

2016

Fairness of the Trial of ECCC Case 002/01 Compared to Other Comparable Judgments in International Tribunals

Nicole Triola

Follow this and additional works at: https://scholarlycommons.law.case.edu/war_crimes_memos



Part of the [Criminal Law Commons](#), and the [International Law Commons](#)

Recommended Citation

Triola, Nicole, "Fairness of the Trial of ECCC Case 002/01 Compared to Other Comparable Judgments in International Tribunals" (2016). *War Crimes Memoranda*. 269.

https://scholarlycommons.law.case.edu/war_crimes_memos/269

This Memo is brought to you for free and open access by the War Crimes at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in War Crimes Memoranda by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.



CASE WESTERN RESERVE
UNIVERSITY

SCHOOL OF LAW

CASE WESTERN RESERVE UNIVERSITY
SCHOOL OF LAW

MEMORANDUM FOR THE OFFICE OF THE PROSECUTOR
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

Issue: Fairness of the Trial of ECCC Case 002/01 Compared to Other Comparable Judgments in
International Tribunals

Prepared by Nicole Triola
J.D. Candidate, 2017
Fall Semester, 2016

TABLE OF CONTENTS

I. Introduction.....	7
A. Scope.....	7
B. Summary of Conclusions.....	7
i. The Trial Chamber in Case 002/01 met the standards set in the ECCC Internal Rules and analyzed the claims of impartiality of the Trial Chamber in a manner consistent with how other international tribunals analyze similar claims.....	7
ii. The Trial Chamber in Case 002/01 took a more involved approach in the investigation into Nuon Chea’s health in order to establish if he was fit to stand trial versus the Trial Chamber in the comparable case in the International Criminal Tribunal for Rwanda.....	8
II. Factual Background.....	9
A. The Establishment of the ECCC.....	9
B. Case 002/01.....	10
III. Legal Discussion.....	11
A. Clarifying Fairness in Domestic v. International Courts.....	12
B. Issues of Equality Before the Tribunal: Impartiality of the Trial Chamber.....	13
i. Issues Alleged by Nuon Chea in Case 002/01.....	13
ii. Relevant Rules of the ECCC and Conclusive Findings on Objective Bias Against Nuon Chea.....	14
iii. Relevant Considerations and Conclusive Findings on the Predetermination of Guilt of Nuon Chea.....	17
iv. Issues of Bias Alleged by Matthieu Ngrumpatse in <i>Édouard Karemera, Matthieu Ngrumpatse v. The Prosecutor</i>	18
v. Issues of Predetermination of Guilt and Bias Alleged by Dominique Ntawukulilyayo in <i>Ntawukulilyayo v. The Prosecutor</i> and Radovan Karadžić in <i>Prosecutor v. Karadžić</i>	20
vi. Equality Before the Tribunal: Conclusion on Fairness of Case 002/01....	22

C. Issue of Fitness to Stand Trial.....	23
i. Issues Alleged by Nuon Chea in Case 002 and Case 002/01.....	23
ii. Relevant Rules of the ECCC and Conclusive Findings on Nuon Chea’s Fitness to Stand Trial.....	25
iii. Issues of Fitness to Stand Trial Alleged by Matthieu Ngrumpangse in <i>Édouard Karemera, Matthieu Ngrumpangse, Joseph Nzirorera v. The Prosecutor</i>	27
iv. Fitness to Stand Trial: Conclusion on Fairness of Case 002/01.....	29
IV. Analysis.....	31
V. Conclusion.....	35

BIBLIOGRAPHY OF SOURCES

Statutes and Rules

1. *Agreement Between the United Nations and the Royal Government of Cambodia concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea*, resolution 57/228 of 18 December 2002.
2. *Extraordinary Chambers in the Courts of Cambodia: Internal Rules*, Rev. 8, as revised 3 August 2011.
3. *Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994*, Adopted by Security Council resolution 955 (1994) of 8 November 1994 amended by Security Council resolutions 1165 (1998) of 30 April 1998 , 1329 (2000) of 30 November 2000, 1411 (2002) of 17 May 2002 and 1431 (2002) of 14 August 2002, available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/StatuteInternationalCriminalTribunaIForRwanda.aspx>.

Cases

ECCC

4. *Appeal Judgment*, Case File 001/18-07-2007-ECCC/SC, 3 February 2012.
5. *Case 002/01 Judgment*, Case File 002/19-09-2007/ECCC/TC, 7 August 2016.
6. *Decision on Ieng Thirith's Fitness to Stand Trial*, Case File 002/13-09-2007-ECCC/TC, 17 November 2011.
7. *Decision on Ieng Thirith, Nuon Chea and Ieng Sary's Applications for Disqualification of Judges Nil Nonn, Silvia Cartwright, Ya Sokhan, Jean-Marc Lavergne and Thou Mony*, Case File 002/19-09-2007-ECCC/TC, 23 March 2011.
8. *Decision on Nuon Chea's Fitness to Stand Trial and Defense Motion for Additional Medical Expertise*, Case File 002/19-09-2007-ECCC/TC, 15 November 2011.
9. *Follow Up Geriatric Report Concerning Mr. Nuon Chea in Accordance to Trial Chamber's Expertise Order E62/3 Dated 4 April 2011*, 26 August 2011.
10. *Report Prepared in Response to the Trial Chamber's Order Assigning Expert- E/62/3*, Case File 002/19-09-2007-ECCC/TC, 13 June 2011.

11. *Termination of Proceedings Against the Accused Ieng Sary*, Case File Case File 002/19-09-2007-ECCC/TC, 14 March 2013.
12. *Termination of Proceedings Against the Accused Ieng Thirith*, Case File 002/13-09-2007-ECCC/TC, 27 August 2015.
13. *Transcript of the Trial Proceedings Public*, Case File 002/19-09-2007/ECCC/TC, 21 November 2011.
14. *Urgent Application for the Disqualification of the Trial Chamber Judges*, Case File 002/19-09-2007-ECCC/TC, 24 February 2011.

ICTR

15. *Decision on Motion for Disqualification of Judges*, Case No. ICTR-05-82-A, 8 February 2011.
16. *Decision on Appeal Concerning the Severance of Matthieu Ngrumapatse*, Case No. ICTR-98-44-AR73.16, 19 June 2009.
17. *Édouard Karemera, Matthieu Ngrumapatse v. The Prosecutor*, Case No. ICTR-98-44-A, 29 September 2014.

ICTY

18. *Decision on Motion to Disqualify Judge Picard and Report to the Vice-President Pursuant to Rule 15(B)(ii)*, Case No. IT-95-05/18-PT, 22 July 2009.
19. *Prosecutor v. Payle Strugar Public Judgment*, Case No. IT-01-42-A, 17 July 2008.
20. *Prosecutor v. Radovan Karadžić Public Redacted Version of Judgment Issued on 24 March 2016*, Case No. IT-95-5/18-T, 24 March 2016.
21. *Public Version of the Decision on Accused's Fitness to Enter a Plea and Stand Trial*, Case No. IT-01-42/2-I, 12 April 2006.

Books

22. Legal Digest of International Fair Trial Rights (2012), OSCE Office for Democratic Institutions and Human Rights, available at www.osce.org/odihr

Law Review and Articles

23. Gerard V. Bradley, *Retribution: The Central Aim of Punishment*, Harvard Journal of Law & Public Policy, Vol. 27: 19-31 (Fall 2003).

24. Mirjan Damaška, *Reflections on Fairness in International Criminal Justice*, *Journal of International Criminal Justice* 10 (2012).
25. Michael G. Karnavas, *Bringing Domestic Cambodian Cases into Compliance with International Standards*, *Cambodia Law and Policy Review*, Vol. 3: 1-27 (December 2014).

Miscellaneous

26. Case 002, Extraordinary Chambers in the Courts of Cambodia, (2014) available at www.eccc.gov.kh
27. ECCC At a Glance, Extraordinary Chambers in the Courts of Cambodia, (2014), available at www.eccc.gov.kh

I. Introduction

A. Scope

This memorandum discusses how the Trial Chamber judgment against Nuon Chea and Khieu Samphan (hereinafter referred to as “Case 002/01”) in the Extraordinary Chambers in the Courts of Cambodia (“ECCC”) compares with the most analogous judgments in other international criminal tribunals in terms of fairness of the trial; further taking into account factors such as the geographic and temporal scope of the charges, number of victims, seriousness of the crimes, and level of power and authority of the accused.* Specifically, this memorandum analyzes two out of many important concepts of a fair trial within an international tribunal: equality before the tribunal and fitness to stand trial. The issue of equality before the tribunal is further separated to discuss possible objective bias of the Trial Chamber as well as the Trial Chamber’s predetermination of the guilt of the Accused. The issues associated with fitness to stand trial revolve around discussing the Tribunal’s method to have the overall health of the Accused analyzed and whether the Accused is able to meaningfully participate in his own trial. Throughout the discussion on the equality of the trial chamber and fitness to stand trial, Case 002/01 will be compared to similar cases in the International Criminal Tribunal for Rwanda (“ICTR”) and International Criminal Tribunal for the former Yugoslavia (“ICTY”) to determine if the Trial Chamber in Case 002/01 dealt with the compared issues in a fair manner.

B. Summary of Conclusions

i. The Trial Chamber in Case 002/01 met the standards set in the ECCC Internal Rules and analyzed the claims of impartiality of the Trial

* Compare the judgment of the ECCC Trial Chamber against Nuon Chea and Khieu Samphan in Case 002/01 with the most comparable judgments in any other international criminal courts or tribunals. How do these judgments compare in terms of the fairness of the trial? Relevant factors would include the geographic and temporal scope of the charges; the number of victims; seriousness of crimes; and level of power and authority of the accused, amongst other factors.

Chamber in a manner consistent with how other international tribunals analyze similar claims.

The ECCC Internal Rules illustrate the possible ways that a trial chamber judge could be viewed as impartial or biased. If an accused brings a claim of impartiality before a trial chamber in the ECCC, the analysis to respond to those claims begins in the Internal Rules. The ECCC supplements its Internal Rules with the “reasonable observer” standard established in the ICTR. By comparing how the Trial Chamber in Case 002/01 analyzed Nuon Chea’s various claims alleging the impartiality of the Trial Chamber, including the bias of the Trial Chamber as well as the Trial Chamber’s predetermination of Nuon Chea’s guilt, it is clear that the Trial Chamber first consulted the relevant standard within the ECCC Internal Rules and then used the applicable standards set by other international criminal tribunals. The Trial Chamber’s application of the relevant standards were applied to Nuon Chea’s allegations of impartiality in a manner consistent with comparable examples. Through this comparison and in consideration of the overall concept of fairness in an international criminal tribunal, the Trial Chamber in Case 002/01 handled Nuon Chea’s allegations of impartiality fairly.

ii. The Trial Chamber in Case 002/01 took a more involved approach in the investigation into Nuon Chea’s health in order to establish if he was fit to stand trial versus the Trial Chamber in the comparable case in the International Criminal Tribunal for Rwanda case.

In order to analyze Nuon Chea’s fitness to stand trial, the Trial Chamber in Case 002/01 first consulted the ECCC Internal Rules. Further, the Trial Chamber supplemented the Internal Rules with applicable standards set in other international tribunals, including the “meaningful participation” standard from the ICTY. In comparison to the ICTR case analyzed, the Trial Chamber in Case 002/01 was far more informed on the status of the health of Nuon Chea and had a complete understanding of his medical conditions. The Trial Chamber in Case 002/01 even

went beyond the standard set out in the ICTY and vouched to continue to analyze Nuon Chea's health as the trial continued, despite an earlier conclusion that further monitoring was not necessary. Through this comparison, the Trial Chamber in Case 002/01 handled the issue of Nuon Chea's fitness to stand trial fairly.

II. Factual Background

A. The Establishment of the ECCC

The Khmer Rouge government, led by Pol Pot, seized power of the people of Cambodia in 1975, and devastated the population until their reign ended in 1979.¹ The Khmer Rouge had a goal to build socialism and defend their country; in order to do this the Khmer Rouge believed that the feudalist and capitalist classes of society had to be eliminated.² Through “starvation, torture, execution, and forced labor [sic]” more than 1.7 million people, over 20% of the total population of Cambodia, are believed to have died between 1975 and 1979.³

The ECCC is the result of a 2003 agreement between the Cambodian government and the United Nations to address the crimes committed during the reign of the Khmer Rouge government from April 1975 to January 1979.⁴ Article 12 of the 2003 agreement between the United Nations and Cambodian government states, “The Extraordinary Chambers shall exercise their jurisdiction in accordance with international standards of justice, fairness and due process

¹ ECCC at a Glance, available at https://www.eccc.gov.kh/sites/default/files/ECCC%20at%20a%20Glance%20-%20EN%20-%20April%202014_FINAL.pdf. [Electronic copy provided in accompanying USB flash drive at Source 27].

² Trial Chamber, *Case 002/01 Judgment*, Case File 002/19-09-2007/ECCC/TC, 7 August 2016, at para. 195. [Electronic copy provided in accompanying USB flash drive at Source 5].

³ ECCC at a Glance, *supra* note 1.

⁴ *Id.*

of law, as set out in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights, to which Cambodia is a party.”⁵ Further, Article 13 states, “The rights of the accused enshrined in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights shall be respected throughout the trial process.”⁶

The procedure of the ECCC is in accordance with Cambodian law, with the caveat that if there are gaps or uncertainty in Cambodia law, then the ECCC can look to international standards for guidance, but following international standards is not required.⁷ Due to the domestic and international nature of the ECCC, the ECCC became known as a hybrid court, described as “an ad hoc Cambodian court with international participation.”⁸ The courts formally went into operation in 2006 with the goal of bringing the top leaders of the Khmer Rouge government to justice for crimes including: torture, genocide, crimes against humanity, and grave breaches of the 1949 Geneva Conventions, among others.⁹

B. Case 002/01

Originally, Case 002 charged Khmer Rouge members Nuon Chea, Khieu Samphan, Ieng Sary, and Ieng Thirith with crimes against humanity, grave breaches of the Geneva Conventions of 1949, and genocide.¹⁰ Nuon Chea was the former Deputy Secretary of the Communist party

⁵ *Agreement Between the United Nations and Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of the Democratic Kampuchea*, Article 12, 6 June 2003, entered into force 29 April 2005, U.N. Doc. A/Res57/228B (Annex) (13 May 2003). [Electronic copy provided in accompanying USB flash drive at Source 1].

⁶ *Id.* at Article 13.

⁷ *Id.*

⁸ *See*, ECCC at a Glance, *supra* note 1.

⁹ *Id.*

¹⁰ Case 002, available at <https://www.eccc.gov.kh/en/case/topic/2>. [Electronic copy provided in accompanying USB flash drive at Source 26].

and Khieu Samphan was the former Head of State; they were the highest-ranking living members of the Khmer Rouge.¹¹ Ieng Sary was the former Deputy Prime Minister for Foreign Affairs and his wife, Ieng Thirith, was the former Social Action Minister.¹² However, in order to limit the massive scope of the trial, Case 002 was severed into Case 002/01 and Case 002/02.¹³

On November 21, 2011, the initial hearing of Case 002/01 against the accused took place.¹⁴ The scope of Case 002/01 focused on crimes against humanity.¹⁵ Specifically, the scope of the charges focused on three major events between 1975 and 1979: two forced movements of population (known as “Phase One” and “Phase Two”) as well as the execution of former Khmer Republic officials shortly after the government takeover in 1975.¹⁶ On August 7, 2014, the Trial Chamber found both Nuon Chea and Khieu Samphan guilty of crimes against humanity and sentenced both men to life imprisonment.¹⁷

III. Legal Discussion

¹¹ See, ECCC At a Glance, *supra* note 1.

¹² *Id.*

¹³ See Case 002, *supra* note 10.

¹⁴ Trial Chamber, *Transcript of Trial Proceedings Public*, Case File 002/19-09-2007-ECCC/TC, 21 November 2011. [Electronic copy provided in accompanying USB flash drive at Source 13].

¹⁵ Trial Chamber Judgment, Case 002/01, *supra* note 2, at para. 197.

¹⁶ *Id.*

¹⁷ *Id.* at para. 1106-1107. The Trial Chamber separated the case against Ieng Thirith in 2011 and stayed proceedings against her after medical experts assessed that she was unfit to stand trial due to a diagnosis of dementia. See, *Decision on Ieng Thirith’s Fitness to Stand Trial*, Case File 002/13-09-2007-ECCC/TC, 17 November 2011. [Electronic copy provided in accompanying USB flash drive at Source 6]. In 2015, the Trial Chamber formally terminated proceedings against Ieng Thirith following her death. See, *Termination of the Proceedings Against the Accused Ieng Thirith*, Case File 002/13-09-2007-ECCC/TC, 27 August 2015. [Electronic copy provided in accompanying USB flash drive at Source 12]. The Trial Chamber terminated proceedings against Ieng Sary in 2013 following his death. See, *Termination of the Proceedings Against the Accused Ieng Sary*, Case File 002/19-09-2007-ECCC/TC, 14 March 2013. [Electronic copy provided in accompanying USB flash drive at Source 11].

A. Clarifying Fairness in Domestic v. International Courts

The concept of fairness is subjective, and can have many different interpretations depending on the accompanying circumstances. Specifically, the concept of fairness has a different substantive meaning in international criminal tribunals versus fairness in domestic courts. As argued by Mirjan Damaška, fairness in domestic courts is predicated on the consistency of procedure.¹⁸ In fact, the fairness and consistency of procedure in domestic courts can be viewed as more important than the actual outcome of the proceedings.¹⁹ Often the goal of domestic court proceedings is to ensure that every defendant and court participant is treated equally before the law.

In contrast, international courts are created using powers outside of themselves and require assistance to function, unlike self-sustaining domestic courts.²⁰ The goal of international court proceedings is often viewed as to “end impunity,” which is a much broader and more difficult goal to accomplish versus the goal of domestic courts.²¹ International courts often have a harder time collecting evidence and establishing basic facts.²² Therefore, the outcome of the proceedings in an international court is more focused on understanding exactly what happened and identifying those responsible.²³ After gaining an understanding of what occurred and those

¹⁸ Mirjan Damaška, *Reflections on Fairness in International Criminal Justice*, *Journal of International Criminal Justice* 10 (2012). [Electronic copy provided in accompanying USB flash drive at Source 24].

¹⁹ *Id.* at 613.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

responsible, international criminal courts have the further goal of punishing those found responsible as a form of retribution.

Damaška posits that the goal of international criminal courts should be to spread the human rights culture.²⁴ Therefore, the concept of fairness in international courts should not be limited to procedural notions of fairness as it is in domestic courts, but balanced with fairness to the victims and even fairness to the prosecutors on the case.²⁵ This idea evokes the notion that the international criminal justice system has a much broader and more difficult goal to attain versus domestic courts, and thus the concept of fairness in an international proceeding must be judged differently than it would in a domestic court. For the purposes of this analysis, fairness will be judged based on whether the ECCC followed their own rules and guidelines and whether the larger goal of ending impunity and punishing those responsible for crimes was served by the trial.

B. Issues of Equality Before the Tribunal: Impartiality of the Trial Chamber

i. Issues Alleged by Nuon Chea in Case 002/01

In Case 002/01 the issue of equality before the tribunal arose early in the life of the trial and began with Ieng Thirith, Nuon Chea, and Ieng Sary's various applications and applications in support to disqualify five of the Trial Chamber Judges.²⁶ Specifically, on February 24, 2011, Nuon Chea's defense team put forward an urgent application to have all of the Trial Chamber Judges that served on Case 001²⁷ (hereinafter referred to as the "Duch Judgment") removed.²⁸

²⁴ *Id.* at 614.

²⁵ *Id.*

²⁶ Trial Chamber Judgment, Case 002/01, *supra* note 2, at para. 43.

²⁷ Case 001 was the ECCC's first case. Kaing Guek Eav, also known as Duch, was the former chairman of Phnom Penh's security prison S-21. On July 26, 2010 Duch was convicted of crimes against humanity

The reasons alleged for removal of the Trial Chamber Judges rested on two distinct propositions. First, Nuon Chea alleged that the factual findings made in the Duch Judgment would lead a reasonable observer to conclude that the Trial Chamber Judges in Case 002/01 were biased against him.²⁹ While there were no allegations of subjective bias on the part of any one particular Judge, Nuon Chea alleged that based on an objective analysis, it would appear given the findings in the Duch Judgment that the Trial Chamber was biased against Nuon Chea in Case 002/01.³⁰ Second, Nuon Chea alleged that the Trial Chamber already predetermined Nuon Chea's guilt for crimes against humanity in the Duch Judgment.³¹ On March 23, 2011, the Trial Chamber collectively denied Ieng Thirith, Nuon Chea, and Ieng Sary's applications to disqualify any of the Trial Chamber Judges.³²

ii. Relevant Rules of the ECCC and Conclusive Findings on Objective Bias Against Nuon Chea

The ECCC primarily relies on the Internal Rules to settle disputes and procedural question; the rules "form a self-contained regime of procedural law related to the unique

and grave breaches of the Geneva Conventions of 1949 and sentenced to 35 years imprisonment. On February 3, 2012, the Supreme Court Chamber upheld the convictions an increased Duch's sentence to life imprisonment. *See*, ECCC At a Glance, *supra* note 1. *See*, *Appeal Judgment*, Case File 001/18-07-2007-ECCC/SC, 3 February 2012. [Electronic copy provided in accompanying USB flash drive at Source 4].

²⁸ Trial Chamber, *Urgent Application for the Disqualification of the Trial Chamber Judges*, Case File 002/19-09-2007-ECCC/TC, 24 February 2011. [Electronic copy provided in accompanying USB flash drive at Source 14].

²⁹ *Id.* at para. 26.

³⁰ *Id.*

³¹ *Id.* at para. 29.

³² Trial Chamber, *Decision on Ieng Thirith, Nuon Chea and Ieng Sary's Applications for Disqualification of Judges Nil Nonn, Silvia Cartwright, Ya Sokhan, Jean-Marc Lavergne and Thou Mony*, Case File 002/19-09-2007-ECCC/TC, 23 March 2011. [Electronic copy provided in accompanying USB flash drive at Source 7].

characteristics of the ECCC.”³³ However, despite the independence of the ECCC and procedural role of the Internal Rules, the court also draws on the Code of Criminal Procedure of the Kingdom of Cambodia, with the Internal Rules remaining the primary source.³⁴ Rule 21 of the Internal Rules that govern the ECCC state, in relevant part, that:

- a) ECCC proceedings shall be fair and adversarial and preserve a balance between the rights of parties. They shall guarantee separation between those authorities responsible for prosecuting and those responsible for adjudication.
- b) Persons who find themselves in a similar situation and prosecuted for the same offences shall be treated according to the same rules.
- c) The ECCC shall ensure the victims are kept informed and that their rights are respected throughout the proceedings; and
- d) Every person suspected or prosecuted shall be presumed innocent as long as his/her guilt has not been established. Any such person has the right to be informed of any charges brought against him/her, to be defended by a lawyer of his/her choice, and at every stage of the proceedings shall be informed of his/her right to remain silent.³⁵

In making their disposition of the various Accused’s applications for the removal of the Trial Chamber Judges, and specifically Nuon Chea’s application alleging objective bias against him and a predetermination of his guilt, the Trial Chamber primarily analyzed Internal Rule 34.³⁶

Internal Rule 34(2) states:

Any party may file an application for disqualification of a judge in any case which the Judge has a personal or financial interest or concerning which the

³³ Michael G. Karnavas, *Bringing Domestic Cambodian Cases into Compliance with International Standards*, 3 Cambodia L & Policy Rev, at 9 (December 2014). [Electronic copy provided in accompanying USB flash drive at Source 25].

³⁴ *Id.*

³⁵ *Extraordinary Chambers in the Courts of Cambodia: Internal Rules* (Rev. 8), as revised 3 August 2011, at 20. [Electronic copy provided in accompanying USB flash drive at Source 2].

³⁶ *See Decision on Ieng Thirith, Nuon Chea and Ieng Sary’s Applications for Disqualification of Judges Nil Nonn, Silvia Cartwright, Ya Sokhan, Jean-Marc Lavergne and Thou Mony, supra*, note 32, at para. 10.

Judge has, or has had, any association which objectively might affect his or her impartiality, or objectively give rise to the appearance of bias.³⁷

Further, an appearance of bias is established if “the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias.”³⁸ A reasonable observer is “an informed person, with knowledge of all the relevant circumstances, including the traditions of integrity and impartiality that form a part of the background and appraised also of the fact that impartiality is one of the duties that Judges swear to uphold.”³⁹ The moving party bears the high burden of displacing the presumption that the trial chamber judges are impartial.⁴⁰ These rules are a product of the Agreement Between the United Nations and the Royal Government of Cambodia concerning the Prosecution under Cambodia Law of Crimes Committed during the Period of Democratic Kampuchea and Article 10 of the ECCC law.⁴¹

The Trial Chamber in Case 002/01 held that the only relevant consideration was whether the Judges were able to consider evidence and rule impartially in the present case [002].⁴² The Trial Chamber found that the Judges’ task is to independently evaluate the evidence of Case 002/01, regardless of their previous findings in the Duch Judgment.⁴³ Therefore, the Trial

³⁷ *Extraordinary Chambers in the Courts of Cambodia: Internal Rules* (Rev. 8), *supra*, note 35, at 32.

³⁸ See *Decision on Ieng Thirith, Nuon Chea and Ieng Sary’s Applications for Disqualification of Judges Nil Nonn, Silvia Cartwright, Ya Sokhan, Jean-Marc Lavergne and Thou Mony*, *supra*, note 32, at para. 11.

³⁹ *Id.* at para. 12.

⁴⁰ *Id.*

⁴¹ *Agreement Between the United Nations and Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of the Democratic Kampuchea*, *supra*, note 5.

⁴² *Id.* at para. 16

⁴³ *Id.* at para. 17.

Chamber of Case 002/01 does not have to rely on the precedent established in the Duch Judgment to return findings in Case 002/01. This principle is in line with the overall structure of the ECCC. There is no rule that requires the ECCC to follow the jurisprudence of other international tribunals, the structure of the ECCC allows a trial chamber to look to other international tribunals for guidance or to supplement their own Internal Rules when it sees fit.⁴⁴ In Case 002/01, Nuon Chea was not able to distinguish any evidence that the Trial Chamber was objectively biased against him beyond the assertion that the findings made by the same Trial Chamber in the Duch Judgment clearly meant they would be biased in Case 002/01.⁴⁵ Because the allegations of Nuon Chea were not supported by standards established in the Internal Rules and Cambodian Criminal Code, they were denied.

iii. Relevant Considerations and Conclusive Findings on the Predetermination of Guilt of Nuon Chea

Nuon Chea alleged three specific paragraphs within the Duch Judgment that give credence to the assertion that the Trial Chamber made a predetermination of Nuon Chea's guilt.⁴⁶ Nuon Chea highlights the sections in the Duch Judgment where the Trial Chamber finds that the Duch received instructions from Nuon Chea as the Duch's superior, as well as the establishment that Nuon Chea was Pol Pot's secretary and a member of the Communist Party of Kampuchea Standing Committee.⁴⁷

⁴⁴ See, *Bringing Domestic Cambodian Cases into Compliance with International Standards*, *supra*, note 33, at 12.

⁴⁵ See, *Decision on Ieng Thirith, Nuon Chea and Ieng Sary's Applications for Disqualification of Judges Nil Nonn, Silvia Cartwright, Ya Sokhan, Jean-Marc Lavergne and Thou Mony*, *supra*, note 32, at paras. 18-19.

⁴⁶ *Id.* at para. 22.

⁴⁷ *Id.* at paras. 22-23.

Here, in contrast to how the Trial Chamber analyzed the allegations of objective bias, the Trial Chamber did not consult the ECCC Internal Rules or the Cambodian Criminal Code. Instead the Trial Chamber looked to other international tribunals for guidance in order to analyze the issue of the predetermination of Nuon Chea's guilt in the Duch Judgment.⁴⁸ Again, while there is no bright-line rule that requires the ECCC to rely on jurisprudence of other international tribunals, there is no rule preventing the ECCC from looking elsewhere for guidance.⁴⁹ In reaching the conclusion that the Trial Chamber in Case 002/01 was impartial and did not engage in a predetermination of Nuon Chea's guilt, the Trial Chamber held that it is commonplace for a judge to "make findings in one case that bear upon the background and context of a different case, and would not, for that reason alone, doubt the impartiality of the court."⁵⁰

iv. Issues of Bias Alleged by Matthieu Ngrimpatse in *Édouard Karemera, Matthieu Ngrimpatse v. The Prosecutor*

On September 29, 2014, the Appeals Chamber in the International Criminal Tribunal for Rwanda affirmed the judgment in the case of *Édouard Karemera, Matthieu Ngrimpatse v. The Prosecutor*.⁵¹ Similarly to Nuon Chea and Khieu Samphan, Édouard Karemera and Matthieu Ngrimpatse were high-ranking members of a government party, the National Republican Movement for Democracy ("MRND"), and convicted before an international tribunal.⁵² Édouard

⁴⁸ *Id.* at paras. 20, 25.

⁴⁹ *See, Bringing Domestic Cambodian Cases into Compliance with International Standards, supra*, note 33, at 12.

⁵⁰ *See, Decision on Ieng Thirith, Nuon Chea and Ieng Sary's Applications for Disqualification of Judges Nil Nonn, Silvia Cartwright, Ya Sokhan, Jean-Marc Lavergne and Thou Mony, supra*, note 32, at para. 20.

⁵¹ Appeals Chamber, *Édouard Karemera, Matthieu Ngrimpatse v. The Prosecutor*, Case No. ICTR-98-44-A, 29 September 2014, at para. 750. [Electronic copy provided in accompanying USB flash drive at Source 17].

⁵² *Id.* at paras. 2-3.

Karemera and Matthieu Ngrumpatse were convicted before the ICTR for genocide and crimes against humanity for their actions against the Tutsi population of Rwanda; both men were sentenced to life imprisonment for their crimes.⁵³

In his appeal, Matthieu Ngrumpatse alleged that “his right to equality before the Tribunal was infringed because the Trial Chamber ruled differently than other trial chambers in similar situations.”⁵⁴ This is comparable to Nuon Chea’s allegation that the Trial Chamber Judges in Case 002/01 were biased against him due to findings that those Judges made in a previous case. Also similarly to Nuon Chea’s application, the ICTR Trial Chamber denied Matthieu Ngrumpatse’s allegations of impartiality and inequality.⁵⁵

In reaching its disposition, the ICTR Trial Chamber recited Article 20 of the Statute,⁵⁶ “[a]ll persons shall be equal before the [Tribunal].”⁵⁷ Further, the Trial Chamber held that individual trial chambers are not bound by the findings of other trial chambers, and that, “a trial chamber must make its own final assessment of the evidence on the basis of the totality of the

⁵³ *Id.* at paras. 5, 750.

⁵⁴ *Id.* at para. 48.

⁵⁵ *Id.* at para. 56.

⁵⁶ United Nations Security Council, *Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994*, Adopted by Security Council resolution 955 (1994) of 8 November 1994 amended by Security Council resolutions 1165 (1998) of 30 April 1998 , 1329 (2000) of 30 November 2000, 1411 (2002) of 17 May 2002 and 1431 (2002) of 14 August 2002, available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/StatuteInternationalCriminalTribunalForRwanda.aspx>. [Electronic copy provided in accompanying USB flash drive at Source 3].

⁵⁷ *Id.*

evidence presented in the case before it.”⁵⁸ The ICTR Trial Chamber’s assessment is similar to the reasoning conducted by the Trial Chamber in the ECCC in Case 002/01. While the Trial Chamber in the ICTR can look to its past cases or other international tribunals for precedent, it is not bound by that precedent.⁵⁹ In its disposition, the ICTR Trial Chamber held that, “An error cannot be established by simply demonstrating that other trial chambers have exercised their discretion in a different way.”⁶⁰ This is similar to the ECCC Trial Chamber’s conclusion on Nuon Chea’s impartiality and inequality claims in Case 002/01: without more evidence beyond the bare findings of the respective trial chambers, the allegations of bias or inequality cannot be substantiated.

v. Issues of Predetermination of Guilt and Bias Alleged by Dominique Ntawukulilyayo in *Ntawukulilyayo v. The Prosecutor and Radovan Karadžić* in *Prosecutor v. Karadžić*

In another ICTR case, Dominique Ntawukulilyayo made an application for the disqualification of four of the Appeals Chamber Judges in his appeal from conviction.⁶¹ On August 3, 2010, the Trial Chamber convicted Dominique Ntawukulilyayo of genocide for his role in the killings of the Tutsi population and sentenced him to 25 years imprisonment; and on August 23, 2010, he submitted the application for disqualification of several of the Trial Chamber Judges.⁶² Dominique Ntawukulilyayo’s application alleges the appearance of bias; he believes that several of the Trial Chamber Judges already conveyed their belief that he is guilty

⁵⁸ See, *Édouard Karemera, Matthieu Ngirumpatse v. The Prosecutor*, *supra*, note 49, at para. 52.

⁵⁹ See, *Édouard Karemera, Matthieu Ngirumpatse v. The Prosecutor*, *supra*, note 49, at para. 52

⁶⁰ *Id.*

⁶¹ Appeals Chamber, *Decision on Motion for Disqualification of Judges*, Case No. ICTR-05-82-A, 8 February 2011, at para. 2. [Electronic copy provided in accompanying USB flash drive at Source 15].

⁶² *Id.*

in a previous trial.⁶³ The Trial Chamber denied Dominique Ntawukulilyayo's application to disqualify the Judges in his appeal.⁶⁴

Prior to reaching its disposition, the Trial Chamber explained the applicable law, a judge is not impartial if it's shown that, "the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias."⁶⁵ Further, a reasonable observer is "an informed person, with knowledge of all the relevant circumstances, including the traditions of integrity and impartiality that form a part of the background and appraised also of the fact that impartiality is one of the duties that Judges swear to uphold."⁶⁶ The ICTR Trial Chamber derived the law on impartiality and reasonable observer standard from other previous cases adjudicated in the ICTR.⁶⁷ This is the standard that the ECCC used in its analysis of Nuon Chea's application for the disqualification of several trial chamber judges.⁶⁸

In another similar judgment of a high-ranking official, The International Tribunal for the Former Yugoslavia denied Radovan Karadžić's application to disqualify one judge from the panel of the Trial Chamber on July 22, 2009.⁶⁹ Radovan Karadžić served as the President of the Republika Srpska during the Bosnian War and was charged with genocide, and crimes against

⁶³ *Id.* at para. 3.

⁶⁴ *Id.*

⁶⁵ *Id.* at para. 5.

⁶⁶ *Id.* at para. 6.

⁶⁷ *Id.*

⁶⁸ See *Decision on Ieng Thirith, Nuon Chea and Ieng Sary's Applications for Disqualification of Judges Nil Nonn, Silvia Cartwright, Ya Sokhan, Jean-Marc Lavergne and Thou Mony*, *supra*, note 32, at para. 11.

⁶⁹ Trial Chamber, *Decision on Motion to Disqualify Judge Picard and Report to the Vice-President Pursuant to Rule 15(B)(ii)*, Case No. IT-95-05/18-PT, 22 July 2009. [Electronic copy provided in accompanying USB flash drive at Source 18].

humanity, amongst other charges.⁷⁰ In his allegations of bias, Radovan Karadžić alleged that the Judge’s “decisions and public statements while she was President of the Human Rights Chamber of Bosnia and Herzegovina from 1997 to 2003, “reflect an unacceptable appearance of bias such that a reasonable observer, properly informed, would reasonably apprehend bias.””⁷¹ Again, this Trial Chamber evoked the standard later used in Dominique Ntawukulilyayo and Nuon Chea’s applications to disqualify certain judges. It clear from this string of comparable cases in the ECCC, ICTR, and ICTY that the “reasonable observer” standard is the preferred approach to analyzing claims of impartiality of trial chamber judges.

vi. Equality Before the Tribunal: Conclusion on Fairness of Case 002/01

First, it is important to note that the judgment of Case 002/01 is comparable to the judgments in the above analyzed cases in the ICTR as well as the ICTY. In each of the cases that are compared in order to analyze the fair trial issue of equality before the tribunal, each of the accused were high on the “food chain” and in a position of power. Further, each of the accused were charged and convicted of similar crimes (including war crimes, genocide, grave breaches of the Geneva Conventions of 1949), and each received lengthy sentences before an international criminal tribunal.⁷²

In analyzing the way the Trial Chamber handled Nuon Chea’s various claims alleging his inequality before the tribunal, it is clear that the Trial Chamber in Case 002/01 followed their

⁷⁰ Trial Chamber, *Prosecutor v. Radovan Karadžić Public Redacted Version of Judgment Issued on 24 March 2016*, Case No. IT-95-5/18-T, 24 March 2016, at paras. 2-3. [Electronic copy provided in accompanying USB flash drive at Source 20].

⁷¹ See *Decision on Motion to Disqualify Judge Picard and Report to the Vice-President Pursuant to Rule 15(B)(ii)*, *supra*, note 69 at para. 4.

⁷² See *Case 002/01 Judgment*, *supra*, note 2; *Édouard Karemera, Matthieu Ngrumampse v. The Prosecutor*, *supra*, note 50; *Decision on Motion for Disqualification of Judges*, *supra*, note 60; Trial Chamber, *Prosecutor v. Radovan Karadžić Public Redacted Version of Judgment Issued on 24 March 2016*, *supra*, note 70.

Internal Rules and respected Nuon Chea's right to be before an impartial and fair tribunal.⁷³ Further, by comparing the judgments in *Édouard Karemera, Matthieu Ngirumpatse v. The Prosecutor, Ntawukulilyayo v. The Prosecutor*, and *Prosecutor v. Karadžić* to Case 002/01, it is apparent that the Trial Chamber in Case 002/01 consistently applied rules or principles, including the "reasonable observer" standard, that originated in other international criminal tribunals and became the international standard for analysis.⁷⁴ In terms of following their own Internal Rules and applying procedure consistently, the ECCC judgment in Case 002/01 in regards to the Accused's fair trial right of equality before the tribunal was fair.

C. Issue of Fitness to Stand Trial

i. Issues Alleged by Nuon Chea in Case 002 and Case 002/01

Nuon Chea's defense team first raised the issue of his fitness to stand trial on February 2, 2011, by requesting the Trial Chamber to appoint an expert to medically assess Nuon Chea.⁷⁵ On April 4, 2011 the Trial Chamber appointed Professor A. John Campbell to conduct medical assessments of any of the Accused that wished to avail themselves of the expert's services.⁷⁶ On June 13, 2011, the expert, Professor A. John Campbell, released a report on Nuon Chea and concluded that while he was currently fit to stand trial; his health should be reassessed prior to

⁷³ See *Decision on Ieng Thirith, Nuon Chea and Ieng Sary's Applications for Disqualification of Judges Nil Nonn, Silvia Cartwright, Ya Sokhan, Jean-Marc Lavergne and Thou Mony*, *supra*, note 32, at paras. 11, 20.

⁷⁴ *Id.* at para. 11.

⁷⁵ Trial Chamber, *Decision on Nuon Chea's Fitness to Stand Trial and Defense Motion for Additional Medical Expertise*, Case File 002/19-09-2007/ECCC/TC, 15 November 2011, at para. 2. [Electronic copy provided in accompanying USB flash drive at Source 8].

⁷⁶ *Id.* at para. 4.

the start of trial proceedings if his condition should change in any way.⁷⁷ On August 25, 2011, Professor A. John Campbell reassessed Nuon Chea and concluded that there had been no significant changes in his medical condition since the first assessment.⁷⁸

On September 7, 2011, Nuon Chea's defense team submitted a "written Request for Additional Expertise."⁷⁹ In its submission, Nuon Chea alleges that Professor A. John Campbell's report (hereinafter referred to as the "Expert Report") was defective because it failed to follow the appropriate test required to assess Nuon Chea's health.⁸⁰ In addition, the Request for Additional Expertise alleged that the Expert Report was lacking responses to specific issues raised by Nuon Chea, and too heavily relied on prior medical reports versus conducting its own further testing and examination.⁸¹ On November 15, 2011, after Case 002 had been severed into Case 002/01 and Case 002/02, the Trial Chamber responded to Nuon Chea's Request for Additional Expertise and the allegations therein.⁸² The Trial Chamber ultimately found Nuon Chea to be fit to stand for trial and dismissed the Request for Additional Expertise.⁸³

⁷⁷ Professor A. John Campbell, *Report Prepared in Response to the Trial Chamber's Order Assigning Expert- E62/3*, Case File 002/19-09-2007/ECCC/TC, 13 June 2011. [Electronic copy provided in accompanying USB flash drive at Source 10].

⁷⁸ Professor A. John Campbell, *Follow Up Geriatric Report Concerning Mr. Nuon Chea in Accordance to Trial Chamber's Expertise Order E62/3 Dated 4 April 2011*, 26 August 2011. [Electronic copy provided in accompanying USB flash drive at Source 9].

⁷⁹ See, *Decision on Nuon Chea's Fitness to Stand Trial and Defense Motion for Additional Medical Expertise*, *supra*, note 69, at para. 7.

⁸⁰ *Id.* at para. 8.

⁸¹ *Id.*

⁸² *Id.* at para. 1.

⁸³ See generally, *Decision on Nuon Chea's Fitness to Stand Trial and Defense Motion for Additional Medical Expertise*, *supra*, note 69.

ii. Relevant Rules of the ECCC and Conclusive Findings on Nuon Chea's Fitness to Stand Trial

Prior to reaching its disposition, the Trial Chamber assessed the applicable rules of the ECCC. Internal Rule 32 states, in relevant part:

The Co-Investigating Judges or the Chambers may, for the purpose of determining whether a Charged Person or Accused is physically and mentally fit to stand trial, or for any other reasons, or at the request of a party, order that they undergo a medical, psychiatric or psychological examination by an expert.⁸⁴

Further, the ECCC uses the principles and standards established in *Prosecutor v. Pavle Strugar* and *Prosecutor v. Vladimir Kovačević* to supplement its own Internal Rules.⁸⁵ The applicable standard to determine an accused's fitness to stand trial, derived from the *Strugar* case, is that of, "meaningful participation which allows the accused to exercise his fair trial rights to such a degree that he is able to participate effectively in his trial and has an understanding of the essentials of the proceedings."⁸⁶ The ICTY in the *Strugar* case established that, "an accused represented by counsel cannot be expected to have the same understanding of the material related to his case as a qualified and experienced lawyer."⁸⁷ Further, the Trial Chamber in the *Kovačević* case determined that:

In order to determine whether the Accused is capable of entering a plea and standing trial, the Chamber needs to consider whether the accused has the capacity to: plead; understand the nature of the charges; understand the course

⁸⁴ *Extraordinary Chambers in the Courts of Cambodia: Internal Rules* (Rev. 8), *supra*, note 35, at 31-32.

⁸⁵ *See, Decision on Nuon Chea's Fitness to Stand Trial and Defense Motion for Additional Medical Expertise, supra*, note 69, at para. 15.

⁸⁶ Appeals Chamber, *Prosecutor v. Pavle Strugar Public Judgment*, Case No. IT-01-42-A, 17 July 2008, at para. 55. [Electronic copy provided in accompanying USB flash drive at Source 19].

⁸⁷ *Id.* at para. 60.

of the proceedings; understand the details of the evidence; instruct counsel; understand the consequences of the proceedings; and testify.⁸⁸

Therefore, the standard to determine fitness to stand trial is one of true meaningful participation in one's own defense.⁸⁹ While it is common practice for a trial chamber to consult more than one expert, there is no requirement to appoint multiple experts.⁹⁰

The Trial Chamber considered expert Professor A. John Campbell's multiple reports and assessments of Nuon Chea. The Trial Chamber found that expert Professor A. John Campbell focused on four potential medical problems of Nuon Chea: cardio-vascular disease, cerebro-vascular disease, musculo-skeletal problems, and other systems.⁹¹ The Trial Chamber recognized that Professor A. John Campbell's assessment of Nuon Chea confirmed that there were no major dysfunctions of the Accused's memory, concentration, or attention span that would hinder his ability to understand the proceedings or participate in his own defense in a meaningful way.⁹²

Ultimately, the Trial Chamber concluded that, "In view of the Expert's testimony and Report, and all the pertinent medical documentation, the Chamber finds no evidence of impairment in the Accused's physical or cognitive functions affecting his capacities to the extent rendering him unfit to stand trial."⁹³ While the Trial Chamber found that there was no basis for

⁸⁸ Trial Chamber, *Public Version of the Decision on Accused's Fitness to Enter a Plea and Stand Trial*, Case No. IT-01-42/2-I, 12 April 2006, at para. 29. [Electronic copy provided in accompanying USB flash drive at Source 21].

⁸⁹ See, *Decision on Nuon Chea's Fitness to Stand Trial and Defense Motion for Additional Medical Expertise*, *supra*, note 69, at para. 17.

⁹⁰ *Id.* at para. 18.

⁹¹ *Id.* at para. 22.

⁹² *Id.* at paras. 22-23.

⁹³ *Id.* at para. 33.

Nuon Chea's medical condition to be reassessed by Professor A. John Campbell, they committed to continue to monitor the Accused's health as his trial progressed.⁹⁴

iii. Issues of Fitness to Stand Trial Alleged by Matthieu Ngrumpatse in *Édouard Karemera, Matthieu Ngrumpatse, Joseph Nzirorera v. The Prosecutor*

On August 18, 2008, more than four months after Édouard Karemera began to present his defense, the Trial Chamber learned that Matthieu Ngrumpatse was ill and could not attend the trial; so the Trial Chamber stayed the proceedings.⁹⁵ By October 8, 2008, Matthieu Ngrumpatse was transferred to a different medical facility for further tests and treatment; by the own admission of the Trial Chamber, neither the parties nor the Chamber were aware of the nature of Matthieu Ngrumpatse's illness.⁹⁶ In response to Matthieu Ngrumpatse's prolonged absence, the Trial Chamber adjourned the proceedings of the case until February 2009.⁹⁷ After February arrived, Matthieu Ngrumpatse's defense team sought additional stays, with the time frame ranging from three to nine months.⁹⁸ In response, the Prosecutor sought to sever Matthieu Ngrumpatse from the trial.⁹⁹ The Trial Chamber denied Matthieu Ngrumpatse's Motion to Stay the Proceedings, and reasoned that any further delay would result in a violation of Édouard Karemera's and Joseph Nzirorera's right to be tried without undue delay.¹⁰⁰ The Trial Chamber

⁹⁴ *Id.*

⁹⁵ Appeals Chamber, *Decision on Appeal Concerning the Severance of Matthieu Ngrumpatse*, Case No. ICTR-98-44-AR73.16, 19 June 2009, at para. 3. [Electronic copy provided in accompanying USB flash drive at Source 16].

⁹⁶ *Id.* at para. 3.

⁹⁷ *Id.* at para. 4.

⁹⁸ *Id.*

⁹⁹ *Id.* at para. 6.

¹⁰⁰ *Id.* at para. 8.

ultimately decided to sever Matthieu Ngrumpatse from the trial to protect the interests of all the parties.¹⁰¹

On June 19, 2009, the Appeals Chamber reversed the decision of the Trial Chamber to sever Matthieu Ngrumpatse from the trial.¹⁰² In its decision, the Appeals Chamber found several shortcomings of the Trial Chamber's analysis and handling of the claims of Matthieu Ngrumpatse's unfitness to stand trial. The Appeals Chamber held, "the Trial Chamber reached its conclusions on prejudice without having assessed all relevant factors."¹⁰³ In reaching its disposition, the Appeals Chamber reviewed several of the ICTR's applicable laws and principles. First, the Appeals Chamber reviewed the context of Rule 82(b), which states, "A Trial Chamber may order that persons accused jointly under Rule 48 to be tried separately if it considers it necessary in order to avoid a conflict of interests that might cause serious prejudice to an accused, or to protect the interests of justice."¹⁰⁴ Further, the Appeals Chamber noted that while not a requirement, trial chambers generally considered more than one professional medical opinion before making a significant procedural decision in the life of a case.¹⁰⁵

Here, the Appeals Chamber found that the Trial Chamber exclusively relied on the Tribunal's Chief Medical Officer to assess information about Matthieu Ngrumpatse's health and

¹⁰¹ *Id.* at para. 9.

¹⁰² *Id.* at para. 25.

¹⁰³ *Id.* at para. 22.

¹⁰⁴ *See, Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994, supra*, note 55.

¹⁰⁵ *See, Decision on Appeal Concerning the Severance of Matthieu Ngrumpatse, supra*, note 88, at para. 22.

ability to participate in the trial.¹⁰⁶ While not a significant problem on its own that the Trial Chamber only relied on one medical expert, the Appeals Chamber discussed that the key problem in the Trial Chamber's actions was chiefly relying on only the Tribunal's Chief Medical Officer's information and assessments when they were so clearly lacking in detail and useful information on the condition of Matthieu Ngrumpatse.¹⁰⁷ In this instance the Trial Chamber failed to gather enough information on Matthieu Ngrumpatse's medical condition to reach an informed decision on what to do with the status of the trial.¹⁰⁸

iv. Fitness to Stand Trial: Conclusion on Fairness of Case 002/01

In terms of following the applicable law and principles of the ECCC, the Trial Chamber in Case 002/01 was fair on the issue of determining Nuon Chea's fitness to stand trial. The Trial Chamber used the established "meaningful participation" standard from the ICTY and in using the information gathered from their medical expert, applied the accepted standard to Nuon Chea's case.¹⁰⁹ The Trial Chamber also went beyond the "meaningful participation" standard and continued to monitor Nuon Chea's health throughout the trial, although it was earlier determined that a reassessment was not necessary.¹¹⁰ It is important to note that as the law of the ECCC currently stands, the age of the accused is not by itself a reason to declare someone unfit to stand trial.¹¹¹ At the conclusion of the Trial Chamber Judgment in Case 002/01, Nuon Chea and Khieu

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *See Prosecutor v. Pavle Strugar Public Judgment, supra*, note 83, at para. 60.

¹¹⁰ *See, Decision on Nuon Chea's Fitness to Stand Trial and Defense Motion for Additional Medical Expertise, supra*, note 69, at para. 17.

¹¹¹ *Id.*

Samphan were in their eighties; because of their advancing ages, the Trial Chamber will most likely continue to assess the medical fitness of both Accused as Case 002/02 begins.

Further, the analysis conducted in Case 002/01 on the issue of fitness to stand trial compared to *Édouard Karemera, Matthieu Ngrumpatse, Joseph Nzirorera v. The Prosecutor* illustrates that the Trial Chamber in the ECCC took a much more hands-on approach to the Accused's health and continued to stay informed of his medical condition throughout the life of the trial. In contrast, the Trial Chamber in the ICTR was admittedly unaware of the exact nature of the Accused's health, and it was later determined that the lack of information the Trial Chamber possessed rendered their decision to sever the trial based on the health of the Accused prejudicial.¹¹² It is also important to note that the Appeals Chamber in the ICTR pointed out the possible flaw in only using one medical expert: a trial chamber not having enough information to make an informed decision on the health of the accused.¹¹³ However, the ECCC Trial Chamber in Case 002/01 demonstrated how it is possible to only use one medical expert in assessing the condition of an accused and still make a fair and informed decision on the accused's ability to meaningfully participate in their trial.¹¹⁴

Therefore, given the compared cases in the ECCC and ICTR, as well as the standard set in the ICTY, the hallmarks of a fair decision on an accused's fitness to stand trial could be viewed as whether a trial chamber made an informed decision using all of the medical evidence available by one or more experts on the health of the accused. Overall, the Trial Chamber in

¹¹² See, *Decision on Appeal Concerning the Severance of Matthieu Ngrumpatse*, *supra*, note 88, at para. 22.

¹¹³ *Id.*

¹¹⁴ See, *Decision on Nuon Chea's Fitness to Stand Trial and Defense Motion for Additional Medical Expertise*, *supra*, note 69, at para. 33.

Case 002/01 followed their Internal Rules and the accepted standard set by the ICTY; in terms of fairness and consistency of application, the judgment in Case 002/01 in regards to the Accused's fair trial right of fitness to stand trial was fair.

IV. Analysis

For a trial to be fair, it must give certain rights to the accused.¹¹⁵ In the above section discussing the concept of fairness, fairness in an international criminal proceeding was considered as being substantively different than fairness in a domestic court proceeding.¹¹⁶ While fairness in a domestic criminal proceeding revolves around the consistency of procedure, fairness in an international criminal proceeding considers the consistency of procedure, but further revolves around understanding what happened, who is responsible, and bringing retribution as well as a sense of justice to the international community.¹¹⁷ Earlier, it was posited that fairness in the Trial Chamber Judgment of Case 002/01 would be judged based on whether the ECCC followed their own Internal Rules and guidelines as well as the applicable international standards when appropriate, and whether the goals of fairness in an international criminal proceeding were met.

On the issue of equality before the tribunal, the ECCC in the Trial Chamber Judgment of Case 002/01 fairly decided the allegations before it. The Trial Chamber in Case 002/01 first consulted the ECCC Internal Rules to establish the Accused's rights as well as the Rule

¹¹⁵ Legal Digest of International Fair Trial Rights (2012), OSCE Office for Democratic Institutions and Human Rights, available at www.osce.org/odihr. [Electronic copy provided in accompanying USB flash drive at Source 22].

¹¹⁶ See *Reflections on Fairness in International Criminal Justice*, *supra*, note 18.

¹¹⁷ *Id.*

regarding the implication of bias of a trial chamber.¹¹⁸ Next, the Trial Chamber in Case 002/01 applied the “reasonable observer” standard that was adopted from the ICTR and incorporated into the ECCC’s Internal Rules.¹¹⁹ It is clear that the Trial Chamber in Case 002/01 analyzed all the relevant procedure before it prior to making a final disposition on Nuon Chea’s allegations of impartiality and inequality.¹²⁰ Also, compared to the similar judgments in *Édouard Karemera, Matthieu Ngriumpatse v. The Prosecutor*, *Ntawukulilyayo v. The Prosecutor*, and *Prosecutor v. Karadžić*, the outcome of Case 002/01 in regards to Nuon Chea’s various allegations on equality before the tribunal was consistent with those other cases.¹²¹ In each of the compared cases, the level of power and authority of the accused were similar as well as the seriousness of the crimes as types of sentences that the accused received.¹²² Further, the compared cases consistently used the “reasonable observer” standard to analyze bias and the assertion that an accused has to allege more than just bare accusations of unfairness in order to establish bias.¹²³

¹¹⁸ See *Decision on Ieng Thirith, Nuon Chea and Ieng Sary’s Applications for Disqualification of Judges Nil Nonn, Silvia Cartwright, Ya Sokhan, Jean-Marc Lavergne and Thou Mony*, *supra*, note 32, at paras. 11, 20.

¹¹⁹ See *Decision on Ieng Thirith, Nuon Chea and Ieng Sary’s Applications for Disqualification of Judges Nil Nonn, Silvia Cartwright, Ya Sokhan, Jean-Marc Lavergne and Thou Mony*, *supra*, note 32, at para. 11.

¹²⁰ *Id.*

¹²¹ *Id.* at para. 11.

¹²² See *Case 002/01 Judgment*, *supra*, note 2; *Édouard Karemera, Matthieu Ngriumpatse v. The Prosecutor*, *supra*, note 50; *Decision on Motion for Disqualification of Judges*, *supra*, note 60; *Decision on Motion to Disqualify Judge Picard and Report to the Vice-President Pursuant to Rule 15(B)(ii)*, *supra*, note 67.

¹²³ See *Decision on Ieng Thirith, Nuon Chea and Ieng Sary’s Applications for Disqualification of Judges Nil Nonn, Silvia Cartwright, Ya Sokhan, Jean-Marc Lavergne and Thou Mony*, *supra*, note 32, at paras. 11 and 20; *Decision on Motion for Disqualification of Judges*, *supra*, note 61 at para. 2.

In addition, through analyzing the various allegations of inequality, the Trial Chamber in Case 002/01 addressed a larger goal of international criminal justice. The Trial Chamber in Case 002/01 ensured that the Accused was being held responsible for the crimes he committed; and that this notion of the Accused's guilt was found through fact-finding in his own trial and not predicated on the bias of a judge or findings of a previously held trial. By ensuring that the accused is found guilty through his own trial and not because of bias or facts established in a previous trial, it allows for the international community to exact retribution on a guilty party. Retribution is a theory of punishment that has been viewed as a society's way of reacting to someone who committed a societal harm.¹²⁴ Through fairly analyzing an accused's claims of impartiality, it ensured that the right person was being prosecuted for the right reasons (i.e. the right person is being held responsible for the harms they committed on society). If a trial chamber is impartial and fails to treat the various accused before it equally, then there is a diminished chance of punishing the responsible perpetrator and rendering society's ability to punish those responsible for societal harms, exacting retribution, impossible.

On the issue of fitness to stand trial, the ECCC Trial Chamber in Case 002/01 followed the Internal Rules and guidelines as well as the applicable standards from other international tribunals.¹²⁵ The Trial Chamber applied the principles from the *Strugar* case in the ICTY to come to the disposition that Nuon Chea was fit to stand trial; meaning that Nuon Chea was able to meaningfully participate in his own defense.¹²⁶ Further, the Trial Chamber in Case 002/01 went

¹²⁴ Gerard v. Bradley, *Retribution: The Central Aim of Punishment*, 27 Harvard Journal of Law & Public Policy, at 24 (Fall 2003), citing H.L.A. Hart, *Prolegomenon to the Principles of Punishment*, in *Punishment and Responsibility* 1, 8 (5th ed. 1982). [Electronic copy provided in accompanying USB flash drive at Source 23].

¹²⁵ See *Prosecutor v. Pavle Strugar Public Judgment*, *supra*, note 83, at para. 60.

¹²⁶ *Id.*

beyond the established “meaningful participation” standard and committed to continue to monitor Nuon Chea’s fitness to stand trial as the proceedings progressed, despite the earlier findings by the medical expert that further monitoring was not necessary.¹²⁷ The Trial Chamber’s decision in Case 002/01 was compared with the Trial Chamber decision in *Édouard Karemera, Matthieu Ngrumpatse, Joseph Nzirorera v. The Prosecutor*. The Trial Chamber’s decision on Matthieu Ngrumpatse’s fitness to stand trial demonstrated that if a trial chamber attempts to make a decision on an accused’s fitness to stand trial without having enough information on the accused’s medical condition, that decision could later be reversed by an appeals chamber and labeled prejudicial.¹²⁸ Because the medical expert in Case 002/01 collected an extensive amount of medical information on Nuon Chea, the Trial Chamber was able to make an informed and fair decision on Nuon Chea’s fitness to stand trial.

In addition, the Trial Chamber in Case 002/01 took steps to achieve the broader goal of international criminal justice of ending impunity and punishing the responsible party by engaging in the analysis it did to determine whether Nuon Chea was fit to stand trial. The retributive value of punishing someone that has harmed society would be lost if the person being held responsible cannot understand the proceedings. Therefore, by being engaged and hands-on in the investigation into Nuon Chea’s health, the Trial Chamber in Case 002/01 not only complied with the ECCC Internal Rules and accepted standard of analysis from the ICTY, but also contributed to the overarching goal of fairness in an international criminal justice system by ensuring that the Accused was fit to stand trial and thus legitimizing the process of holding him responsible for his crimes.

¹²⁷ See, *Decision on Nuon Chea’s Fitness to Stand Trial and Defense Motion for Additional Medical Expertise*, *supra*, note 69, at para. 17.

¹²⁸ See *Decision on Appeal Concerning the Severance of Matthieu Ngrumpatse*, *supra*, note 95, at para. 22.

V. Conclusion

There are many concepts of a fair trial that can be evaluated in an attempt to deem a judgment of a trial chamber fair or unfair. Here, within the Trial Chamber Judgment of Case 002/01, the Trial Chamber's analysis and final dispositions on the fair trial concepts of equality before the tribunal and fitness to stand trial were deemed fair. For both the allegations of inequality before the tribunal and fitness to stand trial, the Trial Chamber in Case 002/01 applied the ECCC Internal Rules and any accepted standards from other international tribunals. Through the consistency of the application of the relevant rules and by comparing the Trial Chamber's process of analysis in Case 002/01 with other comparable judgments in international tribunals, the Trial Chamber in Case 002/01 legitimized the process of holding the Accused responsible for their crimes, allowed the harmed society to obtain a form of retributive justice, and furthered the goal of international criminal justice of ending impunity.