

# សង្គមស្ថានបរិក្ខារកម្ពុជា

## SAVING JUSTICE WHEN AN ACCUSED DIES: CASE 002 AT THE ECCC

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### INTRODUCTION

#### I: THE CASE OF THE DEATH OF AN ACCUSED

- A. Timing
  - i. During Trial*
  - ii. After Trial Proceedings*
  - iii. During Appellate Proceedings*
- B. Jointly Tried Accused

#### II: THE SALVATION OF EVIDENCE, FINDINGS, AND TESTIMONY

- A. Educational Value: To Remember and to Prevent
  - i. Documentaries, Exhibitions, and Textbooks*
  - ii. Exhibitions*
  - iii. Textbooks*
  - iv. Extraordinary Archives*
    - 1. Judicial Assessments
    - 2. Court Records
  - v. Caveat: Confidential Information and Protected Witnesses*
- B. Impact on Future Trials: the ECCC and Beyond
  - i. The Khmer Rouge Tribunal*
  - ii. Outside the UN Backed Court*
- C. Legacy of the ECCC

## INTRODUCTION

The Extraordinary Chambers in the Courts of Cambodia (ECCC) is up against the clock. The four surviving senior leaders of Democratic Kampuchea currently awaiting joint trial in Case 002 for crimes against humanity, war crimes, genocide, and felonies under the Cambodian Penal Code are nearing the inevitable realities of old age. Former Deputy Secretary, Nuon Chea, and former foreign minister, Ieng Sary, are well into their eighties, while former head of state, Khieu Samphan, and former social affairs minister, Ieng Thirith, follow close behind.<sup>1</sup> It is likely that one, if not all, of the accused may die before the ECCC renders a final judgment.

On June 27, 2011, initial hearings for Case 002 began. During these proceedings, the four accused were already asking to be excused from the room, struggling with the cool air conditioning, the bright lights, and the long hours sitting.<sup>2</sup> The substantive proceedings are expected to commence in a few months. It is feared that if one or more of the accused die before the trial's conclusion, the ECCC will be seen as a complete failure.<sup>3</sup> Indeed, the Court will have wasted the government's and international community's valuable time and money, and the absence of a judgment will deprive many Khmer Rouge victims of justice.

Fortunately, a final judgment, though key to the relevance of a court, is not the only valuable element that may derive from the ECCC. Case 002—the criminal prosecution of four accused destined to span the course of a number of years, involving 3,850 Civil Parties,<sup>4</sup> 4,151

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<sup>1</sup> Ieng Sary, 86; Nuon Chea, 85; Khieu Samphan, 80; Ieng Thirith, 79.

<sup>2</sup> Christine Evans, *A Time of Transparency*, "Not Sealed Envelopes," *CAMBODIA TRIBUNAL MONITOR*, June 27, 2011.

<sup>3</sup> See John D. Ciorciari, *Introduction*, in *ON TRIAL: THE KHMER ROUGE ACCOUNTABILITY PROCESS* 13, 16 (John D. Ciorciari & Anne Heindel eds., 2009) ("For the ECCC to succeed, one thing is clear: it has to deliver a significant measure of justice in the eyes of Cambodians and the international community.") [hereinafter *ON TRIAL*].

<sup>4</sup> See ECCC, Pretrial Chamber, Decision on Appeals Against Orders of the Co-Investigating Judges on the Admissibility of Civil Party Applications, Case 002, Case No. 002/19-09-2007-ECCC/OCIJ, 24 June 2011 (overturning the previous rejection of 1, 728 civil party applicants by the Co-Investigating Judges).

victims' complaints, and more than 350,000 pages of documents<sup>5</sup>—will be bursting with material that could be useful in education and development. This article will first examine the legal effect the death of an accused has on a criminal trial. It will then present opportunities to salvage the evidence, findings, and testimony of Case 002 in the event the trial is terminated before judgment.

## I: THE CASE OF THE DEATH OF AN ACCUSED: LEGAL EFFECT

There have been a number of accused in the international arena who have died prior to final judgment. Thanks to the notoriously slow process of international criminal justice, “at rates that would constitute a national scandal in a domestic jurisdiction, defendants in international criminal processes die.”<sup>6</sup> The International Criminal Tribunal for the former Yugoslavia (ICTY), an *ad hoc* court established to prosecute the horrific crimes committed in the former Yugoslavia, has terminated six cases due to the death of an accused.<sup>7</sup> While there are no explicit rules in the core documents of international courts, international court precedent suggests that proceedings should be terminated in the event of death of an accused prior to judgment.<sup>8</sup>

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<sup>5</sup> ECCC, Office of the Co-Investigating Judges, Closing Order, *Case 002*, Case No. 002/19-09-2007-ECCC-OCIJ, 15 September 2010, par. 12, 17 [hereinafter Case 002 Closing Order].

<sup>6</sup> Timothy W. Waters, *A Kind of Judgment: Searching for Judicial Narratives after Death*, SELECTEDWORKS 13 (2010), [http://works.bepress.com/timothy\\_waters/4](http://works.bepress.com/timothy_waters/4).

<sup>7</sup> See *infra* note 8.

<sup>8</sup> See e.g. ICTY, Order Terminating the Proceedings, *Prosecutor v. Milosevic*, Case No. IT-02-54-T, 14 March 2006 (“[C]onsidering that, in the case of the death of an accused, the proceedings have to be terminated”) (emphasis omitted.); ICTY, Trial Chamber II, Order Terminating Proceedings Against Momir Talic, *Prosecutor v. Talic*, Case No. IT-99-36/1-T, 12 June 2003; Press Release, ICTY Registry, Proceedings Against Mehmed Alagic Terminated, J.P./P.I.S./740e (24 March 2003); Press Release, ICTY Registry, Milan Kovacevic Passed Away, CC/PIU/337-E (1 August 1998); ICTY, Order Terminating Proceedings Against Slavko Dokmanovic, *Prosecutor v. Mrksic et al.*, 15 July 1998; Press Release, ICTY, Djukic Case Terminated by the Death of the Accused, CC/PIO/082-E (3 June 1996); SCSL, Trial Chamber I, Decision on Registrar’s Submission of Evidence of Death of Accused Samuel hinga Norman and Consequential Issues, *Prosecutor v. Norman et al.*, Case No. SCSL-04-14-T, 21 May 2007; ICTR, Press Release, Accused Joseph Nzirorera Dies, Case No. ICTR/INFO-9-2-646.EN, 1 July 2010; ICC, Pre-Trial Chamber II, Decision to Terminate the Proceedings Against Raska Lukwiya, *Situation in Uganda: Prosecutor v. Kony et al.*, Case No ICC-02/04-01/05, 11 July 2007.

## A: Timing

### *i. During Trial*

All international courts terminate proceedings if an accused dies mid-trial. Perhaps the most notable death mid-trial at the ICTY is that of Slobodan Milosevic for genocide, war crimes, and crimes against humanity.<sup>9</sup> Milosevic, the first former head of state to ever stand trial before an international criminal tribunal for such crimes, died in a United Nations detention facility on March 11, 2006.<sup>10</sup> ICTY proceedings were terminated days later, allowing him to escape judgment four years into trial.<sup>11</sup>

### *ii. After Trial Proceedings*

The Special Court for Sierra Leone (SCSL) has held that the death of an accused terminates proceedings against that person effective the moment of death.<sup>12</sup> In *SCSL Prosecutor v. Norman et al.*, the joint accused Samuel Hinga Norman died after conclusion of trial proceedings but before judgment was rendered.<sup>13</sup> Although Norman had fully undergone trial and presented his defense, given the “individual and personalized” nature of criminal matters, the SCSL found that it could not exercise “its jurisdiction *ratione personae*” over the accused once he died.<sup>14</sup>

The SCSL held that the principle of individual criminal responsibility, the right to a fair trial, and the right to appeal, if convicted, would be violated if proceedings continued for

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<sup>9</sup> ICTY, Indictment, *Prosecutor v. Milosevic et al.*, Case No. IT-99-37, 22 May 1999.

<sup>10</sup> Marlise Simons & Alison Smale, Obituary, *Slobodan Milosevic, 64, Former Yugoslav Leader Accused of War Crimes, Dies*, N.Y. TIMES, March 12, 2006.

<sup>11</sup> ICTY, Order Terminating the Proceedings, *Prosecutor v. Milosevic*, Case No. IT-02-54-T, 14 March 2006.

<sup>12</sup> SCSL, Trial Chamber I, Decision on Registrar’s Submission of Evidence of Death of Accused Samuel Hinga Norman and Consequential Issues, *Prosecutor v. Norman et al.*, Case No. SCSL-04-14-T, 21 May 2007, par. 13 [hereinafter SCSL Norman Decision on Death of Accused].

<sup>13</sup> *Id.* at par. 12, 18.

<sup>14</sup> *Id.* at par. 13, 14 (the Trial Chamber found that the death of the accused frustrated the doctrine of extinguishment or abatement).

Norman after his death.<sup>15</sup> Once deceased, Norman would “be unable to exercise effectively his right of appeal against conviction” or “properly instruct counsel as to the conduct of his . . . appeal.”<sup>16</sup> The SCSL also highlighted the fact that a judgment in a criminal trial is “the exclusive legal privilege and prerogative” of the person alleged to have committed the crime and cannot be conferred to a surviving successor to pursue any additional proceedings.<sup>17</sup>

The law establishing the ECCC guarantees to an accused the same rights outlined above by the SCSL Trial Chamber in *Prosecutor v. Norman et al.*<sup>18</sup> These rights together appear to ensure that a judgment at the ECCC cannot be rendered if the accused is no longer alive, even if the trial has been completed.<sup>19</sup> According to Article 35 of ECCC Law, an accused is presumed innocent until the court has reached a definitive judgment.<sup>20</sup> Thus, once one of the four aging senior leaders in Case 002 die, the ECCC proceedings will be terminated for that accused and he or she will die legally innocent.

### *iii. During Appellate Proceedings*

*Prosecutor v. Delic* at the ICTY appears to be the only case at an international criminal tribunal where an accused has died pending the resolution of appellate proceedings. In September 2008, accused Rasim Delic was convicted of cruel treatment in violation of the laws

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<sup>15</sup> *Id.* at par. 17.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at par 16.

<sup>18</sup> Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, 27 October 2004, NS/RKM/1004/006, Article 35(d) [hereinafter ECCC Law]. Article 35 states an “accused shall be equally entitled to the following minimum guarantees, in accordance with Article 14 of the International Covenant on Civil and Political Rights [ICCPR].” ECCC Law Article 35 new. ICCPR Article 14 grants accused the right to a fair trial and the right to have a conviction “reviewed.” International Covenant on Civil and Political Rights, General Assembly Resolution 2200A (XXI), adopted 16 December 1966, Article 14 (1), (5). While the ECCC, through Rule 81 of the Internal Rules, requires presence, it does allow trial *in absentia* subject to a set of conditions. ECCC, Internal Rules, as amended on 23 February 2011, Rule 81 (“[an] Accused shall be tried in his or her presence, except as provided in this Rule.”). [hereinafter ECCC Internal Rules]. However, death is not stated as an exception. *Id.* (if an accused “refuse(s) or fail(s) to attend the proceedings . . . the proceedings may continue in his or her absence” or the accused may be excused from proceedings for health reasons).

<sup>19</sup> See SCSL Norman Decision on Death of Accused, *supra* note 12, at par. 16.

<sup>20</sup> ECCC Law Article 35.

and customs of war and sentenced to three years imprisonment.<sup>21</sup> Delic filed an appeal in 2009 but died while on provisional release before the ICTY Appeals Chamber rendered a judgment.<sup>22</sup> Faced with the issue of how to proceed with Delic’s appeal, and lacking any judicial precedent or ICTY Rule of Procedure and Evidence (RPE) on the appropriate course of action to take, the ICTY Appeals Chamber sought guidance from other international courts.<sup>23</sup> Citing to the International Criminal Court, a case where the accused died prior to trial, and the SCSL Trial Chamber decision in *Prosecutor v. Norman et al.* discussed above, the ICTY Appeals Chamber held that the death of an accused after the delivery of a trial judgment, but before the rendering of the appeals judgment, effectively terminates appellate proceedings.<sup>24</sup>

As a consequence, the ICTY Appeals Chamber had to consider the finality of the Trial Judgment convicting Delic of cruel treatment. Finding no customary international law on the matter or any general principle of law followed by both common and civil law jurisdictions, the Appeals Chamber determined that sustaining a trial judgment when an appellant dies follows the spirit of an international criminal tribunal.<sup>25</sup> First, if convicted, an accused is no longer presumed innocent.<sup>26</sup> Second, according to ICTY RPE, the appealing accused has the burden of showing an error of law, an error of fact, or a miscarriage of justice to overturn a conviction.<sup>27</sup> Since it is no longer possible to render an appeal judgment, “nothing can undermine the finality of the Trial Judgment.”<sup>28</sup>

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<sup>21</sup> ICTY, Trial Chamber I, Judgment, *Prosecutor v. Delic*, Case No. IT-04-83-T, 15 September 2008.

<sup>22</sup> ICTY, Appeals Chamber, Decision on the Outcome of the Proceedings, *Prosecutor v. Delic*, Case No. IT-04-83-A, 29 June 2010, par 4.

<sup>23</sup> *Id.* at par. 7.

<sup>24</sup> *Id.* at par. 7, 8 (citing ICC, Pre-Trial Chamber II, Decision to Terminate the Proceedings Against Raska Lukwiya, *Situation in Uganda: Prosecutor v. Kony et al.*, Case No ICC-02/04-01/05, 11 July 2007).

<sup>25</sup> *Id.* at par. 14.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at par. 15.

## B. Jointly Tried Accused

If one of more of the four accused die during trial, the proceedings would continue for the remaining, surviving accused. If the trial proceedings have concluded in a joint trial, but the chamber has not announced judgment, a verdict may only be rendered for the surviving accused.<sup>29</sup> However, it may be possible for the court to consider all the evidence brought before the court in rendering the judgment—including that related to the deceased accused. For example, in the joint trial of *Prosecutor v. Norman et al.* at the SCSL, the judgment for the remaining surviving accused was based on the “the entire evidentiary record” before the court.<sup>30</sup> The court found that it was “neither possible nor desirable to separate the evidence” from the case file admitted against the deceased accused.<sup>31</sup> Bearing in mind that no party to the SCSL proceedings objected to a review of the whole record, if one or more accused in Case 002 at the ECCC die before judgment, it is conceivable the ECCC could follow this same approach. Indeed, considering all the evidence as a whole will form a more complete account of the facts and “get to the truth of the allegations in relation”<sup>32</sup> to the four accused at the ECCC.

## II: THE SALVATION OF EVIDENCE, FINDINGS, AND TESTIMONY

The abrupt and premature end of proceedings due to the death of an accused undeniably robs victims of gross human rights violations a final judicial determination of guilt or innocence. Yet, beyond this sought verdict, exculpatory and inculpatory evidence used during the trials of deceased accused are replete with potential value. Whether in-court testimony, written witness statements, maps, photographs, or trial transcripts, much of this evidence may be used after the death of an accused to educate the general public, publicize the horrific atrocities, guide

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<sup>29</sup> SCSL Norman Decision on Death of Accused, *supra* note 12.

<sup>30</sup> *Id.* at par. 22 (it is important to note that the two surviving accused in *Prosecutor v. Norman et al.* did not object to the court’s review of the entire record).

<sup>31</sup> *Id.* at par. 21.

<sup>32</sup> *Id.* at par 2 (prosecution submission).

international legal standards, and act as a guard against future crimes in Cambodia and elsewhere.

#### A. Educational Value: To Remember and to Prevent

##### *i. Documentaries*

Not long after Milosevic's death, an independent filmmaker released a documentary exposing the wealth of material introduced during the *Milosevic* trial.<sup>33</sup> Capturing 2,000 hours of proceedings over a four-year period, *Milosevic on Trial* provided background information on the crimes committed in the former Yugoslavia and showed detailed accounts of the trial's proceedings, including live witness testimony, admitted trial exhibits, and courtroom scenes.<sup>34</sup> The trial footage was accompanied by interviews with the lead prosecutor, defense support teams, and historians.<sup>35</sup>

If one or more of the accused die before judgment in Case 002 at the ECCC, filmmakers may use the trial evidence, testimony, and exhibits from Case 002 in a documentary similar to *Milosevic on Trial* to educate the public. Viewers of the documentary would then have the opportunity to learn about the history of the Democratic Kampuchea and the roles the four senior leaders in Case 002 played during that time. The documentary should contain video clips of the four accused present in the courtroom, revealing the accused's demeanor during trial proceedings. This would verify to Cambodians that justice was being sought, even if there was no final judgment. Additionally, the documentary should include filmed testimony of victims and witnesses. This would confirm that Cambodians were given a voice during the trial and that

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<sup>33</sup> Icarus Films, *Milosevic on Trial*, <http://icarusfilms.com/new2008/milo.html>.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*



they were able to “tell their stories and to validate their experience of suffering.”<sup>36</sup> As live footage of victims is more personal, the message conveyed to viewers may be more compelling than mere words on paper. However, to reach the most Cambodians, the documentary would have to be widely distributed to schools, presented at educational forums throughout the provinces, or aired on the local television stations.

#### *ii. Exhibitions*

Maps, photos, drawings, statements, and transcripts introduced at trial could be used in exhibitions to publicize the details and findings of Case 002. ECCC Internal Rule 87 allows all evidence to be admitted which the Chamber “deems conducive to ascertaining the truth.”<sup>37</sup> Presumably a low standard, this rule will allow introduction of an enormous amount of documents into the case file of Case 002. Evidence admitted during proceedings by the prosecution or civil parties and examined and questioned by the accused, although not judicially verified, could be a key to learning about the Khmer Rouge.

Exhibitions have already been set up at Tuol Sleng Museum, the notorious S-21 torture prison commanded by now convicted Kang Guek Eav (Duch) of Case 001, and the Choeung Ek killing fields in Phnom Penh. These permanent exhibitions educate visitors on Case 001 and are supplemented by temporary displays. One temporary exhibit currently on display at Tuol Sleng Museum highlights the biographies of the four accused in Case 002 and explains the accused’s respective charges.<sup>38</sup> However, tourist sites like Tuol Sleng Museum and Choeung Ek are visited by foreigners more than the younger generation of Cambodians and the people outside the city.<sup>39</sup>

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<sup>36</sup> Timothy Gallimore, *The Legacy of the International Criminal Tribunal for Rwanda (ICTR) and its Contributions to Reconciliation in Rwanda*, 14 NEW ENGLAND J. INT’L & COMPARATIVE L. 239, 240 (2008).

<sup>37</sup> ECCC Internal Rule 87 (1), (4).

<sup>38</sup> See DOCUMENTATION CENTER OF CAMBODIA, GENOCIDE: WHO ARE THE SENIOR KHMER ROUGE LEADERS TO BE JUDGED? THE IMPORTANCE OF CASE 002 (2010).

<sup>39</sup> *Cambodia Releases First Ever Textbook on Pol Pot Era*, RADIO AUSTRALIA, May 25, 2009.

It would be beneficial to have traveling exhibitions throughout the provinces that visit school sites or areas frequented by villagers. These traveling exhibitions would have a greater chance of educating youths who have little or no knowledge of the genocide committed<sup>40</sup> and the rural individuals who are unable to travel to Phnom Penh. Since many of the Khmer Rouge survivors are illiterate and uneducated,<sup>41</sup> in order to adequately communicate the relevant information from Case 002, the “legalese” of the documents and records would need to be simplified when used in the exhibits.<sup>42</sup>

After four years of trial, the *Milosevic* case generated a vast, detailed account of the atrocities committed against the Bosnian people. Of note, the infamous “Scorpion video,” which captured brutal executions by the Serbian police, was only made available to the public after being shown in trial.<sup>43</sup> When local television stations throughout Serbia aired the video, people were visually confronted with facts they had previously denied and forced to admit that Serbians had committed these atrocities.<sup>44</sup> The country became outraged and the government was pressured to arrest the individuals in the video who committed the crimes.<sup>45</sup> In Cambodia, many Khmer people have doubts that a government would commit such egregious acts against its own people.<sup>46</sup> Testimony and trial evidence released during Case 002 may be equally significant and have as great of an effect on Cambodians.

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<sup>40</sup> Much of what youths know in Cambodia regarding the genocide has been told to them by relatives who survived the violence. *See infra* note 29 and related text.

<sup>41</sup> John D. Ciorciari & Sok-Kheang Ly, *The ECCC’s Role in Reconciliation*, in ON TRIAL, *supra* note 3, at 321.

<sup>42</sup> *Id.*

<sup>43</sup> HUMAN RIGHTS WATCH, *WEIGHING THE EVIDENCE: LESSONS FROM THE SLOBODAN MILOSEVIC TRIAL* 14 (2006) [hereinafter *WEIGHING THE EVIDENCE*].

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> Seth Mydans, *Pain of Khmer Rouge Era Lost on Cambodian Youth*, N.Y. TIMES, April 2, 2009, available at <http://www.nytimes.com/2009/04/08/world/asia/08cambo.html>.

### *iii. Textbooks*

It is important for all generations of Cambodians to know about the history of the Khmer Rouge era to ensure that tragedies like that never happen again.<sup>47</sup> Yet, up until two years ago, Cambodian students were barely taught about the horrific events that plagued their country. Just five lines in a history textbook were all that was offered.<sup>48</sup> In 2009, the Royal Government of Cambodia officially integrated a history textbook specifically about Democratic Kampuchea into the curriculums of primary and secondary schools.<sup>49</sup> Students are now required to learn about the formation of the Khmer Rouge regime, the organizational structure, and the party leaders, including Case 002's Khieu Samphan, Noun Chea, and Ieng Sary.<sup>50</sup> The recent arrest and subsequent charge of S-21 prison commander, Duch, for war crimes is also briefly mentioned.<sup>51</sup>

It would be beneficial to update the official school textbook and the supplemental book, *A History of Democratic Kampuchea (1975-1979)*, published by the Documentation Center of Cambodia, to include details from Case 002. Facts, evidence, and testimony presented in the case may form a more complete understanding of the Democratic Kampuchea period and supplement the material already available. Additionally, devoting pages to the charges and findings in the trial of the four former leaders, even absent a verdict, would confirm to readers that Cambodia did hold some Khmer Rouge leaders to account. Anyone picking up the textbook, whether students, teachers, or villagers, would receive the most representative account of what occurred during that time period.

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<sup>47</sup> Ciorciari & LY, *supra* note 41, at 320 (85% of 1,000 adult Cambodians surveyed wanted to know more about their history, up 12% from 2002); WEIGHING THE EVIDENCE, *supra* note 43, at 14.

<sup>48</sup> Ker Munthit, *New Text Gives Cambodians Glimpse of Khmer Rouge Period*, ASSOCIATED PRESS, June 18, 2007.

<sup>49</sup> *1st Textbook on KRouge*, AMERICAN FREE PRESS, May 25, 2009.

<sup>50</sup> KHAMBOLY DY, *A HISTORY OF DEMOCRATIC KAMPUCHEA (1975-1979)* 19, 22 (Documentation Center of Cambodia 2007).

<sup>51</sup> *Id.* at 54.

It would not be wise for the updated textbook to be overwhelmed with legal information about the trials at the ECCC. This may be confusing to the targeted group of students and distracting to the purpose of educating students on the history of the Democratic Kampuchea. An alternative possibility would be to produce a specific textbook that outlines in detail Case 001/002's evidence, findings, testimony, and proceedings. Although able to spark interest in high school students, the specialized textbook would be best geared for Cambodian law and graduate students. These students would then not only gain a more accurate understanding of the history of the Khmer Rouge, but also learn valuable lessons about international criminal law and trial procedures. Particularly with Cambodia's weak and tainted judicial system, training prospective lawyers fair trial methods and how to use the resources available to defend clients and construct compelling arguments would benefit the whole country. However, international criminal justice is a gigantic and daunting field of law. Much of the intricate details on the record would need to be simplified for a broader understanding.

#### *iv. Extraordinary Archives*

The evidence, testimony, and trial footage introduced in Case 002 will constitute a public record of the grave crimes committed by the Khmer Rouge and be accessible to historians, lawyers, academics, scholars, and other interested parties. While not containing a judicially verified verdict, the record will preserve the memories that have come to light during the trial proceedings and help individuals understand Cambodia's turbulent history, how it happened, and who was or may have been responsible. Notably, scholars have argued that experts may construct narratives from the record that may be as "informational and persuasive" as an actual

verdict.<sup>52</sup> Even if Case 002 is terminated, Cambodians will have the opportunity to craft their own final judgment if given access to the information necessary to do so.

### 1. Judicial Assessments

Some of this information could come from the ECCC closing order setting out the initial judicial assessment of the allegations. For example, two years before Milosevic died, the ICTY Trial Chamber was asked to decide whether the prosecution had presented enough evidence to continue with the proceedings.<sup>53</sup> ICTY RPE 98*bis* allows the accused to file a motion at the close of the prosecution's case, requesting the Chambers to acquit when there is no probative evidence to support a conviction.<sup>54</sup> In such case, the Chamber must determine whether the evidence already presented, if accepted, could establish guilt beyond a reasonable doubt.<sup>55</sup> The ICTY Trial Chamber in the *Milosevic* case extensively examined the legal standards and the charges alleged against Milosevic and found that there was enough evidence on nearly all of the factual allegations for him to be convicted.<sup>56</sup> After Milosevic's death, the scope of this Rule 98*bis* decision "regained a potential prominence in the vacuum of frustrating indecision and inarticulation."<sup>57</sup> For instance, the International Court of Justice (ICJ), the main judicial organ of the United Nations, granted a "retrospective authority" to the Rule 98*bis* decision, citing to the evidence from the decision in an ICJ case the same way the court would a final judgment.<sup>58</sup> Some even went so far as to assert that the decision in effect showed that Milosevic would have

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<sup>52</sup> Waters, *supra* note 6, at 65-66.

<sup>53</sup> *Id.* at 121-22.

<sup>54</sup> ICTY Rules of Procedure and Evidence, adopted 11 February 1994, as amended 6 April 2004, Rule 98*bis* [hereinafter ICTY RPE].

<sup>55</sup> GIDEON BOAS, THE MILOSEVIC TRIAL: LESSONS FOR THE CONDUCT OF COMPLEX INTERNATIONAL CRIMINAL PROCEEDINGS 122 (2007) (quoting ICTY, Judgment, *Prosecutor v. Jelusic*, Case No. IT-95-10-A, 5 July 2001, par. 37).

<sup>56</sup> ICTY, Decision on Motion for Judgment of Acquittal, *Prosecutor v. Milosevic*, Case No. IT-02-54-T, 16 June 2004 (rule 98*bis* is tied to the common law and has since been amended to require oral decisions and oral submissions by the parties to simplify the process).

<sup>57</sup> Waters, *supra* note 6, at 47.

<sup>58</sup> *Id.* at 54-55.

been convicted of genocide, war crimes and crimes against humanity if he had not died before the conclusion of trial.<sup>59</sup>

The appropriateness of placing such weight on a Rule 98*bis* decision is highly disputed.<sup>60</sup> The Trial Chamber's decision was not a ruling on the guilt of Milosevic and unless it had acquitted Milosevic of all the charges, the Rule 98*bis* decision had "no dispositive or authoritative value whatsoever."<sup>61</sup> However, the decision does highlight the potential historical significance of a public judicial determination on the evidence when an accused dies before judgment.

While ECCC Internal Rules do not have a similar provision, Case 002's closing order may offer some consolation to victims. A closing order is a written judicial decision, rendered at the end of the co-investigating judges pre-trial investigation which either sends the case to trial or dismisses the charges.<sup>62</sup> Unlike a prosecution's indictment at the ICTY, which merely provides "reasonable grounds for believing that a suspect has committed a crime within the jurisdiction of the [ICTY],"<sup>63</sup> a co-investigating judges closing order functions as an independent and impartial assessment of the factual and legal findings of the investigation.<sup>64</sup> The 772 page Closing Order in Case 002 presents a detailed account of the individual allegations against the four accused, much of the evidence gathered during the judicial investigations, and the reason why the Co-Investigating Judges reached their decision.<sup>65</sup> While not yet contested through trial,

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<sup>59</sup> *Id.* at 47–59 (at a press conference the day after Milosevic's death, ICTY chief prosecutor, Carla Del Ponte, heightened the value of the Milosevic's Rule 98*bis* decision, stating that the decision confirmed that the prosecution's case contained "sufficient evidence capable of supporting a conviction").

<sup>60</sup> *See id.* at 57.

<sup>61</sup> *Id.* at 48.

<sup>62</sup> ECCC Internal Rule 67.

<sup>63</sup> ICTY RPE 47 (A).

<sup>64</sup> ECCC Internal Rule 67.

<sup>65</sup> Case 002 Closing Order, *supra* note 5.

if an accused in Case 002 dies before judgment, the closing order has potential to tell some of the story of that accused's role during Democratic Kampuchea.

## 2. Court Records

Following the conclusion of Case 002, there will be a wealth of case material accessible to the general public as a result of the internet.<sup>66</sup> For example, the University of California, Berkeley, War Crimes Studies Center is developing an “interactive online educational resource” offering archives, trial footage, transcripts, interviews, newspaper articles, and commentaries relating to the prosecutions at the ECCC.<sup>67</sup> However, many Cambodians do not have easy access to the web,<sup>68</sup> and even if the ECCC's archives are located in Phnom Penh,<sup>69</sup> many people affected by the Khmer Rouge will not be able to travel to the city to review these materials. It would be beneficial to set up information and documentation centers throughout the provinces, complete with copies of the public records from Case 002/001 and staffed with individuals who could read, interpret, and locate the sought documents.<sup>70</sup> If this is not feasible, temporary traveling centers may be just as efficient in reaching the most people. The centers could coordinate with the schools in each district and create educational forums for students and villagers.

### *v. Caveat: Confidential Information and Protected Witnesses*

Not all evidence, findings, and testimony introduced during Case 001/002 will be available to the public. A trial conducted before the ECCC, even one which fails to render a

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<sup>66</sup> See ECCC, <http://www.eccc.gov.kh/en>; Cambodian Tribunal Monitor, <http://www.cambodiatribunal.org/>; War Crimes Study Center, [http://socrates.berkeley.edu/~warcrime/Cambodia\\_home.htm](http://socrates.berkeley.edu/~warcrime/Cambodia_home.htm).

<sup>67</sup> War Crimes Study Center, Virtual Tribunal Project, <http://socrates.berkeley.edu/~warcrime/virtualtribunal.htm>.

<sup>68</sup> Ciorciari & Ly, *supra* note 41, at 323.

<sup>69</sup> Compare to ICTY and SCSL archives located in the Hague to accommodate the judges, prosecutors, and defense parties who are the main users of the records.

<sup>70</sup> See Valerie Oosterveld, *The International Criminal Court and the Closure of the Time-Limited International and Hybrid Criminal Tribunals*, 8 LOYOLA U. CHICAGO INT'L L. REV. 13, 17 (2010) (recommending information centers in Sierra Leone to compensate for the trials being hosted by the Special Tribunal in Lebanon located in the Hague).

verdict, will unavoidably produce an immense amount of public, confidential, and strictly confidential evidence. Only the material classified as public is open and may be distributed to Cambodians and the rest of the world to view for educational purposes. The confidential material, which includes *inter alia*, Co-Prosecutor submissions, Co-Investigating Judges findings and decisions, and *in camera* hearings, is only accessible to the Judges, the Co-Prosecutors, civil party lawyers, defense counsel, and authorized staff.<sup>71</sup> Material relating to protective measures and the health of the accused are considered strictly confidential and restricted to Judges and authorized staff.<sup>72</sup> Any person having access to confidential or strictly confidential materials are bound by the duty of confidentiality and prohibited from disclosing such information to other individuals.<sup>73</sup>

Under ECCC law, trial proceedings must be conducted with due regard to the protection of victims and witness.<sup>74</sup> Therefore, any victim or witness who testified or assisted the Court in a way which “is liable to place their life or health or that of their family members or close relatives in serious danger” is entitled to appropriate security measures.<sup>75</sup> This includes orders by the Co-Investigating Judges and the Chambers expunging identifying information from the public case file, using pseudonyms, or conducting *in camera* or closed sessions.<sup>76</sup> In the event of death of an accused and the termination of proceedings, these measures remain effective unless cancelled or changed.<sup>77</sup> This is significant because failure to protect these individuals

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<sup>71</sup> Practice Direction 004/2009, Classification and Management of Case-Related Information, amended 5 June 2009, Articles 3.3(d)(ii), 5.1 (a)-(i) [hereinafter PD Classification & Management].

<sup>72</sup> *Id.* at Articles 3.3 (d)(iii), 6 (a)-(c).

<sup>73</sup> *Id.* at Article 8 (subject to few exceptions).

<sup>74</sup> ECCC Law Article 33.

<sup>75</sup> ECCC Internal Rule 29 (3).

<sup>76</sup> *Id.* at Rule 29 (4) (a)-(e).

<sup>77</sup> Practice Direction ECCC/03/2007/Rev.1, Protective Measures, amended 29 April 2008, Article 4.1.



uninterrupted may prompt retaliation and thus discourage continued participation of victims and witnesses in existing and future trials.<sup>78</sup>

The overarching principle behind the ECCC's classification system is to protect the confidentiality of closed judicial proceedings while ensuring transparency of information to the public.<sup>79</sup> Pursuant only to an order by the Co-Investigating Judges or Chambers, a document marked confidential or strictly confidential may become accessible to the public.<sup>80</sup> One way to accomplish this is by creating copy of the confidential or strictly confidential document and editing the content of any sensitive information.<sup>81</sup> Another way confidential material becomes public is when events make protection of the document no longer necessary and it may be re-classified and placed in the public section of the case file.<sup>82</sup>

#### B. Impact on Future Trials: the ECCC and Beyond

On June 29, 2011, the Co-Investigating Judges (CIJ) issued a notice shutting down the investigations in Case 003 of two suspected persons.<sup>83</sup> In the weeks that followed, the international co-prosecutor, absent his national counterpart, requested the CIJs take further investigative action and publicly identify the suspects in Case 003.<sup>84</sup> The national co-prosecutor, however, stated that the Court does not have jurisdiction over the two suspects and all prosecution should conclude at the end of Case 002.<sup>85</sup> While the fate of Case 003 appears uncertain, the CIJs are in any event required to issue a closing order, either indicting the

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<sup>78</sup> Oosterveld, *supra* note 70, at 17.

<sup>79</sup> PD Classification & Management, *supra* note 71, at Article 1.2.

<sup>80</sup> *Id.* at Article 9.

<sup>81</sup> *Id.* at Article 9.2.

<sup>82</sup> *Id.* at Article 9.1.

<sup>83</sup> Office of the Co-Investigating Judges, Notice of Conclusion of Judicial Investigation, Case 003, Case No. 003/07-09-2009-ECCC-OCIJ, 29 April 2011.

<sup>84</sup> Office of the Co-Prosecutors, Statement from the International Co-Prosecutor Regarding Case File 003, 10 May 2011.

<sup>85</sup> Office of the Co-Prosecutors, Statement by the National Co-Prosecutor Regarding Case File 003, 11 May 2011.

individuals or dismissing the case.<sup>86</sup> If additional prosecutions are not possible at the ECCC, additional accused may nevertheless be tried in national court proceedings or by other states applying the principle of universal jurisdiction.

*i. The Khmer Rouge Tribunal*

If an accused dies before judgment, the incomplete trial proceedings and evidentiary material introduced in Case 002 may place pressure on the ECCC to continue operations and pursue future prosecutions. Testimony, maps, or exhibits from Case 002, may help establish or clarify the facts underlying the charges against future accused. Trial transcripts of the questioning of the accused may also prove helpful.

Subject to the right to remain silent, an accused may testify at the start of trial in civil law systems.<sup>87</sup> The accused is then questioned by the judges, co-prosecutors, fellow accused, and civil parties.<sup>88</sup> The ECCC Internal Rules are structured under the civil law and provide for this order of procedure.<sup>89</sup> In fact, the Chambers followed this approach in Case 001.<sup>90</sup> Recently, the international co-prosecutor filed a court motion requesting the four accused in Case 002 to inform the Chambers if they plan on giving oral testimony at the start of trial.<sup>91</sup> The prosecutor noted that the accused Khieu Samphan had previously stated that he intended to “actively contribute to the work of justice by presenting his version of the facts at trial, in the interests of historical and legal truth for the international community and the people of Cambodia.”<sup>92</sup> This testimony, or any other from the accused, may prove helpful in ECCC Case 003 or 004.

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<sup>86</sup> ECCC Internal Rules 67 (1).

<sup>87</sup> Code of Criminal Procedure of the Kingdom of Cambodia, adopted 7 June 2007, Articles 325 & 326.

<sup>88</sup> *Id.*

<sup>89</sup> ECCC Internal Rule 90(1).

<sup>90</sup> ECCC, Trial Chamber, Direction on the Scheduling of the Trial, *Case 001*, Case No. 001/18-07-2007/ECCC/TC, 20 March 2009, page 2.

<sup>91</sup> ECCC, Co-Prosecutors’ Request for a Direction Regarding the Intentions of the Accused with Respect to Testifying, *Case 002*, Case No.: 002/19-09-2007-ECCC/TC, 17 June 2011.

<sup>92</sup> *Id.* at par. 4 (emphasis omitted).

The Internal Rules are silent on whether written statements from deceased persons may be introduced at trial. However, the ECCC Trial Chamber did object to the admittance of two deceased witness statements in the case file taken by representatives of the Documentation Center of Cambodia, a non-governmental organization set up to document the history of the Khmer Rouge.<sup>93</sup> Because this matter had never been addressed at the ECCC before, the Trial Chamber looked to jurisprudence from international criminal tribunals.<sup>94</sup> The ECCC Trial Chamber cited an ICTY Rule that allowed the admittance of statements by unavailable witnesses.<sup>95</sup> When determining whether to admit a statement under this rule, ICTY chambers consider when the statement was made, if it was subject to questioning by an opposing party, and how it was made or recorded.<sup>96</sup> However, ICTY chambers do not admit evidence under this rule which “goes to the proof of the acts and conduct of the accused as charged.”<sup>97</sup>

While the ECCC Trial Chamber ultimately decided to exclude these statements from the case file—the statements were not taken under oath and went to the alleged criminal acts and conduct of the accused<sup>98</sup>—that does not automatically imply that statements from a deceased accused could not be admitted in a trial at the ECCC under any circumstances. Statements taken from deceased accused during trial would be made under oath and subject to questioning by an opposing party. Perhaps the ECCC could adopt a rule similar to one used at the ICTY, which permits testimony to be introduced in trials when the speaker is deceased. Under ICTY rules, “[t]he evidence of a person in the form of a written statement or transcript who has subsequently

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<sup>93</sup> ECCC, Trial Chamber, Decision on Admissibility of Material on the Case File as Evidence, *Case 001*, Case No. 001/18-07-2007/ECCC/TC, 26 May 2009.

<sup>94</sup> *Id.* at par. 15.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at par. 16.

died . . . may be admitted.”<sup>99</sup> The precondition to admissibility depends upon the unavailability of the person whose transcript is sought and the reliability of the evidence.<sup>100</sup> While no testimony from deceased accused have been used in subsequent trials at the ICTY, statements from deceased witnesses have been admitted.<sup>101</sup>

It is probable that the ICTY prosecutor will attempt to admit statements from the defendant, Milosevic, in the trial of Radovan Karadzic, former Bosnian Serb leader accused of, *inter alia*, genocide and crimes against humanity during the Bosnian War in the early 1990s.<sup>102</sup> During trial, Milosevic made statements beneficial to the prosecution’s case against Karadzic involving the alleged crimes.<sup>103</sup> Though one may argue any statement by a deceased accused lacks reliability as it is advantageous for an accused to blame others in his or her defense, the ECCC judges have the ability to weigh this evidence and assess the credibility. A chamber of “professional judges [are] perfectly capable of sifting evidence to determine what items could lawfully sustain a conviction and what items could not.”<sup>104</sup> Unlike a jury of peers in common law jurisdictions, “there is certainly less need to insulate judges of a Trial Chamber from evidence.”<sup>105</sup>

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<sup>99</sup> ICTY RPE Rule 92 *quarter* (A).

<sup>100</sup> *Id.* at Rule 92 *quarter* (A) (i)–(ii).

<sup>101</sup> ICTY, Trial Chamber II, Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 *quarter*, *Prosecutor v. Vujadin Popovic et al.*, Case No.: IT-05-88-T, 21 April 2008 (admitting testimony and exhibits introduced in the Milosevic trial from now deceased witnesses).

<sup>102</sup> ICTY, Initial Indictment, *Prosecutor v. Karadzic et al.*, Case No. IT-95-5-I, 24 July 1995.

<sup>103</sup> See Mike Corder, *Karadzic in U.N. Custody in Netherlands: Lawyer Says Karadzic, Like Milosevic, Will Conduct his own Defense*, Associated Press, July 30, 2008 (quoting Michael Scharf, professor of international law, “During the Milosevic trial, it became really clear that Karadzic was the real architect of genocide . . . [t]he defense made a convincing case that Milosevic was much less culpable than Karadzic”), available at [http://www.msnbc.msn.com/id/25935682/ns/world\\_news-europe/t/karadzic-un-custody-netherlands/](http://www.msnbc.msn.com/id/25935682/ns/world_news-europe/t/karadzic-un-custody-netherlands/).

<sup>104</sup> Andrew Cayley & Alexis Orenstein, *Motion for Judgment of Acquittal in the Ad Hoc and Hybrid Tribunals*, 8 J. INT’L CRIMINAL JUSTICE 575, 583 (2010) (quoting ICTY, Decision on Motion of Acquittal, *Prosecutor v. Milosevic*, Case No. IT-02-54-T, 16 June 2004, separate opinion of Judge Robinson, par. 18).

<sup>105</sup> *Id.*

*ii. Outside the UN Backed Court*

The ECCC was set up to try a limited number of people.<sup>106</sup> As a result, a majority of members of the Khmer Rouge will die with impunity for any crimes they committed, including the suspects in Case 003/004 if the ECCC fails to investigate. However, the principle of “universal jurisdiction”<sup>107</sup> empowers a national court with the competence to prosecute persons suspected of committing serious violations of human rights even when the court does not have jurisdiction over the person, the alleged crimes, or the place the crimes were committed.<sup>108</sup> This principle reasons that some crimes—genocide, war crimes, and crimes against humanity—are so serious that they cannot go unpunished.<sup>109</sup> Any country with jurisdiction may hold persons accountable for the grave abuses committed in Cambodia from 1975–79. Evidence and testimony from Case 002/001 may be admitted during these prosecutions and be valuable to the case. Also, findings from the ECCC Chambers may be persuasive to the judges when they rule on the matter.

Evidence from Case 002 may also be used by other international courts. The International Court of Justice (ICJ), cited the *Milosevic* case numerous times in its decision in *Bosnia and Herzegovina v. Serbia and Montenegro*.<sup>110</sup> This ICJ case adjudicated whether Serbia and Montenegro had committed genocide against Bosnia during the Yugoslav wars.<sup>111</sup> The judgment looked at the Rule 98*bis* decision, evidence introduced during trial, testimony of

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<sup>106</sup> ECCC Law Article 1 (“senior leaders of Democratic Kampuchea and those who were most responsible for the crimes”). For an account of the negotiation process regarding the number of persons to prosecute at the ECCC, see David Scheffer, *The Negotiating History of the ECCC’s Personal Jurisdiction*, CAMBODIAN TRIBUNAL MONITOR, 22 May 2011.

<sup>107</sup> The principle of universal jurisdiction is highly debated. See Henry Kissinger, *The Pitfalls of Universal Jurisdiction: Risking Judicial Tyranny*, FOREIGN AFFAIRS (2001) (arguing against this principle because it violates a state’s sovereignty).

<sup>108</sup> *Id.*

<sup>109</sup> HUMAN RIGHTS WATCH, UNIVERSAL JURISDICTION IN EUROPE: THE STATE OF THE ART 1 (2006) (citing LUC REYDAMS, UNIVERSAL JURISDICTION: INTERNATIONAL AND MUNICIPAL LEGAL PERSPECTIVES (Oxford 2003)).

<sup>110</sup> ICJ, Judgment, *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, 26 February 2007, General List No. 91.

<sup>111</sup> *Id.*

witnesses, and visual material presented.<sup>112</sup> Case 002 will surely produce a vast amount of material that may be introduced in future trials for prosecuting individuals responsible for the Khmer Rouge atrocities. However, any decisions rendered by the ECCC Chambers in Case 002 will not be binding precedent on any court except the ECCC.<sup>113</sup> Case 002's precedent may be persuasive authority but it does not need to be followed.

### *C. Legacy of the ECCC*

Case 002 will be the most important trial for the ECCC. The case is expected to confirm that Democratic Kampuchea leadership made the decisions that caused the deaths of nearly two million Cambodians. Through the introduction of evidence at trial, Case 002 will formally recognize these crimes. Providing that the ECCC's handling of Case 002 is independent, impartial, and consistent with fair trial standards, whether a verdict is recorded or not, the trial can ensure the Court "leaves a positive legacy as a credible judicial institution for Cambodians."<sup>114</sup>

The absence of verdict will be a serious, but not fatal, blow to the relevance of the ECCC. First, two former Khmer Rouge leaders, current accused Ieng Sary and Brother Number One, Pol Pot, have already been judged by the people of Cambodia. In 1979, the country established the People's Revolutionary Tribunal to try the individuals responsible for the grave human rights abuses committed during Democratic Kampuchea.<sup>115</sup> Although the trial "had serious procedural flaws that gutted it of international legitimacy," it was the first effort by Cambodia to tell the

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<sup>112</sup> *Id.* at pars. 273, 315, 339, 371.

<sup>113</sup> *See id.* at para. 219 ("Because the judge or the Chamber does not make definitive findings . . . , the Court does not consider that it can give weight to those rulings. The standard of proof which the Court requires in this case would not be met.").

<sup>114</sup> OPEN SOCIETY JUSTICE INITIATIVE, SALVAGING JUDICIAL INDEPENDENCE: THE NEED FOR A PRINCIPLED COMPLETION PLAN FOR THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA 6 (Nov. 2010).

<sup>115</sup> John D. Ciorciari, *History and Politics Behind the Khmer Rouge Trials*, in ON TRIAL, *supra* note 3, at 39 (citing EVAN GOTTESMAN, CAMBODIA AFTER THE KR: INSIDE THE POLITICS OF NATION-BUILDING 60-66 (2002); CRAIG ETCHESON, AFTER THE KILLING FIELDS: LESSONS FROM THE CAMBODIAN GENOCIDE 14-17 (2005)).

world about the Khmer Rouge crimes and seek justice.<sup>116</sup> Second, it has been over thirty years since Vietnam removed the Khmer Rouge forces from power.<sup>117</sup> It has been far too long since the crimes of the Democratic Kampuchea era to care only about a judgment. The very fact that Case 002 went to trial will be itself a notable contribution to reconciliation in Cambodia.

When Milosevic died on March 11, 2006, he brought a four-year trial to a startling halt. Some saw the lack of final judgment as proof of the court's inability to manage country-wide, complex international crimes.<sup>118</sup> For others, the mere trial of Milosevic reaffirmed the importance of international criminal justice.<sup>119</sup> A former head of state had been indicted, extradited to the ICTY, and put on trial.<sup>120</sup> While he may have technically evaded a final judgment, he did die in a jail cell. He did not escape justice.<sup>121</sup> The day the ECCC issued indictments for genocide, war crimes, and crimes against humanity, the same became true for the four remaining leaders of Democratic Kampuchea: they will live to judgment or die on trial.

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<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> Human Rights Watch, *Milosevic Escapes Judgment, Not Justice Process*, 10 March 2006, *available at* <http://www.hrw.org/en/news/2006/03/10/milosevic-escapes-judgment-not-justice-process>.

<sup>119</sup> *Id.*

<sup>120</sup> Payam Akhavan, *Milosevic Trial Set Revolutionary Precedent*, THE GAZETTE, 19 March 2006, Opinion, at A15, *available at* [http://mils.mcgill.ca/images/events/Akhavan\\_article.pdf](http://mils.mcgill.ca/images/events/Akhavan_article.pdf)

<sup>121</sup> Human Rights Watch, *supra* note 118.