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How does the judgement of the ECCC Trial Chamber against Nuon Chea and Khieu Samphan in Case 002/01 compare with the judgments of other international criminal courts or tribunals in terms of the quality and quantity of the evidence relied on as the basis of convictions?

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CASE WESTERN RESERVE
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MEMORANDUM FOR THE EXTRAORDINARY CHAMBERS
IN THE COURTS OF CAMBODIA

Issue: How does the judgement of the ECCC Trial Chamber against Nuon Chea and Khieu Samphan in Case 002/01 compare with the judgments of other international criminal courts or tribunals in terms of the quality and quantity of the evidence relied on as the basis of convictions?

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Fall Semester, 2016

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I. Introduction

A. Scope

This memorandum compares the judgment of the Extraordinary Chambers in the Courts of Cambodia (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. The analysis focuses only on the judgments of the trial phases of the international criminal courts and tribunals compared. This memorandum specifically compares these judgments in terms of the quality and quantity of the evidence relied on as the basis of convictions. Relevant evidentiary factors discussed include the geographic and temporal scope of the charges against the accused; the level of power and authority of the accused; the number of victims; and the seriousness of the crimes alleged to be committed.

B. Summary of Conclusions

- i. The evidence presented at the hearings of the Trial Chambers of international criminal courts and tribunals have a significant impact on the judgments of the cases.**

It is a rule of each international criminal court discussed in this memorandum that in order to convict one accused of violating international criminal law, guilt must be proven beyond reasonable doubt. To prove such guilt, evidence of the international crimes must be examined at the Trial Chamber. Evidence may be direct or circumstantial, and may take the form of witness and expert testimony (via oral or written statement), documentation, and audio or visual records. This evidence may be presented to prove relevant factors such as the scope of the charges against the accused, the level of power and authority of the accused, the number of victims of the crimes, and the seriousness of the crimes. It is the Chamber's duty to examine all relevant evidence to

determine conviction and sentencing. Consequently, the evidence presented at these hearings have a significant impact on the decisions of the courts.

ii. The evidence relied on as the basis of conviction suggests that there is some uniformity in the standards of practice among the various international criminal courts and tribunals.

The evidence relied on in the judgments of senior leaders and major war criminals charged with genocide, war crimes, crimes against humanity, or other serious violations of international law suggests that there is some uniformity in the standards of practice among the various international criminal courts and tribunals. This uniformity is most evident in the rules and procedures which govern the courts, as well as the courts' application of those rules in their judgments. For example, the Extraordinary Chambers in the Courts of Cambodia, the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, and the Special Court for Sierra Leone each have a rule that any evidence relevant to the case may be admitted. It is also a rule that in order to convict, the Chamber must be convinced of guilt beyond reasonable doubt. Furthermore, individual items of evidence (i.e. witness testimony or documentary evidence) must be analyzed by the Chamber considering the entire body of evidence adduced. These rules place a burden on Prosecutors to present any evidence that could establish the accused's guilt, and on the Chamber to analyze all evidence as a whole in determining whether to convict the accused. Thus, general practices and standards are created among the courts regarding the amount and type of evidence that must be presented to the Chamber as well as the Chamber's evaluation of that evidence in determining the conviction and subsequent sentencing of serious violators of international crimes.

iii. Uniformity in the standards of practice among the different international criminal courts and tribunals should alleviate any contentions that it is easier to convict in some courts than in others.

The various international criminal courts and tribunals, in practice, seem to be using the same standards based on the evidence relied on as the basis of conviction. As a result of this uniformity, it is neither harder nor easier to convict senior leaders and major war criminals in the Extraordinary Chambers of the Courts of Cambodia than it is to convict in other international criminal courts or tribunals. If evidence is presented to the Chamber that proves the accused's guilt beyond reasonable doubt, then there will be a conviction.

II. Factual Background

A. The Extraordinary Chambers in the Courts of Cambodia

The Extraordinary Chambers in the Courts of Cambodia (hereinafter the "ECCC") is an "ad hoc Cambodian court with international participation"¹ established in 2006 by the Cambodian government and the United Nations to "bring to trial senior leaders and those most responsible for crimes committed during the time of Democratic Kampuchea, also known as the Khmer Rouge regime."² The Khmer Rouge regime lasted from April 17, 1975 to January 6, 1979.³ During that period, at least 1.7 million people are believed to have died from starvation, torture, execution and forced labor.⁴

i. Jurisdiction of the ECCC

The ECCC has been deemed a "hybrid" court – because of its ability to apply both national and international law – designed to provide fair trials in conformity with international

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 21].

² *Id.*

³ *Id.*

⁴ *Id.*

standards of justice.⁵ The Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea Articles 2 through 8 set out the jurisdictional limits of the ECCC.⁶ The court's temporal jurisdiction is specified as during Democratic Kampuchea, from 17 April 1975 to 6 January 1979.⁷ Its personal jurisdiction is limited to senior leaders of the Democratic Kampuchea and those who are most responsible for crimes committed during Democratic Kampuchea.⁸ The subject matter jurisdiction of the court includes torture, murder and religious persecution under the 1956 Cambodian Penal Code; genocide; crimes against humanity; grave breaches of the 1949 Geneva Conventions; destruction of cultural property during armed conflict; and crimes against internationally protected people under the 1961 Vienna Convention on diplomatic relations.⁹

ii. Case 002/01

Two former Khmer Rouge leaders are currently on trial in the second case before the ECCC, known as Case 002.¹⁰ Nuon Chea is the former Chairman of the Democratic Kampuchea

⁵ *Id.*

⁶ Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006), available at https://www.eccc.gov.kh/sites/default/files/legal-documents/KR_Law_as_amended_27_Oct_2004_Eng.pdf. [Electronic copy provided in accompanying USB flash drive at Source 5].

⁷ ECCC at a Glance, *supra* footnote 1.

⁸ *Id.*

⁹ *Id.*

¹⁰ A Guide to the First Trial in Case 002, available at https://www.eccc.gov.kh/sites/default/files/Guide%20to%20the%20First%20Trial%20in%20Case%20002%20-%20April2014_FINAL.pdf. [Electronic copy provided in accompanying USB flash drive at Source 20].

National Assembly and the former Deputy Secretary of the Communist Party of Kampuchea.¹¹ Khieu Samphan is the former Head of State of the Democratic Kampuchea.¹² Nuon Chea and Khieu Samphan have been charged with crimes against humanity (for murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecution and other inhumane acts), grave breaches of the Geneva Conventions of 1949 (for willful killing, torture, inhumane treatment, and unlawful confinement), and genocide against the Muslim Cham and the Vietnamese.¹³

Case 002 has been severed into two trials, each addressing a different section of the indictment.¹⁴ The first trial, referred to as Case 002/01, focused on charges of crimes against humanity related to two forced movements of the population and executions of members of the Khmer Republic at Tuol Po Chrey in Pursat.¹⁵ The trial also considered the roles of the accused in the Khmer Rouge regime, including the establishment and implementation of the regime's policies, relevant to the charges set out in the indictment.¹⁶

B. The International Criminal Tribunal for the former Yugoslavia

The International Criminal Tribunal for the former Yugoslavia (hereinafter the "ICTY") is an ad hoc tribunal established in 1993 by United Nations Security Council Resolution 827 "for the sole purpose of prosecuting persons responsible for serious violations of international

¹¹ Extraordinary Chambers in the Courts of Cambodia Case 002, available at <https://www.eccc.gov.kh/en/case/topic/2>. [Electronic copy provided in accompanying USB flash drive at Source 22].

¹² *Id.*

¹³ ECCC at a Glance, *supra* footnote 1

¹⁴ Extraordinary Chambers in the Courts of Cambodia Case 002, *supra* footnote 11.

¹⁵ A Guide to the First Trial in Case 002, *supra* footnote 10.

¹⁶ *Id.*

humanitarian law committed in the territory of the former Yugoslavia” since 1991.¹⁷ The Statute of the International Criminal Tribunal for the former Yugoslavia¹⁸ establishes the tribunal’s jurisdiction to prosecute natural persons responsible for grave breaches of the Geneva Conventions of 1949, violations of the law or customs of war, genocide, and crimes against humanity committed in the territory of the former Socialist Federal Republic of Yugoslavia since January 1, 1991.¹⁹

C. The International Criminal Tribunal for Rwanda

The International Criminal Tribunal for Rwanda (hereinafter the “ICTR”) was established in 1994 by United Nations Security Council Resolution 955 “for the sole purpose of prosecuting 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 [sic] States, between 1 January 1994 and 31 December 1994.”²⁰ The tribunal has jurisdiction to prosecute genocide, crimes against humanity, and violations of Article 3 common to the Geneva Conventions and of Additional Protocol II.²¹

¹⁷ UN Security Council, Security Council Resolution 827 (1993) [International Criminal Tribunal for the former Yugoslavia (ICTY)], 25 May 1993, S/RES/827 (1993), available at http://www.icty.org/x/file/Legal%20Library/Statute/statute_827_1993_en.pdf. [Electronic copy provided in accompanying USB flash drive at Source 8].

¹⁸ UN Security Council, Statute of the International Criminal Tribunal for the Former Yugoslavia (as amended on 7 July 2009), 25 May 1993, available at http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf. [Electronic copy provided in accompanying USB flash drive at Source 10].

¹⁹ *Id.* at Art. 2-8.

²⁰ UN Security Council, Security Council Resolution 955 (1994) [International Criminal Tribunal for Rwanda (ICTR)], 8 November 1994, S/RES/955 (1994), available at http://unictr.unmict.org/sites/unictr.org/files/legal-library/941108_res955_en.pdf. [Electronic copy provided in accompanying USB flash drive at Source 9].

²¹ *Id.* at Annex, Art. 2-4.

D. The Special Court for Sierra Leone

The Special Court for Sierra Leone (hereinafter the “SCSL”) is an independent special court established in 2002 by an agreement between the United Nations and the Government of Sierra Leone to adjudicate the serious violations of international law committed against civilians and UN peacekeepers during the country's civil war.²² The Agreement grants the court power “to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996.”²³ The Statute of the Special Court for Sierra Leone provides that it is within the court’s jurisdiction to prosecute crimes against humanity, violations of Article 3 common to the Geneva Conventions and of Additional Protocol II, other serious violations of international humanitarian law, crimes under Sierra Leonean law, and “leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone.”²⁴

III. Legal Discussion

A. Commonalities of the International Criminal Courts and Tribunals

The ECCC, ICTY, ICTR, and SCSL each prosecutes individuals – rather than states, organizations, political parties, army units, administrative entities or other legal subjects –

²² Philippa Webb & Morten Bergsmo, International Criminal Courts and Tribunals, Complementarity and Jurisdiction, Max Planck Encyclopedia of Public International Law (2010), available at <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1381?rskey=kbt7kr&result=2&prd=epil>. [Electronic copy provided in accompanying USB flash drive at Source 18].

²³ Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, available at <http://www.rscsl.org/Documents/scsl-agreement.pdf>. [Electronic copy provided in accompanying USB flash drive at Source 1].

²⁴ Statute of the Special Court for Sierra Leone, available at <http://www.rscsl.org/Documents/scsl-statute.pdf>. [Electronic copy provided in accompanying USB flash drive at Source 7].

responsible for serious international crimes committed within specific geographical areas during specific time periods. These crimes include genocide, war crimes, crimes against humanity, and violations of the Geneva Conventions. A key difference among these courts, however, is in their personal jurisdiction. The ECCC prosecutes only senior leaders and those most responsible for the international crimes committed. The SCSL similarly prosecutes only those bearing the greatest responsibility while the ICTY and the ICTR prosecute any “natural persons responsible.”²⁵²⁶ Because this analysis focuses only on trials most comparable to that of ECCC Case 002/01, only trials against those most responsible for the international crimes committed in each court will be examined.

The main focus of ECCC Case 002/01 was the prosecution of Nuon Chea and Khieu Samphan for their alleged crimes against humanity during the Khmer Rouge regime.²⁷ The ECCC, ICTY, ICTR, and SCSL each recognize “crimes against humanity” as international crimes justiciable in their courts. Furthermore, each of these courts share similar definitions of “crimes against humanity,” characterized as acts (such as murder; extermination; enslavement; deportation; imprisonment; torture; rape; persecutions on political, racial and religious grounds;

²⁵ UN Security Council, Statute of the International Criminal Tribunal for the Former Yugoslavia (as amended on 7 July 2009), *supra* footnote 18 at Art. 6.

²⁶ UN Security Council, Security Council Resolution 955 (1994), *supra* footnote 20 at Art. 5.

²⁷ A Guide to the First Trial in Case 002, *supra* footnote 10.

or other inhumane acts) committed “as part of a widespread or systematic attack against any civilian population.”²⁸²⁹³⁰³¹

B. Most Comparable Cases

Nuon Chea and Khieu Samphan both held various positions in the Communist Party of Kampuchea and Democratic Kampuchea. Both were alleged to have committed:

[T]he crimes against humanity of murder, political persecution and other inhumane acts comprising forced transfer and attacks against human dignity during movement of population (phase one); political persecution and other inhumane acts comprising forced transfer and attacks against human dignity during movement of population (phase two); and murder and extermination of Khmer Republic Officials.³²

These crimes were alleged to have been committed via joint enterprise, “a legal doctrine that considers each member of the group responsible for crimes committed by the group in furtherance of a common plan.”³³ It was also alleged that Chea and Samphan “planned, instigated, ordered, aided, abetted and/or were responsible as superiors for the following crimes against humanity falling within the scope of Case 002/01: murder; extermination; persecution on political grounds; and other inhumane acts comprising attacks against human dignity, forced transfer and enforced disappearances.”³⁴

²⁸ Law on the Establishment of the Extraordinary Chambers, *supra* footnote 6 at Art. 5.

²⁹ UN Security Council, Statute of the International Criminal Tribunal for the Former Yugoslavia, *supra* footnote 18 at Art. 5.

³⁰ UN Security Council, Security Council Resolution 955 (1994), *supra* footnote 20 at Art. 3.

³¹ Statute of the Special Court for Sierra Leone, *supra* footnote 24 at Art. 2.

³² ECCC Case 002/01 Judgment, 002/19-09-2007/ECCC/TC (2014) at 5-6, available at https://www.eccc.gov.kh/sites/default/files/documents/courtdoc/2014-08-07%2017:04/E313_Trial%20Chamber%20Judgement%20Case%20002_01_ENG.pdf. [Electronic copy provided in accompanying USB flash drive at Source 11].

³³ A Guide to the First Trial in Case 002, *supra* footnote 10.

³⁴ ECCC Case 002/01 Judgment, *supra* footnote 32.

The Trial Chamber of ECCC Case 002/01, which sat for a total of 222 days, heard live evidence of 92 individuals – including three experts, 53 fact witnesses, five character witnesses and 31 civil parties – and examined thousands of documents in relation to historical background, administrative and communication structures of the regime, Khmer Rouge military structure, forced evacuations, and executions of Lon Nol officials.³⁵ The Chamber admitted a total of 1,124 written statements and transcripts of witnesses and Civil Parties who did not appear before the Chamber in place of oral testimony and 5,824 pieces of documentary evidence, “including contemporaneous and analytical documents, audio and video recordings and the written evidence of witnesses, experts and Civil Parties.”³⁶ Both Nuon Chea and Khieu Samphan were found “guilty of the crimes against humanity of extermination (encompassing murder), persecution on political grounds, and other inhumane acts (comprising forced transfer, enforced disappearances and attacks against human dignity) committed within the territory of Cambodia between 17 April 1975 and the end of 1977.” They were subsequently sentenced to life imprisonment.³⁷

Zdravko Tolimir, former Assistant Commander of the Main Staff of the Army of the Republika Srpska, and Chief of the Sector for Intelligence and Security Affairs within the Main Staff, was charged by the ITCY with genocide; conspiracy to commit genocide; the crimes against humanity of murder, extermination, persecutions, inhumane acts through forcible transfer, and deportation; and murder as a violation of the laws or customs of war.³⁸ Tolimir was

³⁵ A Guide to the First Trial in Case 002, *supra* footnote 10.

³⁶ ECCC Case 002/01 Judgment, *supra* footnote 32 at 16.

³⁷ ECCC Case 002/01 Judgment, *supra* footnote 32 at 622.

³⁸ *Prosecutor v. Zdravko Tolimir*, IT-05-88/2-T (2012), available at <http://www.icty.org/x/cases/tolimir/tjug/en/121212.pdf>. [Electronic copy provided in accompanying USB flash drive at Source 15].

alleged to not only have participated in but to have committed, ordered, instigated, planned, or otherwise aided and abetted in the planning, preparation, and execution of the charged crimes through his involvement with two joint criminal enterprises.³⁹

Mr. Zdravko Tolimir was one of the Assistant Commanders of the Main Staff of the Army of the Republika Srpska, and Chief of the Sector for Intelligence and Security Affairs within the Main Staff. In this capacity, he is charged as being a member of two joint criminal enterprises. The first: a joint criminal enterprise to murder the able-bodied Bosnian Muslim men from the enclave of Srebrenica, between approximately 11 July and 1 November 1995. The second: a joint criminal enterprise to forcibly remove and deport the Bosnian Muslim population from the enclaves of Srebrenica and Žepa, which allegedly commenced with the issuance of Directive 7 in March of 1995 and culminated in the actual removal of the populations from these enclaves from July to August 1995.⁴⁰

The Trial Chamber in Zdravko Tolimir's case sat for a total of 242 days, producing over 19,000 transcript pages.⁴¹ It admitted nearly 3,500 exhibits into evidence.⁴² "The Prosecution adduced the evidence of 183 witnesses; the Defence [sic] presented four witnesses."⁴³ Tolimir was found guilty of genocide; conspiracy to commit genocide; the crimes against humanity of extermination, persecutions, and inhumane acts through forcible transfer; and murder as a violation of the laws or customs of war. He was subsequently sentenced to life imprisonment.⁴⁴

Elizer Niyitegeka, former Chairman of the Mouvement Démocratique Républicain in Kibuye Prefecture, member of the national political bureau, and Minister of Information of the Interim Government, was charged with genocide, complicity in genocide, conspiracy to commit

³⁹ *Id.*

⁴⁰ Judgment Summary for Zdravko Tolimir, available at http://www.icty.org/x/cases/tolimir/tjug/en/121212_summary.pdf. [Electronic copy provided in accompanying USB flash drive at Source 12].

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Prosecutor v. Zdravko Tolimir, supra* footnote 38 at 519

genocide, direct and public incitement to commit genocide, and crimes against humanity by the ICTR.⁴⁵ The Trial Chamber relied very heavily on witness testimony. Twenty-four witnesses were heard in the trial which sat for 33 days.⁴⁶ Niyitegeka was found guilty of genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, and the crimes against humanity of murder, extermination, and other inhumane acts. He was subsequently sentenced to life imprisonment.⁴⁷

Charles Taylor was the President of Liberia at the time of his indictment in 2003. He was prosecuted in the SCSL for committing the crimes against humanity of murder, rape, sexual slavery, other inhumane acts, and enslavement; violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II for acts of terrorism; violence to life, health and physical or mental well-being of persons (murder and cruel treatment); outrages upon personal dignity; pillage; and the serious violation of international law of conscripting or enlisting children under the age of 15 years into armed forces or groups, or using them to participate actively in hostilities.⁴⁸ Forms of evidence reviewed by the Trial Chambers include witness testimony, documentary evidence, and expert testimony and reports.⁴⁹ “The Trial Chamber heard the viva voce testimony of a total of 115 witnesses: 94 called by the Prosecution and 21

⁴⁵ *Prosecutor v. Eliezer Niyitegeka*, ICTR-96-14-T (2003), available at <http://ictrcaselaw.org/docs/doc37572.pdf>. [Electronic copy provided in accompanying USB flash drive at Source 14].

⁴⁶ Trial International, Eliezer Niyitegeka, available at <https://trialinternational.org/latest-post/eliezer-niyitegeka/> [Electronic copy provided in accompanying USB flash drive at Source 28].

⁴⁷ *Prosecutor v. Eliezer Niyitegeka*, *supra* footnote 45

⁴⁸ *Prosecutor v. Charles Ghankay Taylor*, SCSL-03-01-T (2012), available at <http://www.rscsl.org/Documents/Decisions/Taylor/1283/SCSL-03-01-T-1283.pdf>. [Electronic copy provided in accompanying USB flash drive at Source 13].

⁴⁹ *Id.*

called by the Defense (including the Accused).”⁵⁰ The Chamber also “admitted a total of 1522 exhibits: 782 were tendered by the Prosecution, and 740 by the Defense.”⁵¹ The Trial Chamber convicted Taylor for aiding and abetting and planning the commission of acts of terrorism; the crimes against humanity of murder, rape, sexual slavery, other inhumane acts, and enslavement; violence to life, health and physical or mental well-being of persons, in the forms of murder and cruel treatment; outrages upon personal dignity; conscripting or enlisting children under the age of 15 years into armed forces or groups, or using them to participate actively in hostilities; and pillage. He was subsequently sentenced to 50 years imprisonment.

C. Evidence Relied on in the Judgments of International Criminal Courts and Tribunals

i. Rules of Procedure and Evidence

The ECCC, ICTY, ICTR, and SCSL each have governing rules of procedure and evidence that the courts must follow. The ECCC Internal Rules provide that “all evidence is admissible.”⁵² Both the ICTY and the ICTR Rules of Procedure and Evidence state that “[a] Chamber may admit any relevant evidence which it deems to have probative value.”⁵³⁵⁴ The Rules of Procedure and Evidence of the Special Court for Sierra Leone state that “[a] Chamber

⁵⁰ *Prosecutor vs. Charles Ghankay Taylor*, supra footnote 48 at 67.

⁵¹ *Id.*

⁵² ECCC Internal Rules (REV.9) (2015) at Rule 87, available at https://www.eccc.gov.kh/sites/default/files/legal-documents/Internal_Rules_Rev_9_Eng.pdf. [Electronic copy provided in accompanying USB flash drive at Source 2].

⁵³ International Criminal Tribunal for the former Yugoslavia Rules of Procedure and Evidence, as amended on 8 July 2015 at Rule 89(C), available at http://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032Rev50_en.pdf. [Electronic copy provided in accompanying USB flash drive at Source 3].

⁵⁴ International Criminal Tribunal for Rwanda Rules of Procedure and Evidence, as amended on 13 May 2015 at Rule 89(C), available at <http://unictr.unmict.org/sites/unictr.org/files/legal-library/150513-rpe-en-fr.pdf>. [Electronic copy provided in accompanying USB flash drive at Source 4].

may admit any relevant evidence.”⁵⁵ These rules essentially allow for the admission of any evidence as long as it is relevant to the charges. Thus, the various international courts and tribunals have seen numerous forms evidence – including victim, witness and expert testimony via oral or written statement, documentation, audio recordings, and visual imagery - addressing relevant factors of the charges such as the geographic and temporal scope, the level of power and authority of the accused, the number of victims, and the seriousness of the crimes.

ii. Evidence Establishing the Scope of the Charges

There are jurisdictional limitations relating to the temporal and geographical scope of the charges against the accused in each international criminal court and tribunal. These limitations are enumerated in the statutes that establish each court. For example, charges can only be brought in the ECCC if the crimes were committed in Cambodian territory during the time of Democratic Kampuchea. In the ICTY, the scope of the charges is limited to serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991. The ICTR only permits charges for genocide and other international crimes committed in the territory of Rwanda and neighboring States in 1994. In the SCSL, only charges for international crimes committed in the territory of Sierra Leone since November 30, 1996 may be brought. Considering this, evidence is not adduced to establish the scope of the charges, but rather to affirm it. In making its decisions, courts look to the governing rules to determine whether the evidence admitted falls within the geographical and temporal scope of the charges. Any evidence that falls outside of the temporal or geographical scope of the charges or of the jurisdiction of the court would be excluded.

⁵⁵ Special Court for Sierra Leone Rules of Procedure and Evidence, as amended on 31 May 2012 at Rule 89(C), available at <http://www.rscsl.org/Documents/RPE.pdf>. [Electronic copy provided in accompanying USB flash drive at Source 6].

iii. Evidence Establishing the Level of Power and Authority

The prosecution in ECCC Case 002/01 alleged that Nuon Chea and Khieu Samphan held key positions in the Khmer Rouge regime. Chea was alleged to be the Chairman of the People's Representative Assembly, Deputy Secretary of the Communist Party of Kampuchea, a full-rights member of the Communist Party of Kampuchea's Standing Committee and Central Committee, and was responsible for party affairs, political education and training of cadres.⁵⁶ Samphan was alleged to be the Chairman of the State Presidium (Head of State), a member of the Communist Party of Kampuchea's Central Committee, a de facto member of the Communist Party of Kampuchea's Standing Committee, the political chairman of Office 870, and was responsible for overseeing commerce matters throughout the country.⁵⁷

The first segment of Case 002/01, which took place from December 2011 through February 2012, examined the historical background of the Khmer Rouge regime and the roles of the accused.⁵⁸ Both Nuon Chea and Khieu Samphan were questioned regarding their backgrounds leading up to their involvement in the communist movement and the establishment of the regime. Chea was questioned about the positions he held in the communist movement, his knowledge of party structure and policy, his motivations for joining the Communist Party, the creation of the Khmer Rouge's armed forces, the elimination of the currency, and the existence of security centers prior to the establishment of Democratic Kampuchea in April 1975.⁵⁹ Samphan exercised his right not to answer questions related to the charges against him with the

⁵⁶ A Guide to the First Trial in Case 002, *supra* footnote 10

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

exception of a few biographical questions and questions regarding the historical background of Democratic Kampuchea.⁶⁰

Evidence relied on to establish Chea and Samphan's leadership roles in Democratic Kampuchea include the questioning of the accused; interviews of Ieng Sary (an accused party who died during the proceedings); expert and witness testimony; public radio reports; and documents including meeting minutes indicating the attendance of both Chea and Samphan in official leadership capacity, reports of appointments into multiple leadership positions, telegrams, and financial documents⁶¹ The prosecution then presented evidence to prove that the accused, through their various leadership positions, participated in the design and implementation of core policies of the Communist Party of Kampuchea including the forced movement of the population from urban to rural areas, forced labor in worksites and cooperatives, use of violence to kill "enemies" through a nationwide network of reeducation or security offices, persecution of Buddhists, Cham and Vietnamese, and forced marriage.⁶²

Prosecutors of the ICTY alleged that Zdravko Tolimir held the leadership positions of Chief of the Sector for Intelligence and Security Affairs and Assistant Commander of the Bosnian Serb Army.⁶³ In this capacity, he is charged as being a member of two joint criminal enterprises, one for forcible transfer and one for murder. The evidence most heavily relied on to establish Tolimir's role in such leadership positions was testimony from various witnesses, some

⁶⁰ *Id.*

⁶¹ ECCC Case 002/01 Judgment, *supra* footnote 32 at 164-210

⁶² A Guide to the First Trial in Case 002, *supra* footnote 10

⁶³ *Prosecutor v. Zdravko Tolimir*, *supra* footnote 38 at 389

of whom have been convicted by the tribunal for crimes arising from events which are alleged in the Indictment as the basis for the charges against the Accused.⁶⁴

Eliezer Niyitegeka held the position of Minister of Information in the Interim Government of Rwanda. Under this position, he was responsible for government policy concerning the mass media and he controlled the content of broadcasts on the Hutu Power extremist radio station, RTLM. Evidence establishing Niyitegeka's position included witness testimony and written statements. Witness names are not provided by Chamber; initials are used instead. "Witness GGH knew the Accused when he was a radio journalist and when he was a member of parliament. He also knew the Accused was a member of the MDR Power Party, or what used to be called the MDR Parmehutu."⁶⁵

Charles Taylor was the President of Liberia at the time of his indictment.⁶⁶ He was the first sitting African head of state to be indicted.⁶⁷ The SCSL Prosecutor alleged that Taylor, "while holding positions of superior responsibility and exercising command and control over subordinate members of the RUF, AFRC, AFRC/RUF Junta or alliance, and/or Liberian fighters, is individually criminally responsible for the crimes as alleged in the Indictment."⁶⁸ Evidence was presented in the forms of: (1) oral evidence, (2) documentary evidence, including such

⁶⁴ *Id.* at 14

⁶⁵ *Prosecutor v. Eliezer Niyitegeka*, *supra* footnote 45 at 10

⁶⁶ The Prosecutor vs. Charles Ghankay Taylor, The Special Court for Sierra Leone, the Residual Special Court for Sierra Leone, available at <http://www.rscsl.org/Taylor.html>. [Electronic copy provided in accompanying USB flash drive at Source 27].

⁶⁷ *Id.*

⁶⁸ *Prosecutor v. Charles Ghankay Taylor*, *supra* footnote 48 at 7

evidence provided in lieu of oral testimony, (3) testimony of expert witnesses, (4) facts of which judicial notice was taken and (5) facts agreed upon by the Parties.⁶⁹

iv. Evidence Establishing the Number of Victims

The Trial Chamber in ECCC Case 002/01 found that “a minimum of 250 Lon Nol officials were murdered at Tuol Po Chrey and as a minimum, between 2,330,000 to 2,430,000 people were victims of crimes committed during the first two phases of population movement.”⁷⁰ At least two million people were transferred from the capital to rural areas in phase one⁷¹ and between 330,000 to 430,000 were displaced in phase two.⁷² Evidence of these numbers include national and foreign government reports, grave site findings, refugee accounts, books, documents, and witness testimony accounting the conditions and effects of these events. The Trial Chamber also admitted evidence from the Documentation Center of Cambodia which “identified an estimated 1.3 million human remains in 390 mass grave sites spread throughout Cambodia.”⁷³

Experts suggest that there is a high probability that those mass grave sites contain the remains of only a sample of those who died as a result of Khmer Rouge policies and actions during the DK era: it is likely that many grave sites have never been identified and that many who died were never buried. Overall, estimates indicate that between 600,000 and 3 million died as a result of Khmer Rouge policies and actions. Within this range, experts accept estimates falling between 1.5 and 2 million excess deaths as the most accurate⁷⁴

⁶⁹ *Id.*

⁷⁰ ECCC Case 002/01 Judgment, *supra* footnote 32 at 586

⁷¹ *Id.* at 294

⁷² *Id.* at page 368

⁷³ *Id.* at 98

⁷⁴ *Id.*

The ICTY found Zdravko Tolimir criminally responsible for committing the crimes of genocide, conspiracy to commit genocide, extermination, murder, persecution, and forcible transfer through his participation in the Joint Criminal Enterprise to Forcibly Remove and the Joint Criminal Enterprise to Murder.⁷⁵ The Trial Chamber in the ICTY case against Zdravko Tolimir found that, with respect to the forcible transfer count, approximately 29,400–34,400 Bosnian Muslims were forcibly moved by the Bosnian Serb Forces, constituting crimes of forcible transfer as inhumane act. Also, at least 5,749 Bosnian Muslim males from Srebrenica were systematically murdered by Bosnian Serb Forces within a period of only several days. Evidence relied on to establish these numbers include expert and witness testimony, documentary evidence including transcripts and written statements, demographic and DNA identification data used to list the Srebrenica-related missing, recordings of intercepted communications, aerial imagery capturing gravesites and dead bodies, and a notebook with information regarding important events and combat activities.

The ICTR relied very heavily on witness testimony in the Niyitegeka case. Transcripts and other written statements were presented as well but relevant information regarding attacks come from witness testimony. Witness GGM described the May 13 attack on Tutsis in which 40,000 – 50,000 people were killed.⁷⁶ The SCSL case against Charles Taylor adduced much more evidence adduced than the ICTR. Approximately 50,000 victims were impacted by the serious violations of international crimes committed during the Sierra Leonean Civil War. The SCSL as well as Taylor presented evidence such as expert and witness testimony, including the testimony of Taylor himself and of supermodel Naomi Campbell, documents and written

⁷⁵ *Prosecutor v. Zdravko Tolimir*, *supra* footnote 38 at 511

⁷⁶ *Prosecutor v. Eliezer Niyitegeka*, *supra* footnote 45 at 33

statements for the court to evaluate on in deciding whether to hold Taylor individually criminally responsible.

v. Evidence Establishing the Seriousness of Crimes

The Trial Chamber in ECCC Case 002/01 found that the movement of the population and the conditions of the forced transfer were severe, unrelenting and inhumane.⁷⁷ “The crimes were perpetrated with cold disregard for human life and were often brutal, adding to their gravity.”⁷⁸ Also adding to the severity of the crimes are the number of victims and the lasting impact on them and their relatives.⁷⁹

For the victims who died as a result of the crimes, the consequences were absolute. Many of those who survived suffered ongoing physical trauma, as well as mental and psychological disorders. The grave impact of these crimes on the victims and their relatives is both devastating and enduring.

The Chamber’s evaluation of the severity of the crimes relied heavily on witness testimony recalling the harsh conditions of the two phases of forced movement, specifically with regard to the detailed accounts how people were forcibly evicted from their homes by Khmer Rouge soldiers at gunpoint; witnessed beatings, shootings and killings; and saw countless dead bodies lying along the roads as they exited the city on long journeys marked by a lack of food, water, medical care, shelter and hygiene facilities, which caused many sick, injured, elderly, pregnant and young people to suffer.

In the Tolimir case, the ICTY held that the deliberate and calculated physical destruction of the Bosnian Muslim population “amounts to one of the worst crimes known to humankind—

⁷⁷ *Id.* at 586

⁷⁸ *Id.*

⁷⁹ *Id.*

the crime of genocide” and that “that the extreme magnitude and scale of the crimes committed could only have been achieved by an organised [sic], interconnected military structure working in unison.”⁸⁰ The Majority also found that, as a result of the massive and cruel murder operation, at least 5,749 Bosnian Muslim males from Srebrenica were systematically murdered by Bosnian Serb Forces within a period of only several days. “Bosnian Serb Forces committed these crimes with the repugnant intent to discriminate and destroy this particular group.”⁸¹ In evaluating the seriousness of the crimes, the Chambers relied on evidence it heard of “horrific mass executions from survivors who managed to crawl out of piles of dead bodies, as well as evidence of men who were detained under unspeakably inhumane conditions, mistreated and tortured, knowing that all that is left for them to expect from life is to simply await their death.”⁸²

Not only did the Chamber hear evidence of adult men being shot to death, it also recalls the heart-breaking case of an approximately five or six year old boy who survived the execution at Oraovac. The boy, being shot by VRS soldiers, emerged from the pile of dead bodies, covered with bits of other people’s bowel, tissue, and blood; and then called out “Baba,” meaning father, “where are you?” The boy’s father was murdered next to him.⁸³

The Chamber also heard evidence of the long-term physical and psychological suffering and patent vulnerability of survivors due to the large-scale brutality used by the VRS.⁸⁴ These factors were all considered in determining the sentence of the accused.

In the Niyitegeka case, ICTR Prosecutors presented evidence demonstrating that Niyitegeka took part in several large-scale attacks against Tutsi civilians resulting in the

⁸⁰ *Prosecutor v. Zdravko Tolimir*, *supra* footnote 38 at 511

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

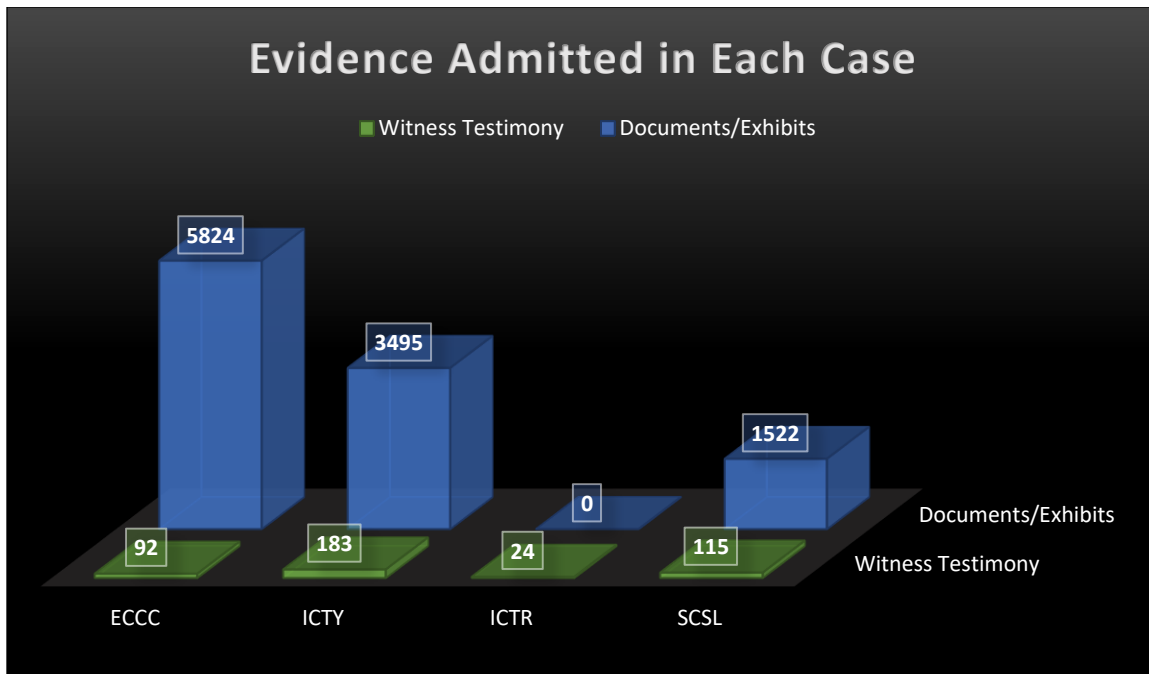
⁸⁴ *Id.*

massacre of thousands of Tutsis during the genocide. Most of this evidence was in the form of witness testimony. In its evaluation of the evidence, the ICTR recognized that genocide and crimes against humanity are serious offences which are “particularly shocking to the conscience of mankind.”⁸⁵

Charles Taylor was charged by the SCSL for the serious violations of international law of aiding and abetting and planning the commission of acts of terrorism; the crimes against humanity of murder, rape, sexual slavery, other inhumane acts, and enslavement; violence to life, health and physical or mental well-being of persons, in the forms of murder and cruel treatment; outrages upon personal dignity; conscripting or enlisting children under the age of 15 years into armed forces or groups, or using them to participate actively in hostilities; and pillage. Evidence relied on by the Trial Chambers in its decision to convict Taylor include witness testimony, documentary evidence, including written statements, and other exhibits.

Evidence may be presented at the Trial Chambers of the international criminal courts and tribunals in many different forms. Although more documents and other exhibitory evidence usually are admitted, witness testimony seems to be the most heavily relied upon by the courts. The graph below shows how much documentary evidence and witness testimony was used in each of the cases compared.

⁸⁵ *Prosecutor v. Eliezer Niyitegeka*, *supra* footnote 45 at 109



IV. Conclusion

In order to convict senior leaders and major war criminals charged with genocide, war crimes, crimes against humanity, or other serious violations of international law such as those in the cases of the ECCC, ICTY, ICTR, and SCSL, a majority of the Trial Chamber must be satisfied that guilt has been proven beyond reasonable doubt. This is required by the rules of procedure and evidence of each of the aforementioned courts. To prove the accused’s guilt beyond reasonable doubt, evidence relevant to the charges must be presented to the Trial Chamber. Another rule shared by the courts compared provides that a Chamber may admit any relevant evidence. This evidence rule allows for the presentation of anything relevant to the case – witness, expert, or victim testimony, documentation, audio, video, etc. – to prove relevant factors – such as the scope of the charges of the accused, the level of power and authority of the accused, the number of victims of the crimes, and the seriousness of the crimes – to establish guilt beyond reasonable doubt. The evidence presented would then be examined by the judges to

determine not only conviction but also sentencing if the accused is convicted. This means that the evidence presented at the hearings of the Trial Chamber of international criminal courts and tribunals have a significant impact on the judgments of the cases. These rules also demonstrate that there is uniformity among the different international criminal courts and tribunals; that, in practice, they are using the same standards. Because of this uniformity in the standards of practice among the various international criminal courts and tribunals, it is not necessarily harder nor easier to get a conviction in one court than it is in another. As long as evidence is presented that proves the accused's guilt beyond reasonable doubt, there will be a conviction, no matter the court.