Justice on Appeal

Commentary on the Case 002/01 Final Judgment at the Extraordinary Chambers in the Courts of Cambodia

David Cohen, Daniel Mattes & Caitlin McCaffrie
JUSTICE ON APPEAL

COMMENTARY ON THE CASE 002/01 FINAL JUDGMENT
AT THE EXTRAORDINARY CHAMBERS
IN THE COURTS OF CAMBODIA

By David Cohen, Daniel Mattes & Caitlin McCaffrie

Report for the WSD HANDA Center for
Human Rights and International Justice at Stanford University
# Table of Contents

**List of Acronyms and Abbreviations**

I. **Introduction**
   A. Background to the ECCC  
   B. Background to Case 002/01  
   C. Background to the Appeal  
   D. Overview of this Report

II. **Summary of Significant Findings**
   A. Fairness of Proceedings
   B. Approach to Evidence
      1. Permitting Witnesses to Review and Confirm Prior Statements
      2. Admission and Use of Written Evidence in Lieu of Oral Testimony
   C. Civil Party Evidence
   D. Definition of Crimes
      1. Murder and Extermination during Population Movements Phases One and Two
      2. Criminal Liability for Crimes Against Humanity Committed at Tuol Po Chrey

III. **Continued Issues with JCE in the Appeal Judgment**
   A. JCE in International Customary Law in 1975
   B. The SCC’s Conclusion that *Dolus Eventualis* is Sufficient for JCE I Liability

IV. **Impact of Case 002/01 Appeal Judgment on Case 002/02**
   A. Severance of Case 002
   B. Civil Party Participation in Case 002
      1. Examining the Role of Civil Parties in Cases 002/01 and 002/02
      2. Continued Debate at the Close of Case 002/02

V. **Concluding Remarks**

**About the Authors**

**About the Research Supporters**
List of Acronyms and Abbreviations

AIJI  Asian International Justice Initiative
Art(s.)  Article(s)
CPK  Communist Party of Kampuchea
CPLCL  Civil Party Lead Co-Lawyer(s)
DC-Cam  Documentation Center of Cambodia
DK  Democratic Kampuchea
ECCC  Extraordinary Chambers in the Courts of Cambodia
ECtHR  European Court of Human Rights
e.g.  Exempli Gratia
ibid.  Ibidem
ICC  International Criminal Court
ICTR  International Criminal Tribunal for Rwanda
ICTY  International Criminal Tribunal for the former Yugoslavia
IRs  Internal Rules of the ECCC
ITU  Interpretation and Translation Unit
JCE  Joint Criminal Enterprise
KRT  Khmer Rouge Tribunal
OCIJ  Office of the Co-Investigating Judges
OCP  Office of the Co-Prosecutors
p.  Page
para(s).  Paragraph(s)
pp.  Pages
PTC  Pre-Trial Chamber
RAK  Revolutionary Army of Kampuchea
RGC  Royal Government of Cambodia
SCC  Supreme Court Chamber
SCSL  Special Court for Sierra Leone
UN  United Nations
UNAKRT  United Nations Assistance to the Khmer Rouge Tribunal
WESU  Witness and Expert Support Unit
I. Introduction

On 23 November 2016, the Supreme Court Chamber (SCC) of the Extraordinary Chambers in the Courts of Cambodia (ECCC) issued its long-awaited final judgment in the first part of the ongoing trial against Nuon Chea and Khieu Samphan, the two surviving senior leaders of the Democratic Kampuchea (DK) regime, which lasted from 17 April 1975 to 6 January 1979. The pronouncement of this final judgment came more than two years after the ECCC Trial Chamber found the two Accused guilty of crimes against humanity, and sentenced them both to life in prison. Each of the Accused appealed that trial judgment, alleging a total of 371 combined errors of fact and law. The Office of the Co-Prosecutors (OCP) also appealed the Chamber’s decision in relation to the application of the extended form of Joint Criminal Enterprise (more commonly referenced as JCE III).

A. Background to the ECCC

The ECCC was established as an internationalized Cambodian tribunal after years of negotiation between the United Nations (UN) and the Royal Government of Cambodia (RGC). The Court is mandated to try “senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period of 17 April 1975 to 6 January 1979.”

The Court began proceedings in early 2009 with Case 001: the trial of Kaing Guek Eav, alias Duch. Duch served as the chief of a security center in Phnom Penh known as S-21, or Tuol Sleng, for most of the DK regime. Proceedings in Case 001 spanned 77 days over 22 weeks, and the Trial Judgment, finding Duch guilty of crimes against humanity and sentencing him to 20 years in prison, was handed down on 26 July 2010. On appeal, the SCC upheld this decision and increased his sentence to life in prison. Duch is presently detained at Kandal Provincial Prison in Ta Khmao, Cambodia. It is now alleged that upwards of 18,133 people lost their lives in this center.

B. Background to Case 002/01

On 27 June 2011, trial proceedings in Case 002 began for the four surviving senior leaders of the regime: Nuon Chea, Khieu Samphan, Ieng Sary and Ieng Thirith. The four were each indicted for crimes against humanity, genocide, grave breaches of the Geneva Conventions, and murder, torture, and religious persecution in violation of the 1956 Cambodian Penal

---


2 Michelle Staggs Kelsall et. al., Lessons Learned from the ‘Duch’ Trial: A Comprehensive Review of the First Case Before the Extraordinary Chambers in the Courts of Cambodia (December 2009), p. 4.

3 Trial Chamber, ‘Case 001 Judgment’ (26 July 2010), E188.

4 SCC, ‘Case 001 Appeal Judgment’ (3 February 2012), F28.

5 The precise number of people who passed through the center is unknown and will likely remain so. In its Appeal Judgment in Case 001, the Supreme Court Chamber (SCC) confirmed the Trial Judgment in its finding that, “No fewer than 12,272 victims, including men, women, and children, were executed at S-21.” See SCC, ‘Appeal Judgment’, Case 001 (3 February 2012), F28, paras. 2, 7, 376, 380, pp. 5, 7, 172, 175. During its ongoing investigations in Cases 003 and 004, the OCIJ has more recently compiled a list of 15,101 names of people who it found were sent to S-21 during the DK regime. As of writing, this list is not publicly available, however, its author Ms. HIN Sotheany testified as a witness in Case 002/02. A summary of her testimony is available in: Case 002/02 KRT Monitor, Issue No. 79, Hearings on Evidence Week 76 (9-11 January 2017), pp. 1-3. The OCP referred to this list in its closing brief in Case 002/02, but it also argued that after conducting its own review of the revised OCIJ list of 15,101 names and the underlying contemporaneous documents, the OCP had found an additional number of individuals who were imprisoned at S-21, bringing the total number of prisoners up to 18,133 individuals.
Code. Before opening statements were held, former DK Social Affairs Minister Ieng Thirith, was found unfit to stand trial due to advanced dementia, and she was granted a stay of proceedings. Thus, the trial in Case 002 began with three defendants. However, Ieng Thirith’s husband and the former DK Deputy Prime Minister for Foreign Affairs, Ieng Sary, passed away on 14 March 2013, prior to the trial’s conclusion.

Whereas Case 001 only focused on one security center in the country’s capital, and thus had a narrow scope of investigation, the alleged crimes in Case 002 spanned the entire country. The breadth and variety of charges contained in the Case 002 Closing Order led to one of the most disruptive issues in the ECCC’s history: how to manage the caseload.

The Trial Chamber made the controversial decision prior to evidentiary hearings to sever the case into smaller trials (later referred to as “trial segments”). Although intended to expedite proceedings, the severance ultimately created many procedural delays. Trial monitors observing proceedings day-to-day noted repeated interruptions caused by uncertainty over the permissible scope of inquiry when interviewing witnesses and Civil Parties. A Well-Reasoned Opinion?, a 2015 report on the Case 002/01 Judgment from the Handa Center and East-West Center, noted “inconsistent rulings by the Court throughout proceedings as they determined on a case-by-case basis what was allowed.” After multiple submissions from Parties, the SCC eventually annulled the Trial Chamber’s first severance decision. However, the Trial Chamber then issued a second order, severing the case in a very similar way to the first, in order to allow Case 002/01 to reach its conclusion without needing to institute significant changes. Although the Parties appealed this decision, the SCC dismissed these appeals on the final day of evidentiary hearings in Case 002/01, meaning severance issues managed to persist throughout the entirety of the trial. The most significant change in the new severance order was to establish the contours for the second and final segment of the case, Case 002/02, which would eventually begin evidentiary hearings on 17 October 2014.

Ultimately, Case 002/01 covered charges related to two phases of forced population movement and one mass execution of former Khmer Republic soldiers at Tuol Po Chrey. The Trial Judgment in Case 002/01 was handed down on 7 August 2014. This eagerly anticipated judgment was thoroughly in A Well-Reasoned Opinion? in 2015. That report noted the Trial Judgment’s lack of academic rigor and failure to meet the standard expected of such a document. The legal basis for some findings was also called into question. It is not the purpose of the present report to reiterate these already well-documented critiques of that judgment. Rather, this report focuses on the Case 002/01 Appeal Judgment, particularly those

---

7 Trial Chamber, ‘Decision on Ieng Thirith’s Fitness to Stand Trial’ (17 November 2011), E138. Ieng Thirith later passed away at home in Pailin Province on 22 August 2015 due to cardiac arrest. The Trial Chamber rapidly terminated proceedings against her in accordance with Cambodian law. See Trial Chamber, ‘Termination of Proceedings Against the Accused Ieng Thirith’ (27 August 2015), E359/1.
8 Trial Chamber, ‘Termination of Proceedings Against the Accused Ieng Sary’ (14 March 2013), E270/1.
9 Trial Chamber, ‘Severance Order Pursuant to Internal Rule 89ter’ (22 September 2011), E124.
11 Nuon Chea Defense, ‘Immediate Appeal Against the Trial Chamber’s Second Decision on Severance and Response to Co-Prosecutor’s Second Severance Appeal’ (27 May 2013), E284/4/1; Office of the Co-Prosecutor, ‘Co-Prosecutor’s Immediate Appeal of Second Decision on Severance of Case 002’ (10 May 2013), E284/2/1.
12 SCC, ‘Decision on Immediate Appeals Against Trial Chamber’s Second Decision on Severance of Case 002’ (23 July 2013), E284/7.
pieces substantively or procedurally germane to the forthcoming Trial Judgment in Case 002/02.

C. Background to the Appeal

Nuon Chea, Khieu Samphan, and the OCP all appealed the Trial Chamber’s Judgment toward the end of 2014.\textsuperscript{15} The SCC took two years to reach a verdict on these appeals, announcing its final Judgment on 23 November 2016. While the SCC had been deliberating and drafting, the majority of evidence was heard in the Case 002/02 trial. When compared with the Trial Chamber’s 2014 Judgment, the SCC decision is a considerably better organized and more well-reasoned piece of legal writing — a fact welcomed by longtime observers of the ECCC. In contrast to the Case 002/01 Trial Judgment, the Appeal Judgment succinctly weighs the evidence to determine the validity of the numerous grounds of appeal put forward. Where the initial judgment was criticized for its disorderly structure, lack of analysis of the evidence presented by parties, and vague reasoning, the Appeal Judgment offers clarity and sound argument. The Appeal Judgment identified a significant number of errors of fact and law. It also overturned some convictions, perhaps most notably by throwing out findings of the Accused’s criminal responsibility for the executions at Tuol Po Chrey. The well-reasoned and balanced final judgment sets a positive example for the Cambodian domestic court system and other international tribunals, while also hopefully raising the standard of production for the Trial Chamber’s pending judgment in Case 002/02.

D. Overview of this Report

This report seeks not only to summarize the main findings in the Appeal Judgment, but also to analyze the extent to which these findings may impact the trial judgment in Case 002/02, which is expected by mid-2018.\textsuperscript{16} Part II of this report examines in more detail the main findings and positive legacies of the Appeal Judgment, particularly findings in relation to the use of evidence and the overturning of the conviction for crimes alleged at Tuol Po Chrey. Part III explores the principal lingering question from the Appeal Judgment: the Court’s treatment of Joint Criminal Enterprise (JCE), which the report authors argue remains poorly applied by the SCC. Part IV of the present report looks more closely at two central issues from Case 002/01 that have continued to affect Case 002/02: the Case 002 severance order and the role of Civil Parties, and how they were addressed by the SCC. The Appeal Judgment was released only two months before the end of evidentiary hearings in Case 002/02. Although the Judgment’s findings failed to substantially affect the conduct of remaining evidentiary hearings in Case 002/02, all Parties referred to the Appeal Judgment on numerous occasions both in their written closing briefs and during the June 2017 oral hearings held for closing statements in Case 002/02.\textsuperscript{17} It appears that all Parties expect this Appeal Judgment to impact the upcoming Trial Judgment in Case 002/02. With approximately one year from the close of hearings to prepare its reasoning, the Trial Chamber certainly has enough time to take the criticisms of the SCC on board.

\textsuperscript{15} Office of the Co-Prosecutors, ‘Co-Prosecutors’ Appeal Against the Judgment of the Trial Chamber in Case 002/01’ (28 November 2014), F11, [hereinafter, OCP Appeal Brief]; Khieu Samphan Defense, ‘Khieu Samphan’s Defence Appeal Brief Against the Judgement in Case 002/01’ (29 December 2014), F17, [hereinafter, Khieu Samphan Appeal Brief]; Nuon Chea Defense, ‘Nuon Chea’s Appeal Against the Judgment in Case 002/01’ (29 December 2014), F16, [hereinafter, Nuon Chea Appeal Brief].

\textsuperscript{16} The latest ECCC Completion Plan foresees the Final Judgment will be released at the end of the second quarter 2018. See: ECCC, ‘Completion Plan (Revision 13)’ (17 July 2017), p. 11.

\textsuperscript{17} For a summary of the two weeks of Case 002/02 closing statements that took place in June 2017, see: Case 002/02 KRT Monitor, Issue No. 80, Closing Statements (13-23 June 2017).
II. Summary of Significant Findings

The SCC identified and dealt with many of the same problems in the Trial Judgment that outside observers had previously criticized. It is hoped that the higher chamber’s careful and comprehensive legal reasoning will positively impact the form and substance of the Trial Judgment in Case 002/02. The SCC pointedly criticized the Trial Chamber’s approach to using documentary evidence in the Case 002/01 Judgment, as well as the Chamber’s admission of and reliance on written evidence in lieu of oral testimony. The SCC clarified the role of Civil Party evidence, and more rigorously applied the law when assessing the guilt of the Accused.

A. Fairness of Proceedings

On appeal in Case 002/01, the two Defense Teams centered many of their procedural arguments around the alleged bias of the judges at trial. The Defense Teams would continue to raise these arguments throughout Case 002/02, taking particular issue with the fact that the same judges who had already rendered guilty verdicts and life sentences to the Accused in Case 002/01 were proceeding with Case 002/02 as if it was a new trial, even though they faced the same two Accused, the same two Defense Teams, and the same foundation of documentary evidence.

In its Judgment, the SCC addressed this argument in addition to others related to fairness of proceedings. First, it dismissed the repeated Defense claims of apparent bias on the part of the judges of the Trial Chamber, echoing the dismissal of the disqualification motions that were submitted at the outset of Case 002/02, with the following finding: “Professional judges are expected to be able to put aside their personal experiences when trying cases and this also applies to post-conflict situations.”  

Further to the above claim of lack of judicial impartiality, the Nuon Chea Defense also argued that the national judges of the ECCC demonstrated judicial bias in their repeated decision to block requests to call Heng Samrin, current President of Cambodia’s National Assembly, to appear as a witness at the Tribunal. Nuon Chea further argued that the failure to call Heng Samrin violated his right to an effective defense. The SCC addressed Nuon Chea’s arguments systematically. They agreed with the Defense that the national judges’ conclusion (that summoning Heng Samrin would have delayed proceedings) was based on supposition and therefore unreasonable, however the SCC ultimately dismissed the claim that Heng Samrin’s testimony would have provided “significant additional exonerating information.”

---

19 Nuon Chea Appeal Brief, para. 54-75, pp. 20-30.
20 Appeal Judgment, para. 147, p. 69.
21 Ibid, para. 154, pp. 24-25. In the Trial Chamber’s recent decision on proposed witnesses in Case 002/02, the Judges again split 3-2 between the national and international sides on Nuon Chea’s requests to call Heng Samrin, as well as current ruling party senator Ouk Bunchhoeun and military leader Pol Saroeun, as witnesses. Although they retained the same disposition as before, the national judges recognized the Case 002/01 Appeal Judgment in their reasoning: they noted that the SCC disagreed with their prior finding that a potential delay of proceedings was not enough to warrant not calling Heng Samrin, and they instead re-focused their reasoning for not calling him in Case 002/02 to reach the ultimate point of the SCC’s finding, that Heng Samrin would not provide enough exonerating information. The international judges reiterated their prior opinion from Case 002/01 that Heng Samrin and the other two persons were prima facie relevant and should therefore be called. See Trial Chamber, ‘Decision on Witnesses, Civil Parties, and Experts Proposed to Be Heard During Case 002/02’ (18 July 2017), E459, pp. 97-143.
Both Nuon Chea and Khieu Samphan also alleged that the Trial Chamber violated their right to a reasoned decision by repeatedly failing to give sufficient, or indeed any, reason for decisions made during the trial. The SCC rejected Khieu Samphan’s allegation on the grounds that it was not fully substantiated, but the Chamber addressed Nuon Chea’s arguments more fully. While acknowledging that fairness of proceedings requires reasoned decisions, the SCC ruled that this “does not mean that a chamber has to mechanically work through each and every argument that a party has raised.” Rather, the SCC determined it is more important that Parties are able to understand how a chamber reached a decision. Ultimately, the SCC found that the Trial Chamber adequately explained its approach to reaching decisions, even in cases where it did not specifically address Defense arguments.

B. Approach to Evidence

Nuon Chea and Khieu Samphan collectively argued that the Trial Chamber had committed 12 distinct errors in its approach to evidence in its original judgment. Rather than addressing all 12 here, this section of the report will focus on the treatment of the grounds of appeal that have the most impact on the ongoing Case 002/02.

Throughout trial, the Trial Chamber generally responded to objections from Parties concerning the relevance of evidence by averring that the Bench would consider the probative value of all evidence when making its Judgment. As was noted in A Well-Reasoned Opinion?, if this weighing process did take place, it was not explicitly stated in the eventual Trial Judgment, which largely refrained from analyzing the credibility of witness testimony or explaining the reasoning by which the Trial Chamber reached evidentiary findings beyond a reasonable doubt. The SCC made several references to this point throughout its Judgment, at times appearing to chastise the Trial Chamber for this oversight:

In particular when the probative value of the evidence on which a finding rests is inherently low (as is the case with out-of-court statements by witnesses and civil parties), the explanation provided by the Trial Chamber as to why it was confident that findings beyond reasonable doubt could be based thereon are of particular importance when determining whether the Trial Chamber’s findings were reasonable.

This is a far more rigorous application of the beyond reasonable doubt standard than was employed by the Trial Chamber. Other persistent complaints made during Case 002/01 related to the practice of allowing witnesses and Civil Parties to review old statements prior to testifying and an alleged over-reliance on written testimony.

1. Permitting Witnesses to Review Prior Statements and Confirm their Contents

One of the examples of the SCC demonstrating its reasoning in a clear and concise manner appears in its treatment of the ground of appeal based on permitting witnesses to review their

---

22 Nuon Chea Appeal Brief, paras. 110-111, pp. 42-43; Khieu Samphan Appeal Brief, para. 34, p. 15.
23 Appeal Judgment, para. 199, p. 93.
25 To support its finding that it is unnecessary to outline every step of reasoning in a reasoned judgment, the SCC cited Prosecutor v. Kupreškić, Appeal Judgment (23 October 2001), IT-95-16-A, ICTY, para. 32; and Van De Hurk v. The Netherlands, Judgment (19 April 1994), 16034/94, European Court of Human Rights, para. 61.
prior statements, and subsequently asking them to confirm the contents therein before testifying in court. Both Khieu Samphan and Nuon Chea submitted that the Trial Chamber erred in providing witnesses with their previous statements prior to testifying, arguing that the Trial Chamber prioritized expediency over the fair trial rights of the Accused. Both Parties argued that this system seriously undermined the value of witness testimony.

In assessing this ground of appeal, the SCC first addressed whether the Trial Chamber adequately based this decision on Cambodian law and international practice. Indeed, despite there being no direct ban of the practice of reviewing prior statements in Cambodia’s Code of Criminal Procedure, the SCC found that it “would be more consistent with the spirit” of the document not to permit this practice, as it is in line with “several other jurisdictions following the Romano-Germanic tradition.” After assessing whether the practice is in line with Cambodian Criminal Procedure, the SCC then moved to analyze whether international practice favors the practice, also known as ‘witness proofing.’ The Judgment cited examples from the ICTY, ICTR, and ICC indicating that those tribunals allow it.

Ultimately, the SCC found that allowing witnesses to review statements and confirm their contents beforehand “could interfere with or distort their memory” and may affect the Trial Chamber’s ability to “observe how a witness relates the events in question.” However, the SCC also found that the practice could be justified if it saved a considerable amount of time. As in many other cases in the Judgment, the SCC balanced the right to be tried in an expeditious fashion with the right to examine witnesses and, more fundamentally, the right to a fair trial. As the SCC reiterated, in practical terms at the ECCC, witnesses receive written copies of their interviews after they are originally given. Even if the Court did not furnish them with copies when the witness was called to testify, in theory, the witness could have consulted them at any time prior. Further, the Witness and Expert Support Unit (WESU), not the Parties, assists witnesses in reviewing prior statements, thus the SCC found less concern for undue influence. Ultimately, while finding that the Trial Chamber could have chosen a practice more in keeping with Cambodian criminal procedure, the SCC found that the practice was not sufficiently grave to amount to a serious violation necessitating legal redress.

2. Admission and Use of Written Evidence in Lieu of Oral Testimony

Each Defense Team appealed the Trial Judgment on the grounds that the Trial Chamber’s use of written evidence in lieu of oral testimony violated their clients’ rights. The Defense Teams submitted that the Trial Chamber erred in law in admitting the statements in lieu of oral testimony and relying on them to make factual findings, and also that the Chamber erred in its assessment of the probative value of such evidence by failing to provide its reasoning.

---

27 Ibid, paras 257-270, pp. 120-126.
29 Appeal Judgment, para. 262-263, p. 122-123.
31 Appeal Judgment, para. 267, p. 124.
This appeal is significant because the Trial Chamber admitted some 1,124 written statements and transcripts of witnesses who did not appear in court to be examined.\(^{33}\)

With reference to three cases at the European Court of Human Rights, the SCC found that the right of an Accused to examine evidence against him or her is not absolute and must be balanced with other fair trial rights.\(^{34}\) The SCC determined that the right to examine every witness who gave evidence against the Accused would be practically impossible in a case of this size. Keeping this in mind, the SCC nonetheless found that written evidence from a witness who had not appeared in court “must generally be afforded lower probative value” than a witness who testifies in court.\(^{35}\) The Trial Chamber has consistently reached similar conclusions.\(^{36}\) The SCC further noted that written evidence admitted that was not specifically created for the purpose of the trial, such as interviews with different organizations, should be given even less probative value.

The SCC dismissed Nuon Chea’s argument that the Trial Chamber erred in not addressing even once the weight assigned to any specific out-of-court statement, finding that it would be impractical and against the principle of an expeditious trial to do so. It also found that the two Accused failed to show an overall error in the Trial Chamber’s approach. The SCC later addressed findings of fact involving the use of untested written statements on a case-by-case basis in the evaluation of crimes for which the Accused were charged. For example, in the case of finding whether civilian officials and soldiers hors de combat had been killed on the spot during the first population movement, the SCC pointed out that the evidence provided in a written record of an interview of Ut Seng cited in the Trial Judgment would not be sufficient on its own for a finding beyond reasonable doubt, as Ut Seng had never appeared in Court.\(^{37}\) Similarly, the SCC criticized the Trial Chamber for finding that soldiers had been taken elsewhere and killed during the first population movement without referencing even one piece of live testimony. On this point, the SCC concluded that this finding “falls short of providing a reasonable basis for a finding to the requisite evidentiary standard.”\(^{38}\) There are multiple similar examples throughout the Appeal Judgment. This problem was exacerbated by the general lack of analysis of the probative value of such evidence by the Trial Chamber, already noted above. Given the Trial Chamber’s pervasive reliance on out-of-court statements, and its failure to explain the grounds for reliance on such evidence (even in regard to crucial findings), one might question the consistency of the SCC’s overall conclusion on this issue in light of its evident awareness of these shortcomings and their impact on conclusions of liability.

---

\(^{33}\) Trial Chamber, ‘Decision on Objections to the Admissibility of Witness, Victim and Civil Party Statements in Case 001 Transcripts Proposed by the Co-Prosecutors and Civil Party Lead Co-Lawyers’ (15 August 2013), E299; see also Trial Judgment, para. 32.

\(^{34}\) S.N. v Sweden Judgment; Trofimov v. Russia Judgment; and, F and M v. Finland Judgment. The SCC noted that only the English version of Internal Rule 84(1) describes the right to examine evidence against the Accused.

\(^{35}\) Appeal Judgment, para. 296, p. 136.

\(^{36}\) In a footnote of the Appeal Judgment, the SCC cited, for example, in the Trial Judgment: “Absent the opportunity to examine the source or author of the evidence, less weight may be assigned to that evidence.” See Trial Chamber, Case 002/01 Judgment (7 August 2014), E313, para. 34, p. 17.

\(^{37}\) See Appeal Judgment, para. 470, p. 216. Another example is, when assessing the Accused’s criminal responsibility for killings for disobeying orders occurring during the evacuation of Phnom Penh, the SCC found that, ‘The above-mentioned out-of-court evidence was, as a whole, inapt to serve as a basis for a finding beyond reasonable doubt.’ See Appeal Judgment, para. 431, p. 196.

\(^{38}\) Ibid, para. 472, p. 218. Another relevant example of similar criticism from the SCC can be found in para. 483, p. 223, concerning evidence related to the killing of Khmer Republic soldiers at checkpoints. The SCC found the Trial Chamber could not reasonably establish such events had occurred in the absence of live testimony.
C. Civil Party Evidence

The role and level of engagement of Civil Parties at the ECCC has been fraught. The inclusion of victims as parties to a trial with rights similar to those of the Defense and Prosecution comes from the French civil law system inherited by Cambodia. No other international court follows civil law and involves Civil Parties in proceedings in this way, meaning there is no direct precedent upon which the Parties or the Chambers can rely. While often lauded as a ground-breaking and unique way the ECCC can contribute to Cambodian transitional justice, the novelty and uncertainty around this system have led to significant disruptions to judicial procedure. Even as Case 001 began its pre-trial stage, the internal rules were rewritten to amend the rights granted to Civil Parties. Although Civil Party engagement was established in Case 001, that engagement differed enormously between Case 001 and Case 002/01. While approximately a quarter of Civil Parties admitted in Case 001 were able to testify in court, the sheer size of Case 002 made this impossible. A total of 3,869 victims were ultimately admitted as Civil Parties in Case 002, necessitating a move towards collective legal representation.

Questions were raised during the Case 002/01 trial about the probative value of evidence given by Civil Parties as opposed to “fact witnesses” or “expert witnesses,” both of which testify under oath. Civil Parties are not required to take an oath prior to appearing in the courtroom, and, in many instances, their Civil Party applications were made with the assistance of third parties not related to the Court, making the chain of custody difficult to establish. Further, unlike witnesses, Civil Parties, at the conclusion of their testimony, are permitted to give “statements of suffering” on which the Defense cannot question them. Others may appear in unique “victim impact hearings” to testify on the harms they suffered. Thus, the appropriate weight to give to Civil Party documentary and oral evidence was a fiercely contested legal issue throughout Case 002/01, and the Trial Chamber’s reliance on Civil Party evidence in its Judgment was raised as a ground of appeal by both Accused.

The SCC found that all Parties were aware throughout the course of Case 001 and Case 002/01 that Civil Party testimony could be used to make determinations of guilt, and therefore there was no violation of the Accused’s rights to examine such evidence that was used in the Trial Judgment. While Nuon Chea argued that international legal norms dictate “victim impact statements” or “statements of suffering” should not be used to establish guilt, the SCC rejected this argument on the grounds that all of the jurisdictions cited are outside of the civil law code on which the ECCC is based. While noting that there was no overall error

39 The ICTY, ICTR and SCSL allow victims to participate but only as witnesses. The ICC and Special Tribunal for Lebanon similarly allow victims to participate but do not give them the same status as other Parties. For more information, see: John Ciorciari and Anne Heindel, Hybrid Justice: The Extraordinary Chambers in the Courts of Cambodia (Michigan, USA: University of Michigan Press, 2014), pp. 202-225. At the ICC, victims may only participate if their own “personal interests” are affected, and the Court has more control over which stages of proceedings the victim is involved in. See: Rome Statute of the International Criminal Court, adopted on 17 July 1998, entered into force on 1 July 2002, Art. 68(3). See also Mahdev Mohan, ‘The Paradox of Victim-Centrism: Victim Participation at the Khmer Rouge Tribunal’, International Criminal Law Review 9 (2009), pp. 13-15.
40 Four more internal rules related to Civil Parties were added between Revision 4 (September 2009) and Revision 5 (February 2010) of the Internal Rules.
42 Case 002 Closing Order, para. 1111, p. 598.
44 The common law countries cited by the Nuon Chea Defense were Australia, Canada, Israel, New Zealand, and the United States, as well as the ICC.
in the way the Trial Chamber approached and assessed Civil Party testimony, the SCC did find that there may have been individual cases in which the testimony was incorrectly assessed, and that those cases would be considered in other relevant parts of the Appeal Judgment. This is a similar finding to that which was made regarding the use of written statements in lieu of oral testimony. On the one hand, the SCC’s finding reflected a thorough analysis of the Trial Judgment, but on the other hand, it relieved the SCC from systemically addressing all of the Trial Chamber’s findings based on such evidence. Again, the lack of explanation in the Trial Judgment as to the reasoning by which probative value was assessed only adds to concern about such findings. Part IV of this report addresses the continuing issue of the probative value assigned to Civil Party evidence in Case 002/02.

D. Definition of Crimes

The clearest effects of the Appeal Judgment related to the grounds of appeal alleging errors of both fact and law related to the crimes for which the two Accused were convicted during the course of three main events: the evacuation of Phnom Penh (referred to as Population Movement Phase One), the transfer of people from mid-1975 to 1977 (Population Movement Phase Two) and the killing of approximately 250 Lon Nol soldiers at Tuol Po Chrey in late April 1975.46 Key findings of the SCC were related to the Accused’s convictions on the charges of murder as opposed to extermination in both population movements, and the conviction for crimes against humanity found to have occurred at Tuol Po Chrey.

Before going into the details of specific crimes, it is worth noting that, on a number of occasions, the SCC found the Trial Chamber had “extrapolated” findings to an unreasonable degree, such as in relation to the Trial Chamber’s finding that a “majority” of the two million people evacuated from Phnom Penh in April 1975 had witnessed “beatings, shootings and killings.”47 Criticisms of the Trial Chamber’s unreasonable conclusions based on insufficient evidence pepper the Appeal Judgment and indicate the SCC’s rejection of the Trial Chamber’s low evidentiary threshold as well as its failure to provide a reasoned account of how it weighed specific evidence in regard to its factual and legal conclusions. Following its examination of the definition of crimes against humanity of extermination, murder, and persecution on political grounds, as well as a case-by-case analysis of the evidence that led the Trial Chamber to enter convictions for these crimes, the SCC reversed six convictions and re-characterized one to enter a new conviction. The SCC reversed Nuon Chea and Khieu Samphan’s convictions for the crime against humanity of extermination in Population Movement Phases One and Two and Tuol Po Chrey, the crime against humanity of political persecution in Population Movement Phase Two and Tuol Po Chrey, and the crime against humanity of murder at Tuol Po Chrey. The SCC re-characterized the crime against humanity of extermination in Population Movement Phase Two as that of murder.48

1. Murder and Extermination During Population Movement Phases One and Two

The Closing Order charged Nuon Chea and Khieu Samphan with the crimes against humanity of murder and extermination arising from Population Movement Phase One, and extermination alone in Population Movement Phase Two.49 The Trial Chamber found the

---

47 Trial Judgment, para. 563, p. 315.
48 See Appeal Judgment, Disposition, p. 519.
49 Case 002 Closing Order, pp. 311-314, 375.
Accused guilty of all of these crimes. Both Accused contested this finding on various grounds, including a lack of sufficient first-hand witness testimony attesting to murders during these two events, and a misapplied legal definition of what constitutes extermination.\footnote{Nuon Chea Appeal Brief, paras. 329-345, pp. 126-130; Khieu Samphan Appeal Brief, paras. 59-67, 364, 511, pp. 25-28, 130, 182-183.}

Regarding Population Movement Phase One, the SCC agreed that not every individual finding of murder made by the Trial Chamber was supported by evidence and rejected many findings as erroneous.\footnote{The SCC determined that the Trial Chamber’s finding that civilians who disobeyed orders to evacuate were killed rested on one killing recounted by Civil Party Pin Yathay, which was corroborated by a Civil Party and another witness as well as out-of-court evidence; the SCC determined this finding was “not unreasonable.” The SCC determined, however, that the Trial Chamber’s finding of killings of those who sought to return to Phnom Penh rested on a single hearsay testimony from witness Lay Bony, which the SCC found was unreliable and unreasonable to enter such a finding. See Appeal Judgment, paras. 423-448, pp. 191-204.} Although the SCC criticized the Trial Chamber for not clearly setting out its findings in relation to individual instances of killings in a narrative manner, the Appeal Judgment determined this proved neither that the Trial Chamber acted unreasonably nor that it erred gravely enough to invalidate the verdict.\footnote{Appeal Judgment, para. 446, pp. 203-204.} Therefore, the SCC found there was still sufficient evidence to support a conclusion that the crime against humanity of murder had been committed during the evacuation of Phnom Penh.

However, when considering the conviction for extermination, the SCC found that the Trial Chamber had indeed applied an incorrect legal standard. The Trial Chamber had ruled that the \textit{mens rea} for murder and extermination are the same, and found that the Accused were guilty of extermination on the grounds that they should have known that the mistreatment of people and general conditions during the evacuation would lead to their deaths. The Trial Chamber thus defined the \textit{mens rea} of extermination as: “The intent 1) to kill persons on a massive scale; or 2) to inflict serious bodily injury or create conditions of living that lead to death, in the reasonable knowledge that such act or omission is likely to cause the death of a large number of persons (\textit{dolus eventualis}).”\footnote{Trial Judgment, para. 417, p. 213. This definition draws upon the Case 001 Trial Judgment and the ICTY’s \textit{Krstic} Trial Judgment, explaining that, although the \textit{mens rea} for extermination as a crime has been inconsistently defined, \textit{dolus eventualis} seems to have become the norm in the definition since before 1975. See: Trial Chamber, ‘Case 001 Judgment’ (26 July 2010), E188, para. 338; and, \textit{Prosecutor vs. Radislav Krstic, ‘Judgment’} (2 August 2001), ICTY, IT-98-33-T, para. 495.} The Defense Teams argued that the Trial Chamber erroneously applied this standard of \textit{dolus eventualis} to the crime of extermination.

The SCC held that the Trial Chamber did indeed err when it found that extermination did not require the “direct intent to kill on a large scale.”\footnote{Appeal Judgment, para. 522, p. 238.} The SCC determined that the definitions of murder and extermination are different, and the crime of extermination, by its nature, must require intent. The SCC also overturned the Accused’s convictions for the charge of extermination during Population Movement Phase Two for similar reasons.

While quashing the extermination convictions for both population movements, the SCC also re-characterized the legal allegations contained in the Closing Order regarding Population Movement Phase Two to constitute murder, rather than extermination. The Closing Order had charged extermination, however, Internal Rule 98(2) provides that the Trial Chamber (and thus the SCC) is only limited by the OCIJ’s factual allegations, not their legal characterizations.\footnote{Internal Rule 98(2) provides that: “The judgment shall be limited to the facts set out in the Indictment. The Chamber may, however, change the legal characterization of the crime as set out in the Indictment, as long as no new constitutive elements are introduced.” See Extraordinary Chambers in the Courts of Cambodia, ‘Internal Rules (Rev. 9)’ (16 January 2015).} Through this re-characterization, both Khieu Samphan and Nuon Chea
were convicted of the crime against humanity of murder with relation to both population movements. Both Accused were found not to be liable for extermination as a crime against humanity, because the evidence failed to meet the required threshold to establish intent. The reversal of the convictions on extermination exemplifies the SCC’s critical analysis of the legal and factual foundations of the Trial Chamber’s conclusions. The Prosecution’s failure to prove the more serious crime of extermination on final appeal also detracts from the gravity of the convictions against the two Accused. These, however, were not the only substantive reversals of crucial legal conclusions in the Trial Judgment.

2. Criminal Liability for Crimes Against Humanity Committed at Tuol Po Chrey

Significantly, the SCC also overturned the convictions of both Accused for criminal responsibility related to events at Tuol Po Chrey. These charges, it will be recalled, constituted one of the three principal pillars of the case against the Accused.56 The Closing Order had alleged that soldiers and officials from the Khmer Republic regime were executed en masse at the Tuol Po Chrey execution site in present-day Pursat Province (in the DK-era Northwest Zone) toward the end of April 1975.57 Although estimates of the number killed differed significantly, the Trial Chamber found sufficient evidence to conclude that at least 250 former Lon Nol soldiers had been killed, and that these killings constituted murder, extermination, and persecution on political grounds. As Nuon Chea pointed out in his appeal, however, only three witnesses were heard in court in relation to Tuol Po Chrey.58 Moreover, the Trial Chamber itself had acknowledged, “None of the witnesses heard by the Chamber were present at the Tuol Po Chrey site to witness the fate of those transferred.”59

Although it did agree that there was “some indication that a number of killings of Khmer Republic soldiers occurred,” the SCC found that the evidence was “ambivalent, uncorroborated, inconsistent and of hearsay value.”60 This conclusion, of course, reflects poorly on both the OCIJ, for its original indictment of the Accused for crimes committed at the site, and the Trial Chamber, for relying on evidence of such poor quality in reaching a finding that the charges had been proved beyond a reasonable doubt. The SCC found the Trial Chamber further erred in reaching conclusions related to the existence of a policy to target Lon Nol officials in relation to the fall of Oudong in 1974.61 The finding of such a policy constituted a central point in the Trial Chamber’s conclusion about Tuol Po Chrey. The SCC found that, although there appears to have been a pattern of arrests, the evidence was insufficient to establish that they resulted in executions. The SCC also noted that many of the key DK documents used as evidence of a policy post-dated the events at Tuol Po Chrey. Accordingly, the SCC concluded that the evidence the Trial Chamber had used to establish that there was such a policy to execute Lon Nol soldiers was “all but solid and consistent.”62

This conclusion again supported the Defense arguments that the Trial Chamber made factual findings and reached legal conclusions on flawed evidence that did not meet the required burden of proof.

56 These three “pillars” are also listed in Appeal Judgment, para. 411, p. 185.
57 Case 002 Closing Order, paras. 698-714, pp. 75-78.
58 These were LIM Sat, SUM Alat and UNG Chhat. See Nuon Chea Appeal Brief, para. 449, p. 116.
59 Appeal Judgment, para. 962, p. 430.
60 Ibid.
61 Ibid. para. 968, p. 433.
The SCC further noted that the temporal restriction of the scope of Case 002/01 meant that the Trial Chamber’s reliance on documents dated after 1977 to establish some kind of targeting policy was irrelevant. Ultimately, in reversing the convictions, the SCC found that no reasonable Trial Chamber would have found there was sufficient evidence to establish that a policy existed to execute Lon Nol officials at Tuol Po Chrey. On the basis of these errors, the SCC reversed the Trial Chamber’s legal conclusion and found the Accused could not be held criminally liable for the crimes against humanity that the Trial Chamber found had been committed at Tuol Po Chrey.\(^\text{63}\)

III. Continued Issues with JCE in the Appeal Judgment

JCE was the main form of criminal liability used by the ECCC in Case 002. The 1999 Tadić Appeals Chamber at the ICTY defined three forms of JCE: the basic form (JCE I), systematic form (JCE II), and extended form (JCE III). Although the OCP has argued that it is the extended form that should be applied against Nuon Chea and Khieu Samphan, the Pre-Trial and Trial Chambers at the ECCC have dismissed this, ruling that JCE III was not reasonably foreseeable in 1975. Thus, the main form of liability used was JCE I. The Defense argued there was not strong enough evidence tying the Accused to the charges to convict them using JCE I. They also contested that this mode of criminal liability was foreseeable at the time.

The Appeal Judgment indicated serious flaws in the Trial Chamber’s treatment of JCE as a core theory of responsibility. The errors found by the SCC echoed a number of the criticisms made in A Well-Reasoned Opinion?, and particularly those concerning the treatment of foreseeability in relation to JCE I. Having rejected the Trial Chamber’s use of JCE I to justify convictions where there was no clear evidence to show a shared intent on the part of the Accused to commit the crimes charged, the SCC faced a dilemma. Since the extended form of JCE (JCE III) is not applicable at the ECCC, if the crimes committed during the two population movements or at Tuol Po Chrey were arguably only foreseeable to the Accused, how could the mens rea requirement of JCE I, namely intent, be fulfilled? It is beyond the scope of this summary report to analyze fully the SCC’s extensive treatment of JCE, which takes up some 150 pages of the Appeal Judgment. What follows will focus on two aspects of the Appeal Judgment that indicate the way in which the SCC responded to this dilemma and justified using JCE as a principal grounds of conviction despite the errors it found in the Trial Chamber’s application of that doctrine.

A. JCE in International Customary Law in 1975

As the principle of legality requires that the ECCC apply the doctrine of JCE as it existed (or, if it existed) in international customary law in 1975, the Trial Chamber, Pre-Trial Chamber, and Supreme Court Chamber have devoted considerable attention to the body of World War Two (WWII) era case law that provides the principal basis for evaluating the status and contours of that theory of liability. In its Judgment in Case 002/01, the SCC discussed at considerable length this body of WWII jurisprudence and, more specifically, those cases decided by national war crimes tribunals or national military commissions. There appears, however, to be a contradiction inherent in the SCC’s treatment of the JCE doctrine. On the one hand, the SCC correctly favored the arguments of the Accused that the Trial Chamber had erred in finding that crimes committed during the population movements were attributable to the Accused without having found that they had been intended as a defining element of the alleged JCE. On the other hand, aspects of the SCC’s treatment of this same body of cases to establish elements of JCE I appeared to fall victim to the same methodological errors for which they criticized the Trial Chamber.

What the SCC specifically found as error was that, “The policy of population movement ‘resulted in and/or involved’ the commission of crimes without pronouncing that the crimes

64 Trial Chamber, ‘Decision on the Applicability of Joint Criminal Enterprise’ (12 September 2011), E100/6; Pre-Trial Chamber, ‘Decision on the Appeals Against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE)’ (20 May 2010), D97/15/9.


66 The various treatments of this issue preceding the Appeal Judgment in Case 002/01 have been dealt with in A Well-Reasoned Opinion?.

13
had been intended, contemplated, or otherwise encompassed within the common purpose.” 67

The inclusion of the vague phrase, “or otherwise encompassed,” is an important qualification of “intended” and “contemplated.” The SCC went on to also reject the arguments of the Co-Prosecutors that JCE III liability was established in international customary law in the post-WWII cases. The SCC correctly found that the national British, Australian, and American military commission cases relied on by the OCP could not establish such an international customary law norm because there was no basis for reaching conclusions as to what legal doctrines or principles grounded the convictions in those cases.

The clear justification for this finding is that there were, in fact, no judgments promulgated by the tribunals in the military commission cases cited. There were no factual or legal findings, but merely verdicts of guilty or not guilty on each of the charges. 68 The SCC also noted that the Dachau Concentration Camp case reference employed by the Co-Prosecutors was based upon the review of the case by the United Nations War Crimes Commission (UNWCC). 69 What the SCC did not explicitly state is that the reports relied on are unofficial summaries and analyses made by observers sent to a relatively small number of the thousands of war crimes trials held before such bodies in a variety of countries. The American cases of this type alone number 489, and the British, French, Australian, Polish, Russian, and Chinese war crimes programs, to name only those, were of massive scope as well. 70 For this reason alone, it would be perilous to conclude on the basis of an examination of less than one tenth of one percent of the total cases that an international customary law norm was established by the handful of cases referenced in the Tadić Appeals Judgment or at the ECCC.

More important, as noted by the SCC, is the lack of judgments in many of the cases referenced. As the SCC indicated, neither the comments of the UNWCC nor those of the American JAG, nor, for that matter, the closing or opening statements of the prosecution (all of which have served as references) could substitute for a complete lack of any findings by the judges as to the legal or factual issues in the case. 71 The reason for going into this matter in some detail, however, is not simply to praise the SCC for its excellent research and analysis on these cases and their relevance for JCE III type liability in 1975. What is striking is that the same critical acuity appears to be lacking when the SCC itself employed this same category of cases, which it later rejected, in order to buttress its argument on another issue pertaining to JCE.

Thus, the SCC held that it considered it irrelevant that none of the WWII cases used the term, “significant contribution to the implementation of the common purpose.” They further held that what mattered was the “essence” of the WWII case law: “Namely that individual criminal liability may also arise in circumstances where an individual makes a contribution to the implementation of the common criminal purpose, even if that contribution does not amount to the actus reus of the crime and is removed from the commission of the crime itself. In the view of the SCC, this correctly reflects the position taken in the post-World War II case

69 Ibid, para. 793, p. 358.
71 Of course, the judgments in the 12 Nuremberg Military Tribunal cases constitute the most important body of jurisprudence from the WWII era. It is striking, however, that the national cases that do include judgments or legal findings by the court are so seldom referenced in the SCC’s Appeal Judgment. The Norwegian, Dutch, and Chinese cases, for example, do include judgments, although they are sometimes very brief. In the case of the French trials, at the trial level, the judges filled out forms indicating their findings in brief.
The immediately following paragraphs of the Appeal Judgment relied substantially on exactly the same body of cases reported by the UNWCC that the SCC later, as seen above, unequivocally rejected as unable to provide the basis for conclusions about legal standards. For example, in the first case they cited, the British *Almelo* case, involving the killing of downed Allied airmen, the SCC quoted the following to support the position noted immediately above: “It was noted that ‘[i]f people were all present together at the same time taking part in a common enterprise which was unlawful, each one in his own way assisting the common purpose of all, they were all equally guilty in law.’” This quotation, however, does not come from the judgment of the British military tribunal, because that tribunal did not promulgate a judgment.

The next case cited by the SCC was the *Schonfeld* Case, another British trial reported in the UNWCC series. The SCC drew from this case the conclusion that the accused German soldiers “were found to have participated in the murders, despite not having carried out the killings themselves.” Again, there is no judgment or other findings in the *Schonfeld* Case on the basis of which to conclude on what grounds some accused were convicted and others acquitted. In fact, in this case, six of the ten accused were acquitted, according to the UNWCC commentator, because of a lack of any substantial evidence linking them sufficiently to the commission of the crime. As to the four who were convicted, all of them were at the scene of the raid looking for the victims who were actually shot by one of the four. The prosecutor had alleged that they went to the scene intending to murder the victims rather than arrest them, but there is no way of knowing on what conclusions the guilty verdicts were based as there is no judgment. Even if the prosecutor was correct the accused had the requisite shared intent to kill, that remained a prosecution theory, not a finding by the tribunal. It is puzzling that the SCC here indulged in the same methodological error for which it correctly later rejected the arguments of the OCP and the findings of the Trial Chamber.

B. The SCC’s Conclusion that *Dolus Eventualis* is Sufficient for JCE I Liability

Even after throwing out six convictions for crimes against humanity and recognizing factual findings that diminished Khieu Samphan’s role in the DK regime, the SCC ultimately retained the same life sentence for both Nuon Chea and Khieu Samphan. The maintenance of this sentencing was a telling sign of something amiss in the legal underpinnings of the Appeal
Judgment. While throwing out elements of the Trial Chamber’s reasoning as to the mode of liability to convict Khieu Samphan, the SCC inaccurately redesigned the definition of JCE I.

As noted above, the SCC found that the Trial Chamber erred both in the evidentiary findings it made to establish the elements of JCE in regard to Khieu Samphan and also in regard to the legal standard it applied: “In the section of the Trial Judgment dealing with Khieu Samphan’s mens rea, the Trial Chamber found that he had the requisite intent for liability under JCE, inter alia, because he had known of the substantial likelihood that the implementation of the policies would result in the crimes, and that, in fact, they did result in the crimes committed during the population movements and at Tuol Po Chrey.” This holding essentially subsumed JCE III within JCE I by allowing a recklessness standard, based on foreseeability, to suffice in place of actual intent as the mens rea.76

The SCC then found that “substantial likelihood” was not the correct standard and could not substitute for the required “intent to effect the common purpose.”77 The SCC, however, immediately qualified that statement by noting, “This, however, is a general statement that requires further elaboration, bearing in mind both the crimes at issue and the circumstances of the case.”78 That “elaboration,” which took up most of the rest of the Appeal Judgment, resulted in an ultimate conclusion that despite many errors in analyzing the evidence, the Trial Chamber’s employment of “substantial likelihood” was not “per se” erroneous although at the same time not in itself sufficient to establish the required mens rea.79 In the end, some 30 paragraphs later, the SCC upheld Khieu Samphan’s conviction on JCE on the finding that “he had accepted that such killings could occur.” This grounded the conclusion in the next sentence that, “In sum, it is established that Khieu Samphan had the requisite intent, in the form of dolus eventualis, in respect of deaths by conditions as well as killings of civilians and Khmer Republic soldiers and officials in the context of the evacuation of Phnom Penh.” In other words, the SCC concluded that, although a finding of awareness based upon “substantial likelihood” that crimes will be committed was not the correct standard, it could provide the basis for a conclusion that intent in the form of dolus eventualis was established. This conclusion raises the question of whether the SCC, having rejected foreseeability as applicable only under JCE III, has in fact brought it back in by upholding the use of “substantial likelihood” as the basis for convicting on a finding that dolus eventualis fulfills the required intent for JCE I. What then is the legal basis for allowing dolus eventualis to suffice to establish the requirement of a shared intent of a plurality of persons?

In a previous section elaborating the required elements of JCE, the SCC referred to the role of the ICTY’s Brdanin Appeals Judgment as confirming the elements of JCE.80 The Brdanin Appeals Judgment is in fact one of the leading cases on JCE, but does its discussion of the elements that distinguish JCE I from JCE III support the conclusion of the SCC that dolus eventualis satisfies the intent required for conviction under JCE I?81

76 Appeal Judgment, para. 1051, p. 478.
77 Ibid, para. 1054, pp. 479-480.
78 Ibid.
80 Ibid, para. 774, pp. 346-347.
A reading of the Brdanin Appeals Judgment indicates that it by no means supports the argument of the SCC. For example, in summarizing the required mens rea for the three forms of JCE, the Judgment stated, “Where convictions under the first category of JCE are concerned, the accused must both intend the commission of the crime and intend to participate in a common plan aimed at its commission.”

In a later paragraph, the Appeals Chamber further specified, “What matters in a first category JCE is not whether the person who carried out the actus reus of a particular crime is a member of the JCE, but whether the crime in question forms part of the common purpose.” One might ask how can a crime form part of the “common purpose” defining the JCE if there is only awareness of a “substantial likelihood” that the crime might be committed while implementing the JCE? The Brdanin Appeals Chamber further clarified that, for JCE I, “The accused must possess the requisite intent.” The Chamber added that it must be “the only reasonable inference on the evidence” that the accused is found to “intend the commission of the crime.”

The subsequent paragraph makes clear that neither dolus eventualis nor substantial likelihood can establish that intent for a conviction under JCE. The Brdanin Appeals Chamber found, “A trier of fact must find beyond reasonable doubt that a plurality of persons shared the common criminal purpose; that the accused made a contribution to this common criminal purpose; and that the commonly intended crime (or, for convictions under the third category of JCE, the foreseeable crime) did in fact take place,” (emphasis added). Thus, for JCE I, the commonly intended crime must take place, not a crime that was foreseeable because there was awareness of a substantial likelihood that it could occur. This constitutes the distinction between JCE I and JCE III. The Brdanin Appeals Chamber further makes absolutely explicit that dolus eventualis characterizes JCE III as opposed to JCE I when it holds that an accused may be “appropriately held liable not only for his own contribution, but also for those actions of his fellow JCE members that further the crime (first category of JCE) or that are foreseeable consequences of the carrying out of this crime, if he has acted with dolus eventualis (third category of JCE)” (original parentheticals; emphasis added). Thus, the leading case referenced by the SCC as correctly setting out the elements of JCE contradicts the definition of the mens rea for JCE I that was articulated in the Appeal Judgment.

In June 2017, in her final statements in Case 002/02, Khieu Samphan’s Counsel Anta Guissé similarly raised the Case 002/01 Appeal Judgment to criticize how it modified JCE I to find her client criminally liable through the use of dolus eventualis. She characterized the SCC’s Judgment as having lowered the threshold for a murder conviction by finding that the intent to kill is not an essential element. Ms. Guissé described herself as “flabbergasted” by this, stating: “The principle of legality is going out the window.”

The next section of the present report similarly relates the Case 002/01 Appeal Judgment to the trial in Case 002/02 as the Trial Chamber is currently drafting its decision in that part of the case. The SCC’s findings on JCE will of course greatly impact the Trial Chamber’s determination of criminal liability for both Khieu Samphan and Nuon Chea for the crimes alleged in that trial as well.

82 Brdanin Appeal Judgment, para. 365 (emphasis added).
83 Ibid, para. 410 (emphasis added).
84 Ibid, para. 429.
85 Ibid, para. 430, continues: “In establishing these elements, the Chamber must, among other things: identify the plurality of persons belonging to the JCE…specify the common criminal purpose in terms of both the criminal goal intended and its scope (for example, the temporal and geographic limits of this goal, and the general identities of the intended victims)…” It is clear that dolus eventualis cannot meet the requirements specified here.
86 Case 002/02 KRT Monitor, Issue No. 80, Closing Statements (13-23 June 2017), p. 9.
IV. Impact of Case 002/01 Appeal Judgment on Case 002/02

The Trial Chamber concluded evidentiary proceedings in Case 002/02 just seven weeks after the SCC rendered its final judgment in Case 002/01.\(^{87}\) This was followed five weeks later by the Trial Chamber’s decision on reduction of the scope of Case 002, determining that Case 002/02 will be the final trial of the surviving DK senior leaders.\(^{88}\) The SCC’s final decision in Case 002/01 will assuredly impact the Trial Chamber’s eventual judgment in the much larger and more complex Case 002/02. Due to the Trial Chamber’s decision on the reduction of scope, its judgment in the second trial will be its last in Case 002.

Having monitored proceedings continuously for the combined 499 trial days of Cases 002/01 and 002/02, as well as the simultaneous appeals process in the first case, this report’s authors have determined that the trial’s severance and victim participation process have presented two of the most significant legal and procedural challenges throughout Case 002 and before the ECCC in general. Although the Case 002/01 Appeal Judgment provided much-needed clarity to these complex issues, it also reinforced questions for the Trial Chamber to consider as it prepares to write its second and now final judgment in the case against Nuon Chea and Khieu Samphan. Although this report takes into account a cursory review of the Parties’ recently published and presented closing briefs in Case 002/02,\(^{89}\) by no means does it attempt to summarize the Parties’ strategies in the closing phase of the trial.\(^{90}\)

A. Severance of Case 002

Although the scope of Case 002/01 was relatively limited, concerning only certain actions of the first half of the DK regime, from 17 April 1975 to December 1977, it faced many delays due to extended testimonies and procedural hurdles. These delays pushed the Parties and the Chambers to ensure that a second trial of the surviving senior leaders would occur, and that the trial, Case 002/02, would address the significant remainder of allegations and alleged crime sites, including allegations of genocide.

In response to the Parties’ appeals of the severance order,\(^{91}\) the SCC determined a threshold that the Trial Chamber would need to meet for any new severance: “reasonable representativeness.”\(^{92}\) In annulling the Trial Chamber’s first decision on severance, as well as its subsequent decision to add Tuol Po Chrey execution site to the scope of Case 002/01, the SCC asked the lower chamber to determine the necessity of a new severance order only after consulting the Parties. The SCC found that, if the Trial Chamber subsequently decided a new severance was merited, “The Trial Chamber should...give due consideration to reasonable

88 Trial Chamber, ‘Decision on Reduction of Scope of Case 002’ (27 February 2017), E439/5.
90 The oral hearings for the Closing Statements in Case 002/02 were held from 13 to 22 June 2017. See footnote 18, supra, p. 7.
91 For the original severance order, see: Trial Chamber, ‘Severance Order Pursuant to Internal Rule 89ter’ (22 September 2011), E124.
92 SCC, ‘Decision on the Co-Prosecutors’ Immediate Appeal of the Trial Chamber’s Severance Order Concerning the Scope of Case 002/01’ (8 February 2013), E163/5/1/13.
representativeness of the Indictment within the smaller trial(s).”

After considering the advanced age of the two surviving Accused as well as the lengthy back-and-forth with the Parties in oral and written submissions, the Trial Chamber eventually issued a new severance order with the scope of Case 002/02 carefully laid out according to this standard of “reasonable representativeness.”

As outlined above, the scope of the second case covered much more ground than the first. To meet the standard of “reasonable representativeness,” the Trial Chamber chose to hear evidence on: Tram Kak District cooperatives and three of the five other worksites listed in the Closing Order; S-21 Security Center and three of the twelve remaining security centers and execution sites listed in the Closing Order; the treatment of Buddhists (limited to Tram Kak Cooperatives); the targeting of former Khmer Republic Officials (implementation limited to Tram Kak Cooperatives, 1st January Dam Worksite, S-21 Security Center and Kraing Ta Chan Security Center); genocide against the Cham; genocide against the Vietnamese (excluding crimes against humanity committed by the RAK on Vietnamese territory); internal purges of the CPK; and, the nationwide regulation of marriages and incidents of rape within the context of those marriages. The SCC affirmed this severance order and scope the day before the 30 July 2014 initial hearing in Case 002/02. The SCC found that the combination of the then-nearly completed Case 002/01 and the new scope of Case 002/02 met the standard of “reasonable representativeness” for the full indictment. In stark contrast to the continuous appeals during Case 002/01, Parties in Case 002/02 have largely refrained from requesting further additions to the scope, although this does not mean that Case 002/02 has been free of severance-related disruptions.

On 17 October 2014, just over two months after announcing the Trial Judgment in Case 002/01, the same Trial Chamber opened evidentiary hearings in Case 002/02. A Defense boycott immediately ensued over the Defense Teams’ ongoing motions for the disqualification of judges from the Trial Chamber due to the appearance of bias after they had

---

94 Trial Chamber, ‘Decision on Additional Severance of Case 002/02 and Scope of Case 002/02’ (4 April 2014), E301/9/1.
95 1st January Dam Worksite (present-day Kampong Thom Province, DK Central Zone), Trapeang Thma Dam Worksite (present-day Banteay Meanchey Province, DK Northwest Zone), and Kampong Chhnang Airport Construction Site (present-day Kampong Chhnang Province, DK West Zone).
96 Kraing Ta Chan Security Center (present-day Takeo Province, within Tram Kak District, DK Southwest Zone), Au Kanseng Security Center (present-day Ratanakiri Province, DK Northeast Zone), and Phnom Kraol Security Center (present-day Mondulkiri Province, DK Northeast Zone). The Closing Order in fact lists 13 security centers and execution sites, but Tuol Po Chrey execution site was already included in Case 002/01.
97 SCC, ‘Decision on KHIEU Samphân’s Immediate Appeal Against the Trial Chamber’s Decision on Additional Severance of Case 002 and Scope of Case 002/02’ (29 July 2014), E301/9/1/1/3.
98 The Co-Prosecutors repeatedly sought to discuss of a number of security centers left out of the Case 002/02 scope, as well as the treatment of the Khmer Krom minority, but these were generally ascribed to other elements of the admitted scope, such as general policies related to the internal purges of the CPK. For the most recent in-court debate about the treatment of the Khmer Krom, see: Case 002/02 KRT Monitor, Issue No. 77, Hearings on Evidence Week 74 (12-15 December 2016), p. 9. One example of the OCP questioning Parties on security centers outside of the Case 002/02 scope took place in September 2016 when the OCP asked questions on Knong Security Center in Kratie Province, see: Case 002/02 KRT Monitor, Issue No. 68, Hearings on Evidence Week 65 (19-22 September 2016), pp. 8-9. In the trial segments on the treatment of the Cham, the internal purges, and the roles of the Accused, Nuon Chea’s Defense Team regularly reminded the Trial Chamber that it had erred in not including Krouch Chhmar Security Center (in Kampong Cham Province) in the scope, and this forms one argument of his closing statements, see: ‘Nuon Chea’s Closing Brief in Case 002/02’, paras. 701-704, pp. 311-313.
99 As the introduction of this report states, in supra p. 3, a more thorough analysis of the 2014 Trial Chamber Judgment can be found in the Handa Center and East-West Center’s 2015 report A Well-Reasoned Opinion?.
100 The same national judges and one international judge, Jean-Marc Lavergne, remained on the bench. Although international judge Silvia Cartwright left the Court, she was replaced on the Trial Chamber bench by former Reserve Judge, Claudia Fenz, who had followed the full trial in Case 002/01.
already handed down guilty verdicts against the same Accused. The motions were ultimately rejected primarily because of the civil law principle of trust in judges’ wisdom and capacity to remain impartial. The Khieu Samphan Defense’s boycott of evidentiary hearings in Case 002/02 continued until the end of December 2014, when the Defense had completed its appeal brief in Case 002/01, having argued that its small team did not have the resources to simultaneously appeal one case while engaging in adversarial debate in another case. Evidentiary hearings only resumed as normal in mid-January 2015.

Although the rest of the trial proceeded with relatively few unexpected delays — especially in comparison to Case 002/01, which was continually delayed by health crises of the Accused — it still took two years to complete evidentiary hearings in Case 002/02, and the critiques related to severance never disappeared. As explained in Section II.A above, the arguments for judicial disqualification made their way into the Defense Teams’ Case 002/01 appeals as well.

In a finding of the Appeal Judgment related directly to the confusion over the Case 002 severance, the SCC recognized the possibility of future problems arising in terms of judicial impartiality in Case 002/02. The two Accused each raised arguments related to the right to be informed of the charges against them, specifically with reference to the scope of the trial in Case 002/01, which as detailed above, had shifted in the middle of trial. Nuon Chea claimed the Trial Chamber erred in law when it made findings related to elements from the scope of Case 002/02: namely, the “regulation of marriage” as a CPK policy, Nuon Chea’s role in relation to S-21, the total death toll under the DK regime, and findings related to the existence of a policy to smash enemies. Khieu Samphan also argued that the Trial Chamber prematurely made findings related to collectivization, cooperatives, and forced labor, which the Trial Chamber had severed from Case 002/01 and made a part of the second trial.

The SCC found that the Trial Chamber had “discretion to determine which facts were relevant for determining the charges at hand, even if they pertained to the factual foundation of other charges,” and that “the five CPK policies that were identified in the Closing Order [including “regulation of marriage”] are not clearly distinguishable and mutually exclusive.” The SCC’s next finding, however, was a warning shot for a challenge that arose in the closing arguments of Case 002/02, and that will form a centerpiece of Defense arguments on appeal should there be a conviction by the Trial Chamber. This finding demonstrates the SCC’s keen awareness all along of the pitfalls of the severance and the Trial Chamber’s decision to sit for both trials in Case 002:

As to the potential complications caused by an overlap of factual findings in the situation where the same Accused are being tried once again by the same trial panel for crimes stemming from a common factual background, and as to the inappropriateness of treating findings from one case as the “foundation” for another, the Supreme Court Chamber has
repeatedly flagged the issue and recalls its findings in the appeal decisions concerning the severance.¹⁰⁵

Even as it dismissed issues related to severance on appeal in Case 002/01, the SCC recognized the future risk to Case 002/02 stemming from (i) a bench that had already convicted and sentenced the Accused sitting in a second trial of the same Accused, and (ii) the factual findings in Case 002/01 related to DK administration and CPK policies that may overlap with or form the basis of criminal findings in the second trial.

Nonetheless, the SCC also provided a way out of the dark for the Trial Chamber as it moves to assess the whole of Case 002/02 and draft its next judgment. As discussed already in this report, the Appeal Judgment demonstrates the capacity for this hybrid court of Cambodian and international judges to consider and respond to every Defense argument in turn and provide detailed reasoning for every decision it makes.

The Trial Chamber has already faced negative consequences for its lack of sufficient reasoning and failure to consult the Parties about severing Case 002 in September 2011. This led to multiple appeals, which resulted in the 8 February 2013 SCC decision annulling the first severance after specifically admonishing the Trial Chamber for its lack of reasoning and its tendency to justify its decision primarily with the excuse the severance was in the interest of expeditiousness.¹⁰⁶ In that surprising moment mid-trial, however, the Trial Chamber held hearings to listen to all Parties, and by July 2014, it had formulated the scope of the new trial in Case 002/02, and one that met the SCC’s standard of “reasonable representativeness.” Although the Trial Chamber faces the “potential complications” that the SCC “flagged” throughout the fits and starts of severance during Case 002/01, the Trial Chamber can now address these challenges head-on in its judgment in Case 002/02 through careful weighing of the evidence, sound reasoning, clear drafting, and attention to every detail of the Defense’s arguments.

B. Civil Party Participation in Case 002

The Handa Center’s previous report, A Well-Reasoned Opinion?, detailed the Trial Chamber’s reliance on victim evidence in its Case 002/01 Judgment, particularly in comparison to Case 001.¹⁰⁷ The opportunity to contribute evidence to the case file gave victims the opportunity to act as “full-rights” parties to the proceedings, as the CPLCLs argued in their closing briefs in Case 002/01.¹⁰⁸ In that sense, the participation of Civil Parties in the first trial of Case 002 resulted in both successful support of the Prosecution’s case and the formulation of associated reparations projects. A Well-Reasoned Opinion? was concerned with legal analysis of the ways in which this reliance on Civil Party evidence in the Trial Judgment may have violated the fair trial rights of the Accused, an analysis that international lead co-lawyer Marie


¹⁰⁷ The report asserted that, “Over the course of the first segment of Case 002, the Trial Chamber heard testimony from 31 Civil Parties and 58 witnesses,” and that there was much greater reliance on Civil Party evidence in the Case 002/01 Judgment than in the Case 001 Judgment...Civil Party evidence was cited a total of 787 times in the Case 002/01 Judgment for an average of 25.4 times per Civil Party who testified, compared with only 131 times in the Case 001 Judgment, for an average 5.9 times per Civil Party who testified.” See Cohen et. al., A Well-Reasoned Opinion?, pp. 20-21.

¹⁰⁸ Civil Party Lead Co-Lawyers, ‘Civil Parties’ Closing Brief to Case 002/01’ (26 September 2013), E295/6/2, para. 6, p. 4.
Guiraud has publicly critiqued. In contrast, the present report has examined the SCC’s determinations that the Trial Chamber’s reliance on victim evidence did not adversely impact the Accused. This report now looks ahead to the Trial Judgment in Case 002/02 to assess the potential impact of those SCC findings.

The Appeal Judgment directly addressed the Defense arguments that the Trial Chamber’s reliance on “statements of suffering” and “victim impact statements” constituted an error in law through over-reliance on what it characterized as unsworn, unreliable testimony often falling outside the scope of Case 002/01. It is worth noting that the severance order in Case 002 was also partially to blame for this kind of testimony coming from Civil Parties in Case 002/01. The Trial Chamber eventually decided to allow Civil Parties to testify about their suffering related to allegations in the whole of Case 002 rather than focusing on just the scope of the first segment. Defense Teams were also asked to comment on these “statements of suffering” after the Civil Party left the courtroom, so as not to insult or re-traumatize the victims. Although this decision had implications for the way the Chamber relied on Civil Party evidence in the Trial Judgment, it was also an important recognition of the way victim participants in the trial could not be expected to “compartmentalize” their suffering into different types of crimes. In its Appeal Judgment, the SCC largely supported this procedural mechanism, which simultaneously ensured respect for and found probative value in the evidence of Civil Parties. The SCC dismissed Defense arguments opposing the assignment of probative value to Civil Party evidence even as it further pushed the Trial Chamber to clarify the guided reasoning it employed in weighing each victim testimony on which it relied. With the SCC’s affirmation that Civil Parties have not only the right to participate but also the capacity to provide evidence of probative value, will this alter potential outcomes in Case 002/02?

1. Examining the Role of Civil Parties in Cases 002/01 and 002/02

There were a total of 499 days of trial in the whole of Case 002, with 224 trial days in Case 002/01 and 275 in Case 002/02. A total of 278 individuals have appeared before the Trial Chamber in Case 002: 172 witnesses, 95 Civil Parties, and 11 experts. Table 1, below, breaks this down into Case 002/01 and Case 002/02, and it lists the number and proportion of each type of testimony in each sub-trial.

---


110 In the final weeks of the Case 002/01 evidentiary hearings, 15 Civil Parties appeared at “victim impact hearings” to provide statements related to the harm they suffered throughout the DK era.

111 On 22 October 2012, during the testimony of Yim Sovann (TCCP-169), national CPLCL Pich Ang requested for statements of suffering to be allowed to go beyond Case 002/01 and cover the full scope of Case 002, and international senior assistant prosecutor Vincent de Wilde D’Estmael joined, noting, “Suffering cannot be compartmentalized.” While the Chamber awaited a formal written submission, Judge Lavergne issued the Chamber’s oral ruling regarding the Civil Party testimonies scheduled for that day: “[T]he Chamber feels it is wise to allow the Civil Party to express herself on the totality of the suffering that is relevant to Case 002. However, if the other Parties feel that some of the statements made by the Civil Party are irrelevant, the Parties will be given the opportunity, once the Civil Party has finished with her statement to raise the point and to address the elements of the statement that seem irrelevant.” Later in the week, the Trial Chamber moved to have the Defense Teams comment on statements of suffering only after Civil Parties left the courtroom, after Ieng Sary’s Defense Counsel Ang Udom directly told Yim Sovann, “I do not know exactly the reason for the tears,” which she shed during her statements.
Notably, with only 51 more trial days in Case 002/02 than in Case 002/01 (an 122.77% increase in trial days), the Trial Chamber in Case 002/02 heard the testimony of 186 individuals as opposed to 92 in Case 002/01, for an increase in individual testimonies by 202%. Both trials in Case 002 heard more or less the same proportion of witnesses, Civil Parties, and experts. Generally, in both trials, just over one third of all individuals who testified in Case 002 were victims participating in the proceedings as Civil Parties, and just under two thirds were fact witnesses. The remainder in both trials was made up of expert witnesses.

Although the data from Table 1 shows the number of Civil Parties who testified in Case 002/02 (64) more than doubled from Case 002/01 (31), it also offers a clear reminder that the vast majority of Civil Parties determined as admissible in Case 002 will not be heard directly. A total of 3,869 Civil Parties were admitted in Case 002 by either the OCIJ or the PTC to form the consolidated group of Civil Parties, but the severance order and the distinct scope of each trial prevents some of those admitted Civil Parties from ever seeing discussion of the findings most relevant to them at trial. In its February 2017 decision to reduce the scope of Case 002, the Trial Chamber noted the CPLCLs had determined that the OCIJ had admitted 446 of the Civil Parties for factual findings not yet covered in Cases 002/01 or 002/02 but that only 34 of those individuals were admitted solely for such findings.113

With 95 Civil Parties who had testified by the end of the 499 trial days in both parts of Case 002, less than five percent of the total consolidated group of 3,869 Civil Parties had testified before the Trial Chamber in the whole of Case 002. The Co-Lawyers therefore utilized documentary hearings to read out the written statements of other Civil Parties who would not have the chance to testify in person.114

112 However, it is not necessarily the case that, even as Case 002/02 took on a much wider scope, dealing with charges of genocide, as well as crime sites across every DK zone, this data signifies the Trial Chamber has somehow become more efficient. In Case 002/01, individuals typically testified over multiple days, for two main reasons: first, Ieng Sary’s Defense Team actively participated until his death in March 2013; and, secondly, some witnesses, such as the DC-Cam director and deputy director, Mr. CHHANG Youk and Mr. VANTHAN Dara Peou, respectively, provided evidence that forms the foundation of Case 002/02, and they have not had to re-appear.

113 However, the decision also noted the CPLCLs’ determination that the number did not include Civil Parties admitted for the treatment of Buddhists nationwide and population movement phase three. See Trial Chamber, ‘Decision on Reduction of Scope of Case 002’ (27 February 2017), E439/5, para. 6, citing CPLCLs’ Request for Clarification Relating to Remaining Charges in Case 002 (9 September 2016), E439, paras. 7-8.

114 ‘Civil Party Lead Co-Lawyers’ Closing Brief in Case 002/02’, para. 21, pp. 13-14. For example, “In key documentary hearings, the CPLCLs presented 100 civil party documents.”
2. Continued Debate at the Close of Case 002/02

The closing briefs recently published in Case 002/02 already provide a picture of the challenges the Trial Chamber is faced with when drafting a Judgment in the second trial. The Nuon Chea Defense and the Civil Party Lead Co-Lawyers presented diametrically opposed interpretations of the SCC’s Appeal Judgment in Case 002/01 when it came to standards for Civil Party evidence.

Nuon Chea’s Defense asserted, “As Civil Parties are not required to take an oath, and may have an interest in providing incriminating evidence as alleged victims, the probative value of their in-court statements is lower than for witnesses.” A footnote indicated that Nuon Chea based this assertion on paragraph 313 of the Case 002/01 Appeal Judgment, which partially reads, “The Trial Chamber may rely on the testimony of Civil Parties to make determinations of guilt, just as it may rely on the testimony of the Accused person, should he or she decide to testify. While the status of a Civil Party may be of relevance to the probative value and/or credibility of the testimony, there is no reason to exclude it per se.” It is not clear which aspect of this SCC finding relates to Nuon Chea’s assertion that the probative value of Civil Party testimony is lower. Furthermore, just two paragraphs later in the Appeal Judgment, the SCC stated clearly, “These factors per se do not demonstrate an error of law in the Trial Chamber’s approach. Nuon Chea’s arguments are therefore dismissed.”

The CPLCLs’ closing brief cited the very same paragraphs of the Appeal Judgment to argue that the SCC affirmed that the Trial Chamber could rely upon Civil Party evidence “within its guided discretion,” and “to enter factual and legal findings on facts concerning the alleged criminal allegations within the Closing Order that form part of Case 002/02.”

As A Well-Reasoned Opinion? recounted, developing a victim participation scheme has been a challenge for the ECCC since its inception. However, even with the clarity provided by the SCC in its November 2016 Appeal Judgment in Case 002/01, the arguments over the value of Civil Party evidence are still live. Parties have already staked their claims in their closing briefs for Case 002/02, and the issue was raised again during closing arguments in June 2017. During the hearings on closing statements, CPLCL Marie Guiraud defended the participation of Civil Parties by reminding the Trial Chamber of the intrinsic validity of the Civil Party mechanism, arguing, “If there is a system of Civil Party participation at the ECCC, it is first and foremost because the Cambodian penal procedure has this system.”

As stated earlier in Section IV, the issue of severance and trial scope has been raised and will continue to be raised alongside victim participation matters as Case 002 proceeds to completion. In both matters, it is essential that the Trial Chamber looks to the SCC’s Appeal Judgment in Case 002/01 for guidance.

117 Ibid., para. 315-16, pp. 145-146.
119 Ibid., para. 137, p. 48.
120 This argument did not appear to change the position of either Defense Team. National Counsel for Nuon Chea, Son Arun, subsequently opened his team’s arguments by referencing his interpretation of the SCC Appeal Judgment, arguing that: “Evidence of witnesses is stronger than evidence of Civil Parties since witnesses take an oath and Civil Parties do not.”
The SCC’s delay in announcing its judgment in Case 002/01 may have undermined its potential impact on the Trial Chamber’s procedural management of Case 002/02. However, the SCC’s critiques may nevertheless impact the juridical determinations of the Trial Chamber going forward. Furthermore, and perhaps of greatest significance, the Appeal Judgment provided a new standard for reasoned decision-making as the Trial Chamber turns to writing its second and final judgment in Case 002 over the coming months. With no certainty that further cases will go forward beyond the investigative phase, and the advanced age of the two Accused making a lengthy appeals process uncertain, this could be the final opportunity the Court has to make a lasting, positive impact in international criminal law.
V. Concluding Remarks

This report set out to summarize the most significant findings of the Case 002/01 Appeal Judgment but also to analyze to what extent these findings may impact the pending final judgment in Case 002/02, expected in mid-2018.

The Appeal Judgment has set a higher standard for final written decisions at the ECCC through its clear and succinct response to the Defense Teams’ copious procedural grounds of appeal concerning, among other things, the Trial Chamber’s methods in calling witnesses, weighing evidence, and determining probative value. Although these determinations arrived too late in the evidentiary hearings of Case 002/02 to significantly alter procedures in that trial, the SCC’s reasoning, based on case-by-case analysis, presents a model for the Trial Chamber as it begins to draft its next judgment in Case 002/02. One hopes that the finding of many errors in the Trial Chamber’s Case 002/01 judgment will motivate that chamber to rethink the organization and methodology of its judgment in Case 002/02.

The SCC also provided strong reasoning in reversing the convictions for the crime against humanity of extermination and for throwing out the convictions for the crimes found to have been committed at Tuol Po Chrey. This was not an easy decision to make, given the weight of survivors’ demands for justice and the gravity of the crimes committed there, but the SCC clearly stated its role and the role of the ECCh in its legal reasoning. With the example of Tuol Po Chrey, the SCC also demonstrated the difference between a finding of fact — that a criminal massacre of former Khmer Republic soldiers occurred at that site — and a finding of criminal responsibility for the accused senior leaders.

The SCC’s Appeal Judgment also noted some significant challenges that will return to the fore as Case 002/02 concludes. It recognized the dilemma of the Trial Chamber’s poor severance decision, which separated Case 002 into a series of smaller trials in the interest of expeditiousness. In the end, it appears the severance slowed down the completion of Case 002 and also created a host of unintended consequences that particularly impact both the right of the Accused to a fair trial and the right of the victims to justice. The Appeal Judgment cemented the role of Civil Parties by recognizing the value of their evidence, so long as the use of such evidence is clearly stated and reasoned from the outset. However, this finding implicitly directed many errors in the Case 002/01 trial at the Prosecution for a weak case built on a weak set of witnesses and experts who did not always succeed in proving facts and criminal liability beyond a reasonable doubt.

Nonetheless, there were still weaknesses in this Appeal Judgment concerning some of the legal findings related to criminal responsibility. Following the Trial Chamber’s confused determinations related to JCE in its original convictions of Nuon Chea and Khieu Samphan, the SCC’s explanation was a massive improvement in terms of logical reasoning and legal writing, but its determinations still stand on shaky ground. The SCC found that the Trial Chamber’s legal reasoning had erroneously entered convictions for the two Accused on what is considered ‘JCE III’ rather than the intended ‘JCE I’. The SCC fixed these errors and clarified the convictions on ‘JCE I’ but somehow determined that foreseeability, the concept that a senior leader could have foreseen a crime would be committed as a result of the common purpose, even if it was not the main intent of the common purpose, constituted part of ‘JCE I’. This determination was flawed. The shakiness of the recognizably improved segment of the Appeal Judgment on criminal liability raises another question: was there some
kind of internal compromise on the SCC’s bench, to criticize the soundness and reasoning of significant parts of the Trial Chamber judgment and overturn convictions on certain charges, while refusing any change to the overall guilty verdicts or life sentences for both Accused? This is a question not only for the ECCC and its observers to consider, but for international tribunals to recognize as fundamental as well. Given the moral sway of victims’ calls for justice and the universal recognition of the atrocious nature of the crimes alleged before these international institutions, should we expect anything less?

Nonetheless, the fact that this question can now be asked of the ECCC is a sign of the impressive achievements and the legitimizing force of this Appeal Judgment. After the procedural delays, cost overruns, and the removal of two Accused from the trial (one to death by natural causes and the other to dementia), the Trial Chamber issued a judgment that was so poorly organized that ostensibly reasonable determinations were rendered impossible to define or understand. The sections on findings of historical background, factual findings related to the crimes, and findings of criminal responsibility were each presented in a disjointed manner and without a reasoned demonstration of their basis in evidence.

With the SCC’s Appeal Judgment, this organizational confusion was brought into order, and the reasoned judicial determination of criminal liability was afforded the priority it warrants. The Appeal Judgment demonstrated the hybridized Cambodian tribunal’s ability to weigh the fair trial rights of the Defense, namely the presumption of innocence and the equality of arms. The Judgment also finally confirmed the Civil Parties’ requests for moral and collective reparations projects, making the projects the first of their kind to be approved on final judgment, internationally.

Given the OCIJ’s recent dismissal of charges in Case 004/01 and the possibility of a similar determination in the remaining three cases that are still under investigation, the legal legacies of both segments of Case 002 may be the ECCC’s most memorable and long-lasting footprint. Regardless of whether one disagrees with some of its conclusions, the Appeal Judgment in Case 002/01 demonstrated both to Cambodia and to the international community that the ECCC appeals process is able to address serious shortcomings in the Trial Judgment and produce a well-reasoned, well-founded, and well-written decision. The Appeal Judgment demonstrated that the institution of the ECCC has retained its purpose to provide justice while effectively balancing the rights of the accused. The hope now is that the Trial Chamber will take this into account as a model for what it must improve upon in the coming year, as it writes its second and final judgment, in Case 002/02.

---

121 On 22 February 2017, the OCIJ dismissed charges in the investigation of Ms. Im Chaem after finding that her role as a DK district-level chief did not place her within the ECCC’s personal jurisdiction to try those “most responsible” for the crimes committed under the DK regime. See: OCIJ, ‘Closing Order (Reasons)’; Case 004/01 (10 July 2017), D308/3. The outcomes of the remaining investigations of Mr. Meas Muth (Case 003), Mr. Ao An (Case 004/02), and Mr. Yim Tith (Case 004) remain undetermined, with the OCIJ expecting to issue closing orders in all three cases at best by the first quarter of 2018. See: ECCC, ‘Completion Plan (Revision 13)’ (17 July 2017), p. 8.
About the Authors

David Cohen is a leading expert in the fields of human rights, international law, and transitional justice. He taught at the University of California Berkeley from 1979 to 2012 as the Ancker Distinguished Professor for the Humanities, and he served as the founding director of the Berkeley War Crimes Studies Center (WCSC), which moved to Stanford University at the end of 2013 and became the WSD HANDA Center for Human Rights and International Justice. Cohen is now a visiting professor at Stanford University; professor in the Graduate School at UC Berkeley; professor of law at the William S. Richardson School of Law, University of Hawai’i; and, a fellow at the Hoover Institution at Stanford University. His involvement in research in war crimes tribunals began in the mid-1990s with a project to collect the records of the national war crimes programs conducted in approximately 20 countries in Europe and Asia after WWII. Since 2001, Cohen's work has largely focused on contemporary tribunals and transitional justice initiatives. Cohen has led justice-sector reform initiatives and tribunal monitoring programs in Indonesia, Timor-Leste, Sierra Leone, Bangladesh, Rwanda, and Cambodia. Cohen received his JD at UCLA’s School of Law, his PhD in classics and ancient history from Cambridge University, and an Honorary Doctorate in Law from the University of Zurich.

Daniel Mattes is an international consultant with the Cambodia Programs of the WSD HANDA Center for Human Rights and International Justice at Stanford University. He has monitored Case 002 in a variety of roles with the Handa Center’s KRT Monitor since September 2012, and he has supported the Cambodia Programs’ ongoing outreach and research projects. Mattes earned an MSc in global politics and global civil society from the London School of Economics and Political Science, focusing on modern Southeast Asian political history, in particular. He completed a dissertation analyzing the transnational activist response to capital-led rubber development in Cambodia’s Ratanakiri Province. He received his BA from Stanford University in International Relations and Italian, with Honors from the Center for Democracy, Development, and the Rule of Law.

Caitlin McCaffrie is an international consultant with the Cambodia Programs of the WSD HANDA Center for Human Rights and International Justice at Stanford University. She joined Handa Center’s KRT Monitor in 2015 as lead international trial monitor midway through Case 002/02 and she has since supported the Cambodia Programs’ ongoing outreach, education, and research projects. McCaffrie graduated with First Class Honors in International Studies from the University of Adelaide, where her thesis focused on French colonialism and France’s military intervention in Mali. She also holds a double BA in Arts and International Studies, majoring in French, Chinese, and politics. Prior to joining the Handa Center team, Caitlin worked with the Cambodian Center for Human Rights (CCHR) and the United Nations Office for Project Services (UNOPS) in Phnom Penh, and the Australian Permanent Mission to the United Nations in Geneva.
About the Research Supporters

The **WSD HANDA Center for Human Rights and International Justice at Stanford University** equips a new generation of leaders with the knowledge and skills necessary to protect and promote human rights and dignity for all. Reflecting a deep commitment to international justice and the rule of law, the Center collaborates with partners across Stanford University and beyond on innovative programs that foster critical inquiry in the classroom and in the world. Since its founding nearly two decades ago, the Center has pursued its mission through a range of international programs including justice sector capacity-building initiatives, civil society outreach efforts, trial monitoring, expert consultancies, and archival resource development, with a focus on transitional justice initiatives and new technologies. In 2014, Director David Cohen moved the Center from UC Berkeley to Stanford University with the generous support of Dr. Haruhsa Handa. The move enabled the Center to sustain its established international programs while expanding the scope of opportunities for meaningful student engagement by integrating classroom curricula with faculty research, student internships, and community-engaged learning opportunities.

[handacenter.stanford.edu](http://handacenter.stanford.edu)

The **East-West Center (EWC)** promotes better relations and understanding among the people and nations of the United States, Asia, and the Pacific through cooperative study, research, and dialogue. Established by the US Congress in 1960, the Center serves as a resource for information and analysis on critical issues of common concern, bringing people together to exchange views, build expertise, and develop policy options. The Center’s 21-acre Honolulu campus, adjacent to the University of Hawai‘i at Manoa, is located midway between Asia and the US mainland and features research, residential, and international conference facilities. The Center’s Washington, DC, office focuses on preparing the United States for an era of growing Asia Pacific prominence.

[www.eastwestcenter.org](http://www.eastwestcenter.org)

**KRT Monitor** was established as a collaborative project between the East-West Center, in Honolulu, and the WSD HANDA Center for Human Rights and International Justice at Stanford University (previously known as the UC Berkeley War Crimes Studies Center). Since 2003, the two Centers have been collaborating on projects relating to the establishment of justice initiatives and capacity-building programs in the human rights sector in Southeast Asia, and the KRT Monitor program builds upon years of experience in trial monitoring in Sierra Leone, Timor-Leste, Rwanda, and Indonesia. KRT Monitor aims to widen public awareness of the Khmer Rouge trials before the Extraordinary Chambers in the Courts of Cambodia (ECCC) in Cambodia, in the region, and internationally, through the dissemination of weekly trial reports and holistic legal analyses both describing and assessing the proceedings as they unfold. The program also seeks to train young lawyers and human rights workers by giving them the experience of engaging in monitoring and legal analysis at an international tribunal and assessing the overall effectiveness of justice processes.

[www.krtmonitor.org](http://www.krtmonitor.org)
JUSTICE ON APPEAL: COMMENTARY ON THE CASE 002/01 FINAL JUDGMENT AT THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

BY DAVID COHEN, DANIEL MATTES & CAITLIN MCCAFFRIE

On 23 November 2016, the Supreme Court Chamber (SCC) of the Extraordinary Chambers in the Courts of Cambodia (ECCC) issued its long-awaited final judgment in the first part of the ongoing trial against Nuon Chea and Khieu Samphan, the two surviving senior leaders of the Democratic Kampuchea (DK) regime, which lasted from 17 April 1975 to 6 January 1979. The pronouncement of this final judgment came more than two years after the ECCC Trial Chamber found the two Accused guilty of crimes against humanity, and sentenced them both to life in prison. In contrast to the Case 002/01 Trial Judgment, the Appeal Judgment succinctly weighs the evidence to determine the validity of the numerous grounds of appeal put forward by the Defense Teams. Where the initial judgment was criticized for its disorderly structure, lack of analysis of the evidence presented by parties, and vague reasoning, the Appeal Judgment offers clarity and sound argument. Although it failed to fully resolve issues surrounding the legal concept of Joint Criminal Enterprise (JCE), the Appeal Judgment identified and addressed a significant number of errors of fact and law. It overturned some convictions, perhaps most notably by throwing out findings of the Accused’s criminal responsibility for the executions at Tuol Po Chrey. The well-reasoned and balanced final judgment sets a positive example for the Cambodian domestic court system and other international tribunals, while also hopefully raising the standard of production for the Trial Chamber’s pending judgment in Case 002/02.

Cover Photographs: Courtesy of the Extraordinary Chambers in the Courts of Cambodia (ECCC).

The WSD HANDA Center for Human Rights and International Justice at Stanford University equips a new generation of leaders with the knowledge and skills necessary to protect and promote human rights and dignity for all. Reflecting a deep commitment to international justice and the rule of law, the Center collaborates with partners across Stanford University and beyond on innovative programs that foster critical inquiry in the classroom and in the world. Since its founding nearly two decades ago, the Center has pursued its mission through a range of international programs including justice sector capacity-building initiatives, civil society outreach efforts, trial monitoring, expert consultancies, and archival resource development, with a focus on transitional justice initiatives and new technologies. In 2014, Director David Cohen moved the Center from UC Berkeley to Stanford University with the generous support of Dr. Haruhisa Handa. The move enabled the Center to sustain its established international programs while expanding the scope of opportunities for meaningful student engagement by integrating classroom curricula with faculty research, student internships, and community-engaged learning opportunities.