courts are insufficiently responsive to democratic preferences.[111] These numbers suggest that differing institutional arrangements for incorporating popular sentiment into the determination of criminal sentencing, rather than differences in popular sentiment itself, accounts for the lion's share of the relative severity of American criminal punishment as compared to other developed democracies.

Yet while the preceding discussion has measured democratic responsiveness by reference to the bluntest of such modalities (i.e., the electoral process and the popular

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[102] *Id.* at 182–86.
[103] *Id.* at 185–86.
[104] GEORGE F. COLE & CHRISTOPHER E. SMITH, CRIMINAL JUSTICE IN AMERICA 7 (2008).
[105] *See* Jed Shugerman, *Economic Crisis and the Rise of Judicial Elections and Judicial Review*, 123 HARV. L. REV. 1061, 1063–64 (2010) (describing judicial elections as "uniquely American").
[106] *See* ZIMRING ET AL., *supra* note 75, at 185–86 (noting that among the United States, Canada, France, Italy, Japan, the United Kingdom and Germany, "no nation uses direct election to determine general penal policies" other than the United States, and that judges in the United States have the least discretion to determine penalties in particular cases).
[107] *Id.* at 186.
[108] *See* WHITMAN, *supra* note 75, at 76.
[109] *See* Christopher Nuttall, *Introduction* to THE COUNCIL OF EUROPE, CRIME AND CRIMINAL JUSTICE IN EUROPE 9, 11–12 (2000).
[110] *Id.* at 12; ALINE ROYER, THE COUNCIL OF EUROPE 28–29 (2010).
[111] Nuttall, *supra* note 109, at 11–12.

referendum), empirical evidence suggests that institutions that are formally insulated from electoral pressures may at times incorporate definitive expressions of popular sentiment into their decision-making. Researchers have observed, for example, that "aggregate sentencing decisions of [California courts] changed to reflect more closely prevailing public opinion" expressed via plebiscite—even though the judges on those particular courts were not subject to electoral sanction.[112] In other words, the mechanism by which the law is shaped by popular attitudes and beliefs need not be formal. Courts can and do reformulate their jurisprudence to align with democratic sentiment through informal, perhaps even subconscious, means.

While far from universal,[113] the above-explored developments in the American democratic laboratory—combined with evidence that American forms of domestic political discourse with regard to punishment are migrating into other developed democracies[114]—have led political scientists to speculate that there is a general relationship between higher levels of popular control over penal policies and excessive punitiveness.[115] Possibly because these findings upset centuries of liberal political theory, scholars have tended to paint such trends in terms of the public's ignorance[116] or "irrational" susceptibility to manipulation by self-interested political forces.[117] Yet perhaps it is more productive to cast the debate in terms of the excesses attendant to differing underlying theories of punishment rather than "rational" versus "irrational." After all, a Kantian retributivist would find punishing Duch with less than a day's imprisonment per person he tortured and murdered to be as "irrational" as a rehabilitation-minded theorist would find punishing Leandro Andrade with six years and three months in prison per children's video he surreptitiously stuffed down his pants at the local K-Mart. Perhaps, in other words, popular majorities—be they European, American, or Cambodian—are, for whatever reason, more likely to be

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[112] James H. Kuklinski & John E. Stanga, *Political Participation and Government Responsiveness: The Behavior of California Superior Courts*, 73 AM. POL. SCI. REV. 1090, 1090 (1979).

[113] Some citizen referenda focused on criminal punishment, for example, have resulted in more lenient sentencing practices. *See* Massachusetts Sensible Marijuana Policy Initiative, approved on Nov. 4, 2008 (eliminating criminal penalties for marijuana possession in Massachusetts); *see also* Peter Hodgkinson, *Alternatives to the Death Penalty—The United Kingdom Experience*, *in* DEATH PENALTY: BEYOND ABOLITION 159, 164 (Council of Europe ed., 2004) (noting that throughout the 1960s in the United Kingdom, abolition of the death penalty was repeatedly advanced by the House of Commons, the popularly elected branch of the legislature, and rejected by the House of Lords, the largely hereditary branch).

[114] *See* Blumstein, *supra* note 80, at 12–13; WHITMAN, *supra* note 75, at 69.

[115] *See* ZIMRING ET AL., *supra* note 75, at 203.

[116] Nuttall, *supra* note 109, at 12. *But see* MICHAEL H. TONRY & RICHARD S. FRASE, SENTENCING AND SANCTIONS IN WESTERN COUNTRIES 268 (2001) (the "[i]ncrease in public awareness and 'information' about public policy issues increases pressures toward direct democracy and weakens . . . deference to policy elites and experts").

[117] *See* Blumstein, *supra* note 80, at 15 (decrying "the *inevitable* temptation by politicians in a democracy to exploit the public's fear and concern about crime to gain political advantage which too often comes at the expense of rational policy" (emphasis added)).

guided by retributive impulses, while policymaking elites and jurists trend toward viewing punishment from a more utilitarian perspective.[118]

Observing this phenomenon—whereby the democratic responsiveness of a given sentencing regime seems correlated with the severity of that regime's output—from an international legal perspective leads one to question whether the reverse might be true, that is, whether international criminal tribunals' curious lenience may result, at least in part, from their lack of democratic responsiveness. Judges and practitioners at international tribunals are uniquely insulated from the popular judgments and beliefs of relevant communities. Unlike domestic courts, almost all international tribunals are located hundreds, if not thousands, of miles away from affected regions—with their awareness of the public response to their rulings limited to distant press clippings. And even in the rare cases (like the ECCC) where an international court is located on-site, international jurists are unlikely to be culturally equipped or jurisprudentially disposed to identify with the local community's retributivist inclinations. Moreover, local communities are unlikely to have any input in the selection or retention of national jurists who are selected to sit on international tribunals.[119] While Ohlin is likely right that the jurisprudential predispositions of an overwhelmingly European judicial workforce likely play a powerful role in international criminal law's lenient sentencing practices, international tribunals' insulation from democratic forces and, to a lesser extent, their indifference to the outrage these practices engender amongst affected communities, likely contribute significantly to their sustenance and solidification.

VI. CONCLUSION

While the injustices emanating from the American approach to punishment counsel against too close a proximity between popular sentiment and criminal sentencing, the ECCC's inexplicable lenience in Case 001 reveals the extent to which international criminal law has swung too far in the opposite direction. One might rightly question whether the ECCC's lenience dilutes the moral condemnation associated with criminal prosecution, thereby rendering the "expressive function [of international criminal law] . . . trivial or non-existent."[120] Moreover, the public discontent engendered by the ECCC's verdict in Case 001 exposes the potential for disproportionately lenient sentences to undermine the overall legitimacy of international criminal law, especially amongst affected populations.

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[118] *But see* WHITMAN, *supra* note 75, at 70–71.

[119] At the ECCC, for example, national judges are selected by an administrative board, Cambodia's Supreme Council of Magistracy. Ciorciari, *supra* note 14, at 77.

[120] *See* Ku & Nzelibe, *supra* note 44, at 796. Ku and Nzelibe argue that under an economic theory of deterrence, international criminal tribunals' lenient sentences relative to their domestic counterparts largely neuter their power to deter. *See id.* at 792–98, 808.

Using comparative methods and insights gleaned from the political science literature, this article has sought to diagnose the source of international criminal law's lenience as at least partially derived from its excessive insulation from popular preferences and values. A more systematic examination of international sentencing practices than can be performed here will be necessary before this hypothesis can be definitively confirmed (or rejected). Assuming its validity, however, what are its prescriptive implications? Democratic participation in the policy and practice of punishing international criminals seems neither feasible nor necessarily desirable. No one would support the crass spectacle of holding a plebiscite to determine Duch's punishment, for example. Yet international jurists could and should approach sentencing decisions with greater sensitivity to popular conceptions of justice, fairness, and proportionality. If one of the primary goals of international criminal tribunals is to offer a "model for fair trials" in nations recovering from collective trauma,[121] international jurists must reconcile themselves to the fact that international sentencing practices strike the ordinary observer as appallingly unfair.

From a historical perspective, the enduring legacy of Case 001 will be as a prologue to the far more significant Case 002. For all his cruelty and for all the horrific suffering he furthered, Duch was merely the ruthlessly zealous conductor of a train that was designed, built, and unleashed on Cambodia by the defendants in that Case—the most senior surviving leaders of the Khmer Rouge. Similarly, Case 001's jurisprudential significance will pale in comparison to that of Case 002.[122] To the extent international lawyers parse Case 001's legal reasoning at all, they will likely be searching for clues as to how the ECCC will rule on issues that will be critical to its resolution of Case 002.[123]

Because Duch's guilt was never in question, the primary task before the ECCC in its disposition of Case 001 was to demonstrate its own worth to its primary audience, the Cambodian public. By uncritically allowing international criminal law's lenient

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[121] *DC-Cam Khmer Rouge History Database*, *supra* note 37, at 3.

[122] Case 002 will be far more jurisprudentially complex than Case 001. For example, the ECCC will be forced to grapple with subtle and contested legal issues related to proving, by inference, the defendants' genocidal intent. *See* Ryan Y. Park, *Proving Genocide: International Precedent and ECCC Case 002*, 63 RUTGERS L. REV. __ (forthcoming Fall 2010). Moreover, prosecutors will not have the luxury of a cooperative, compliant defendant like Duch, which—especially in light of the many years that have passed since the fall of the Khmer Rouge—will hinder the ECCC's ability to establish the "truth" as to what occurred during the dark days of that regime. *See also* NANCY COMBS, FACTFINDING WITHOUT FACTS: THE UNCERTAIN EVIDENTIARY FOUNDATIONS OF INTERNATIONAL CRIMINAL CONVICTIONS 4 (2010) (surveying the transcripts of several international criminal tribunals and concluding that they "confront severe impediments to accurate fact-finding . . . [giving] rise to serious doubts about the accuracy of [their] factual determinations").

[123] One key legal issue that observers of the ECCC will scrutinize is its treatment of joint criminal enterprise (JCE) liability, and most notably, the ECCC's decision to punt the issue of whether the third, "extended" category of JCE had the status of customary international law during the time of the Khmer Rouge. *See* Case 001, *supra* note 7, at ¶¶ 504–13.

sentencing practices to dictate the terms of Duch's punishment, however, the ECCC failed in this simple task. Given the advanced age of the defendants in Case 002—they are all in their eighties or late seventies—any sentence in that case will likely encompass their remaining years. But by disregarding the critical importance of popular legitimacy, and thereby ignoring Cambodian public sentiment regarding the proper punishment for former Khmer Rouge leaders, the ECCC risks sullying the project of international law for entire generations of captive Cambodians. If there is one hole in the theoretical fabric of international criminal law that was exposed by Duch's trial, it is the unprincipled and unreflective lenience that pervades the system. Case 002 gives the ECCC the chance to correct that mistake. All those who support the project of international criminal justice should hope that they do so.