

Admissibility of Extra-Temporal Evidence in the Extraordinary Chambers in the Courts of Cambodia

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I. Introduction

Noted historian David Chandler has said “[The Khmer Rouge’s] rise to power was made more likely by external events, starting in March 1945, and by the Cold war after that than by anything else.”¹ While historical context is necessary to fully understand the atrocities committed by the Khmer Rouge, it is simultaneously important to allow for the attribution of responsibility to individuals and not permit context to obstruct a court’s ability to conduct fair trials and enforce punishment. First established in the Nuremberg trials, the principle that an individual may be held responsible in international law for grave violations of human rights continues to allow for tribunals, such as the Extraordinary Chambers in the courts of Cambodia, to bring individual perpetrators to justice.²

II. Temporal Jurisdiction of the ECCC

The Establishment Law for the Extraordinary Chambers in the Courts of Cambodia (‘ECCC’) defines the court’s temporal jurisdiction as applying to “crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from April 17, 1975 to January 6, 1979.”³ These dates correspond with the generally recognized beginning

¹ David Chandler, Address at the Documentation Center of Cambodia’s University Lecturer Training: The Khmer Rouge in a Cold War Context delivered at the on (Jul. 25, 2011)(transcript available through DC-Cam).

² U.N. Secretary-General, Letter Dated Dec. 9 1994 from the Secretary- General addressed to the President of the Security Council, U.N. Doc. S/1994/1405 (Dec. 9, 1994).

³ Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, as amended and promulgated on Oct. 27, 2004, NS/RKM/1004/006, art. 2 new; Article 2 new; Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea (June 6, 2003), arts 1, 5 and 6. April 17, 1975 is the date the Khmer Rouge overthrew Lon Nol, establishing Democratic Kampuchea and January 6 1979 is the date the Khmer Rouge were overthrown by Vietnamese troops, thus ending the rule of Democratic Kampuchea.

and end of the Pol Pot regime ('Democratic Kampuchea'), reflecting Cambodia and the international community's desire to focus the trials on the so-called "worst of the worst" perpetrators.

The Court's limited jurisdiction is indicative of both pragmatic and political concerns. Similar temporal limits are present in the International Criminal Tribunal for Rwanda ('ICTR') and the Special Court for Sierra Leone ('Special Court'), signifying the unique jurisdiction of these courts over specific political and historical events. These jurisdictional limitations reflect a goal in international criminal law to focus ad hoc tribunals around only those most responsible for the most egregious crimes—rather than opening tribunals to investigate the broader historical context in which human rights violations occurred—an approach that could open itself to politicization.⁴ However, while it is necessary to limit the scope of tribunals such as the ECCC, it is equally important to recognize that these events did not occur within a neat temporal slice of history and the discussion of some events preceding 1975 and following 1979 may be necessary in order to conduct fair trials. Interestingly, at some point during negotiations, the governments involved in each of these tribunals advocated for the temporal jurisdiction to be extended in order to place events in historical perspective. The intensity of these negotiations points to the high stakes potential of tribunals to establish the victors' historical truth.

At the April 5, 2011 Trial Management meeting, the Trial Chamber of the ECCC announced that it intended the initial four topics in Case 002 to cover the structure of Democratic Kampuchea, the roles of each accused during the period prior to the

⁴ CESARE ROMANO P.R., ANDRE NOLLKAEMPER, & JANN K. KLEFFNER, INTERNATIONALIZED CRIMINAL COURTS- SIERRA LEONE, EAST TIMOR, KOSOVO AND CAMBODIA 28 (2004).

establishment of Democratic Kampuchea, the role of each accused in the Democratic Kampuchea government, and the policies of Democratic Kampuchea on the issues raised in the indictment.⁵ In response, defendants Ieng Sary and Nuon Chea submitted motions to the Trial Chamber requesting the inclusion of topics pre-1975 and post-1979; topics they deemed “material to the allegations made in the Indictment” and “essential to a proper determination of the charges made therein.”⁶

Ieng Sary’s proposed topics include: the culture and demography of Cambodia from the pre-colonial period to 1975; the background to, rise and aims of the Cambodian left; the context of attitudes towards Buddhism in Democratic Kampuchea; the context to attitudes towards the Cham in Democratic Kampuchea; the context to attitudes towards the Vietnamese in Democratic Kampuchea; the UN’s recognition of Democratic Kampuchea as the legitimate government of Cambodia, the nature of government in the Peoples’ Republic of Kampuchea, and the historiography of Democratic Kampuchea (collectively the “Ieng Sary Topics”).⁷

On May 25, 2011, Nuon Chea’s defense team filed a motion supporting Ieng Sary’s request for additional topics and requested that additional topics be added to the Trial

⁵ See Ieng Sary’s Motion to Add New Trial Topics to Trial Schedule Case No. 002/19-09-2007-ECCC/TC (Trial Chamber, May 23, 2011)(referencing Document No E-1I2.1, 'Transcript of Hearing "Trial Management Meeting" ', 5 April 2011, ERN 00664215-00664345 (the 'TMM Transcript'), 52:6-17 ('The Chamber wishes at this stage to provide an early indication of the sequencing of the beginning of the trial. The Chamber wishes to inform the parties of its intention to commence the hearing of the substance in the following order: One, the structure of Democratic Kampuchea; two, roles of each accused during the period prior to the establishment of Democratic Kampuchea, including when these roles were assigned; three, role of each accused in the Democratic Kampuchean government, their assigned responsibilities, the extent of their authority and the lines of communication, throughout the temporal period with which the ECCC is concerned; four, policies of Democratic Kampuchea on the issues raised in the indictment.')).

⁶ See Ieng Sary’s Motion to Add New Trial Topics to Trial Schedule Case No. 002/19-09-2007-ECCC/TC (Trial Chamber, May 23, 2011).

⁷ *Id.*

Schedule.⁸ Adopting the reasoning from Ieng Sary's motion, the Nuon Chea defense team motioned to add to the Trial Schedule:

Relevant Contextual Elements: the historical, geo-political, socio-economic, demographic, military, and legal circumstances and/or institutions- including those of the CPK and those originating in or operating from outside Cambodian soil- which directly or indirectly impacted Cambodia before, during and following the DK regime.⁹

Arguing in favor of the discussion of these extra-temporal topics during the substantial hearing, Nuon Chea's defense team purported that "merely discussing the topics suggested by the Trial Chamber would lead to an incomplete and unsatisfactory assessment of the 'facts' for which Nuon Chea is being prosecuted."¹⁰ They maintained that a more comprehensive historical understanding is key to "accurately assess and appraise" events that occurred within the Court's temporal jurisdiction.¹¹ Moreover, they argued that forgoing a broader contextual analysis of the crimes their client is charged with for the sake of judicial economy would deprive their client of a fair trial. In its decision, the Trial Chamber rejected the motions, however left open the possibility of revisiting the introduction of extra-temporal evidence at a later stage.¹² An examination of the ECCC's temporal jurisdiction and that of other tribunals, along with instances where exceptions have been made, sheds light on when, if ever, the Trial Chamber may be inclined to admit extra-temporal evidence.

A. Practical Motivations for a Limited Temporal Jurisdiction

a. Cambodia

⁸ See Nuon Chea's Motion in Support of "Ieng Sary's Motion to Add New Trial Topics to the Trial Schedule' and Request to Add Additional Topics Case No. 002/19-09-2007-ECCC/TC (Trial Chamber, May 25, 2011).

⁹ *Id.* The motion also included a section on fair-trial concerns.

¹⁰ *Id.* at ¶ 9.

¹¹ *Id.*

¹² Trial Chamber Directive in Advance of Initial Hearing Concerning Proposed Witnesses, Case 002/19-09-2007-ECCC/TC (E93) (Trial Chamber, June 3, 2011).

The process for creating the ECCC began in June of 1997, when the co-Prime Ministers of Cambodia sent a letter to the UN Secretary-General requesting the UN's assistance "in bringing to justice those persons responsible for the genocide and crimes against humanity during the rule of the Khmer Rouge from 1975-1979."¹³

The UN General Assembly took the lead on Cambodia's request and the Secretary-General appointed a Group of Experts ('the Group') to look into the possibility of a tribunal.¹⁴ The Group's mandate was to "determine the nature of the crimes committed by the Khmer Rouge leaders in the years 1975-1979," "to assess . . . the feasibility of bringing Khmer Rouge leaders to justice" and "to explore options for bringing to justice Khmer Rouge leaders before an international or national jurisdiction."¹⁵

This mandate directed them to consider human rights violations that occurred between 1975 and 1979. The Group interpreted this mandate to mean the period of the Khmer Rouge's rule over Cambodia, specifically from April 17 1975- January 7, 1979, and decided Khmer Rouge violations of international law that occurred outside of that period were beyond their scope of inquiry, unless they were necessary to discuss the Group's mandate.¹⁶ In their discussion of who should be tried by the Tribunal, the Group explained that trying people for human rights abuses outside of the period of the rule of Democratic Kampuchea would "detract from the unique and extraordinary nature of the crimes

¹³ Letter dated June 21, 1997 from the First and Second Prime Ministers of Cambodia to the UN Secretary-General, in U.N. Doc A/51/930-S/1997/488 (June 25, 1997).

¹⁴ See Report of the Group of Experts for Cambodia, established pursuant to G.A. Res. 52/135, U.N. GAOR, 53rd Sess., Annex, U.N. Doc. A/53/850, S/1999/231 (Mar. 16, 1999).

¹⁵ *Id.*

¹⁶ See Report of the Group of Experts for Cambodia, established pursuant to G.A. Res. 52/135, U.N. GAOR, 53rd Sess., Annex, 7, U.N. Doc. A/53/850, S/1999/231 (Mar. 16, 1999).

committed by the leaders of Democratic Kampuchea,” however, the Group left the final decision of the Tribunal’s temporal jurisdiction for the body that would create the Tribunal.¹⁷

b. ICTR

The ICTR’s temporal jurisdiction is defined in Article 1, Article 7, and Article 15(1) of the Court’s Statute as limited to the adjudication of crimes within the subject-matter jurisdiction of the Tribunal committed between January 1 and December 31, 1994.¹⁸ During Security Council meetings prior to the establishment of the Tribunal, the Council repeatedly stated that the genocidal crime took place between April 6, 1994 and July 17, 1994.¹⁹ The genocide was preceded by a long history of war and ethnically motivated massacres in Rwanda—and while the Security Council was aware of violations of international law that preceded this period—it wanted to limit the Tribunal’s jurisdiction to crimes committed during the 1994 genocide and war. Prior to the Security Council’s vote on establishing the Tribunal, the French delegation made statements shedding light on the reasoning of the Tribunal’s temporal jurisdiction. The delegate said that the start date of January 1 was chosen to take into account planning and preparation for the genocide, which began on April 6, and the end date of December 31 was chosen in order to take into account that persecution of Tutsis continued after July.²⁰ In the end, the Security Council extended the beginning of the Tribunal’s jurisdiction to January 1 in order to include the planning stages of the genocide and the end to December 31.²¹

¹⁷ *Id.* at 41.

¹⁸ S.C. Res. 955, U.N. SCOR, 49th Sess., 3453rd mtg., Annex, U.N. Docs. S/RES/955 (1994) (hereinafter ICTR Statute).

¹⁹ U.N. SCOR, 49th Sess., 3453^d mtg., U.N. Doc. S/PV.3453 (Nov. 8, 1994).

²⁰ *Id.*

²¹ *Id.* at 3.

c. Sierra Leone

The creation of the Special Court sheds some light on the pragmatic considerations that went into defining the ECCC's temporal jurisdiction. The Special Court is likewise characterized by its limited temporal scope, focused on only the most prominent atrocities however unlike the ICTR and ECCC, the Special Court's jurisdiction does not include an end date. The reason for this is illustrated in the "Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone," documenting the debate over establishing the Special Court's temporal jurisdiction.

The generally accepted date the civil war in Sierra Leone began is March 23, 1991: the date forces of the Revolutionary United Front ('RUF') came to Sierra Leone from Liberia with the intent to overthrow the All People's Congress ('APC') government.²² Nevertheless, it was decided that beginning the Special Court's temporal jurisdiction in 1991 would create too heavy an administrative burden on the Court. The issue of amnesties granted under the Lomé Peace Agreement also had to be reconciled if a pre-1999 start date were to be decided upon. The agreement between the Government of Sierra Leone and the UN to deny the legal effect of amnesties granted under the Lomé Peace Agreement removed the obstacle to determining a beginning date that preceded 1999.²³ November 30, 1996, was eventually decided upon as the start date of the court's jurisdiction because it satisfied three main considerations that the Secretary General believed would prevent the jurisdiction from being

²² CESARE ROMANO P.R., ANDRE NOLLKAEMPER, & JANN K. KLEFFNER, INTERNATIONALIZED CRIMINAL COURTS- SIERRA LEONE, EAST TIMOR, KOSOVO AND CAMBODIA 130 (2004).

²³ Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, U.N. Docs S/2000/915 ¶24 (2000).

perceived as “selective or discriminatory.”²⁴ First, the temporal jurisdiction was reasonably limited so that the Prosecutor would not be overburdened and the Court would not be overloaded. Second, it corresponds to a new event or phase of conflict without necessarily having political connotations. Third, it encompassed the most serious crimes committed during the civil war.²⁵ Other dates considered were May 25, 1997, the date of the coup d’état by the Armed Forces Revolutionary council (AFRC) against the Government, and January 6, 1999, the date on which RUF/AFRC launched a military operation to take control of Freetown.²⁶ November 30, 1996—the conclusion of the Abidjan Peace Agreement—was preferred because the temporal jurisdiction would not unduly burden the prosecution and the court’s resources and encompassed the most serious violations of international humanitarian law. Furthermore, that date lacked the politicized implications of a May 25, 1997 start date which could be viewed as a means of punishing those involved in the coup d’état.²⁷

While the UN Group of Experts did not describe its decision to limit the Khmer Rouge Tribunal’s temporal jurisdiction in the language utilized by the Special Court, its temporal jurisdiction fulfills the Special Court’s considerations. The fact that the Court’s jurisdiction appeared in both the United States’ Genocide Justice Act of 1994 and in Hun Sen’s 1997 letter to the UN requesting assistance with forming a tribunal is a testament to the international and national recognition that the three years, eight months, and twenty days of

²⁴ Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, U.N. Docs S/2000/915 ¶25 (2000).

²⁵ *Id.*

²⁶ *Id.* at 6.

²⁷ *Id.*

Khmer Rouge rule be the Court's primary focus.²⁸ Even though human rights abuses occurred outside of the 1975-1979 period, this scope is reasonably limited so as not to overburden the Court's financial and personnel resources. Second, the dates correspond to new events in the conflict—the beginning date corresponds to the fall of Phnom Penh and the end date corresponds with when Vietnamese forces entered Phnom Penh—the beginning and end of the Democratic Kampuchea government. While it can be argued that the temporal jurisdiction is politicized since it excludes the United States' bombing campaign, abuses by the US backed Lon Nol regime, and crimes committed by Vietnam and the Cambodian government during the Third Indochina War, the Tribunal would not have gained needed support from outside powers and the Cambodian People's Party ("CPP") government with an expansive temporal jurisdiction.²⁹ Third, the ECCC's temporal jurisdiction encompasses the most serious crimes committed, a goal highlighted by the Group of Experts when they reported a desire to focus on the "unique and extraordinary nature" of the crimes committed by the Khmer Rouge.³⁰ At all three courts' jurisdiction artificially cuts out events relevant to the crimes, but provides 1) a clear cutoff, 2) limited mandate, and 3) political support.

B. Political Motivations for a Constricted Temporal Jurisdiction

a. Cambodia

²⁸ See 22 USCA §2656; Letter dated June 21, 1997 from the First and Second Prime Ministers of Cambodia to the UN Secretary-General, in U.N. Doc A/51/930-S/1997/488 (June 25, 1997).

²⁹ JOHN CIORCIARI & ANNE HEINDEL, ON TRIAL: THE KHMER ROUGE ACCOUNTABILITY PROCESS 73 (2009).

³⁰ See Report of the Group of Experts for Cambodia, established pursuant to G.A. Res. 52/135, U.N. GAOR, 53rd Sess., Annex, 41, U.N. Doc. A/53/850, S/1999/231 (Mar. 16, 1999).

The enthusiasm expressed in the Cambodian government's letter to the Secretary General requesting a tribunal was soon tempered by a number of domestic events: internal power struggles, the death of Pol Pot, and the opportunity to encourage the defection of Khmer Rouge leaders such as Ieng Sary.³¹ While the Group of Experts were working on their recommendations, more Khmer Rouge leaders defected, including Nuon Chea and Khieu Samphan, prompting Hun Sen to say that "the time had come to dig a hole and bury the past," a sentiment diametrically opposed to the establishment of a war crimes tribunal.³² In January of 1999, Hun Sen submitted a memorandum to the Secretary-General suggesting a trial could lead to instability and recommending if there is such a trial, it should address crimes committed before 1975 and after 1979.³³ He then submitted a response to the Group of Experts report, in which he expressed concern that a trial could renew guerrilla warfare in Cambodia and that the government was looking into the possibility of a South African style truth and reconciliation commission instead.³⁴ The Cambodian government revisited the idea of a tribunal when Ta Mok, one of the remaining Khmer Rouge leaders, was captured on March 6, 1999. Hun Sen expressed renewed interest in a tribunal to the extent that it would try the one person who had refused to surrender, Ta Mok.³⁵ Ambassador Hammarberg noted that it appeared "the tribunal had been considered as a means of defeating the Khmer Rouge."³⁶

³¹ See Thomas Hammarberg, *How the Khmer Rouge tribunal was agreed: discussions between the Cambodian government and the UN*, SEARCHING FOR THE TRUTH, 2001; CESARE ROMANO P.R., ANDRE NOLLKAEMPER, & JANN K. KLEFFNER, INTERNATIONALIZED CRIMINAL COURTS- SIERRA LEONE, EAST TIMOR, KOSOVO AND CAMBODIA 28 (2004).

³² Thomas Hammarberg, *How the Khmer Rouge tribunal was agreed: discussions between the Cambodian government and the UN*, SEARCHING FOR THE TRUTH, 2001.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

Negotiations between the UN and the Cambodian government began in July 1999, against this politically tempestuous backdrop. While in its initial letter the Cambodian government put forth a temporal jurisdiction of 1975-1979, the government used the Court's temporal jurisdiction as a bargaining chip during negotiations, proposing changes when the UN pushed provisions with which it did not agree.³⁷ The negotiations were contentious and involved many quarrels, including over the Tribunal's jurisdiction. A major outstanding issue, whether a foreign prosecutor could act without the support of his or her Cambodian colleague, prompted Hun Sen to indicate to the Secretary-General in April 2000 that if the foreign prosecutor was permitted to act independently, then the Tribunal's establishment law might allow for the prosecution of crimes committed from 1970 to 1999.³⁸

The Cambodian government was not the only entity with an interest in constraining the ECCC's temporal jurisdiction. Opposition from China, upon whom the Khmer Rouge relied for support between 1975 and 1979, also undermined efforts to create the type of international criminal tribunal recommended by the U.N. Group of Experts for Cambodia.³⁹ Following the Group's report, China told the United States it would veto any tribunal brought before the United Nations Security Council.⁴⁰ While Hun Sen responded to the Group's report by seeking to expand the temporal jurisdiction from 1970 to 1999, the United States rejected this proposal because it would encompass America's own 1970 bombing campaign

³⁷ *Id.*

³⁸ *Id.* These conflicts culminated in the Secretary-General's decision to withdraw from negotiations in February 2002 because he felt the proposed Cambodian mixed tribunal would not meet international standards of justice; *see also* CESARE ROMANO P.R., ANDRE NOLLKAEMPER, & JANN K. KLEFFNER, INTERNATIONALIZED CRIMINAL COURTS- SIERRA LEONE, EAST TIMOR, KOSOVO AND CAMBODIA 17 (2004).

³⁹ *See* Elizabeth Becker, *U.N. Panel Urges Tribunal for Khmer Rouge Leaders*, N.Y. TIMES, Mar. 2, 1999, at A8.

⁴⁰ *Id.*

in Cambodia.⁴¹ In the end, the ECCC's Establishment Law codified the originally agreed upon temporal jurisdiction, which satisfied all of the players' political interests.

b. ICTR

Both the government in power during the genocide and the successor Rwandese Patriotic Front ('RPF') government pushed for the ICTR's temporal jurisdiction to begin in 1990, indicating that both sides believed the broader historical context would be beneficial to understanding their conflict. During the beginning stages of the UN Security Council's debate on the creation of the ICTR, the Rwandan delegation pushed for the Tribunal to begin in October of 1990, arguing that the date corresponded with the war's beginning. Since this argument was made by Jérôme Bicomumpaka, later tried for genocide, in the midst of the genocide, it appears his desire to expand the temporal jurisdiction was prompted by a desire to broaden the scope past his government's genocide in 1994 and view it in the lens of the war between the RPF and the Hutu government.⁴²

The Rwandan delegation, representing the new RPF government, voted against the resolution establishing the ICTR for a number of reasons, one of which was a disagreement over the temporal jurisdiction. The Rwandan delegation noted that there had been massacres of the Tutsi minority before 1994 and wanted the Tribunal to cover those as well with a temporal jurisdiction beginning on October 1, 1990 and extending to the end of the war, July 17, 1994.⁴³ This suggestion was rejected by the Security Council. Since the Tribunal was established so soon after the genocide, its temporal jurisdiction was not intended to exclude any crimes committed by the RPF after 1994 but rather to keep the focus on the

⁴¹ Thomas Hammarberg, *How the Khmer Rouge tribunal was agreed: discussions between the Cambodian government and the UN*, SEARCHING FOR THE TRUTH, 2001.

⁴² U.N. SCOR, 3377th mtg., U.N. Doc. S/PV.3377 (May 16, 1994).

⁴³ *Id.*

genocide, its planning, and immediate consequences. Many have nevertheless considered the court biased.

c. Sierra Leone

As discussed above, the Special Court's jurisdiction began on November 30, 1996, the date of the failed Abidjan Peace Agreement.⁴⁴ The Peace Agreement represented the first time the warring factions attempted to reach a peaceful settlement of the conflict and the violence that followed encompassed the most serious crimes committed in the provinces. There was no overt political consideration behind not beginning the Special Court's temporal jurisdiction at the start of the civil war in 1991, it was simply accepted by all parties involved that requiring the Prosecutor to investigate crimes since 1991 would be too onerous in terms of time and cost.⁴⁵ Other potential start dates, however, were rejected for political reasons. May 25, 1997, when the coup d'état was launched by the Armed Forces Revolutionary Council ('AFRC'), was rejected on the grounds of having too many political overtones since beginning with the AFRC's coup would frame the conflict around the AFRC. January 6, 1999, when the AFRC and RUF attacked Freetown, was rejected for fear that the Court would focus only on crimes committed in Freetown at the expense of other regions.⁴⁶

Thus, as in Cambodia, these ad hoc courts have limited their jurisdictions not only due to practical concerns, but also to avoid politicization through the use of a temporal jurisdiction that would favor a particular party's historical narrative. For this reason, accused have argued that the temporal jurisdictions of ad hoc tribunals are biased.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* at 131.

III. Temporal Jurisdiction in International Jurisprudence

The ECCC Trial Chamber addressed both Ieng Sary and Nuon Chea's motions in its Directive in Advance of Initial Hearing Concerning Proposed Witnesses.⁴⁷ The Chamber announced that, at this stage, it was rejecting their motions to add certain pre-1975 and post-1979 topics to the list of issues that the Trial Chamber already decided to hear at trial. The Chamber proceeded to introduce a new standard for when background contextual issues and events outside the ECCC's temporal jurisdiction would be considered: "when demonstrably relevant to matters within the ECCC's jurisdiction and the scope of the trial as determined by the Chamber."⁴⁸

While the Chamber did not elaborate on how it would decide that evidence is "demonstrably relevant," this standard, combined with Rule 87 of the ECCC's Internal Rules and ECCC case law, are consistent with evidentiary rules as established by international courts in determining when evidence outside the court's temporal jurisdiction is "demonstrably relevant."

To address lacunae, the ECCC judges adopted "additional rules where these existing procedures do not deal with a particular matter, or if there is uncertainty regarding their interpretation or application, or there is a question regarding their consistency with international standards," pursuant to Articles 20 new, 23 new, and 33 new of the ECCC Law and Article 12(1) of the Agreement.⁴⁹ However, as both the Internal Rules and Cambodian

⁴⁷ Trial Chamber Directive in Advance of Initial Hearing Concerning Proposed Witnesses, Case 002/19-09-2007-ECCC/TC (E93) (Trial Chamber, June 3, 2011).

⁴⁸ *Id.*

law are silent on the issue of admissibility of extra-temporal topics, the ECCC is permitted to look to international law for guidance.⁵⁰

Despite the practical and political needs for limitations on the time periods addressed, international courts have allowed evidence outside of their temporal jurisdiction to be admitted in limited circumstances.⁵¹ For example, in the case of *Josef Alstötter and Others*, before the United States Military Tribunal, Nuremberg, in 1947, the Tribunal admitted evidence beyond its temporal jurisdiction because "such acts are relevant upon the charges . . . [and] [n]one of these acts is charged as an independent offence in this particular indictment."⁵²

Likewise, the ICTR and the SCSL have also permitted the admission of evidence beyond their temporal jurisdiction in limited circumstances, so long as the crime itself occurred within the court's temporal jurisdiction and the evidence's purpose is in the interest in justice, not solely to blacken the defendant's character or to turn the trial into a political debate. The ICTR Appeals Chamber has noted in its decisions concerning its temporal jurisdiction that while no one may be indicted for a crime outside the prescribed jurisdictional scope, the ICTR is not precluded from including information relating to events falling outside the temporal jurisdiction of the Tribunal in limited circumstances.⁵³

⁵⁰ Decision on Nuon Chea's Appeal Against Order Refusing Request for Annulment, Case No. 002/19-09-2007-ECCC/OCU (PTC06) ¶13 (Pre-Trial Chamber, Aug. 26, 2008); Internal Rules (Rev.7), (Feb.23, 2011); Establishment Law Article 20, 33.

⁵² See Law Reports of Trials of War Criminals by United Nations War Crimes Commission Case No. 35 The Justice Trial of Josef Alstotter and Others United States Military Tribunal, Nuremberg, 73 (Feb. 17-Dec. 4 1947).

⁵³ See Prosecutor v. Nahimana Case No. ICTR-99-52-A Appeals Judgment (Nov. 28, 2007); Simba v. Prosecutor, Case No. ICTR-01-76-AR72.2, Decision on Interlocutory Appeal Regarding Temporal Jurisdiction (July 29, 2004); see also Article 7 of the Statute of the Tribunal (stating "The territorial jurisdiction of the International Tribunal for Rwanda shall extend to the territory of Rwanda

The seminal case of *Prosecutor v. Nahimana et al*, also known as the “Media Case,” established a rule for when the Tribunal was permitted to enter evidence outside of the ICTR’s temporal jurisdiction.⁵⁴ Appellants Nahimana, Barayagwiza and Ngeze raised multiple grounds of appeal, including the allegation that the Trial Chamber exceeded its temporal jurisdiction, in violation of Article 7 of the Statute of the Tribunal, by convicting them on the basis of acts prior to 1994.⁵⁵

In its decision, the Appeals Chamber noted that although it was the intention of the framers of the Statute that the ICTR only have jurisdiction over an accused when all of the elements required to be shown to establish guilt were present in 1994, it is also well established that the provisions of the Statute do not preclude the admission of evidence on events prior to 1994.⁵⁶ Such evidence may be admitted if the Trial Chamber deems it to be “relevant and or probative value and there is no compelling reason to exclude it.”⁵⁷ The Appeals Chamber provided four instances where such evidence would be considered to have relevant and probative value:

- Clarifying a given context, legally or factually
- Establishing by inference the elements of criminal conduct occurring in the court’s jurisdiction
- Demonstrating a deliberate pattern of conduct
- Continuing crimes

including its land surface and airspace as well as to the territory of neighbouring States in respect of serious violations of international humanitarian law committed by Rwandan citizens. The temporal jurisdiction of the International Tribunal for Rwanda shall extend to a period beginning on 1 January 1994 and ending on 31 December 1994.”); *see also* *Prosecutor v. Nahimana* Case No. ICTR-99-52-A, Appeals Judgment (Nov. 28, 2007); *Simba v. Prosecutor*, Case No. ICTR-01-76-AR72.2, Decision on Interlocutory Appeal Regarding Temporal Jurisdiction (July 29, 2004).

⁵⁴ *Prosecutor v. Nahimana* Case No. ICTR-99-52-A Appeals Judgment (Nov. 28, 2007).

⁵⁵ *Prosecutor v. Nahimana* Case No. ICTR-99-52-A Appeals Judgment ¶8,9 (Nov. 28, 2007).

⁵⁶ *Prosecutor v. Nahimana* Case No. ICTR-99-52-A Appeals Judgment ¶ 313, 315(Nov. 28, 2007).

⁵⁷ *Prosecutor v. Nahimana* Case No. ICTR-99-52-A Appeals Judgment ¶315 (Nov. 28, 2007); ICTR Rules of Procedure and Evidence Rule 89(c).

While the ICTR presented four categories, in practice the Court does not clearly articulate which of these categories is being applied and it is often difficult to distinguish when evidence is viewed by the Court as establishing by inference the elements of criminal conduct occurring in the court's jurisdiction, demonstrating a deliberate pattern of conduct, or clarifying a given context. Rather, in its decisions, the Court simply cites the *Nahimana* Appeals Judgment as permitting it to reference extra-temporal evidence.

The issue of the admissibility of extra-temporal evidence most recently arose in the *Prosecutor v. Taylor* case before the Special Court. While the Trial Chamber has yet to rule on the issue, the Prosecution presented five instances in which evidence from outside the temporal scope of the Court's jurisdiction is admissible.⁵⁸ These categories overlap with the instances outlined in *Nahimana*.

While the ECCC's Internal Rules do not explicitly include minimum standards of relevance for the admissibility of evidence as found in the ICTR, ECCC case law has incorporated this standard.⁵⁹ Therefore, for extra-temporal evidence to be admitted, it would need to clarify a given context, establish by inference an element of a crime with which the accused is

⁵⁸ *Prosecutor v. Taylor*, Case No. SCSL-03-01-T Prosecution Response to Defense Motion to Exclude Evidence Falling Outside The Scope of the Indictment And/Or the Jurisdiction of the Special Court for Sierra Leone, p. 5,6 (Sept. 29, 2010). Provide the context in which the offences are said to have been committed, prove the existence of a joint criminal enterprise, command and control, authority over a subordinate, and the *mens rea* of the Accused, establish by inference the elements of criminal conduct occurring during the Court's jurisdiction, demonstrate a deliberate or consistent pattern of conduct, which can then be relied upon to establish specific offences, including a campaign of terror, and/or modes of liability charged in an indictment; and/or prove the chapeau requirements of Crimes Against Humanity, Violations of Article 3 common to the Geneva Conventions and of Additional Protocol II, and other serious violations of international humanitarian law.

⁵⁹ See Decision on Admissibility of New Materials and Direction to the Parties, Case 001/18-07-2007 ECCC/TC (E5/10/2) (Trial Chamber, March 10, 2009)(citing evidence must "prima facie appear relevant to the ascertainment of the truth, subject however, to the assessment of such evidence during the substantive hearing."); Decision on Admissibility of Material on the Case File as Evidence, Case 001/18-07-2007 ECCC/TC (E43/4) (Trial Chamber, May 26, 2009)(holding that in order to be used as evidence, material on the case file must satisfy minimum standards of relevance and reliability necessary for it to be produced before the Chamber).

charged, demonstrate a deliberate pattern of conduct, or pertain to a continuing crime.⁶⁰

Another evidentiary standard from ICTR case law, requiring that extra-temporal evidence's relevance to a crime committed within the temporal jurisdiction be articulated with particularity, is also useful in determining when evidence is "demonstrably relevant."⁶¹ Even if evidence satisfies these criteria, whether or not to admit the evidence remains within the Trial Chamber's discretion.

A. Clarifying a Given Context

In its judgment for Case 001, the ECCC reached back to the 15th Century to establish the context of the Khmer Rouge's policies and its conflict with Vietnam.⁶² The "Historical Context and Armed Conflict" section begins with Vietnamese Southern expansion in the 15th century and describes this event as "resulting in hereditary enmity between Cambodia and Vietnam."⁶³ The Trial Chamber later clarified in its judgment that this context is provided in order to fulfill the required element of the existence of an international armed conflict for grave breaches of the Geneva Conventions of 1949.⁶⁴

In *Nahimana*, the ICTR looked at a shorter extra-temporal scope and found that the Appellant's role in setting up Radio Télévision Libre des Mille Collines ('RTLM') in 1993 and management from the time of its creation could be taken into account in the Court's assessment of his criminal responsibility after January 1, 1994 because it gave context to his

⁶⁰ See Prosecutor v. Nahimana Case No. ICTR-99-52-A Appeals Judgment ¶1315, 317 (Nov. 28, 2007).

⁶¹ *Id.* at ¶127

⁶² Judgment Case No. 001/18/07-2007/ECCC/TC (E188) ¶159-65 (Trial Chamber, July 26, 2010).

⁶³ *Id.* at ¶160

⁶⁴ *Id.*

role in RTLM, whose broadcasts in 1994 instigated the killings of Tutsis.⁶⁵

Judge Shahabuddeen, in his concurring opinion with the *Nahimana* interlocutory appeal, describes context as an event without which “the account...would be incomplete or incomprehensible.”⁶⁶ He saw this category as being broadly interpreted in light of the “scale of events, in space and time.”⁶⁷ In *Aloys Simba*, the ICTR trial chamber referenced his view, finding when the Appellant requested an order to exclude from the indictment against him allegations based on events outside of the Tribunal’s temporal jurisdiction that the indictment only charged Aloys Simba, with crimes committed between April 7, 1994 and May 30, 1994 and found that references to events prior to 1994 were limited to providing a context or background for the charges.⁶⁸ Examples of evidence that have been found to provide a “background or context” include the dismissal of Tutsi from the Rwandan army. The Chamber in *Bagosora* saw this fact as helpful to the Chamber in understanding the context in which the Accused was operating.⁶⁹

In its judgment in the case of *Prosecutor v. Fofana et al*, the Special Court for Sierra Leone similarly used evidence relating to events occurring prior to the temporal jurisdiction

⁶⁵ See *Prosecutor v. Nahimana* Case No. ICTR-99-52-A Appeals Judgment ¶¶575-576, 589 (Nov. 28, 2007). However, the Appeals Chamber found that Nahimana’s involvement prior to the Court’s jurisdiction did not amount to instigating genocide and reversed the Trial Chamber’s conviction of Nahimana on the count of genocide.

⁶⁶ See *Prosecutor v. Bagosora* Case No. ICTR-98-41-T, Decision on Admissibility of Proposed Testimony of Witness DBY (Sept. 18, 2003) (citing Shahabuddeen Opinion para. 21, quoting *R. v. Pettman*, 2 May 1985, unreported, per Purchas W).

⁶⁷ See *Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Admissibility of Proposed Testimony of Witness DBY, 18 September 2003 citing Shahabuddeen Opinion para. 21, quoting *R. v. Pettman*, 2 May 1985, unreported, per Purchas W.

⁶⁸ See *Simba v. Prosecutor* Case No. ICTR-01-76-AR72.2, Decision on Interlocutory Appeal Regarding Temporal Jurisdiction (July 29, 2004).

⁶⁹ See *Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Admissibility of Proposed Testimony of Witness DBY, 18 September 2003 ¶32.

of the Special Court to explain the history of the Kamajors, their structure, and relationship with the military.⁷⁰

In order to for Ieng Sary and Nuon Chea's additional topics to be admissible under the context exception, they would need to be so key to the case that without their inclusion, the account of events would be incomplete or incomprehensible. It is up to the Trial Chamber to decide if the submitted topics meet this standard.

B. Establishing by inference the elements of criminal conduct occurring within the temporal jurisdiction

The ECCC Trial Chamber noted that events relating to M-13, the Khmer Rouge prison where Duch worked prior to Democratic Kampuchea, fell outside of the temporal jurisdiction of the ECCC. Nevertheless, it heard testimony regarding M-13, seeing it as a precursor to S-21, the prison where Duch worked during the ECCC's jurisdiction and the basis of the charges against him.⁷¹ The Trial Chamber clarified that while facts pertaining to M-13 were not in the Closing Order, as they fell outside of the ECCC's temporal jurisdiction, M-13 was key to understanding "the context of S-21 relating to the organizing of structures, the operation and functioning of S-21 and other reasons, and the personality of the accused."⁷² The co-prosecutors described M-13 as "the training ground of the accused."⁷³ The Trial Chamber asked Duch about the conditions in M-13. Duch admitted that he could see the

⁷⁰ Prosecutor v. Fofana Case No. SCSL-04-14-T, Judgment, ¶ 60,64 (Aug. 2, 2007).

⁷¹ Judgment Case No. 001/18/07-2007/ECCC/TC (E188) footnote 192 (Trial Chamber, July 26, 2010).

⁷² Prosecutor v. Kaing Guek Eav alias "Duch," Case No. 001/18-07-2007/ECCC/TC, Transcript of Proceedings p.7 (Trial Chamber Apr. 6, 2009).

⁷³ Prosecutor v. Kaing Guek Eav alias "Duch," Case No. 001/18-07-2007/ECCC/TC, Transcript of Proceedings p.60 (Trial Chamber Mar. 31, 2009).

conditions at M-13 were "very inhumane."⁷⁴ Duch's past experiences in detention, coupled with his practices at M-13 aided the Trial Chamber in showing that Duch understood the conditions at S-21 were inhumane.

The Trial Chamber's judgment noted that Duch's role in running M-13 prepared him for his role in S-21 and he utilized similar techniques in both institutions. Duch even admitted that his time at M-13 had improved his skills as an interrogator and were part of the reason he was chosen to be Deputy of S-21.⁷⁵ At M-13, Duch perfected the record keeping system that he continued to use at S-21 and first created the guard teams and executioners he would later use as a model at S-21.⁷⁶ He also brought staff from M-13 to S-21 with him.⁷⁷ The mission of M-13 was also similar to the purported mission of S-21, to interrogate and "smash" people deemed to be spies.

While most prior instances of utilizing extra-temporal evidence are by the prosecution, it can also be strategically used by the defense. During direct examination on M-13, Duch described his reluctance to head M-13 but that he felt powerless to disobey orders to do so and also that he did not agree with the expansion of M-13's jurisdiction to outside of the liberated zone and into matters of petty theft.⁷⁸ Duch also related an incident involving a young girl that he intervened on behalf of in order to secure her release because he did not believe she belonged in M-13 for stealing an earring and because her husband was a soldier

⁷⁴ *Id.* at 78.

⁷⁵ Judgment Case No. 001/18/07-2007/ECCC/TC (E188) ¶130(Trial Chamber, July 26, 2010).

⁷⁶ Prosecutor v. Kaing Guek Eav alias "Duch," Case No. 001/18-07-2007/ECCC/TC, Transcript of Proceedings p.60 (Trial Chamber Mar. 31, 2009).

⁷⁷ Judgment Case No. 001/18/07-2007/ECCC/TC (E188) ¶118, 162(Trial Chamber, July 26, 2010).

⁷⁸ Prosecutor v. Kaing Guek Eav alias "Duch," Case No. 001/18-07-2007/ECCC/TC, Transcript of Proceedings p.67 (Trial Chamber Apr. 6, 2009).

and she belonged to a wealthy family.⁷⁹ This line of defense was seen throughout Duch's testimony, building on his argument that he was not a person most responsible but was simply acting under orders from above.

The ICTR has held that evidence outside of the Tribunal's temporal jurisdiction "may be a basis on which to draw inferences as to the intent or other elements of the crimes alleged to have been committed within the temporal jurisdiction."⁸⁰ The Chamber offered an illustration of a man charged with a crime committed on a particular date.⁸¹ The prosecution would need to prove that the intent to commit the crime existed on the date as an element of the crime. The evidence to prove intent would not necessarily need to come from the date of the crime; the court could use events from a previous occasion so that a reasonable inference could be drawn that the intent apparent on a previous occasion was also present at the time of the charged crime.

Thus, in *Nahimana*, the Appeals Chamber of the ICTR held that the Trial Chamber had not erred in admitting evidence of events prior to the Tribunal's temporal jurisdiction in order to prove Appellant Barayagwiza's genocidal intent.⁸² This evidence included his presence at "the meetings, demonstrations, and roadblocks that created an infrastructure for and caused the killing of Tutsi civilians."⁸³

In the case of Aloys Simba, the indictment included descriptions of his activities prior to 1994 in preparation for the commitment of genocide, such as training militia, seeking to

⁷⁹ *Id.*

⁸⁰ See *Simba v. Prosecutor* Case No. ICTR-01-76-AR72.2, Decision on Interlocutory Appeal Regarding Temporal Jurisdiction (July 29, 2004).

⁸¹ *Id.*

⁸² See *Prosecutor v. Nahimana* Case No. ICTR-99-52-A Appeals Judgment ¶560-562 (Nov. 28, 2007)

⁸³ *Id.* at ¶645, 646

import arms, publicly expressing his intent to destroy and incite others to destroy the Tutsi, and conducting a census of Hutus and Tutsis.⁸⁴ While these events occurred prior to 1994, the Chamber considered it reasonable to infer that they reveal intent to commit genocide in 1994.

However, in considering the use of extra temporal evidence to establish criminal conduct, the Tribunal in *Bagosora* recalled a long-standing principle of common law adopted by the International Criminal Tribunal for Yugoslavia stating that “as a general principle of criminal law, evidence as to the character of an accused is generally inadmissible to show the accused’s propensity to act in conformity therewith.”⁸⁵ Extra-temporal evidence of the accused’s past conduct cannot be introduced merely to blacken the character of the accused; it must have some probative value.

For extra-temporal topics to be admissible under the exception of establishing by inference the elements of criminal conduct occurring within the temporal jurisdiction, Ieng Sary and Nuon Chea would need to show that a reasonable inference regarding the crimes for which they are accused of can be drawn from the extra-temporal evidence.

C. Demonstrating a deliberate pattern of conduct

The ECCC has not yet addressed the temporal implications of proving a deliberate pattern of conduct. At the ICTR, the rules for introducing evidence of a consistent pattern of conduct are articulated in the Court’s rules.⁸⁶ Under Rule 93, “evidence of a consistent

⁸⁴ See Prosecutor v. Simba Case No. ICTR 2001-76-I, Indictment (Jan. 2, 2002).

⁸⁵ See Prosecutor v. Bagosora Case No. ICTR-98-41-T, Decision on Admissibility of Proposed Testimony of Witness DBY (Sept. 18, 2003)(citing Prosecutor v. Kupreskic, Decision on Evidence of the Good Character of the Accused and the Defence of Tuuogue, 17 February 1999).

⁸⁶ International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence, U.N. Doc. ITR/3/REV.1 (1995), entered into force 29 June 1995, Rule 93.

pattern of conduct relevant to serious violations of international humanitarian law under the Statute may be admissible in the interest of justice.”⁸⁷

The Appeals Chamber in *Nahimana* interpreted the Rule as applying to evidence outside of the ICTR’s temporal jurisdiction, citing the massacres of Tutsis in 1990, 1991, and 1992 detailed in Nahimana’s indictment, his persecution of Tutsis working under him as Director of ORINFOR and his decision in 1992 to broadcast a statement inciting the population against Tutsis as demonstrating a deliberate pattern of conduct.⁸⁸ In the *Bagosora* case, the Chamber referred to this type of evidence as “similar fact evidence” and cites with approval Shahabuddeen’s concurring opinion in *Nahimana* supporting the admission of evidence of prior offenses that “prove a pattern, design or systematic course of conduct by the accused where his explanation on the basis of coincidence would be an affront to common sense.”⁸⁹

The ICTR followed the approach of the Canadian case of *R v. Handy* when deciding whether the similar fact evidence exception was satisfied. According to the ICTR, in order to satisfy the exception, the evidence would need to show:

1. Proximity in time of the similar acts
2. Extent to which the other acts are similar in detail to the charged conduct
3. Number of occurrences of the similar acts
4. Any distinctive feature(s) unifying the incidents
5. Intervening events
6. Any other factor which would tend to support or rebut the underlying unity of the similar acts.⁹⁰

At the Special Court for Sierra Leone, the testimony of Brigadier General John Tarnue during the RUF case appeared to be targeted toward showing a deliberate pattern of

⁸⁷ *Id.*

⁸⁸ Prosecutor v. Nahimana Case No. ICTR-99-52-A, Appeals Judgment ¶1315, 320 (Nov. 28, 2007).

⁸⁹ See Prosecutor v. Bagosora Case No. ICTR-98-41-T, Decision on Admissibility of Proposed Testimony of Witness DBY ¶13 (Sept. 18, 2003)(citing Shahabuddeen Opinion, ¶ 20).

⁹⁰ *Id.* at ¶ 38

conduct by Taylor and focused mostly on events preceding the Special Court's temporal jurisdiction.⁹¹ Most of his testimony on events prior to the Special Court's temporal jurisdiction concerned meetings between Charles Taylor and the leader of the RUF, Foday Sankoh, including efforts by Taylor to convince Sankoh to form an alliance with the National Patriotic Front of Liberia ('NPFL') and discuss Sankoh's plan to stage a revolution in Sierra Leone. At one such meeting, Sankoh was introduced to one of the accused, Augustine Gbao, and told by Taylor that he should utilize methods used by the NPFL. He also described trainings of RUF troops by NPFL, and the trade of weapons and diamonds throughout the early 1990s.

These issues resurfaced during the Charles Taylor trial, when the prosecution attempted to demonstrate longstanding ties between Charles Taylor and the RUF. Testimony and evidence presented spoke to Taylor's support and involvement in Sankoh's creation of the RUF and his provision of training and supplies to the RUF from its creation.⁹² As of the writing of this paper, the Trial Chamber has not yet reached a decision on the Taylor Case.

Continuing Crimes

The ICTR found that extra-temporal evidence is admissible in the case of continuing crimes in cases where the criminal conduct commenced before the court's jurisdiction and continued into the jurisdiction.⁹³ However, a conviction may only be based on the part of such conduct occurring within the court's jurisdiction. The Trial Chamber recognized

⁹¹ Michelle Staggs and Sara Kendall, *Special Court Monitoring Program Update #7 Trial Chamber 1-RUF Trial*, Oct. 8, 2004, <http://socrates.berkeley.edu/~warcrime/SL-Reports/007.pdf>.

⁹² Michelle Staggs and Sara Kendall, *Special Court Monitoring Program Charles Taylor Trial Report*, Aug. 18- Aug. 29, 2008, <http://socrates.berkeley.edu/~warcrime/SL-Reports/CHARLES%20TAYLOR%20TRIAL%20REPORT-August.pdf>.

⁹³ Prosecutor v. Nahimana, Case No. ICTR-99-52-A, Appeals Judgment, ¶317 (Nov. 28, 2007).

conspiracy to commit genocide and public incitement to commit genocide as crimes that could be characterized as continuing offences.⁹⁴

While this issue has not yet arisen in the ECCC, it could come up in the context of genocide or enforced disappearances. For example, there may be evidence of a conspiracy to eliminate the Cham ethnic group before 1975. With regard to enforced disappearances, the Inter-American Court of Human Rights has classified it as continuing crimes and the United Nations has gone as far as calling enforced disappearances “prototypical continuous acts,” beginning at the time of abduction and extending for the entire period of time until the crime is complete.⁹⁵ Thus, for this crime evidence after the Court’s temporal jurisdiction would be relevant.

VI. Conclusion

While ECCC case law and international jurisprudence have shown that, in limited circumstances, it is permissible to admit extra-temporal evidence, it remains up to the Trial Chamber to decide whether or not the topics submitted by Ieng Sary and Nuon Chea meet the Court’s standard of “demonstrably relevant.” International jurisprudence has provided guidance in interpreting when evidence fulfills the standard of being “demonstrably relevant,” including: when it clarifies a given context, legally or factually; allows the court to establish by inference the elements of criminal conduct occurring in the court’s jurisdiction; demonstrates a deliberate pattern of conduct; or pertains to continuing crimes such as

⁹⁴ *Id.*

⁹⁵ See Blake Case, 1998 Inter-Am. Ct. H.R. (ser. C) No. 36, P 52 (Jan. 24, 1998); Office of the High Commissioner for Human Rights, Working Group on Enforced or Involuntary Disappearances General Comment on Enforced Disappearance as a Continuous Crime ¶11, <http://www2.ohchr.org/english/issues/disappear/docs/GC-EDCC.pdf>. The crime is complete when the State acknowledges the detention or releases information pertaining to the fate or whereabouts of the individual.

enforced disappearances. The Trial Chamber in Case 002 has the opportunity to further expound upon these categories and clarify the admissibility threshold for extra-temporal evidence.