

ESSAY

JUSTICE, INTERRUPTED:

A DEATH AT THE KHMER ROUGE TRIALS AND
REASONS FOR OPTIMISM

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I.	ACCOUNTING FOR FOUR DECADES.....	1091
II.	CASE PROCEEDINGS AT THE ECCC.....	1093
III.	AN INCONVENIENT DEATH	1097
IV.	INNOVATIONS IN JUSTICE.....	1100

Dr. Martin Luther King, Jr. famously stated that the “arc of the moral universe is long, but it bends toward justice.”¹ When it comes to justice for atrocity crimes, the shape and length of that arc varies significantly by situation and is impacted by a number of factors. On one end of the spectrum might be the Nuremberg Trials (and similarly, the Control Council Law Number 10 hearings, and the International Military Tribunal for the Far East as relates to Japan), where there was a relatively tight parabola between Nazi atrocities and prosecutions. On the other end are events that occurred long ago (and may be ongoing) for which there is yet to be meaningful accountability; think North Korea and the extensive evidence of crimes against humanity there, without any accountability as of

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1. See, e.g., Dr. Martin Luther King, Jr., Speech in Montgomery, Alabama: Our God is Marching On! (Mar. 25, 1965). This quote was itself a paraphrase of a refrain by Unitarian minister and abolitionist Theodore Parker. See *All Things Considered: Theodor Parker and the 'Moral Universe'*, NAT'L PUB. RADIO (Sept. 2, 2010), <https://www.npr.org/templates/story/story.php?storyId=129609461> [<https://perma.cc/M9LP-RCAQ>].

yet.² Along this continuum fall other situations, whose position might conceptually take into account not only how long in raw time some measure of accountability takes, but also the robustness of that accountability process.

In regards to atrocities committed by the Khmer Rouge,³ the path to justice for one perpetrator recently came to an abrupt end with the death of Nuon Chea, the most senior Khmer Rouge leader put on trial at the Extraordinary Chambers in the Courts of Cambodia (“ECCC”) in August 2019.⁴ For those encountering this fact for the first time, it can be surprising that forty years after the invasion that toppled the Khmer Rouge, the justice process had not yet concluded. Nuon Chea died after conviction at trial for crimes against humanity, genocide, and war crimes, but before the appeals process in that case—the second against him—could be completed. This not only disappointed victims and stakeholders, but also raised interesting legal questions that the court had to resolve regarding the status of the trial convictions.

Many factors contributed to this elongated timeline for justice in regards to Nuon Chea and other Khmer Rouge perpetrators that fall within the personal jurisdiction of the ECCC.⁵ On the hypothetical spectrum the Author raised above, the ECCC’s proceedings are certainly farther along the temporal gap between the commission of atrocities and transitional justice measures assigning criminal responsibility for them than the International Criminal Tribunal for Yugoslavia (“ICTY”), and the International Criminal Tribunal for Rwanda (“ICTR”). After all, in regards to the

2. Although there has not been accountability, there has been documentation of the atrocities by organizations including the United Nations. *See, e.g.*, Hum. Rts. Council, Rep. of the Comm’n of Inquiry on Human Rights in the Democratic People’s Republic of Korea, U.N. Doc. A/HRC/25/63 (2014).

3. Here, the Author uses the colloquial term “Khmer Rouge” to refer to the entity that governed Democratic Kampuchea. That term was coined by the late Cambodian King Norodom Sihanouk, and was not used by the members of the organization themselves.

4. Saloth Sar, a.k.a. Pol Pot, the leader of the Khmer Rouge, passed away before he could be detained by the tribunal. *See* Seth Mydans, *Death of Pol Pot; Pol Pot, Brutal Dictator who Forced Cambodians to Killing Fields, Dies at 73*, N.Y. TIMES, Apr. 17, 1998, at A14.

5. The personal jurisdiction of the ECCC is limited to “senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia.” Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea (with inclusion of amendments as promulgated on Oct. 27, 2004), art. 2, NS/RKM/1004/006 (Cambodia).

atrocities that the ICTY and ICTR respectively addressed, the relevant events occurred over a decade later than those perpetrated by the Khmer Rouge, and the judicial mechanisms have largely concluded.⁶

The story, briefly outlined here, of how trials against Khmer Rouge perpetrators were not yet complete in 2019 is a cautionary one about the need for states and the international community to move as swiftly as possible to attain justice for atrocities. However, the unsatisfying conclusion in regards to Nuon Chea occurs at a time when international accountability mechanisms have made new, creative strides towards shortening the justice arc, giving hope that such occurrences will be fewer and farther between in the future.⁷ Those who claim that the golden age for international criminal justice is past, must also acknowledge the advantages of these novel developments.

I. ACCOUNTING FOR FOUR DECADES

In August 2019, Nuon Chea (born Long Buntuoton), the Deputy Secretary of the Communist Party of Kampuchea (CPK) and second in command of the Khmer Rouge, died of natural causes at the age of ninety-three.⁸ On his death, proceedings against him regarding crimes committed under the Khmer Rouge had not concluded at the joint tribunal established by the United Nations and the Cambodian government, the ECCC. To understand why justice took so long in this case, it is necessary to go back to 1979 when the Khmer Rouge was ousted after almost four years in power by an invading Vietnamese army that was tired of Democratic Kampuchea's (as Cambodia was then known) cross-

6. Two cases emanating out of events in the former Yugoslavia continue under the auspices of the International Residual Mechanism for Criminal Tribunals: Jovica Stanišić and Franko Simatović, and Ratko Mladić. Of course, these tribunals were not without their own deaths prior to proceedings could complete, perhaps most notably the death of Slobodan Milošević. See Marlise Simons & Alison Smale, *Slobodan Milosevic, 64, Former Yugoslav Leader Accused of War Crimes, Dies*, N.Y. TIMES (Mar. 12, 2006), <https://www.nytimes.com/2006/03/12/world/europe/slobodan-milosevic-64-former-yugoslav-leader-accused-of-war.html> [https://perma.cc/GK6J-NAZ4].

7. Full disclosure: The Author was a prosecutor at the Khmer Rouge Trials from 2011-2018, including in the cases concerning Nuon Chea.

8. Seth Mydans, *Nuon Chea, Khmer Rouge's Chief Ideologist, Dies at 93*, N.Y. TIMES (Aug. 4, 2019), <https://www.nytimes.com/2006/03/12/world/europe/slobodan-milosevic-64-former-yugoslav-leader-accused-of-war.html?searchResultPosition=1> [https://perma.cc/4UXB-KNM8].

border aggression. ECCC criminal investigations into atrocities committed by the Khmer Rouge would not begin for over two decades.⁹

Geo-politics would have ensured significant resistance to the creation of a court to try Khmer Rouge suspects for the first dozen or so years after their overthrow. China continued to support the Khmer Rouge—which had fled to an area along the border of northwest Cambodia and Thailand—as it had during the period of Democratic Kampuchea. And the Cold War made strange bedfellows of the United States and the Khmer Rouge, who were united against the Vietnamese puppet government in Cambodia.¹⁰ As one example of this, the United States defended the Khmer Rouge’s holding of the Cambodian seat at the UN over the new government set up by Vietnam.¹¹

Nonetheless, although geo-politics is often a major hindrance to the establishment of international justice mechanisms, in this instance, the delay in the early years had a deeper cause. The fact is that after the courts and proceedings directly following World War II, widespread support for international criminal courts to deal with mass atrocities had been relatively dormant until the early 1990s. Then, as the push for international justice began to bear fruit alongside (and to an extent because of) the end of the Cold War, and around the time events in the former Yugoslavia and Rwanda led to the creation of the ICTY and the ICTR, respectively, Cambodia emerged from UN-sponsored elections in 1993.¹² In addition, Vietnam had withdrawn its forces from Cambodia, and the Union of Soviet Socialist Republics (“USSR”) had dissolved.

9. The Vietnamese did hold *in absentia* show trials, named the People’s Revolutionary Tribunal, of Pol Pot and Ieng Sary shortly after they toppled the Khmer Rouge.

10. In addition to the United States’ antagonistic history with Vietnam, Vietnam was aligned with the USSR.

11. See Don Oberdorfer, *U.S. to Support Pol Pot Regime for U.N. Seat*, WASH. POST (Sept. 16, 1980), <https://www.washingtonpost.com/archive/politics/1980/09/16/us-to-support-pol-pot-regime-for-un-seat/58b8b124-7dd7-448f-b4f7-80231683ec57/> [<https://perma.cc/P5AA-VPA9>]. The United States also supported other Cambodian political factions that wanted to regain power from the government that Vietnam had helped set up, the People’s Republic of Kampuchea. That government contained many former Khmer Rouge members who had fled to Vietnam to avoid the internal purges carried out by the Communist Party of Kampuchea, including the man who currently serves as Prime Minister, Hun Sen.

12. The Paris Peace Agreements of 1991 ended the civil war between the competing factions and established the timeline for the elections.

Fraught negotiations between international stakeholders and the Cambodian government over establishing a court to try Khmer Rouge crimes lasted from the late 1990s to the early 2000s, and the ECCC was finally and fully established in 2004.¹³

II. CASE PROCEEDINGS AT THE ECCC

The prosecutors at the ECCC requested that five suspects, including Nuon Chea, be investigated in 2007.¹⁴ Nuon Chea was detained in September of that year,¹⁵ but his was not the first case to proceed to trial.¹⁶ Instead, the ECCC first tried Kaing Guek Eav, also known as Duch,¹⁷ a much lower level member of the Khmer Rouge who oversaw the S-21 security center in Phnom Penh. Starting with Duch's trial had the benefit of allowing the new court to ease into its work with a relatively straightforward case: there was extensive evidence concerning S-21, the crime sites were mostly focused on that one security center, and Duch was willing to admit to—and provide information on—much of the functioning of the Khmer Rouge and his own role in it.¹⁸ This meant that the Duch case—named Case 001—also served as a useful evidentiary and procedural base for the more complex case that was to come next.

13. Instrument of Ratification on the 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 (promulgated by the Ministry of Foreign Affairs and Int'l Cooperation, (Oct. 19, 2004)).

14. Extraordinary Chambers in the Courts of Cambodia, *Statement of the Co-Prosecutors* (July 18, 2007). Later, in 2009, the International Co-Prosecutor alone would request the investigation of an additional five suspects. Extraordinary Chambers in the Courts of Cambodia, *Statement of the Acting International Co-Prosecutor: Submission of Two New Introductory Submissions* (Sept. 8, 2009).

15. *Police Charge Pol Pot Deputy with War Crimes*, ASSOCIATED PRESS, Sept. 19, 2007. His Co-Defendants Ieng Sary, Ieng Thirith, and Khieu Samphan were then arrested in November.

16. The ECCC had only one staffed trial chamber, preventing concurrent trials.

17. For a fascinating description of how Duch was located, see generally Nic Dunlop, *THE LOST EXECUTIONER* (2006).

18. Thierry Cruvialier, Opinion, *The Khmer Rouge's Perfect Villain*, N.Y. TIMES (Feb. 8, 2012). <https://www.nytimes.com/2012/02/09/opinion/the-khmer-rouges-perfect-villain.html> [<https://perma.cc/7TGB-QD6V>].

The trial against Nuon Chea—Case 002—did not begin until November 2011,¹⁹ after the Trial Chamber had released the judgment in Case 001.²⁰ Two main factors made Case 002 significantly more complex than Case 001. First, it concerned not only Nuon Chea but also three other individuals who, while not quite as senior as him, were among the inner circle of the Khmer Rouge. They were: Khieu Samphan, President of the State Presidium; Ieng Sary, Foreign Minister; and Ieng Thirith,²¹ Minister of Social Affairs.²² Each of these individuals had their own defense teams, and although much of the evidence would relate commonly to all of the defendants, there was portions of evidence that was primarily relevant only to some subset of the defendants. This meant that the case was not as evidentially streamlined as it might have been with fewer defendants. Moreover, in addition to each defense team participating separately in court, it also meant that proceedings had to account for their different roles in the Khmer Rouge, and different defense strategies and requests, and contend with separate briefs. Second, the crimes charged in Case 002 were of a greater variety (each, of course, with their own elements to prove, increasing the evidentiary burden), far more numerous, and covered the entire country.²³

An incident near the beginning of the Case 002 trial served to highlight the significant amount of time that had already passed since the Khmer Rouge was in power. Ieng Thirith developed cognitive difficulties and was eventually diagnosed with dementia. As her medical issues presented themselves, her case was severed

19. Cambodia Tribunal Monitor, *Opening Statements in Case 002 1 November 23, 2011 – Part 1*, VIMEO (Nov. 23, 2011), <https://vimeo.com/32520185> [<https://perma.cc/JN8P-CCL6>].

20. Co-Prosecutors v. Kaing, Case File/Dossier No. 001/18-07-2007/ECCC/TC, Judgement (July 26, 2010), https://www.eccc.gov.kh/sites/default/files/documents/courtdoc/20100726_Judgement_Case_001_ENG_PUBLIC.pdf [<https://perma.cc/MD8G-HQ4N>].

21. Ieng Sary and Ieng Thirith were spouses. Sopheng Cheang, *Ieng Thirith, a Leader of Cambodia's Brutal Khmer Rouge Regime, Dies at 83*, WASH. POST (Aug. 22, 2015), https://www.washingtonpost.com/world/ieng-thirith-a-leader-of-cambodias-brutal-khmer-rouge-regime-dies-at-83/2015/08/22/a2a2c7b4-48dc-11e5-846d-02792f854297_story.html [<https://perma.cc/DH8D-LESD>].

22. *Id.* The power and responsibility of the defendants often had much more to do with their positions within the Communist Party of Kampuchea than with their formal titles.

23. See generally *Case 002: Closing Order*, Extraordinary Chambers in the Courts of Cambodia, Sept. 15, 2010.

from the rest of the defendants so that the resolution of those issues would not delay the case moving forward.²⁴ Eventually, Ieng Thirith's medical condition would prove to be so severe that she could not participate in her own defense, and therefore could not be tried.²⁵

Shortly after the trial in Case 002 began, the Trial Chamber decided to break the case into multiple smaller trials, each of which would be shorter than attempting to try all of the crimes in the indictment in one case.²⁶ This would address two looming concerns. First, as Ieng Thirith's dementia drove home, the defendants were not getting any younger. As the trial started in November 2011, Ieng Sary was eighty-six, Nuon Chea was eighty-five, and Khieu Samphan was eighty.²⁷ This was in a country where average male life expectancy even today is only seventy years.²⁸ One or more smaller trials would increase the possibility that proceedings on at least some charges would reach a conclusion before the defendants passed away or were rendered un-triable. Unfortunately, this would prove to be too little too late in the case of Ieng Sary, who died in March 2013, midway through the first trial.²⁹

Second, breaking the case up into smaller trials helped alleviate the possibility that funding for the court would run out before a larger trial and appeal could conclude. The ECCC was

24. Seth Mydans, *U.N. Court in Cambodia Recommends Freeing Defendant Ill with Dementia*, N.Y. TIMES (Nov. 17, 2011), <https://www.nytimes.com/2011/11/18/world/asia/sickly-defendant-khmer-rouge-genocide-trial-in-cambodia-may-be-freed.html?searchResultPosition=1> [<https://perma.cc/GZT2-XSED>].

25. Ieng Thirith eventually passed away in August 2015. Thomas Fuller, *Ieng Thirith, Khmer Rouge Minister in Cambodia, Dies at 83*, N.Y. TIMES (Aug. 22, 2015), <https://www.nytimes.com/2015/08/23/world/asia/ieng-thirith-khmer-rouge-minister-in-cambodia-dies-at-83.html?searchResultPosition=4> [<https://perma.cc/H6DG-QYHE>].

26. *Case 002: Severance Order Pursuant to Internal Rule 89ter*, Extraordinary Chambers in the Courts of Cambodia, Sept. 22, 2011.

27. See *Case 002: Closing Order*, Extraordinary Chambers in the Courts of Cambodia, Sept. 15, 2010, pp. 391, 392, & 394.

28. See The World Bank, *Life Expectancy at Birth, Total (Years) - Cambodia*, <https://data.worldbank.org/indicator/SP.DYN.LE00.IN?locations=KH> [<https://perma.cc/C3GY-PPS8>] (last visited Feb. 20, 2020).

29. Seth Mydans, *Ieng Sary, Former Official of Khmer Rouge, Dies at 87*, N.Y. TIMES (Mar. 14, 2013), <https://www.nytimes.com/2013/03/15/world/asia/ieng-sary-khmer-rouge-leader-tied-to-genocide-dies-at-87.html?searchResultPosition=1> [<https://perma.cc/W4FG-BD4J>].

funded jointly by the Cambodian government, which often fell short in making payments, and voluntary donations of supportive governments.³⁰ The voluntary donation process, rather than allotments from the general UN budget, made funds precarious and planning difficult.³¹ Having a shorter timeline for judgments made it more likely that funds would suffice through the end of a case.

However, what crimes would be included in the first trial, and what therefore left to possible future trials (or not addressed should no future trials occur), was the subject of significant dispute. The Trial Chamber initially made the decision of what crimes would be included unilaterally, without input from the parties.³² The prosecution, and eventually other parties, challenged that initial decision on the basis that the included crimes were not sufficiently representative in terms of the range and severity of crimes, of the entirety of the indictment.³³ At the time, there was a very real sense that although the possibility was left open for future trials that would include other crimes, there might be only one trial because of the aforementioned age and financial issues. Should Case 2/1 end up being the only trial that was completed against these defendants, the thinking went, it is important that it includes a representative sample of all of the crimes contained in the indictment. The Supreme Court Chamber ultimately agreed with this view, but by the time the litigation on the matter had concluded (including two sets of appeals from Trial Chamber severance orders), it ruled that although the crimes included in the first trial were not representative, issues of practicality dictated that the first trial should be completed as soon as possible in its extant form. It further held that the Trial Chamber

30. A shift in the funding structure in later years allowed for an allotment of funds from the UN general budget directly to make up funding shortfalls.

31. See e.g., Samean Yun, *Budget Woes Trim Hearings*, REFWORLD, (Oct. 23, 2012), <https://www.refworld.org/docid/5090e57c19.html> [https://perma.cc/6684-B398]; Erika Kinetz, *Cambodian Side of ECCC Short of Funds: Auditor*, *CAMBODIA DAILY* (Dec. 21, 2007), <https://english.cambodiadaily.com/news/cambodian-side-of-eccc-short-of-funds-auditor-61714/> [https://perma.cc/Y8X2-YAYQ].

32. *Co-Prosecutors v. Nuon*, Case File/Dossier No. 002/19-09-2007-ECCCITC, Severance Order Pursuant to Internal Rule 89ter (Sept. 22, 2011), https://www.eccc.gov.kh/sites/default/files/documents/courtdoc/E124_EN.PDF [https://perma.cc/6AYV-QWXZ].

33. See Case 002: Decision on the Co-Prosecutors' Immediate Appeal of the Trial Chamber's Decision Concerning the Scope of Case 002/01, Extraordinary Chambers in the Courts of Cambodia, Feb. 8, 2013.

must then move as expeditiously as possible to the second trial, which should exhibit the requisite representativeness.³⁴

The events and crimes ultimately included in Case 2/1, as it was then named, were set at crimes against humanity connected to a series of forced population movements in the earlier part of the Khmer Rouge regime, and a mass execution of former Khmer Republic (as the government immediately preceding the Khmer Rouge was known) members of the military.³⁵ Nuon Chea and Khieu Samphan were convicted at trial in Case 2/1 of various crimes against humanity in August 2014,³⁶ and most of those convictions, as well as the life sentences imposed for them, were confirmed on appeal in November 2016.³⁷ Nevertheless, the defendants had yet to be tried for the majority of the crimes for which they had been indicted, including genocide and war crimes. Moreover, they remained in relatively good health, and funding for the court continued to be available, making a second trial possible.

III. AN INCONVENIENT DEATH

In October 2014, after the Trial Chamber issued its judgment in case 2/1, and while appeals were ongoing, the case 2/2 trial

34. Co-Prosecutors v. Nuon, Case File/Dossier No. 002/19-09-2007-ECCC-TC/SC(28), Decision on Immediate Appeals against Trial Chamber's Second Decision on Severance of Case 002: Summary of Reasons (July 23, 2013), https://www.eccc.gov.kh/sites/default/files/documents/courtdoc/2013-07-23%2016%3A57/E284_4_7_EN.PDF [<https://perma.cc/C3GY-PPS8>]; see also Co-Prosecutors v. Nuon, Case File/Dossier No. 002/19-09-2007-ECCC-TC/SC(18), Decision on the Co-Prosecutors' Immediate Appeal of the Trial Chamber's Decision Concerning the Scope of Case 002/01 (Feb. 8, 2013), https://www.eccc.gov.kh/sites/default/files/documents/courtdoc/2013-02-11%2018%3A23/E163_5_1_13_EN-1.PDF [<https://perma.cc/SLJ6-US7Y>].

35. Co-Prosecutors v. Nuon, Case File/Dossier No. 002/19-09-2007-ECCC-TC/SC, Decision on Severance of Case 002 Following Supreme Court Chamber Decision of Feb. 8, 2013 (Apr. 26, 2013), https://www.eccc.gov.kh/sites/default/files/documents/courtdoc/2013-04-26%2016%3A43/E284_EN.PDF [<https://perma.cc/N6N7-X97S>].

36. Co-Prosecutors v. Nuon, Case File/Dossier No. 002/19-09-2007-ECCC-TC/SC, Case 002/01 Judgement (Aug. 7, 2014), https://www.eccc.gov.kh/sites/default/files/documents/courtdoc/2014-08-07%2017%3A04/E313_Trial%20Chamber%20Judgement%20Case%20002_01_ENG.pdf [<https://perma.cc/Q4W9-PB44>].

37. Co-Prosecutors v. Nuon, Case File/Dossier No. 002/19-09-2007-ECCC/SC, Appeal Judgement (Nov. 23, 2016), https://www.eccc.gov.kh/sites/default/files/documents/courtdoc/%5Bdate-in-tz%5D/F36_EN_0.pdf [<https://perma.cc/2P4T-7RVE>].

began.³⁸ Relative to Case 2/1, the crimes included in 2/2 were far wider-ranging in terms of the type of crimes (which included for the first time charges such as genocide, and that addressed the practice of forced marriage, and marital rape), the chronological period (which covered the entirety of the Khmer Rouge period in power), and the geographic range (which included crime sites across the country).³⁹ This set of crimes captured to a far greater degree the fullness of the Khmer Rouge's atrocities.

The trial judgment in Case 2/2 was issued in March 2019, convicting Nuon Chea and Khieu Samphan of crimes against humanity, war crimes, and genocide of the Vietnamese.⁴⁰ It further convicted Nuon Chea alone of genocide against the Cham, a Muslim minority.⁴¹ On sentencing the defendants to life imprisonment,⁴² the Trial Chamber found Nuon Chea's involvement in the crimes to be "pivotal, extensive, and significant."⁴³ Nuon Chea filed a notice of his intention to appeal on various grounds but then died.⁴⁴

Nuon Chea's death at the interstitial moment between trial judgment and appeal judgment raised a question: what happens to convictions at trial when the defendant dies before an appeal is concluded? Put another way, should a trial judgment where the convicted person does not have the opportunity to appeal remain

38. Co-Prosecutors v. Nuon, Case File/Dossier No. 002-02/19-09-2007-ECCC/TC Transcript of Proceedings, Extraordinary Chambers in the Courts of Cambodia, (Oct. 17, 2014), available at: https://www.eccc.gov.kh/sites/default/files/documents/courtdoc/2014-10-24%2015%3A11/E1_242.1_TR002_20141017_Final_EN_Pub.pdf [https://perma.cc/5J3W-2HV4].

39. Co-Prosecutors v. Nuon, Case File/Dossier No. 002/19-09-2007-ECCC/TC, Decision on Additional Severance of Case 002 and Scope of Case 002/02 (Apr. 4, 2014), https://www.eccc.gov.kh/sites/default/files/documents/courtdoc/2014-04-07%2016%3A12/E301_9_1_EN-optimized.pdf [https://perma.cc/WPL9-NKLA]. Not all crimes in the original indictment were included in Case 2/1 and 2/2 combined, however the Trial Chamber ruled that those that were not would be dismissed.

40. Co-Prosecutors v. Nuon, Case File/Dossier No. 002/19-09-2007-ECCC/TC, Case 002/02 Judgement (Mar. 27, 2019), <https://drive.google.com/file/d/1LA9tt07C4fgC1aSb1cAoe9ofzwDuERx5/view?ts=5c9c9bb0> [https://perma.cc/F75G-B9GL].

41. *Id.*

42. *Id.* This life sentence was merged with the life sentence imposed in Case 002/1.

43. *Id.*, para. 2192.

44. Co-Prosecutors v. Nuon, Case File/Dossier No. 002/19-09-2007-ECCC/TC, Nuon Chea's Notice of Appeal Against the Trial Judgement in Case 002/02 (July 1, 2019), https://www.eccc.gov.kh/sites/default/files/documents/courtdoc/%5Bdate-in-tz%5D/E465_3_1_EN.PDF [https://perma.cc/3MST-YLDQ].

valid, or should it in some way be stricken from the record? This was a consequential question not only for the victims and Nuon Chea's supporters (including his family and attorneys), but also for the legacy of the ECCC generally. Of all the crimes for which Nuon Chea was convicted, perhaps the one that would have been most impacted if the judgment had been annulled entirely was the crime of genocide against the Cham. Because Khieu Samphan had not been convicted of genocide against the Cham, (a decision the prosecution did not appeal),⁴⁵ and because neither Case 001 nor Case 2/1 addressed genocide charges, should the trial judgment in Case 2/2 have been judicially erased, it is quite possible that the ECCC would conclude its work with no extant convictions for the genocide of the Cham.⁴⁶

Addressing the issue of the status of the Case 2/2 trial judgment, the Supreme Court Chamber ruled first that Nuon Chea's death terminated any further proceedings in his case.⁴⁷ It then ruled that the Trial Judgment was neither final as a matter of law, nor was it wiped away by Nuon Chea's death. Instead, it would continue to exist in a sort of suspended animation:

The Chamber clarifies that termination of proceedings does not vitiate that which has previously lawfully transpired. Accordingly, the [termination of proceedings] neither disturbed nor altered the Trial Judgement's findings; it merely had the effect of foreclosing the possibility of any future proceedings by or against Nuon Chea.⁴⁸

In coming to this conclusion, the Trial Chamber broke from a pair of ICTY decisions analyzing similar circumstances, where the court

45. Co-Prosecutors v. Nuon, Case File/Dossier No. 002/19-09-2007-ECCC/TC, Co-Prosecutors' Notice of Appeal Against the Judgement in Case 002/02 (June 21, 2019), https://www.eccc.gov.kh/sites/default/files/documents/courtdoc/%5Bdate-in-tz%5D/E465_2_EN.PDF [<https://perma.cc/J44N-V548>].

46. Other cases currently at various points at the ECCC pre-trial stage do concern charges of genocide against the Cham, but it is not clear that they will proceed to trial.

47. Co-Prosecutors v. Nuon, Case File/Dossier No. 002/19-09-2007-ECCC/SC, Decision to Terminate Proceedings Against Nuon Chea, para. 1 (Aug. 13, 2019), <https://www.eccc.gov.kh/sites/default/files/documents/courtdoc/%5Bdate-in-tz%5D/Decision%20to%20terminate%20proceedings%20against%20Nuon%20Chea%20ENGLISH.pdf> [<https://perma.cc/RV89-AVYQ>].

48. Co-Prosecutors v. Nuon, Case File/Dossier No. 002/19-09-2007-ECCC/SC, Decision on Urgent Request Concerning the Impact on Appeal Proceedings of Nuon Chea's Death Prior to the Appeal Judgment, para. 16 (Nov. 22, 2019), https://www.eccc.gov.kh/sites/default/files/documents/courtdoc/%5Bdate-in-tz%5D/F46_2_4_2_EN.PDF [<https://perma.cc/7SW5-ZTZD>].

found the trial judgments to be final on the death of the accused before appeal judgments.⁴⁹

IV. INNOVATIONS IN JUSTICE

The death of Nuon Chea before the end of Case 2/2 can be seen, at once, in two lights. On the one hand, as a cautionary tale; a system that started too late and moved too slow, at least as regards Nuon Chea (along with Ieng Thirith, Ieng Sary, and other Khmer Rouge figures who died before they could face justice). On the other hand, a tale of perseverance towards accountability; a tenacious four-decade-long push to bring to bear justice for the Khmer Rouge crimes, even if partial. Both narratives can be simultaneously true.

It is absolutely preferable for justice mechanisms to be established and move as quickly as possible while maintaining high standards and ensuring adequate procedural protections. It is also important to keep pushing for justice even when the likelihood of success seems small. After all, circumstances change. Consider the situation of Omar Al Bashir, who for many years thwarted his arrest warrant by the International Criminal Court with impunity.⁵⁰ It was starting to seem that he might never be held to account. But then he was deposed in a *coup d'état*, and the possibility that he will face justice for at least some of the events that occurred while he was president, either at the International Criminal Court or in Sudanese courts, increased substantially, although as of this writing it is still far from assured.⁵¹

Recent years have fortunately seen the development of a middle path for situations where full-fledged courts or trials do not yet seem reachable. These are the investigatory missions that gather evidence with an eye towards being prepared for trials if and when the opportunity arises, whether that be in an international (or internationalized) criminal tribunal, or regional or domestic courts. The current UN-established mechanisms encompass: the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of

49. *Id.* paras. 25, 29, 43.

50. Prosecutor v. Bashir, ICC-02/05-01/09, Warrant of Arrest for Omar Hassan Ahmad Al Bashir (Mar. 4, 2009).

51. *Omar al-Bashir: Sudan Agrees Ex-President Must Face ICC*, BBC, Feb. 11, 2020.

Persons Responsible for the Most Serious Crimes Under International Law Committee in the Syria Arab Republic Since March 2011 (“IIIM”);⁵² the Independent International Fact Finding Mission for Myanmar (“IIMM”);⁵³ and, the United Nations Investigative Team to Promote Accountability for Crimes Committed by Da’esh/ISIL (“UNITAD”).⁵⁴ In addition, non-governmental organizations such as the Syria Justice and Accountability Centre, and the Commission for International Justice and Accountability, are performing this role.

These mechanisms reflect both the import of striving towards accountability even when success is not assured and the import of expediting any eventual trials. If and when courts are ready to hear cases regarding the relevant situations, the process will presumably be significantly shortened by the substantial amount of evidence already having been compiled and processed with criminal trials in mind by the mechanisms. Moreover, the mechanisms allow for the collection of evidence that might not be available years in the future when a trial becomes possible, whether because a witness dies or cannot be located, or a document is lost or destroyed, or for some other reason. The processing of this evidence in advance also helps identify suspects for possible prosecution. Indeed, the work of these mechanisms is already, or will in the near future, facilitate accountability in various fora, including the International Criminal Court, the International Court of Justice, and domestic courts through evidence sharing. Some observers have even called for a permanent investigative mechanism to fill similar gaps on an ongoing basis.⁵⁵

Only time will show the full impact of these mechanisms on promoting justice for their relevant conflicts. The judgments

52. U.N. G.A. Res., A/71/L.48, Dec. 19, 2016.

53. U.N. G.A. Res., A/HRC/RES/39/2, Adopted by the Human Rights Council on 27 September 2018, Oct. 3, 2018.

54. U.N. S.C. Res. 2379, Sept. 21, 2017.

55. See Kingsley Abbott & Saman Zia-Zarifi, *Is it Time to Create a Standing Independent Investigative Mechanism (SIIM)? Part I*, OPINIO JURIS (Apr. 10, 2019), <http://opiniojuris.org/2019/04/10/is-it-time-to-create-a-standing-independent-investigative-mechanism-siim/> [https://perma.cc/9EEY-T59A]; Kingsley Abbott & Saman Zia-Zarifi, *Is it Time to Create a Standing Independent Investigative Mechanism (SIIM)? Part II*, OPINIO JURIS (Apr. 11, 2019), <http://opiniojuris.org/2019/04/11/is-it-time-to-create-a-standing-independent-investigative-mechanism-siim-part-ii/> [https://perma.cc/RL47-38TN].

reached in Case 002 are a great stride towards accountability, but if an investigative mechanism had been created before the ECCC was set up, the case against Nuon Chea might have been fully completed before his death. Nevertheless, the creation of stand-alone investigative mechanisms is a positive development that bends the arc closer to justice.