

# Targeted Groups, Rape and *Dolus Eventualis*

Assessing the ECCC's Contributions to Substantive International Criminal Law

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## Abstract

*This article discusses a number of substantive law developments at the Extraordinary Chambers in the Courts of Cambodia (ECCC) after the issuance of the trial judgment in Case 002/02 against Nuon Chea and Khieu Samphan. It focuses on three themes emblematic of the Khmer Rouge era's unique set of facts: the identification of targeted groups, male victims of rape in the context of forced marriage and the mens rea standard of indirect intent or dolus eventualis. These themes are distilled from the most pertinent jurisprudential developments regarding a number of specific crimes and a mode of liability: persecution on political grounds, genocide, other inhumane acts through conduct characterized as rape in the context of forced marriage, extermination and joint criminal enterprise. This article posits that these substantive law developments have an important place in international criminal law's corpus as a rare stepping stone between the post-World War II trials and the modern-day international criminal courts and tribunals.*

## 1. Introduction

What was part of customary international law as of 1975? Every substantive law query at the Extraordinary Chambers in the Courts of Cambodia (ECCC) starts with this question, rendering subsequent international jurisprudence of

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The discussion herein reflects the personal views of the authors and should not be ascribed to any institution or organization with which the authors are or have been affiliated.

reduced relevance at the military compound on the outskirts of Phnom Penh.<sup>1</sup> As a rare stepping stone between the post-World War II cases of the 1940s and 1950s and the ad hoc Tribunals of the 1990s, the ECCC's contribution to the history of substantive international criminal law is one well worth examining. The ECCC provides a rare window into the substantive international criminal law of the 1970s, and in this regard, acts as an extra benchmark to gauge the development of customary international law.<sup>2</sup>

Furthermore, particular factual aspects make the ECCC unique and worthy of a substantive law study. As the UN Group of Experts for Cambodia (established pursuant to General Assembly Resolution 52/135) noted in 1999, the Khmer Rouge period from April 1975 until January 1979 may be characterized as one of the most horrific onslaughts of human rights abuses by a government against its own people.<sup>3</sup> These abuses affected people's lives on many if not all levels and affected many if not all people living in Cambodia at the time. This included people's public lives, livelihoods and private lives, including their marriages and sex lives. For the ECCC, this has meant having to deal with rarely adjudicated facts where victims were targeted *en masse* for various — at times obscure — reasons, making fairly labelling the Khmer Rouge's abuses a challenge.

This article takes these two unique aspects of the ECCC's work as its point of departure, which thus entails being mindful of how facts can shape law while going back 45 years in time on the customary international law timeline. It discusses the substantive law developments at the ECCC as of the issuance of the trial judgment in Case 002/02 against Nuon Chea, who died on 4 August 2019,<sup>4</sup> and Khieu Samphan; it thus takes into account three trial judgments (Cases 001, 002/01 and 002/02) and two appeal judgments (Cases 001 and 002/01). The article focuses on three themes emblematic of the Khmer Rouge era's unique set of facts: the identification of targeted groups, male victims of rape in the context of forced marriage and the *mens rea* standard of indirect intent or *dolus eventualis*. These themes are distilled from the most pertinent jurisprudential developments regarding a number of specific crimes and a mode of liability, which this article addresses in the following order. First, it discusses the targeting theme by looking at persecution on political grounds as dealt

1 Appeal Judgment, *Kaing Guek Eav alias Duch* (Case 001), F28, Supreme Court Chamber (SCC), 3 February 2012, § 97.

2 R. Hopkins, 'The Case 002/01 Trial Judgment: A Stepping Stone from Nuremberg to the Present?' in S.M. Meisenberg and I. Stegmiller (eds), *The Extraordinary Chambers in the Courts of Cambodia: Assessing their Contribution to International Criminal Law* (T.M.C. Asser Press, 2016) 181–201, at 200–201. An equally important development to which the ECCC has contributed is that of modern evidence law in international crime cases. This topic is comprehensively addressed by Y. McDermott, 'The ECCC's Approach to Evidence and Proof' in this symposium in the *Journal*.

3 *Report of the Group of Experts for Cambodia Established Pursuant to General Assembly Resolution 52/135*, UN Doc. A/53/850-S/1999/23118, Annex, 18 February 1999, § 1 ('Annex').

4 ECCC Press Release, 'Accused Person Nuon Chea Dies', 4 August 2019, available online at <https://www.eccc.gov.kh/en/document/public-affair/press-release-accused-person-nuon-chea-dies> (visited 21 September 2019).

with by the Supreme Court Chamber (SCC) in Case 002/01 and the crime of genocide as addressed by Judge You Ottara in his separate opinion to the trial judgment in Case 002/02 (Section 2). Regarding both topics, this article focuses on the identification of a protected group. Secondly, the article highlights the Trial Chamber's (TC) findings in Case 002/02 regarding other inhumane acts through conduct characterized as rape in the context of forced marriage and its treatment of male victims in this context, taking into consideration the state of the law as of 1975 (Section 3). Thirdly, this article assesses the developments regarding the *mens rea* standard of *dolus eventualis* with respect to the SCC's and the TC's legal findings on extermination and joint criminal enterprise (JCE) (Section 4). Both topics will focus on the compatibility of *dolus eventualis* with the concept under scrutiny. Finally, this article includes brief considerations on the role of customary international law (Section 5).

## 2. The Khmer Rouge's Targeted Groups

The National Day of Remembrance is an annual event held in Cambodia on 20 May. It was first convened in 1984 as the 'Day of Hatred against the genocidal Pol Pot-Ieng Sary-Khieu Samphan clique and the Sihanouk-Son Sann reactionary groups', or in short, the Orwellian 'Day of Hate'.<sup>5</sup> Cambodia was still occupied by Vietnam in the 1980s, hence the communist lingo ('reactionary'), but current-day strongman and Prime-Minister Hun Sen was already in play. While Hun Sen gradually replaced Vietnamese communism with Western capitalism in the 1990s after the Vietnamese occupiers had left Cambodia, he retained the Day of Hate. In 2018, Hun Sen renamed it the 'National Day of Remembrance', and 20 May became an official holiday. To this day, re-enactments of the Khmer Rouge era can be seen throughout the country during this annual event, an opportunity to express rage against Pol Pot's 'genocidal ... clique'.

For a country that has been referring to the horrors of the Khmer Rouge era as 'genocide' for more than 40 years, the trial judgment in Case 002/02 against Nuon Chea and Khieu Samphan of 16 November 2018 might have come as a disappointment. In the first ECCC judgment to deal with the crime of genocide, the charges only pertained to genocide of the Vietnamese and the Cham Muslim minority groups, not the totality of the approximately 1.5–2 million victims of the Khmer Rouge period.<sup>6</sup> The TC convicted Nuon Chea for

5 T. Fawthrop and H. Jarvis, *Getting Away with Genocide? Cambodia's Long Struggle Against the Khmer Rouge* (UNSW Press, 2005), at 73–74.

6 This is the estimate that the trial judgment in Case 002/01 states that experts deem likely most accurate. See Judgment, *Nuon Chea and Khieu Samphan* (Case 002/01), E313, Trial Chamber (TC), 7 August 2014, § 174. On appeal, the SCC was critical of the TC's use of such estimates as the basis for factual findings. See e.g. Case 001 Appeal Judgment, *supra* note 1, §§ 536–537, 556, 600, 640. In Case 002/02's judgment, the TC is more cautious regarding this estimate, citing the ambiguity of demographic evidence in the absence of statistical data, especially within the context of the Khmer Rouge era. See Judgment, *Nuon Chea and Khieu Samphan* (Case 002/02), E465, TC, 16 November 2018, § 297 ('Experts accept estimates falling between 1.5 and

genocide by killing of both protected groups, and Khieu Samphan only for genocide by killing of the Vietnamese.<sup>7</sup> Other minorities and the Khmer national group were excluded from these charges.

In grasping the magnitude of the case, the Co-Investigating Judges organized the Closing Order in Case 002 around policies, which included the policy of re-education of ‘bad-elements’ and killing of ‘enemies’, both inside and outside the party ranks, and the policy of targeting specific groups.<sup>8</sup> Based on the factual findings made in relation to these policies, a wide range of crimes aimed at protected groups were charged, two of which are the focus of this section as most relevant in light of the Khmer Rouge era: persecution on political grounds and genocide. The central question here is: how is the targeted group, within the context of both (political) persecution and genocide, defined? This section discusses two relevant developments in this regard. First, it addresses the SCC’s legal findings on persecution on political grounds in Case 002/01, and more specifically, the identification of the (political) victim group. Secondly, it discusses the TC’s genocide findings in Case 002/02 and Judge You Ottara’s separate opinion, in which he advocates for a broader interpretation of Article 2 of the Genocide Convention, which possibly would have allowed for the Khmer national group to have been included in the genocide charges.

### *A. Persecution on Political Grounds: Delineating the Victim Group*

Article 5 ECCC Law lists among the crimes against humanity of ‘persecutions on political, racial, and religious grounds’.<sup>9</sup> This follows the wording of Article 5 of the Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY) and Article 3 of the Statute of the International Criminal Tribunal for Rwanda (ICTR). The word ‘and’, which deviates from the use of the word ‘or’ in Article 6(c) of the Charter of the International Military Tribunal (IMT), was not added to connote that all three grounds (political, racial *and* religious) must be present.<sup>10</sup> While not discussing this issue

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two million excess deaths as the most probable. The Chamber recalls, however, its finding that the absence of relevant and reliable statistical data for the purposes of assessing a precise number of deaths attributable to the CPK leads to inherent uncertainty surrounding the use of demographic evidence’.

7 Case 002/02 Trial Judgment, *Ibid*, Disposition.

8 Closing Order, *Nuon Chea et al.* (Case 002), D427, Co-Investigating Judges, 15 September 2010, § 157.

9 Law on the Establishment of ECCC for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea (DK), 10 August 2001, with inclusion of amendments as promulgated on 27 October 2004 (ECCC Law). For reference purposes, in the present Symposium crimes against humanity, more specifically the notion of ‘attack against the civilian population’ as interpreted by the International Co-Investigating Judge Bohlander is thoroughly discussed in K. Ambos, ‘The ECCC’s Contribution to Substantive ICL: The Notion of “Civilian Population” in the Context of Crimes Against Humanity’.

10 Judgment, *Tadić* (IT-94-1), TC, 7 May 1997, § 713.

explicitly, the SCC appears to agree that acts conducted upon each of the three grounds may amount to persecution; thus, they are not cumulative requirements.<sup>11</sup>

For the crime of persecution, Chambers examined what was part of customary international law as of 1975<sup>12</sup> and accepted the following definition: an act or omission which discriminates in fact and which denies or infringes upon a fundamental right laid down in international customary or treaty law (*actus reus*), which was deliberately perpetrated with the intent to discriminate on political, racial or religious grounds (*mens rea*).<sup>13</sup> This definition, identical to the one employed at the ad hoc Tribunals,<sup>14</sup> is uncontested at the ECCC. However, how to define the group discriminated against based on political grounds — in other words, a political group — has been the subject of discussion, not only on appeal in Case 002/01 and at trial in Case 002/02 at the ECCC but also at the ad hoc Tribunals.<sup>15</sup>

There are roughly two schools of thought when it comes to defining the political group for the purpose of the crime against humanity of political persecution: one that allows for a subjective identification of the group *by the perpetrator* and one that takes a more objective approach to the group's definition requiring that the victim must *actually belong* to the protected group.

In the appeal judgment in Case 002/01, the SCC took the subjective approach, albeit not without ambiguity. The alleged error at issue related to the 'definition of political persecution adopted by the Trial Chamber, particularly its finding that this crime can be committed against not only political groups or individuals who hold certain political views, but also against discernible groups

11 Case 001 Appeal Judgment, *supra* note 1, § 215 (noting that 'persecution on political racial or religious grounds is clearly listed as an underlying crime against humanity in Article 5 of the ECCC Law' (emphasis added)); Appeal Judgment, *Nuon Chea and Khieu Samphan* (Case 002/01), F36, SCC, 23 November 2016, § 667. For an appraisal of the unique features of the ECCC appellate system and the contribution of the SCC to substantive international criminal law, see in this symposium of the *Journal*, S. Vasiliev, 'ECCC Appeals: Appraising the Supreme Court Chamber's Interventions'.

12 The International Criminal Court's definition of persecution is of limited relevance in this regard, as one may agree with the ICTY TC in *Kupreškić* that Art. 7(1)(h) ICCSt. is 'not consonant with customary international law'. See Judgment, *Kupreškić et al.* (IT-95-16-T), TC, 14 January 2000, § 580. In any event, any reliance on the case law of a tribunal or court postdating the ECCC, including the ad hoc Tribunals, raises the question of whether customary international law has evolved since the Khmer Rouge era.

13 Case 002/02 Trial Judgment, *supra* note 6, § 713; Case 001 Appeal Judgment, *supra* note 1, §§ 236–240, 257, 261, 262, 271–278.

14 See e.g. Judgment, *Krnjelac* (IT-97-25-A), Appeals Chamber, 17 September 2003, § 185.

15 See e.g. *Ibid* (taking a subjective approach and disagreeing with the TC's more objective approach); Judgment, *Krnjelac* (IT-97-25), TC II, 15 March 2002, § 432 (taking a more objective approach). See also E. Kantorowicz-Reznichenko, 'Misidentification of Victims under International Criminal Law: An Attempted Offence?' 15 *Journal of International Criminal Justice* (JICJ) (2017) 291–318, at 314 and 315; H. Brady and R. Liss, 'The Evolution of Persecution as a Crime Against Humanity', in M. Bergsmo et al. (eds), *Historical Origins of International Criminal Law: Volume 3* (Torkel Opsahl Academic EPublisher, 2015) 429–556, at 525–529 (concluding that the *Krnjelac* Appeals Chamber finally resolved the issue at the ICTY).

(not necessarily holding any common political views) who are discriminated against because of political motivations or the political agenda of their persecutors'.<sup>16</sup> The SCC found no error in this reasoning, based on its previous findings in Case 001 against Kaing Guek Eav *alias* Duch and its review of a number of post-World War II cases: for a perpetrator's conduct to discriminate in fact, it is required that 'a victim is targeted because of the victim's membership in a group *defined by the perpetrator* on specific grounds, namely on political, racial, or religious basis'.<sup>17</sup> It further clarified, however, that the victim must '*actually belong* to a sufficiently *discernible* political, racial or religious group' and that 'the relevant discriminatory intent necessarily assumes that the victim is a member of a political, racial or religious group'.<sup>18</sup>

There is a slight — perhaps inadvertent — contradiction in the SCC's reasoning. The requirement that the victim of persecution must *actually belong* to a sufficiently discernible group is at odds with the requirement that the group is defined by the perpetrator and that the victim group need not hold any common political views, as it appears to preclude any margin of error in this regard. However, getting to the heart of the matter when discussing the perpetrator who defines the group, the SCC found that '[a] group or groups persecuted on political grounds may include various categories of persons . . . [T]hey may be made the object of political persecution not because all, or even the majority, of their members hold political views opposed to those of the perpetrator, but because they are perceived by the perpetrator as (potential) opponents or otherwise as obstacles to the implementation of the perpetrator's political agenda.'<sup>19</sup>

While the authors do not disagree with the SCC that this is a logical way of defining the political group, it does not resolve the question of what is then left of the requirement that the victim must *actually belong* to a 'sufficiently discernible' political group. As noted above, the SCC found that for political persecution to materialize, the members of the targeted group need not 'actually hold political views'.<sup>20</sup> It further found that post-WWII case law shows that 'persecution on political grounds can also take place where victims are perceived to be political opponents or are associated with a rival political group'.<sup>21</sup> The SCC eventually concluded that groups can be defined in a negative sense (i.e. 'non-Serbs', 'enemies and opponents of national socialism') or cumulatively ('Serbs, Jews, Gypsies, as well as Croats who did not accept the ideology'). However, the question remains, if the persecuted victims do not need to hold any political views or share any common identity, how do they then *actually belong* to any specific political group? Perhaps the SCC did not intend to include the phrase 'actually belonging' as an independent requirement, and we should read it only as a qualifier of the perception of the perpetrator. Still, the use of

16 Case 002/01 Appeal Judgment, *supra* note 11, § 663.

17 *Ibid.*, § 667 (emphasis in original).

18 *Ibid.* (Emphasis in original).

19 *Ibid.*, § 669 (footnotes omitted).

20 *Ibid.*

21 *Ibid.*, § 670.

the word 'actually' is then unfortunate, as it implies something objectively perceptible as opposed to something subjective.

While this conflation of subjective and objective approaches was not an issue in Case 002/01, it matters in general. Taking a *subjective* approach (i.e. 'defined by the perpetrator') to an *objective* element of the crime (i.e. 'discrimination in fact' as *actus reus* element) can be problematic as it has consequences for what constitutes a mistake of fact. It may be argued that persecution is a results-based crime, such that there must be a discriminatory effect (thus, discrimination *in fact*) upon the victims. This indeed differentiates the *actus reus* of persecution from that of other crimes against humanity. However, Nersessian notes '... a failure [at international criminal tribunals] to analytically segregate mistakes of fact by the accused from the composition of groups in the first instance'.<sup>22</sup> Nersessian does not outright reject the subjective approach to defining the contours of a group, '[b]ut once those subjective criteria are discerned, they become objectively dispositive in determining whether a member of the group has been victimised. ... [O]nce such criteria are established, any erroneous subsequent belief as to whether a particular victim possesses those group characteristics should be treated as a mistake of fact.'<sup>23</sup> A perpetrator would then not have committed persecution, but attempted persecution, an offence that generally falls outside the jurisdiction of international criminal courts and tribunals, but not outside the ICC's.<sup>24</sup>

The SCC appears to take a different view, allowing perpetrators a margin of error in their perception when defining the targeted group. The SCC argued that 'it is appropriate and necessary to take into account the perpetrator's perspective when defining the group that is the object of persecution — if it were otherwise, discernable groups that are persecuted for abstruse reasons would be left unprotected'.<sup>25</sup> Moreover, the group as such is not mentioned in the definition of persecution: the groups (political, racial or religious) are inferred from the types of discriminatory grounds, which necessarily introduce a subjective element. To put it more plainly, persecution is not defined as an act or omission committed against a political, racial or religious group as such<sup>26</sup>; rather, it is defined as an act or omission committed against an individual based on political, racial or religious grounds — grounds that necessarily reflect the perpetrator's motives. While subjective criteria also play a role in

22 D.L. Nersessian, 'Comparative Approaches to Punishing Hate: The Intersection of Genocide and Crimes Against Humanity', 43 *Stanford Journal of International Law* (2007) 221–264, at 242.

23 *Ibid.*

24 Art. 25(3)(f) ICCSt.

25 Case 002/01 Appeal Judgment, *supra* note 11, § 679.

26 In this sense, the definition of persecution differs from that of genocide: the former does not state expressly that the act or omission amounting to persecution must take place against a member of the protected group, while the latter expressly requires that the genocidal act be committed against a member of the protected group. See H. Brady and R. Liss, 'The Evolution of Persecution as a Crime Against Humanity', in Bergsmo et al., *supra* note 15, at 525 and 526, fn 384. See also Nersessian, *supra* note 22, at 258 ('Persecution (like all crimes against humanity) is an offense against individuals. This is precisely the opposite of genocide, which quintessentially is an offense against groups.').

defining the protected group for genocide (see below Section 2.B), this is what differentiates persecution from genocide; these crimes protect different underlying interests. Genocide targets the group's physical and biological existence as such; thus, the group itself is the victim. Persecution targets the individual based on certain characteristics — protection of the larger (political, racial or religious) group is incidental.<sup>27</sup> However, this does not mean that the individual as such is the target of persecution; rather, the target is his or her membership in a specific political, racial or religious group, as perceived by the perpetrator.<sup>28</sup> The perpetrator's perception can therefore not be ignored when defining the 'political group'.

Where an objective approach raises the possibility of a mistake of fact, the subjective approach appears to allow such mistakes without rendering the offence an attempted (or a different) offence.<sup>29</sup> In Case 001, the SCC favoured a more objective approach, rejecting the possibility of mistake of fact expressly<sup>30</sup>; in Case 002/01, it was not addressed. Either way, the question of what is left of the requirement that a person must 'actually belong' to a political group remains unanswered.

### **B. The Cambodian 'Genocide'**

As noted above, the charges in Case 002/02 included genocide by killing committed against the Vietnamese and the Cham. Genocide against the Khmer national group was not considered. In 2010, the Civil Parties requested the Co-Investigating Judges to have an external expert examine the possibility of genocide charges regarding the Khmer national group,<sup>31</sup> but this request was dismissed.<sup>32</sup>

Article 4 ECCC Law follows the definition of genocide as laid down in Article 2 of the Genocide Convention of 1948.<sup>33</sup> Acts of genocide are defined as any acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.<sup>34</sup> In Case 002/02, the TC noted that there are not generally accepted and precise definitions of each of these

27 Nersessian, *supra* note 22, at 260.

28 Case 002/01 Appeal Judgment, *supra* note 11, § 668; Judgment, *Blaskić* (IT-95-14-T), TC, 3 March 2000, § 235.

29 Kantorowicz-Reznichenko, *supra* note 15, at 307.

30 Case 001 Appeal Judgment, *supra* note 1, §§ 275–277.

31 Sixth Investigative Request of Co-Lawyers for Civil Parties Concerning the Charge of Genocide Against the Khmer Nationals, *Nuon Chea et al.* (Case 002), D349, Lead Co-Lawyers, 4 February 2010, §§ 3 and 41–44.

32 Order on Civil Parties Request Concerning the Charge of Genocide Against the Khmer Nationals, *Nuon Chea et al.* (Case 002), Co-Investigating Judges, 24 February 2010, § 4.

33 See e.g. Case 002/02 Trial Judgment, *supra* note 6, §§ 790–804.

34 The English text of the ECCC Law contains an error: instead of 'as such' it reads 'such as'. This must be a mistranslation or unintended error, as the Law expressly states that it follows the Genocide Convention. No ECCC Chamber, nor Co-Investigating Judge, has ever argued otherwise.

groups, but it followed the ad hoc Tribunals in concluding that '[e]ach of these concepts must be assessed in the light of a particular political, social and cultural context.'<sup>35</sup> It further noted the significance in this regard of the object and purpose of the Genocide Convention, which concerned 'the destruction of a race, tribe, nation, or other group with a particular positive identity' and the 'denial of the right of existence of entire human groups'.<sup>36</sup> The TC also held that these groups cannot be defined by negative criteria; it 'must have a particular distinct identity and be defined "as such" by its common characteristics rather than a lack thereof'.<sup>37</sup> In this regard, genocide differs from persecution, which conversely can be defined by negative criteria, as discussed above. Finally, the TC noted that the protected group is defined by considering both objective and subjective elements.<sup>38</sup>

TC Judge You Ottara attached a separate opinion to the trial judgment in Case 002/02 to address the fact that genocide against the Khmer national group was not considered in Case 002. He noted that the approach in the Case 002/02 trial judgment was 'much too narrow', risking 'an overly formalistic, and entirely unrealistic, approach to the definition and identifications of genocides'.<sup>39</sup> Judge You Ottara argued that it would have been possible to take a different approach that would have allowed labelling crimes against the Khmer national group genocide.

Judge You Ottara stated that his argument is different than a call for recognizing political or cultural genocide.<sup>40</sup> He advanced the idea that if certain segments — both in qualitative and quantitative terms — of a national group are intended to be destroyed, it could potentially lead to the intent to destroy said group as such in whole or in part. He concluded:

[I]n my view there would have been a clear basis to examine the broader context of events in Cambodia between 17 April 1975 and 6 January 1979, in particular whether there existed an intention to destroy a substantial part of the very fabric of the Cambodian national group as it then existed. This has little to do with any discussion of "political groups" and/or cultural genocide. If it had been proved that the Khmer Rouge intended to purify Cambodia by intentionally destroying a substantial part of the Cambodian national group, both in terms of numbers and the qualitative features of the society — its religion, leaders and the political, social and cultural features which (and this is the crucial point) defined the national group between 17 April 1975 and 6 January 1979 — the ECCC might have been able to give to such deaths and destruction their proper meaning.<sup>41</sup>

35 Case 002/02 Trial Judgment, *supra* note 6, § 792 (and accompanying footnote).

36 *Ibid.*

37 *Ibid.*, § 793.

38 *Ibid.*, § 795.

39 Judge You Ottara's Separate Opinion on Genocide (*Prolai Pouch-Sas*), Case 002/02 Trial Judgment, *supra* note 6, § 4469.

40 See also B. Van Schaack, 'The Crime of Political Genocide: Repairing the Genocide's Convention's Blind Spot', 106 *The Yale Law Journal* (1997) 2259–2291.

41 Judge You Ottara's Separate Opinion on Genocide (*Prolai Pouch-Sas*), Case 002/02 Trial Judgment, *supra* note 6, § 4517.

The idea that the crimes committed against the Cambodian population can be construed as genocide against the Khmer national group, intending to destroy a part of it, has been floated before.<sup>42</sup> Yet, the UN Expert Group for Cambodia declined to address this head-on in its report in 1999, leaving it up to a tribunal whether such charges were to be brought, and instead focusing on charges of genocide committed against the Vietnamese, Cham and Buddhists, which it deemed more likely.<sup>43</sup>

In objective terms, the definition of genocide as outlined by the TC does not categorically preclude the Khmer national group as such from being deemed a protected group in the sense of the Genocide Convention.<sup>44</sup> Considering that the protected group is defined by both objective and subjective criteria; however, the following stands in the way of convincingly applying the Genocide Convention to the Khmer Rouge's crimes against its own population: '[t]he subjective criterion stresses the importance of the perpetrators' perception of the groups. Such an interpretation allows the victim to be protected by virtue of their "perceived" membership but also incorporates the victim group in the *mens rea* of the crime. Thus, ascertaining the formal existence of protected groups amongst the victims is not sufficient, it also needs to be proven that *the perpetrator* categorised them "as such".'<sup>45</sup> The crux is thus that the specific intent to destroy the Khmer national group 'as such' appears to be lacking in the DK situation due to who the perpetrators were (predominantly also members of the Khmer national group) and with what intent they targeted the Khmer national group (political beliefs leading to population stratification and purification based on social class fuelled by an omnipresent fear of counter-revolutionary enemies).<sup>46</sup> Ultimately, of course, these are matters for a trier of fact to scrutinize. Nonetheless, massive killings of one's own people as occurred in Cambodia between April 1975 and January 1979 — 'auto-genocide' as it has been coined by some<sup>47</sup> — cannot persuasively be characterized as genocide in the sense of the Convention.<sup>48</sup>

42 See D. Hawk, 'The Cambodian Genocide', in I.W. Charney (ed.), *Genocide: A Critical Bibliographic Review* (Facts on File Publications, 1988) 137–154, at 137, 139 and 140; B. Kiernan, 'The Cambodian Genocide: Issues and Responses', in G.J. Andreopoulos (ed.), *Genocide: Conceptual and Historical Dimensions* (University of Pennsylvania Press, 1994) 191–228, at 201 and 202; A.L. Hinton, 'Why Did You Kill?: The Cambodian Genocide and the Dark Side of Face and Honor', 57 *The Journal of Asian Studies* (1998) 93–122. See also Van Schaack, *supra* note 40, at 2261.

43 Annex, *supra* note 3, §§ 63–65.

44 *Ibid.*, § 65. See also W.A. Schabas, *Genocide in International Law: The Crime of Crimes* (2nd edn., Cambridge University Press, 2009), at 139; W.A. Schabas, 'Problems of International Codification – Were the Atrocities in Cambodia and Kosovo Genocide?' 35 *New England Law Review* (2001) 287–302, at 290 and 291.

45 M. Vianney-Liaud, 'Legal Constraints in the Interpretation of Genocide', in Meisenberg and Stegmiller, *supra* note 2, 255–290, at 272 (footnotes omitted).

46 *Ibid.*, at 271, 278.

47 Judge You Ottara's Separate Opinion on Genocide (*Prolai Pouch-Sas*), Case 002/02 Trial Judgment, *supra* note 6, §§ 4475–4476 (discussing how the term 'auto-genocide' has been used in relation to the DK period). See also J. Lacouture, 'The Bloodiest Revolution', 24 *The New York Review of Books*, 31 March 1977, at 9 and 10.

48 Schabas, 'Problems of International Codification', *supra* note 44, at 288.

The political mass killings which took place in DK have been found to constitute a myriad of crimes against humanity in all ECCC cases to date, including the crime against humanity of persecution based on political grounds.<sup>49</sup> This has not made these atrocities any less severe or less punishable. Unfortunately, genocide is often still considered the 'crime of crimes', and the magnitude and severity of the Cambodian atrocities continue to tempt both lawyers and non-lawyers to argue in favour of the 'auto-genocide' label.<sup>50</sup>

### 3. Rape Within the Context of Forced Marriage

In Case 002/02, Nuon Chea and Khieu Samphan were charged with rape within the context of forced marriage. In DK, men and women were forced to marry in mass ceremonies. The marriage was consummated forcibly and both men and women suffered psychosocial consequences of the crime.<sup>51</sup>

The crime is not unique to the Khmer Rouge situation. In *Brima et al.*, the Special Court for Sierra Leone (SCSL) entered a conviction regarding forced marriages in Sierra Leone. The SCSL formally recognized forced marriage as a crime against humanity under the category of 'other inhumane act'.<sup>52</sup> According to the SCSL, forced marriage involves a perpetrator compelling a person by force or threat of force, through words or conduct of the perpetrator, or anyone associated with him, into a forced conjugal association resulting in great suffering or serious physical or mental injury on the part of the victim. In *Sesay et al.*, the SCSL Appeals Chamber upheld the TC's ruling on the conviction of forced marriage.<sup>53</sup>

#### A. Rape as a Crime Against Humanity

The charges were based on the role of Nuon Chea and Khieu Samphan in pursuing the CPK's policy of regulating family-building and marriage in an attempt to control the people and increase DK population. Instructions on the

49 In this regard, it is worth noting that the TC in Case 002/02 devoted considerable attention to the notion of 'real or perceived enemies' of the Communist Party of Kampuchea (CPK). See Case 002/02 Trial Judgment, *supra* note 6, §§ 3744–3863.

50 J. Menzel, 'The Khmer Rouge Tribunal: A Milestone in Cambodian and International Law', 1 *Asia-Pacific Yearbook of International Humanitarian Law* (2005) 134–143, at 141 and 142; Schabas, 'Problems of International Codification', *supra* note 44, at 288 and 289.

51 Case 002/02 Trial Judgment, *supra* note 6, §§ 3641–3665. See also Th. de Langis, 'A Missed Opportunity, a Last Hope? Prosecuting Sexual Crimes under the Khmer Rouge Regime', 3 *Cambodia Law and Policy Journal* (2014) 39–43, at 40.

52 Judgment, *Brima et al.* ('AFRC') (SCSL-04-16-T), TC II, 20 June 2007, §§ 1406–1413, 1460–1473. See F. Nguyen, 'Emerging Voices: Taking Forced Marriage Out of the "Other Inhumane Acts" Box', *Opinio Juris*, 31 July 2013, available online at <http://opiniojuris.org/2013/07/31/emerging-voices-taking-forced-marriage-out-of-the-other-inhumane-acts-box/> (visited 1 October 2019).

53 Judgment, *Sesay et al.* ('RUF') (SCSL-04-15-A), Appeals Chamber, 26 October 2009.

regulation of marriage originated from the upper level of the CPK. The lower level was involved in the matching of couples, which was authorized by the upper level.<sup>54</sup> This policy resulted in a nationwide system that involved widespread forced marriage and rape.<sup>55</sup> The TC found that after wedding ceremonies, newly wedded couples were to sleep in an assigned location where militiamen would monitor the couples at night to ensure the marriage was consummated. Men and women were forced to have sexual intercourse, in some cases at gunpoint.<sup>56</sup> Couples who refused would be re-educated or threatened with being killed or punished.<sup>57</sup> The Co-Prosecutors alleged that ‘by imposing the consummation of forced marriages, the perpetrators committed a physical invasion of a sexual nature against a victim in coercive circumstances in which the consent of the victim was absent’ and that ‘perpetrators intended the physical invasion of a sexual nature, with the knowledge that it occurred in coercive circumstances or otherwise without the consent of the victim’.<sup>58</sup>

The TC did not rule on rape outside the context of forced marriage since this was not in the Closing Order.<sup>59</sup> Responding to the Co-Lawyers for the Civil Parties that these charges should be added, it found that there was no legal basis for such charges since the Co-Investigating Judges had found that while rape did occur in security centres, these crimes could not be linked to the Accused. There was no evidence to support a finding that the CPK leaders used rape as a policy in security centres.<sup>60</sup>

Both accused were charged with rape as the crime against humanity of ‘other inhumane acts’. Referring to a 2011 Pre-Trial Chamber ruling in Case 002, the TC held that during the period 1975–1979, rape did not exist as a ‘stand-alone crime against humanity’.<sup>61</sup> This was made clear in the *Duch*

54 Case 002/02 Trial Judgment, *supra* note 6, § 3693.

55 *Ibid.*, § 279.

56 *Ibid.*, §§ 3645–3661.

57 *Ibid.*, § 3396.

58 *Ibid.*, § 729.

59 *Ibid.*, § 3535. See e.g. Decision on Civil Parties’ Immediate Appeal against the TC’s Decision on the Scope of Case 002/02 in Relation to the Charges of Rape, *Nuon Chea and Khieu Samphan* (Case 002/02), E306/7/3/1/4, SCC, 12 January 2017 (dismissing as inadmissible the Civil Party Lead Co-Lawyers’ appeal against the TC’s ruling that the scope of the trial in Case 002/02, as far as the charges of rape were concerned, did not include the factual allegations of rape regarding incidents that occurred outside the context of forced marriage).

60 Closing Order Case 002, *supra* note 8, §§ 1426–1429. This has been vigorously contested: B. Ye, *Report on the Proceedings on the 2011 Women’s Hearing on Sexual Violence Under the Khmer Rouge Regime*, Cambodian Defenders Project, May 2012, available online at <http://gbvkr.org/wp-content/uploads/2014/05/WomenHearingEng.pdf> (visited 1 October 2019). See also Langis, *supra* note 51, 39–43.

61 Decision on Ieng Thirith’s and Nuon Chea’s Appeal against the Closing Order, *Ieng Thirith and Nuon Chea* (Case 002), D427/2/15, Pre-Trial Chamber (PTC), 13 January 2011, at 6; Decision on Ieng Sary’s Appeal Against Closing Order, *Ieng Sary* (Case 002), D427/1/30, PTC, 11 April 2011, §§ 384–396.

case (Case 001) when the SCC held that by 1975 rape was well established as a war crime but not as a discrete crime against humanity.<sup>62</sup> 'Other inhuman acts', on the other hand, was a well-established category of crimes against humanity.<sup>63</sup> It featured as a category of crimes against humanity in the Statute of the International Military Tribunals for Nuremberg and Tokyo and the subsequent Control Council 10 legislation,<sup>64</sup> as well as in World War II case law.<sup>65</sup>

The question of how the imprecise contours of 'other inhumane acts' comport to *lex certa* and foreseeability was answered by the Pre-Trial Chamber in Case 002, where it concluded that by 1975 'other inhumane acts' only included acts which are both 'inhumane' and of a 'similar nature and gravity' to those specifically enumerated: murder, extermination, enslavement and deportation.<sup>66</sup> The SCC endorsed this finding when it held that the requirement of similar nature and gravity made it sufficiently specific.<sup>67</sup> The SCC also referred to the ICC Statute, which had made this (customary law) requirement explicit in Article 7(1)(k): 'other inhumane acts of similar character [to those practices listed before]'.<sup>68</sup> Moreover, ad hoc Tribunal jurisprudence since the 1990s had further circumscribed and developed 'other inhumane acts'.<sup>69</sup> The

62 Case 001 Appeal Judgment, *supra* note 1, §§ 176 and 180: 'In conclusion, the Supreme Court Chamber finds that a survey of custom and treaties before and during the ECCC's temporal jurisdiction indicates that rape was not a distinct crime against humanity under those sources of international law at the relevant time.' (§ 180).

63 Case 002/01 Appeal Judgment, *supra* note 11, §§ 576–579.

64 *Ibid.*, § 576, referring to IMT Charter, Art. 6(c); IMTFE Charter, Art. 5(c); Control Council Law No. 10, Art. II(1)(c); Nuremberg Principles, Principle VI(c).

65 *Ibid.*, referring to Judgment, *The United States of America v. von Weizsaecker et al.* ('Ministries Case'), 11 April 1949, reprinted in *Trials of War Criminals Before the Nuernberg Military Tribunals under Control Council Law No. 10*, Vol. XIV, 308–870, at 467–468 (the Accused were indicted for a range of crimes, 'including murder, extermination, enslavement, imprisonment, killing of hostages, torture, persecutions on political, racial, and religious grounds, and other inhumane and criminal acts'); Judgment, *The United States of America v. Brandt et al.* ('Medical Case'), 19 August 1947, reprinted in *Trials of War Criminals Before the Nuernberg Military Tribunals under Control Council Law No. 10*, Vol. II, 171–300, at 198 (accused found guilty for taking a consenting part in 'atrocities, in the course of which murders, brutalities, cruelties, tortures and other inhumane acts were committed'); Judgment, *The Netherlands v. Wilhelm Gerbsch* (78), Netherlands Special Court, First Chamber, 28 April 1948, reprinted in *Law Reports of Trials of War Criminals*, Vol. 13, 131–137, at 134 ('[a]cts of ill-treatment are covered by the terms "other inhumane acts"'); Judgment, *The Netherlands v. Willy Zuehlke* (89), Netherlands Special Court, reprinted in *Law Reports of Trials of War Criminals*, Vol. 14, 139–151, at 145 (illegal detention 'fell under the notion of "other inhumane acts committed against any civilian population"').

66 Decision on Ieng Sary's Appeal Against Closing Order, *supra* note 61, §§ 389.

67 Case 002/01 Appeal Judgment, *supra* note 11, §§ 584–586.

68 *Ibid.*, §§ 385–386.

69 *Ibid.*, § 579, referring to Judgment, *D. Milošević* (IT-98-29/1-T), TC III, 12 December 2007, § 934; Judgment, *Vasiljević* (IT-98-32-T), TC II, 29 November 2002, § 234, confirmed in Judgment, *Vasiljević* (IT-98-32-A), Appeals Chamber, 25 February 2004, § 165; Judgment, *Galić* (IT-98-29-T), TC I, 5 December 2003, § 152. See also Judgment, *Kordić and Cerkez* (IT-95-14/2-A), Appeals Chamber, 17 December 2004, § 117; Judgment, *Martić* (IT-95-11-T), TC I, 12 June 2007, § 83; Judgment, *Blagojević and Jokić* (IT-02-60-T), TC I, 17 January 2005, §

SCC in Case 002/01 drew on these developments when it held that other inhumane acts requires proof of three elements:

- (i) there was an act or omission of similar seriousness to the other acts enumerated as crimes against humanity; (ii) the act or omission caused serious mental or physical suffering or injury or constituted a serious attack on human dignity; and (iii) the act or omission was performed intentionally.<sup>70</sup>

The crime against humanity of other inhumane acts through conduct characterized as rape is charged in Cases 003 and 004/02, and the TC's findings in Case 002/02 will no doubt return in those cases.

### B. Men as Victims of Rape

The TC in Case 002/02 adopted the definition of rape developed in ICTY case law<sup>71</sup> and adopted in Case 001.<sup>72</sup> Rape, as understood in 1975–1979, is the sexual penetration, however slight, of: (i) the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (ii) the mouth of the victim by the penis of the perpetrator, where such sexual penetration occurs without the consent of the victim.<sup>73</sup> This definition of rape is still premised on a consent requirement, although a coercive environment can mean that the Prosecutor does not have to prove the victim's lack of consent.<sup>74</sup> Most recently in the ICC case of *Bemba*, the consent requirement has been watered down.<sup>75</sup> The requirement of non-consent of the victim was thought to undermine efforts to bring perpetrators to justice.<sup>76</sup> The TC recognized that certain categories of people may be fundamentally unable to give consent whatever the circumstances.<sup>77</sup> Moreover, from the wording of the ICC's Elements of Crimes, one can deduce that a 'coercive environment' is broader than force, threat of force or coercion.<sup>78</sup> The ECCC, however, mindful

626; *Krnojelac* Trial Judgment, *supra* note 15, § 130; Judgment, *Kajelijeli* (ICTR-98-44A-T), TC II, 1 December 2003, §§ 932–933; Judgment, *Kayishema and Ruzindana* (ICTR-95-1-T), TC II, 21 May 1999, § 151.

70 Case 002/01 Appeal Judgment, *supra* note 11, § 580.

71 Judgment, *Furundzija* (IT-95-17/1-T), TC, 10 December 1998, § 185; Judgment, *Kunarac et al.* (IT-96-23-T and IT-96-23/1-T), TC, 22 February 2001, § 438, 460; Judgment, *Kunarac et al.* (IT-96-23 and IT-96-23/1-A), Appeals Chamber, 12 June 2002, §§ 127 and 128.

72 Judgment, *Kaing Guek Eav alias Duch* (Case 001), E188, TC, 26 July 2010, §§ 362–365 endorsed in Case 001 Appeal Judgment, *supra* note 1, § 208.

73 Case 002/02 Trial Judgment, *supra* note 6, § 731.

74 Judgment, *Kunarac et al.*, TC, *supra* note 71, § 438.

75 Judgment, *Bemba* (ICC-01/05-01/08-3343), TC, 21 March 2016, §§ 99 and 102.

76 *Ibid.*, § 105.

77 *Ibid.*, §107.

78 J.N. Clark, 'The First Rape Conviction at the ICC. An Analysis of the *Bemba* Judgment', 14 *JICJ* (2016) 667–687, at 678.

of the customary law position in the late 1970s, still adheres to the (older) ICTY case law.<sup>79</sup>

The requirement that rape constitutes an act of penetration means that men cannot be victims of rape as charged in this case.<sup>80</sup> While men could not refuse to consummate marriage, that is, were forced to rape their wives and equally suffered psychologically, this was not considered rape.<sup>81</sup> The Co-Prosecutors have appealed this part of the judgment arguing that the TC should have adopted a more 'inclusive and gender-neutral definition of rape'.<sup>82</sup> The TC, however, did not accept that such a definition was part of customary international law at the time and instead considered whether men were subjected to 'sexual violence of such gravity that it amounts to other inhumane acts'. Here, the TC concluded that the conduct did not meet the threshold of seriousness to qualify as an 'inhumane act':

In the absence of clear evidence concerning the level of seriousness of this kind of conduct and of its impact on males, the Chamber, while acknowledging that men were subjected to sexual violence that was contrary to human dignity, is unable to reach a finding on the seriousness of the mental and physical suffering suffered by these men. Accordingly, the Chamber is unable to reach a conclusion to the requisite standard in relation to these incidents and does not consider that they constitute the crime against humanity of other inhumane acts through sexual violence.<sup>83</sup>

The Co-Prosecutors appealed this finding arguing that the TC adopted too narrow an interpretation of 'inhumane acts'. As discussed above, in Case 002/01 the SCC had defined inhumane acts as acts/omissions that cause (i) serious physical or mental suffering or (ii) constitute a serious attack on human dignity.<sup>84</sup> The Co-Prosecutors argued that by applying the test of 'seriousness of suffering', which is part of the first subcategory of inhumane acts, to the second subcategory, the TC adopted a test that was too narrow and out of step with ad hoc Tribunal case law.<sup>85</sup>

We await to see what the SCC decides, but at this point we would argue that the Co-Prosecutors' appeal is not convincing. While the TC's ruling is indeed imprecise in that it extends the serious suffering-test — which belongs to the first limb — to the second limb, we wonder whether this eventually makes much of a difference. The attack on human dignity needs to be 'serious' to qualify as a crime against humanity under 'other inhumane acts'. Moreover, the qualifier 'serious' is part of the second limb itself: an inhuman act

79 Trial Judgment Case 001, *supra* note 72, § 567; Case 001 Appeal Judgment, *supra* note 1, § 176.

80 Case 002/02 Trial Judgment, *supra* note 6, §§ 731 and 3701.

81 *Ibid.*, § 3701.

82 Co-Prosecutors' Appeal Against the Case 002/02 Trial Judgment, *Khieu Samphan* (Case 002/02), F50, 20 August 2019, § 15.

83 Case 002/02 Trial Judgment, *supra* note 6, § 3701.

84 See Case 002/01 Appeal Judgment, *supra* note 11, § 580 and accompanying text.

85 Co-Prosecutors' Appeal Against the Case 002/02, *supra* note 82, §§ 18–24.

constitutes a ‘serious attack’ (on human dignity).<sup>86</sup> This can be read as implying an attack that causes serious suffering. A more compelling challenge would be to question the (factual) finding that forcing male victims to rape their wives is not a serious attack on human dignity.

#### 4. *Dolus Eventualis* at the ECCC

Case 002/02 has thrown up interesting legal points around *mens rea*, in particular regarding the lowest fault degree of *dolus eventualis*. Both Nuon Chea and Khieu Samphan were charged with several crimes against humanity, grave breaches and genocide by participating in a JCE. The JCE’s common purpose, which the accused were said to have shared with other senior leaders such as CPK Secretary Pol Pot, the army’s General Staff Chairman Son Sen and Zone Secretary Ruos Nhim, was allegedly to implement rapid socialist revolution in Cambodia through a ‘great leap forward’ and to defend the Party against enemies by whatever means necessary.<sup>87</sup> In order to achieve this common purpose, Nuon Chea and Khieu Samphan (together with the other JCE participants) designed five policies, which the accused intended to be committed and the implementation of which amounted to the crimes charged in Case 002/02.<sup>88</sup>

##### A. *Extermination and Dolus Eventualis*

Both accused were charged with the crime against humanity of extermination by creating conditions of life during the population movement and at worksites that were calculated to bring about the death of a large number of people. The TC established that large-scale deaths resulted from the conditions imposed at worksites, including hard labour and the deprivation of food, accommodation, medical care and hygiene.

In Case 002/01, the SCC rejected the TC’s ruling that the *mens rea* of extermination included *dolus eventualis*.<sup>89</sup> It found that since the aim of extermination is ‘to eliminate individuals who are part of a group’, this ‘is incompatible with the notion of *dolus eventualis*’.<sup>90</sup> Instead, it held that extermination requires ‘a showing that the killing of members of a group is what was *desired* by the perpetrator, irrespective of whether he was certain that this would actually happen’.<sup>91</sup> The SCC reiterated findings of the ICTR in the

86 See Case 002/02 Trial Judgment, *supra* note 6, § 3691 (‘The foregoing conduct (forced marriage and consummation of marriage, EvS), characterized in the Closing Order as forced marriage, cumulatively caused serious mental or physical suffering or injury or constituted a serious attack on the human dignity of the victims.’).

87 Case 002/02 Trial Judgment, *supra* note 6, § 3727.

88 See *supra* Section 2.

89 Case 002/01 Appeal Judgment, *supra* note 11, § 522.

90 *Ibid.*, § 520.

91 *Ibid.*, §§ 520 and 521 (emphasis added).

*Ntakirutimana* case where extermination was deemed to require proof of deaths as 'inevitable'.<sup>92</sup> This reference to an inevitable result, which one accepts rather than positively desires, seems to refer to the second degree of intent/*dolus*.

The TC in Case 002/02 slightly distanced itself from the SCC ruling on the *mens rea* of extermination. It agreed with the Co-Prosecutors that the 'inevitability-test' was not part of ECCC law.<sup>93</sup> Whether deaths and other consequences of such policies were 'inevitable' does not need to be proven separately. Instead, it found that 'it is sufficient if the perpetrator intended to cause the death of a large number of people'.<sup>94</sup> The 'inevitable result'-reasoning is a distraction. Referring to the *Ntakirutimana* ruling, all the SCC in Case 002/01 did was endorse that extermination requires proof of a result (deaths) that was desired (first degree intent/*dolus*) or that was accepted as something that will occur (second degree/*dolus*). In any event, both the TC in Case 002/02 and the SCC in Case 002/01 agree that for extermination, *dolus eventualis* (i.e. mere knowledge that deaths may occur) is insufficient.

The TC held that, with regard to the extermination charges based on living and working conditions, it was not satisfied that such conditions were imposed to cause death:

Instead, the authorities appear to have intended to exploit the workers for their working capacity by providing them with the minimum conditions that allowed them to keep working, while being indifferent to their well-being and accepting the risk of their death in order to achieve their objective. Contrary to the submission of the Co-Prosecutors, the Chamber recalls that the crime of extermination is incompatible with the notion of *dolus eventualis*.<sup>95</sup>

The TC, on the basis of Internal Rule 98(2), proceeded to recharacterize the crime as murder and convicted the accused for murder as a crime against humanity. The latter comes with a *dolus eventualis* standard, which fits the factual allegation that the accused accepted the *risk* of death rather than its (virtual) certainty.

### **B. Third Category JCE Through the Back Door?**

The ECCC is the only international tribunal that does not recognize Third Category JCE (JCE III), also referred to as Extended JCE. According to the ECCC, this (controversial<sup>96</sup>) category of JCE, with its *dolus eventualis*

92 *Ibid.*, § 521 where the SCC cites Judgment, *Ntakirutimana and Ntakirutimana* (ICTR-96-10-A and ICTR-96-17-A), Appeals Chamber, 13 December 2004, § 522: '[t]he crime of extermination requires proof that the accused participated in a widespread or systematic killing or in subjecting a widespread number of people or systematically subjecting a number of people to conditions of living that would inevitably lead to death, and that the accused intended by his acts or omissions this result' (emphasis added).

93 Case 002/02 Trial Judgment, *supra* note 6, § 658.

94 *Ibid.*

95 *Ibid.*, § 1387.

96 For a classic piece on JCE, which is critical of the breadth of JCE III, see J.S. Martinez and A.M. Danner, 'Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law', 93 *California Law Review* (2003) 75–114, at 136.

test,<sup>97</sup> was not part of customary international law at the time of the crimes.<sup>98</sup> The other two JCE categories — Basic JCE and Systemic JCE — require proof of direct intent and are part of ECCC law since they are considered part of customary international law at the time.<sup>99</sup>

In a Basic JCE — also referred to as JCE I — participants pursue a common purpose and they share the intent.<sup>100</sup> The intent requirement is twofold: an accused must (i) intend to participate in the common purpose and (ii) he/she must intend the underlying crimes.<sup>101</sup> The SCC in Case 002/01 adopted a novel interpretation of *mens rea* for JCE I.<sup>102</sup> The SCC took as a starting point the common purpose and attributed liability to participants on the basis that the crimes are part of that common purpose. Whilst the SCC insisted that JCE liability requires proof of a double intent,<sup>103</sup> its approach is much more ‘loose’. As long as the crimes are within the common purpose, JCE I is applicable regardless of the degree of intent of the crimes (both direct intent and *dolus eventualis* are possible) since crimes will have been ‘contemplated’.<sup>104</sup> All that matters is the existence of a ‘meeting of minds’ when it comes to the common purpose.<sup>105</sup> This meeting of minds does not have to be explicit. When there is no meeting of minds, the mode of liability would be JCE III, which is not an option at the ECCC.<sup>106</sup>

Until the SCC ruling in Case 002/01, participants in a JCE could not be held liable for crimes they just foresaw and did not desire or intend. Their *mens rea* would not reach the required direct intent standard of JCE I. The SCC’s interpretation of JCE I, however, brought back JCE III through the back door, and not without result. The TC in Case 002/01 had entered convictions on the basis of Basic JCE for murder as a crime against humanity committed with

97 Judgment, *Tadić* (IT-94-1-A), Appeals Chamber, 15 July 1999, §§ 204 and 220 (‘What is required is a state of mind in which a person, although he did not intend to bring about a certain result, was aware that the actions of the group were most likely to lead to that result but nevertheless willingly took that risk. In other words, the so-called *dolus eventualis* is required (also called “advertent recklessness” in some national legal systems).’).

98 Decision on Appeals Against the Co-Investigating Judges’ Order on JCE, *Ieng Thirith et al.* (Case 002), PTC, 20 May 2010, §§ 77, 83, 87 and 88, endorsed in: Case 002/01 Appeal Judgment, *supra* note 11, §§ 791–807; Decision on the Applicability of JCE, *Nuon Chea et al.* (Case 002), TC, 12 September 2011, §§ 31, 35 and 38. JCE I and JCE II were part of customary international law at the relevant time. See e.g. Decision on the Applicability of JCE, *Ibid.*, § 22.

99 *Tadić* Appeal Judgment, *supra* note 96, §§ 196–203.

100 *Ibid.*, § 220: ‘[I]n cases of co-perpetration, where all participants in the common design possess the same criminal intent to commit a crime (and one or more of them actually perpetrate the crime, with intent)’.

101 Judgment, *Brđanin* (IT-99-36-A), Appeals Chamber, 3 April 2007, § 365; Judgment, *Popović et al.* (IT-05-88-A), Appeals Chamber, 30 January 2015, § 1652.

102 See also Coman Kenny, who has written an insightful commentary on the SCC Judgment: C. Kenny, ‘Jurisprudence Continues to Evolve: The ECCC’s Revision of Common Purpose Liability’, 16 *JICJ* (2018) 623–644, at 636.

103 See Case 002/01 Appeal Judgment, *supra* note 11, §§ 1053 and 1054.

104 *Ibid.*, § 808.

105 *Ibid.*, § 808.

106 *Ibid.*

*dolus eventualis*.<sup>107</sup> Those convictions were not overturned on appeal in Case 002/01.<sup>108</sup>

In the SCC's interpretation of JCE I, if crimes are *assumed* to have been part of the common purpose, crimes with a fault degree lower than direct intent can be imputed to JCE participants. As long as there is a meeting of minds with regard to the ultimate aim of the joint enterprise, crimes can be imputed that the participant did not directly intend. While it is a different way of attributing blame than via JCE III, the net result is the same. Bearing in mind that the common purpose in international cases is often very abstract and broad, for instance 'to implement rapid socialist revolution', it will not be difficult to meet that 'meetings of minds test' with regard to the common purpose.

In our view, the SCC departs from settled law on this point. The SCC pays lips service to the double *mens rea* test of JCE I, which requires *shared* intent with regard to participation in the common purpose *and* with regard to the underlying crimes. Moreover, its ruling leads to an overhaul of the law on JCE and its three categories. The ruling blurs the distinction between JCE I (including JCE II) and JCE III.

JCE III has a weak basis in customary international law. This is why it attracted so much criticism when the *Tadić* Appeals Chamber declared it was part of customary international law.<sup>109</sup> Sassòli and Olsen argued that JCE III is predominantly based on national (Italian) case law, which cannot be indicative of a rule of customary international law.<sup>110</sup> The only international legal sources are two treaties (the 1997 Terrorist Bombing Convention and the ICC Statute), which they argue is insufficient. Controversy over the concept was compounded by the fact that it comes with this broad *dolus eventualis* test. It is exactly for these reasons that the Pre-Trial Chamber and TC at the ECCC did not accept JCE III as part of the Court's law.<sup>111</sup> It is worth noting that, despite

107 See Case 002/01 Trial Judgment, *supra* note 6, §§ 556, 877, 940, 996 and 1053.

108 Case 002/01 Appeal Judgment, *supra* note 11, §§ 1061, 1062 and 1086.

109 M. Sassòli and L.M. Olsen, 'The Judgment of the ICTY Appeals Chamber on the Merits in the *Tadić* Case: New Horizons for International Humanitarian and Criminal Law?' 839 *International Review of the Red Cross* (2000) 733–769; see also G. Boas et al., *International Criminal Law Practitioner Library, Elements of Crimes under International Law* (Cambridge University Press, 2008), at 21 and 22. Powles argues that the Appeals Chamber really only based extended JCE on one case, the *D'Ottavio et al.* case. See S. Powles, 'Joint Criminal Enterprise: Criminal Liability by Prosecutorial Ingenuity and Judicial Creativity?' 2 *JICJ* (2004) 606–619, at 615 and 616.

110 *Ibid.*; Case 002/01 Appeal Judgment, *supra* note 11, §§ 1061, 1062 and 1086. The SCC in Case 002/01 is equally critical. For instance, it rejected the relevance of Italian case law, including the *D'Ottavio* case, as precedents to establish that liability was ascribed for crimes falling outside the common purpose, irrespective of their foreseeability. See Case 002/01 Appeal Judgment, *supra* note 11, §§ 795 and 796.

111 One could argue that JCE I as interpreted by the SCC is more stringent than JCE III since it requires proof of acceptance or at least indifference with regard to the offence that results from participation in a JCE; there has to be a meeting of minds or 'contemplation'. JCE III concerns offences that were not included in the common purpose but merely foreseeable. The test is that 'the possibility a crime could be committed is sufficiently substantial as to be foreseeable to an accused'. Decision on Prosecution's Motion Appealing TC's Decision on JCE III

how it unfolded on appeal in Case 002/01, the TC in its Judgment in Case 002/02 did not endorse the *dolus eventualis* reading of JCE I.<sup>112</sup>

## 5. Customary International Law

Trying crimes that have been committed in the 1970s, two decades before the surge of modern international criminal justice, has made the ECCC cautious in relying on the ad hoc Tribunals' findings regarding rules of customary international law. The non-acceptance of JCE III and of rape as a distinct crime against humanity is based on the finding that this was not law at the time relevant to the charges and as such not foreseeable and accessible to the accused. In Case 002/01, the SCC ruled that the Co-Prosecutors' attempt to rely on a review of domestic law to establish rules of customary international law with regard to JCE was based on a 'fundamental misunderstanding'.<sup>113</sup> The SCC found that 'general domestic criminal practice cannot be the basis for establishing a rule of customary international law, given that it lacks an international element'.<sup>114</sup> It may only be used to 'identify a general principle of (domestic) law' or as a 'reference point for interpreting international crimes and attendant principles and concepts'.<sup>115</sup>

The methodology of establishing customary modes of liability is *sui generis* and very closely aligned to uncovering general principles of (criminal) law. A recent study on modes of liability in international criminal law takes the position that customary international law in the 'classic' sense is not a source of law for modes of liability and for criminal law concepts such as *mens rea* and *actus reus*.<sup>116</sup> The starting point is not whether certain liability concepts are part of state practice and reflect *opinio iuris*. The central question is whether liability concepts, principles and/or certain interpretations are widely accepted and hence do not violate *nullum crimen sine lege*. International courts and tribunals, in establishing whether a certain concept or specific interpretation at an element level has customary law status, regularly conduct comparative analyses to establish whether a concept exists in multiple jurisdictions and, hence, was foreseeable and accessible. In a way, this is the *opinio iuris* and state practice limbs of traditional customary law collapsed into one.

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Foreseeability, *Karadžić* (IT-95-5/18-AR72.4), Appeals Chamber, 25 June 2009, §18. The SCC standard seems to have a stronger volitional component than JCE III. Still, both *dolus eventualis* interpretations fall short of the intent requirement for JCE I.

112 Case 002/02 Trial Judgment, *supra* note 6, §§ 3713–3715. When it found there was no proof for direct intent, it convicted under other modes of liability, e.g. aiding and abetting liability. See e.g. Case 002/02 Trial Judgment, *supra* note 6, § 4178.

113 Case 002/01 Appeal Judgment, *supra* note 11, § 805.

114 *Ibid.*

115 *Ibid.*

116 J. de Hemptinne, R. Roth and E. van Sliedregt, 'Introduction', in J. de Hemptinne, R. Roth and E. van Sliedregt (eds), *Modes of Liability in International Criminal Law* (Cambridge University Press, 2019) 1–14, at 11–13.

This is not how the SCC has chosen to proceed.<sup>117</sup> Rather than looking at well-established national criminal law concepts, it limited itself to seeking guidance in international criminal law, which certainly in the 1970s was scant, scattered and not fully crystallized. Now, this makes sense when it concerns definitions of international crime. These crimes have an international pedigree.<sup>118</sup> Yet when it comes to modes of liability this is less persuasive. Relying on domestic law for establishing customary international law in the realm of modes of liability is the right thing to do in establishing the scope and content of international criminal liability. The general part of substantive international criminal law has developed from well-established national criminal law. Apart from command responsibility and the defence of superior orders, the provisions on modes of liability in the ECCC Law have a domestic law pedigree. The fact that the Law contains such provisions is merely for jurisdictional reasons; they grant the ECCC jurisdiction to try individuals on the basis of extended liability, concepts and theories that go beyond physical/direct commission. In our view, the ECCC can perfectly legitimately rely on domestic or local criminal law concepts. In fact, we would argue, it would fit its hybrid nature perfectly.

## 6. Conclusion

The ECCC is an often-overlooked institution in the international criminal justice field. It garnered some attention from commentators when the Pre-Trial Chamber first excluded JCE III as non-applicable, but its proceedings are generally not nearly as closely followed as those at the institutions in The Hague. While understandable in light of the time that has passed since the Khmer Rouge atrocities took place, this lack of attention is also a missed opportunity for the exact same reason: the passage of time. The ECCC provides a unique window into the late 1970s for establishing the status of customary international law of elements of international criminal law and, thus, its development from 1940s Nuremberg to modern-day The Hague. This is not only interesting for those following the ECCC and its potential future trials, but it may also be of value to any (domestic, hybrid or international) court dealing with 'old' core crimes.

117 Case 002/01 Appeal Judgment, *supra* note 11, §§ 805–807.

118 Having said that, when it comes to the underlying crimes (murder, rape, etc.), domestic criminal law proved to be an important source of law. See Case 002/02 Trial Judgment, *supra* note 6, §§ 640–650.