The ECCC's Approach to Evidence and Proof

Yvonne McDermott*

Abstract
The Extraordinary Chambers in the Courts of Cambodia (ECCC) has made normative decisions as to the probative value of different categories of evidence and the manner in which the evidentiary record should be assessed. Defying expectations that the ECCC's inquisitorial model would render it quite unique in relation to matters of evidence and proof, this article argues that many of the key epistemological debates witnessed before other international criminal tribunals have also seeped into the practice of the ECCC. Indeed, an analysis of its practice shows that there are several commonalities in approach between the ECCC and the principal contemporary international criminal tribunals on such key issues as whether the evaluation of evidence should be carried out in a piecemeal or a holistic manner, and the weight to be given to hearsay and other categories of evidence. Despite an enormously challenging fact-finding environment and inconsistencies in practice, the ECCC has developed an admirably thorough approach to the evaluation of evidence.

1. Introduction

The ECCC arguably operates in the most challenging epistemic conditions of all the international and hybrid criminal tribunals, given the temporal distance between its trials and the events upon which it must adjudge. In any jurisdiction, determining the culpability of elderly defendants for crimes that were committed over forty years previously, with the attendant loss of evidence that is to be expected over time, would be difficult. To do so in a procedural landscape that has been described as experimental,[1] insofar as it effectively transposes an inquisitorial domestic procedural model onto a hybrid court structure, is even more demanding.[2] Taking into account these factors, together with the political tensions

* Professor of Law, Hillary Rodham Clinton School of Law, Swansea University, UK. Thanks to Guido Acquaviva, Stuart Ford, Paolo Lobba, Niccolò Pons, and the anonymous peer reviewer for very helpful comments on an earlier draft. [Yvonne.McDermottRees@swansea.ac.uk]

[1] J.D. Ciorciari and A. Heindel, 'Experiments in International Criminal Justice: Lessons froInt.m the Khmer Rouge Tribunal', 35 *Michigan Journal of International Law* (2014) 369-442.

[2] For an assessment of whether the ECCC performance has justified the risk the UN assumed when it agreed to support the court — in particular improper influence by the Cambodian Government over case selection — see in this symposium, D. Orentlicher, ''Worth the Effort'? Assessing the Khmer Rouge Tribunal'. See also K. Gibson and D. Rudy, 'A New Model of International Criminal Procedure? The Progress of the *Duch* Trial at the ECCC', 7 *Journal of International Criminal Justice* (*JICJ*) (2009) 1005-1022; G. Acquaviva, 'New Paths in International Criminal Justice? The Internal Rules of the Cambodia Extraordinary Chambers', 6 *JICJ* (2008) 129-151; S. Linton, 'Safeguarding the Independence and Impartiality of the Cambodian Extraordinary Chambers', 4 *JICJ* (2006) 327-341; S. Vasiliev, 'Trial Process at the ECCC: The Rise and Fall of the Inquisitorial Paradigm in

surrounding its operation, particularly the divergence in opinions between its international and national co-investigating judges and co-prosecutors that has emerged,[3] the ECCC's fact-finding role could be described as nothing short of Sisyphean.

Perhaps surprisingly, while the inquisitorial nature of the ECCC's procedural framework and particular questions surrounding evidence (such as the admissibility of torture-tainted evidence and severance) have been comprehensively addressed in the literature,[4] the way in which the ECCC approaches its fact-finding role in practice has not yet been examined in depth to date. This article analyses how the ECCC has addressed its adjudicatory task of assessing the evidence before it and of linking that evidence to factual propositions. The analysis shows that, despite the uniqueness of its procedural framework in the landscape of international and hybrid criminal courts, the ECCC tackled many of the same debates and challenges surrounding proof that have emerged before other tribunals and has even reached similar results. In particular, the ECCC has developed principles on the probative value of different forms of evidence that largely mirror those developed by other tribunals. In some respects, as discussed in Section 2 below, the ECCC has actually taken an approach that is more stringent than that adopted by its more adversarial contemporaries in this regard. Relatedly, as expanded upon in Section 3, the ECCC's case law has examined how the evidentiary record should be evaluated, reflecting the debate on 'holism vs. atomism' of

International Criminal Law?' in S. Meisenberg and I. Stegmiller (eds), *The Extraordinary Chambers in the Courts of Cambodia: Assessing Their Contribution to International Criminal Law* (Springer, 2016) 387, at 389.

[3] For further background, see, 'Statement by the Office of the Co-Prosecutors on Case 004/01', 12 June 2016, available online at https://www.eccc.gov.kh/en/articles/statement-office-co-prosecutors-case-00401 (visited 20 April 2020; all web sources cited in this article have been last consulted on the same day); 'Statement by the Office of the Co-Prosecutors on Case 004/02', 31 August 2017, available online at https://www.eccc.gov.kh/en/document/public-affair/statement-office-co-prosecutors-case-00402; 'Statement by the International Co-Prosecutor on Case 003', 30 November 2017, available online at https://www.eccc.gov.kh/en/articles/statement-international-co-prosecutor-case-003; 'Co-Investigating Judges issue Two Separate Closing Orders in the Case against Ao An Case No. 004/2/07-09-2009-ECCC/OCIJ', 16 August 2018, available online at https://www.eccc.gov.kh/en/articles/co-investigating-judges-issue-two-separate-closing-orders-case-against-ao-case-no-004207; 'Co-Investigating Judges issue Two Separate Closing Orders in the Case against Meas Muth', 28 November 2018, available online at https://www.eccc.gov.kh/en/articles/co-investigating-judges-issue-two-separate-closing-orders-case-against-meas-muth; 'Co-Investigating Judges issue Two Separate Closing Orders in the Case against Yim Tith', 28 June 2019, available online at https://www.eccc.gov.kh/en/articles/co-investigating-judges-issue-two-separate-closing-orders-case-against-yim-tith.

[4] In the international criminal realm, issues of evidence are often considered part and parcel of 'procedural law'. In addition to the scholarly works cited above (*supra* notes 1 and 2), other notable pieces on evidence and procedure before the ECCC include: D. McKeever, 'Evidence Obtained Through Torture before the Khmer Rouge Tribunal: Unlawful Pragmatism?' 8 *JICJ* (2010) 615-630; G. Sluiter, 'Due Process and Criminal Procedure in the Cambodian Extraordinary Chambers', 4 *JICJ* (2006) 314-326; T. Thienel, 'The Admission of Torture Statements into Evidence', in Meisenberg and Stegmiller, *supra* note 2, at 491; S. Williams, 'The Severance of *Case 002* at the ECCC: A Radical Trial Management Technique or a Step Too Far?' 13 *JICJ* (2015) 815-843, and N. Jorgensen, *The Elgar Companion to the Extraordinary Chambers in the Courts of Cambodia* (Edward Elgar, 2018) (particularly at 395-399 on torture-tainted evidence).

evaluation of evidence that has emerged as a key issue across international criminal law more generally in recent years.[5]

2. Forms of Evidence

As with other contemporary international criminal tribunals, the ECCC operates under a free admissibility approach, whereby all relevant evidence is admissible in principle.[6] In order to become 'evidence', material from the case file must be put before the Chamber (either by one of the parties or by the Chamber itself to the parties).[7] Evidence is considered to have been put before the Chamber 'if its content has been summarised, read out, or appropriately identified in court.'[8] This provision introduces an opportunity for adversarial debate on the evidence to proceedings,[9] and has been seen as imposing an element of discipline on the parties in terms of what material they submit for consideration.[10] A request for evidence may be rejected where the Chamber considers it to be irrelevant, repetitious, impossible to obtain within a reasonable time, unsuitable to prove the facts it purports to prove, not permitted under the law, or frivolous or intended to prolong proceedings.[11]

---

[5] Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's 'Judgment pursuant to Article 74 of the Statute', *Bemba* (ICC-01/05-01/08-3636), Appeals Chamber, 8 June 2018, Separate Opinion of Judge Van den Wyngaert and Judge Morrison, §§ 15-16 and 67-68; *ibid.*, Concurring Separate Opinion of Judge Eboe-Osuji, §§ 37-41; Judgment, *Halilović* (IT-01-48-A), Appeals Chamber, 16 October 2007, § 128; Judgment, *Ntagerura et al*. (ICTR-99-46-A), Appeals Chamber, 7 July 2006, § 174; Reasons for oral decision of 15 January 2019 on the Requête de la Défense de Laurent Gbagbo afin qu'un jugement d'acquittement portant sur toutes les charges soit prononcé en faveur de Laurent Gbagbo et que sa mise en liberté immédiate soit ordonnée, *Gbagbo and Blé Goudé* (ICC-02/11-01/15-1263), Trial Chamber I, 16 July 2019, Dissenting Opinion of Judge Herrera Carbuccia, § 5; *ibid.*, Reasons of Judge Geoffrey Henderson, § 31. For academic literature on the subject, see M. Klamberg, 'Epistemological Controversies and Evaluation of Evidence in International Criminal Trials', in K.J. Heller, F. Mégret, S. Nouwen, J.D. Ohlin and D. Robinson (eds), *The Oxford Handbook of International Criminal Law* (Oxford University Press, 2020) 450-472, with a previous version available online at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3313509; S. de Smet, *Enhancing the Quality of Reasoning about the Link Between Evidence and Factual Propositions* (Indian Law Institute, New Delhi, 22 February 2019), available online at https://www.cilrap.org/cilrap-film/190222-smet/; Y. McDermott, 'Strengthening the Evaluation of Evidence in International Criminal Trials', 17 *International Criminal Law Review* (*ICLR*) (2017) 682-702.

[6] Internal Rule 87(1), Internal Rules of the ECCC, adopted by the Plenary on 12 June 2007 (Rev. 9 adopted on 16 January 2015). See also Art. 69(4) ICCSt.; Rules 89(C) ICTY and ICTR RPE. There are clear exceptions to this — e.g. where its prejudicial effect would outweigh the probative value.

[7] Internal Rule 87(2); Decision on Admissibility of Material on the Case File as Evidence, *Kaing Guek Eav* (alias *Duch*) (Case 001), E43/4, Trial Chamber, 26 May 2009, § 6.

[8] Internal Rule 87(3). For further discussion on the evolution of this idea of evidence being 'put before' the Chamber, see Gibson and Rudy, *supra* note 2.

[9] Appeal Judgment, *Nuon Chea and Khieu Samphan* (Case 002/01), F36, Supreme Court Chamber, 23 November 2016, § 171 (Case 002/01 Appeal Judgment); Judgment, *Nuon Chea and Khieu Samphan* (Case 002/02), E465, Trial Chamber, 16 November 2018, §§ 56 and 61 (Case 002/02 Trial Judgment).

[10] Case 002/01 Appeal Judgment, *supra* note 9, § 175 (referring to Internal Rule 80(3), read in conjunction with Internal Rule 87).

[11] Internal Rule 87(3), Rev.9. Rule 87(3)(e) (on evidence that is frivolous or intended to prolong proceedings) was added in Rev.3, 6 March 2009. The word 'may' in this provision means that rejection is a matter for the discretion of the Chamber. Other international criminal tribunals such as the International Criminal Court (ICC) dictate that

Given this relatively liberal approach to admissibility, it stands to reason that the weight to be attached to various categories of evidence would become a contentious issue in the practice of the ECCC, just like before other international criminal tribunals. In a range of decisions at various procedural stages, judges have grappled with, firstly, whether it is even appropriate to elaborate on the probative value of particular types of evidence and, secondly (if such principles were to be developed), where each category of evidence would fit on any hierarchy of sources.

A. Outlining Probative Value

One debate that has arisen in practice, with some inconsistency between different Chambers of the ECCC on the correct approach, is whether it would be appropriate to outline a methodology for assessing different categories of evidence.[12] Wth the exception of the Pre-Trial Chamber in Case 004/01, ECCC judges have generally considered it apt to elaborate on the relevant in assessing the probative value of particular categories of evidence. These principles are elaborated in section B below.

The Pre-Trial Chamber in Case 004/01 noted that a section on 'evidentiary considerations', as had been included in the Closing Order under appeal it was considering, was not envisaged by the statutory framework or Internal Rules of the ECCC, nor in the Cambodian Code of Criminal Procedure and, as such, could be considered both 'unnecessary and superfluous'.[13] Noting the principle of freedom of evidence,[14] the Pre-Trial Chamber found 'that it is an error of law, in an inquisitorial system based on written proof, to make general assertions as to the value of certain categories of evidence, thus creating a hierarchy of evidence based on its nature rather than on its substance, and to consequently give less weight to evidence collected by other entities for strictly formal reasons'.[15] The Pre-Trial Chamber's concern was that enumerating principles that would guide the assessment of evidence in the abstract would prioritise form

certain types of evidence, such as evidence gathered in violation of internationally recognized human rights, shall not be admitted where the means in which it was collected casts doubt upon its reliability or would damage the integrity of the Court.

[12] Considerations on the International Co-Prosecutor's Appeal of Closing Order (Reasons), *Im Cheam* (Case 004/1), D308/3/1/20, Pre-Trial Chamber, 28 June 2018, § 42 (Case 004/1 Pre-Trial Chamber Decision).

[13] *Ibid.* For a qualitative analysis of the purported dysfunctions of the ECCC Pre-Trial Chamber, in particular with regard to Cases 003 and 004, see in this symposium, N. Naidu and S. Williams, 'The Function and Dysfunction of the Pre-Trial Chamber at the Extraordinary Chambers in the Courts of Cambodia'.

[14] *Ibid*., § 44.

[15] *Ibid*., § 52.

over substance, whereas what should matter is not the *type* of evidence, but rather its impact on the judges' evaluation of the case.[16]

On the other hand, the explicit reference to such principles is helpful for the sake of ensuring consistency in fact-finding approaches and of enabling the parties to adequately plan their litigation strategies. The free assessment of evidence, which can be considered as a general principle of international criminal procedure,[17] offers fact-finders discretion in determining which evidence can be relied upon in reaching conclusions. Contrary to the Pre-Trial Chamber's assertion, however, an analysis of the potential probative value of certain categories of evidence does not undermine that principle. Instead, such analysis allows the fact-finder to elucidate the general probative value of a particular category of evidence and note the circumstances under which the probative value of that type of evidence may be enhanced or lessened.[18] For example, judges might note the relative strength of in-court witness testimony, given that it allows them to assess the demeanour and credibility of the witness — though there may be circumstances where credible witnesses' accounts are of limited probative value, because for instance there are gaps in their knowledge.[19] Similarly, the principle of freedom of evidence allows judges to make findings based on hearsay; to note that the probative value of such evidence will be reduced where there is no supporting information on the reliability of the original source does not undermine that principle.

Moreover, the accused's right to a reasoned judgment may actually make it appropriate to outline the general principles that the Chamber used in evaluating evidence. As the ICTY's Appeals Chamber has noted, 'at a minimum, the Trial Chamber must provide reasoning to support its findings regarding the substantive considerations relevant to its decision.'[20] To this end, the ECCC's Supreme Court Chamber correctly noted that the right to a reasoned judgment requires the Chamber to make it clear how it evaluated the evidence before it and used that evidence to draw its factual and legal conclusions.[21]

---

[16] *Ibid.*
[17] Rule 63(2) ICC RPE; see also Decision Adopting Guidelines on the Standards Governing the Admission of Evidence, *Martić* (IT-95-11-T), Trial Chamber, 19 January 2006, Annex A, § 2; Judgment, *Musema* (ICTR-96-13-T), Trial Chamber, 27 January 2000, § 75. See also, e.g., Rule 149(C), Special Tribunal for Lebanon's RPE.
[18] Closing Order (Indictment), *Ao An* (Case 004/2), D360, International Co-Investigating Judge, 16 August 2018, § 37 (Case 004/2 Closing Order, International CIJ).
[19] See e.g. Judgment, *Ntaganda* (ICC-01/04-02/06-2359), Trial Chamber VI, 8 July 2019, § 53 (finding that a witness might be credible but their evidence may still be unreliable).
[20] Decision on Interlocutory Appeal from Trial Chamber Decision Granting Nebojsa Pavkovic's Provisional Release, *Milutinović* (IT-05-87-AR65.1), Appeals Chamber, 1 November 2005, § 11.
[21] Case 002/01 Appeal Judgment, *supra* note 9, § 207.

B. Categories of Evidence

In determining the probative value of a piece of evidence, judges will have regard to its source and/or author (including any issues of bias or motive), and which indicia of reliability it possesses, such as: the circumstances in which it was gathered, whether it has been tested in court, discrepancies between it and other sources, and corroboration.[22] It is difficult to identify an exact hierarchy of evidence before the ECCC — as before other international criminal courts and tribunals — given that the probative value attached to certain sources will vary depending on the circumstances of the case and the stage of proceedings. However, Co-Investigating Judges have made it clear that the written records of interviews they themselves carried out for the purposes of ECCC proceedings would likely sit at the apex of any such hierarchy in the pre-trial phase of proceedings.[23] A high presumption of relevance and reliability attaches to such testimony because it was gathered under judicial supervision, with the legal and procedural safeguards that attach to such judicial oversight.[24] For the same reasons, a presumption of reliability equally attaches to transcripts from previous ECCC trials.[25] In light of its high probative value, it has been held that a finding on whether to present an indictment to the Trial Chamber can potentially be based upon evidence that has been obtained under judicial supervision, even if uncorroborated,[26] provided that the judges consider it to be reliable.

The Trial Chamber in Case 002/02 stated that the reliability of a witness's account will be based upon 'his or her ability to perceive, remember and articulate accurately', and that this can be impacted by such factors as: the passage of time, the witness's age, health, and mental state (both at the time of the events in question and the time of testimony), and potential bias arising from a desire to protect themselves or another person or to avoid public

[22] Case 002/02 Trial Judgment, *supra* note 9, § 61.
[23] One of the unique features of the ECCC is that its cases are underpinned by a judicial investigation, whereas the majority of international criminal tribunals have a model of prosecutor-led investigations: Internal Rule 55(1); see further Acquaviva, *supra* note 2, at 135.
[24] Closing Order (Reasons), *Im Chaem* (004/1), D308/3, Office of the Co-Investigating Judges, 10 July 2017, § 103 (Case 004/1 Closing Order); Closing Order, *Yim Tith* (Case 004), D382, International Co-Investigating Judge, 28 June 2019, § 117 (Case 004 Closing Order, International CIJ); Order Dismissing the Case against Yim Tith, *Yim Tith* (Case 004), D381, National Co-Investigating Judge, 28 June 2019, § 591 (Case 004 Closing Order, National CIJ); Closing Order, *Meas Muth* (Case 003), D267, International Co-Investigating Judge, 28 November 2018, § 118 (Case 003 Closing Order, International CIJ); Order Dismissing the Case against Meas Muth, *Meas Muth* (Case 003), D266, National Co-Investigating Judge, 28 November 2018, § 354 (Case 003 Closing Order, National CIJ); Case 004/2 Closing Order, International CIJ, *supra* note 18, § 123; Order Dismissing the Case against Ao An, *Ao An* (Case 004/2), D359, National Co-Investigating Judge, 16 August 2018, § 485 (Case 004/2 Closing Order, National CIJ).
[25] Case 004/1 Closing Order, § 103; Case 004/2 Closing Order, National CIJ, § 485; Case 003 Closing Order, National CIJ, § 354; Case 004 Closing Order, National CIJ, § 591; Case 003 Closing Order, International CIJ, § 118, all *supra* note 24; Case 004/2 Closing Order, International CIJ, *supra* note 18, § 123.
[26] Case 004 Closing Order, International CIJ, *supra* note 24, § 124.

embarrassment.[27] The Chamber also noted that it would be guided by its Cambodian members on the issue of reliability, in order to avoid cultural bias seeping into the Chamber's assessment of a witness's credibility.

The ECCC has consistently held that contemporaneous Democratic Kampuchea-era documents gathered by the Documentation Centre of Cambodia (DC-Cam) also benefit from a (rebuttable) presumption of relevance and reliability.[28] In Case 002/01, the Trial Chamber's decision to grant this presumption to DC-Cam documents was largely influenced by the testimony of its Director and Deputy Director, who outlined the methodology used for obtaining, archiving, and preserving contemporaneous documents – and offered DC-Cam's assistance in authenticating any such documents upon request.[29] The Supreme Court Chamber found no error in the Trial Chamber's finding that such documents were entitled to a rebuttable presumption of *prima facie* relevance and reliability.[30] As the International Co-Investigating Judge noted in Case 003, contemporaneous documents can help to overcome some of the issues that arise with other forms of evidence, such as witnesses' fading memories.[31] As such, where the Chamber is convinced of their reliability, it has been held that such documents can be relied upon without a need for further corroboration at the pre-trial stage,[32] although it seems unlikely that this evidence, if uncorroborated, would meet the beyond reasonable doubt standard of proof that is required for a conviction at trial.

By contrast, the ECCC has taken a more stringent approach in relation to other written statements, including those gathered by Co-Prosecutors, finding that no presumption of reliability can attach to such statements.[33] This is because they have not been taken under judicial oath and have been collected by a party who has an interest in the outcome of the trial.[34]

---

[27] Case 002/02 Trial Judgment, *supra* note 9, § 62. For a critical discussion of the main legal findings of the ECCC Trial Chamber in Case 002/02 Trial Judgment, see in this symposium E. Fry and E. van Sliedregt, 'Targeted Groups, Rape, and *Dolus Eventualis*: Assessing the ECCC's Contributions to Substantive International Criminal Law'.

[28] Case 004/1 Closing Order, § 104; Case 004/2 Closing Order, National CIJ, § 486; Case 004 Closing Order, National CIJ, § 592; Case 004 Closing Order, International CIJ, § 118; Case 003 Closing Order, International CIJ, § 119, all *supra* note 24; Case 004/2 Closing Order, International CIJ, § 124, *supra* note 18.

[29] Decision on Objections to Documents Proposed to be Put before the Chamber on the Co-Prosecutors' Annexes A1-A5 and to Documents Cited in Paragraphs of the Closing Order Relevant to the First Two Trial Segment of Case 002/01, *Nuon Chea and Khieu Samphan* (Case 002/01), E185, Trial Chamber, 9 April 2012, §§ 25-28.

[30] Case 002/01 Appeal Judgment, §§ 373-375, *supra* note 9.

[31] Case 003 Closing Order, International CIJ, *supra* note 24, § 126.*s*

[32] *Ibid*.

[33] Case 004 Closing Order, National CIJ, *supra* note 24, § 593; Case 004 Closing Order, International CIJ, *supra* note 24, § 119; Case 004/2 Closing Order, National CIJ, *supra* note 24, §§ 486-487; Case 004/2 Closing Order, International CIJ, *supra* note 18, §§ 124-125; Case 003 Closing Order, National CIJ, *supra* note 24, §§ 355-356; Case 003 Closing Order, International CIJ, *supra* note 24, §§ 119-120; Case 004/1 Closing Order, *supra* note 24, § 105; Case 004/1 Pre-Trial Chamber Decision, *supra* note 12, § 50.

[34] Case 004/1 Closing Order, § 105; Case 003 Closing Order, International CIJ, §§ 119-120; Case 004 Closing

The ECCC's case law in this respect has essentially followed the law and practice of the ad hoc tribunals by finding that written statements can be admitted in lieu of oral testimony where they do not go towards proving the acts and conduct of the accused,[35] or that they can be admitted as proof of the accused's acts and conduct where the witness is dead,[36] but that the conviction cannot be based solely or to a decisive degree on such statements.[37]

The International Co-Investigating Judge in Case 003 held that information from written statements can only be relied upon where corroborated by other sources.[38] In this way, the ECCC has actually exceeded the stringencies of its more adversarial counterparts, which had established that a conviction cannot be based on uncorroborated evidence where no cross-examination was possible, but this principle only applies to facts that are indispensable for a conviction.[39] In so doing, the ECCC has disproved the assumption that the *ad hoc* tribunals' principles on evidence going to the acts and conduct of the accused derive from those tribunals' adversarial paradigms and preference for orality.[40]

The principle that low probative value attaches to statements where there has been no opportunity to (cross-)examine the source extends beyond statements gathered by the Co-Prosecutors to all statements taken outside the confines of the judicial investigation.[41] Thus, interviews conducted by NGOs or journalists, Civil Party applications, and newspaper articles will generally be afforded low probative value on their own, although this is to be assessed on a case-by-case basis and in light of other evidence on record.[42] In general, NGO reports have been treated with caution before the ECCC, where issues surrounding their reliability and/or

---

Order, International CIJ, § 119, all *supra* note 24.

[35] Judgment, *Nuon Chea and Khieu Samphan* (Case 002/01), E313, Trial Chamber, 7 August 2014 (Case 002/01 Trial Judgment), § 61 (reflecting Rule 92*bis* ICTY and ICTR RPE). In the Decision on Co-Prosecutors' Rule 92 Submission Regarding the Admission of Witness Statements and Other Documents before the Trial Chamber, (Case 002), E96/7, Trial Chamber, 20 June 2012, §§ 22-23 (Case 002 Witness Statements decision), the Chamber held that, save in certain limited exceptions, written statements going to the acts and conduct of the accused are to be regarded as 'not permitted under the law' pursuant to Internal Rule 87(3)(d). See also Case 002/02 Trial Judgment, § 70; Case 002/01 Appeal Judgment, §§ 284-290, both *supra* note 9.

[36] Case 002/01 Trial Judgment, *supra* note 35, § 31 (reflecting Rule 92*quater* of the ICTY and ICTR RPE); see also Case 002 Witness Statements decision, *supra* note 35, § 24; Case 002/02 Trial Judgment, *supra* note 9, §§ 71-72.

[37] Case 002/01, Supreme Court Chamber, *supra* note 9, § 298.

[38] Case 003 Closing Order, International CIJ, *supra* note 24, § 122.

[39] Judgment, *Martić* (IT-95-11-A), Appeals Chamber, 8 October 2008, § 193; Decision on Appeals against Decision Admitting Jadranko Prlić's Transcript of Questioning into Evidence, *Prlić* (IT-04-74-AR73.6), Appeals Chamber, 23 November 2007, §§ 53-59.

[40] On the ad hoc tribunals' preference for orality and adversarial models, see Acquaviva, supra note 2, at 146.

[41] Case 002/02 Trial Judgment, § 69; Case 002/01, Supreme Court Chamber Judgment, § 296, both *supra* note 9.

[42] *Ibid.*; Case 004 Closing Order, International CIJ, § 118; Case 003 Closing Order, International CIJ, § 123, both *supra* note 24; critical of this approach in relation to prior statements made by the accused to others, see Case 004/1 Pre-Trial Chamber Decision, *supra* note 12, §§ 58-59; *ibid.*, Separate Opinion of Judges Baik and Beauvallet, §§ 285-294.

lack of specificity have often led to their perceived weakness as a form of evidence.[43] This caution is understandable; in other courts, over-reliance on NGO reports has been widely criticized.[44] The treatment of civil party applications as evidence to be accorded little to no probative value[45] has been rather more controversial. On the one hand, because they are not collected by a judicial entity, it makes sense that such applications would not be afforded a presumption of reliability. However, the Pre-Trial Chamber in Case 004/01 was critical of this approach, stating that it undermined the ECCC's uniquely extensive approach to victims' participation.[46] On balance, given that the nature of these applications is such that the victim often offers an insight into their own experiences or knowledge, without further elucidation of the source of that knowledge,[47] there are valid reasons against affording them the presumption of reliability. In addition, the fact that victims often receive assistance from NGOs in drafting and filing applications is a factor warranting less weight being attached to their statements, as judges cannot be certain about those third parties' interactions with victims and how accurately they summarized victims' accounts. Furthermore, as the Supreme Court Chamber held in Case 002/01, there is a risk that certain facts stated in such applications 'might represent "collective memory" or "common narrative" rather than personal experiences' and, as such, it would be inappropriate to use them to establish relevant facts.[48]

As regards hearsay evidence, the ECCC has consistently found that this type of evidence can be cautiously relied upon, where it is relevant and probative, but that it will be have to be assessed on a case-by-case basis,[49] following in this respect the practice of other

---

[43] Case 003 Closing Order, International CIJ, *supra* note 24, §§ 130-131; Case 002/02 Trial Judgment, *supra* note 9, § 130; Case 004 Closing Order, International CIJ, *supra* note 24, § 130; Case 004/2 Closing Order, International CIJ, *supra* note 18, §§ 135-136.

[44] Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute", *Bemba* (ICC-01/05-01/08-3636), Appeals Chamber, 8 June 2018, Separate Opinion of Judge Van den Wyngaert and Judge Morrison, § 64; Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute, *Gbagbo* (ICC-02/11-01/11-432), Pre-Trial Chamber I, 3 June 2013, § 29.

[45] Case 002/02 Trial Judgment, § 73, Case 002/01 Appeal Judgment, § 296, both *supra* note 9; Case 004 Closing Order, National CIJ, *supra* note 24, § 594; Case 004 Closing Order, International CIJ, *supra* note 24, § 120; Case 004/2 Closing Order, International CIJ, *supra* note 18, § 126; Case 004/2 Closing Order, National CIJ, *supra* note 24, § 488.

[46] Case 004/1 Pre-Trial Chamber Decision, *supra* note 12, §§ 54-56.

[47] Case 002/01 Appeal Judgment, *supra* note 9, § 457.

[48] *Ibid*. This is not to suggest that *live* civil party testimony is of lower probative value; as has been consistently held (Case 002/01 Appeal Judgment, §§ 313-324; Case 002/02 Trial Judgment, § 67, both *supra* note 9), despite the fact they do not testify under oath, there is no reason why their testimony or 'statements of suffering' should be treated as less reliable than other live testimony.

[49] Case 003 Closing Order, International CIJ, *supra* note 24, § 124; Case 002/02 Trial Judgment, *supra* note 9, § 63; Case 004 Closing Order, International CIJ, *supra* note 24, § 122; Case 004/2 Closing Order, International CIJ, *supra* note 18, §§ 129-131; Judgment, *Kaing Guek Eav* (alias *Duch*) (Case 001), E188, Trial Chamber, 26 July 2010 (Case 001 Trial Judgment), § 43.

international criminal tribunals.[50] The most crucial aspect in this respect is the reliability and credibility of the original source of the evidence, particularly where the hearsay evidence is uncorroborated.[51] Historical expert witness evidence, which tends to be considered as a form of hearsay (given that the expert's views are normally based on interviews and research they have conducted) has been central to the ECCC's case law.[52] Where those sources are not accessible and verifiable, diminished weight will rightly be accorded to this evidence.[53]

The above analysis shows that the ECCC has, by and large, approached the probative value of different forms of evidence in very similar manner to the approach adopted by other international criminal tribunals.[54] Indeed, on occasion, the ECCC has taken an approach that is even more restrictive than that of other, more adversarial, tribunals. While in the abstract, we might have expected the ECCC to represent a rather unique procedural model, the above discussion demonstrates that, in practice, the principles it applies to the assessment of evidence are not remarkably different from tribunals using different models.[55] This is notable, and can most likely be attributed to the emergence of a more coherent body of international criminal procedural rules in recent years, a body that includes principles on the evaluation of evidence.[56] This coherence likely added to the normative force of international criminal procedure more broadly and, combined with a weak shared procedural culture of actors working the ECCC,[57] led to judges turning to their international counterparts first instead of seeking guidance from Cambodian and other inquisitorial criminal procedures. In addition, the movement of staff from other international criminal tribunals, such as the ICTY and the ICTR, to the ECCC probably led to an internal perception that it was an international criminal tribunal first, and a civil law tribunal second. That, in turn, is likely to have led to the transplant of legal principles on the probative values of different types of evidence from other international criminal tribunals into

[50] Case 004 Closing Order, International CIJ, *supra* note 24, § 122.
[51] Case 003 Closing Order, International CIJ, *supra* note 24, § 125; Case 002/01 Appeal Judgment, *supra* note 9, §§ 302-304. See further on this principle, Reasons for oral decision of 15 January 2019 on the 'Requête de la Défense de Laurent Gbagbo afin qu'un jugement d'acquittement portant sur toutes les charges soit prononcé en faveur de Laurent Gbagbo et que sa mise en liberté immédiate soit ordonnée', *Gbagbo and Blé Goudé* (ICC-02/11-01/15-1263), Trial Chamber I, 16 July 2019, Reasons of Judge Geoffrey Henderson, § 42.
[52] Case 002/01 Appeal Judgment, *supra* note 9, §§ 326-329.
[53] Case 002/01 Appeal Judgment, § 329; Case 002/02 Trial Judgment, §§ 66 and 195, both *supra* note 9. In a similar vein in relation to documentary evidence, see Case 002/01 Appeal Judgment, § 839 ('[T]he probative value of a document is likely to be significantly diminished if its author and provenance are unknown').
[54] The only notable exception is the Case 004/1 Pre-Trial Chamber Decision, *supra* note 12, discussed above.
[55] It has been argued, however, that the adversarial/inquisitorial distinction is overblown, and that there is no 'pure' example of either model: e.g. Vasiliev, *supra* note 2, at 397; Case 004/2 Closing Order, International CIJ, *supra* note 18, § 37.
[56] G. Sluiter et al. (eds), *International Criminal Procedure: Principles and Rules* (Oxford University Press, 2013); K.A.A. Khan et al. (eds), *Principles of Evidence in International Criminal Justice* (Oxford University Press, 2010).
[57] Vasiliev, *supra* note 2, at 402.

the practice of the ECCC. As shall be seen in the next section, a similar level of convergence with contemporary international criminal law practice also emerges as regards the evaluation of evidence.

3. Evaluation of Evidence

Determining the probative value of a piece of evidence is but one step that any trier of fact must undertake; the next step in the process is assessing whether that evidence supports particular factual propositions, and then deciding whether those propositions in turn support findings on the elements of the crime(s) and the mode(s) of liability, as charged. In international criminal law in general, but in the recent practice of the ICC in particular, two key issues have emerged in relation to these processes. The first is the degree of evaluation of evidence (the standard or proof) that must be undertaken at stages of the proceedings earlier than the issuancxe of the judgment on guilt or innocence — such as the confirmation of charges stage before the ICC, or the 'no case to answer' stage before the ad hoc tribunals.[58] The second is the debate between the so-called 'atomistic' and 'holistic' approaches to the evaluation of evidence, relating to the degree of granularity that is expected to be shown in relation to the assessment of individual pieces of evidence and how they fit in relation to the broader case as a whole.[59] The practice of the ECCC reflects broader trends in international criminal justice as regards both these issues.

A. Standards of Proof

Reflecting a judge-led model,[60] investigations at the ECCC are drawn to a close by the issuance of a Closing Order by the Co-Investigating Judges, which either indicts a charged person(s) committing them to trial, or dismisses the case.[61] The standard of proof required to issue a Closing Order is not explicitly set down in the ECCC's legal framework, although Internal Rule 67(3)(c) states that a Dismissal Order should be issued if 'there is not sufficient evidence', without defining what level of evidence ought to be considered 'sufficient'. In Case 002, the Co-Investigating Judges noted that, in French criminal procedure, the notion of sufficiency is left to the 'unfettered discretion' of the investigating judges.[62] Distancing themselves

[58] T. Mariniello and N. Pons, 'The Confirmation of Charges at the International Criminal Court: A Tale of Two Models', in T. Mariniello (ed.), *The International Criminal Court in Search of its Purpose and Identity* (Routledge, 2014), at 217.
[59] McDermott, *supra* note 5, at 687-689.
[60] As outlined in Part C of the Internal Rules (Internal Rule 55 *et seq.*).
[61] Internal Rule 67(1).
[62] Closing Order, *Nuon Chea et al.* (Case 002), D427, Office of the Co-Investigating Judges, 15 September 2010,

somewhat from this approach, the Co-Investigating Judges chose instead to take inspiration from the ICC confirmation of charges standard, as well as the one used by the *ad hoc* tribunals in confirming an indictment.[63] They held that, at the Closing Order stage, the standard of proof was one of 'probability' of guilt – i.e. more than a mere possibility, but not as high a standard as that of 'beyond reasonable doubt' that emerges at the end of the trial stage.[64] They further noted that 'the evidentiary material in the Case File must be sufficiently serious and corroborative to provide a certain level of probative force'.[65] Later Closing Order decisions have continued to emphasise this probability standard.[66]

As regards the standard of proof at trial stage, there is a difference in language between the French version of the Internal Rules (which uses the expression '*intime conviction*') and the English version (which uses 'beyond reasonable doubt').[67] Whether there is any great deal of difference between those two concepts is debatable, although authors have argued that the main difference is that the *l'intime* standard is more subjective and introspective, whereas 'beyond reasonable doubt' is often perceived as a more objective standard.[68] In practice, Trial Chambers have adopted 'a common approach' that examines the sufficiency of the evidence,[69] and have noted the *in dubio pro reo* principle.[70] The Trial Chamber in Case 002/02 added that the notions of *intime conviction* and beyond reasonable doubt are compatible, insofar as 'both require a logical and comprehensive reasoning that first accords with common sense', but that 'the standard of "beyond reasonable doubt" supplements and allows for an interpretation of the "*intime conviction*" concept that accords with the *highest requirements foreseen at the international level*'.[71] In practice, therefore, beyond reasonable doubt is the applicable standard of proof at the trial stage for a decision on guilt or innocence.[72]

---

§ 1322.

[63] *Ibid*., §§ 1324-1326. These two stages are not fully comparable — at the ICC, the confirmation of charges hearing is much more detailed, is designed to be adversarial, and comes at a later stage in proceedings than the confirmation of the indictment at the *ad hoc* tribunals (which is *ex parte*).

[64] *Ibid*., § 1323.

[65] *Ibid*.

[66] Case 004/1 Closing Order, § 2, Case 003 Closing Order, International CIJ, § 30, Case 004 Closing Order, International CIJ, § 25, all *supra* note 24; Case 004/1 Pre-Trial Chamber Decision, *supra* note 12, §§ 61-62.

[67] Internal Rule 87(1); discussed further in Vasiliev, *supra* note 2, at 398-399.

[68] S. De Smet, 'The International Criminal Standard of Proof at the ICC - Beyond Reasonable Doubt or Beyond Reason?' in C. Stahn (ed.), *The Law and Practice of the International Criminal Court* (Oxford University Press, 2015) 861, at 866; Klamberg, *supra* note 5, at 5-8.

[69] Case 001 Trial Judgment, *supra* note 49, § 45; Case 002/01 Trial Judgment, *supra* note 35, § 35; Case 002/02 Trial Judgment, § 38; Case 002/01 Appeal Judgment, §§ 379-380, both *supra* note 9.

[70] *Ibid*.

[71] Case 002/02 Trial Judgment, *supra* note 9, § 39 (emphasis added).

[72] Case 002/01 Appeal Judgment, *supra* note 9, § 380, noting that such terms as '*il ne fait aucun doute*' were used instead of the French expression '*intime conviction*' by the Trial Chamber in reaching its conclusions.

B. The Evaluation of Evidence

The applicable standard of proof has an impact on the Chamber's assessment of the evidence before it. In the rationalist legal tradition, a distinction is drawn between 'fact-finding' and 'law-finding'.[73] Fact-finding is the process of evaluating evidence to establish the truth (or otherwise) of certain factual propositions; this activity necessarily precedes the application of legal standards to those factual findings.[74] One issue, then, is the extent to which the standard of proof must be applied to individual facts that form part of the basis of a conviction. The ECCC has taken inspiration from other international criminal tribunals in finding that material facts – that is, facts underpinning the elements of the crimes or the form of responsibility, or are otherwise indispensable to a conviction — must be proven beyond reasonable doubt.[75] The Trial Chamber in Case 002/02 confirmed that this assessment is to be made on a holistic evaluation of the entire evidential record, rather than one that applies the standard of proof to individual pieces of evidence.[76]

It can be said, as shall be seen below, that the ECCC has developed an approach to matters of proof that highlights two key principles. First, findings of fact cannot rest on weak evidentiary foundations.[77] Second, Chambers are expected to articulate how they reached their factual conclusions.[78] In light of the *in dubio pro reo* principle, where there is an alternative reasonable explanation of the evidence that would be inconsistent with a finding of guilt, a conviction cannot be entered.[79] In this respect, the ECCC's jurisprudence reflects that of other international criminal tribunals, which have equally established core principles for the evaluation of evidence.[80]

---

[73] M. Damaška, 'Rational and Irrational Proof Revisited', 5 *Cardozo Journal of International and Comparative Law* (1997) 25, at 25-26.
[74] *Ibid*.
[75] Case 002/02 Trial Judgment, § 40, Case 002/01 Appeal Judgment, § 418, both *supra* note 9. The Supreme Court Chamber added that '[i]n practical terms, there might be other facts that need to be established beyond reasonable doubt due to the way in which the case was pleaded.'
[76] Case 002/02 Trial Judgment, *supra* note 9, § 40.
[77] In addition to the above, see *ibid.*, § 631 (on a particular finding that was based only on a single civil party application and the vague hearsay testimony of one witness): '[o]n such a weak evidentiary basis, no reasonable trier of fact could have entered that finding.'
[78] Case 002/01 Appeal Judgment, *supra* note 9, § 207.
[79] Case 002/02 Trial Judgment, §§ 64-65; Case 002/01 Appeal Judgment, § 841, both *supra* note 9.
[80] Amongst many others, see Judgement, *Simba* (ICTR-01-76-A), Appeals Chamber, 27 November 2007, § 132; Judgement, *Bizimungu* (ICTR-00-56B-A), Appeals Chamber, 30 June 2014, § 210; Judgement, *Popović et al.* (IT-05-88-A), Appeals Chamber, 30 January 2015, § 90; Reasons for oral decision of 15 January 2019 on the Requête de la Défense de Laurent Gbagbo afin qu'un jugement d'acquittement portant sur toutes les charges soit prononcé en faveur de Laurent Gbagbo et que sa mise en liberté immédiate soit ordonnée, *Gbagbo and Blé Goudé* (ICC-02/11-01/15-1263), Trial Chamber I, 16 July 2019, Reasons of Judge Geoffrey Henderson, § 31; Judgment, *Ntaganda* (ICC-01/04-02/06-2359), Trial Chamber VI, 8 July 2019, §§ 44-70.

One debate that has been central to both international criminal practice and the literature on proof in international criminal trials in recent years is whether the evidence should be evaluated 'holistically' or 'atomistically'.[81] In the former approach, the fact-finder considers the whole mass of evidence relationally and as a whole, and the overall 'story' that they believe this evidence tells; in the latter, the fact-finder interrogates the strength of each item of evidence and then combines those individual assessments to reach a conclusion.[82] The two approaches have been best described more as 'opposite ends of an interpretive continuum rather than as discrete evidentiary approaches'; no evaluation is purely atomistic or holistic, but may tend towards that end of the spectrum.[83] Before the ECCC, it is interesting to observe that different chambers (most notably, the Trial Chamber and the Supreme Court Chamber in Case 002/01) both stated that they took an holistic approach, but have in the end come to quite different conclusions on the same evidence.

It could be argued that the Supreme Court Chamber's approach of first evaluating the individual strength of each piece of evidence, before determining what conclusions can be drawn from that evidence in the light of the totality of the evidentiary record before it, actually falls closer to the 'atomistic' or 'deconstructivist' approach to fact-finding (although that Chamber expressly disavowed a 'piecemeal approach' to evidence).[84] Such an approach is a more appropriate means of fact-finding than an 'holistic' model that focuses more on the 'totality of the evidence', and not on the individual pieces of evidence and the picture they draw, taken together. An overly holistic methodology runs the risk of drawing conclusions on individual factual propositions leading to a conviction when the evidence does not fully support those propositions.[85]

To this end, the Supreme Court Chamber was clearly unimpressed by parts of the Trial Chamber's judgment, which failed on occasion to fully elucidate how it assessed the relevant

[81] For a detailed discussion, see McDermott, *supra* note 5, at 687-689; Klamberg, *supra* note 5, at 3-5.
[82] See further, T. Anderson, D. Schum, and W. Twining, *Analysis of Evidence* (2nd edn., Cambridge University Press, 2005), 156-158; M. Schweizer, 'Comparing Holistic and Atomistic Evaluation of Evidence', 13 *Law, Probability and Risk* (2014) 65-89.
[83] J.L. Mnookin, 'Atomism, Holism, and the Judicial Assessment of Evidence', 60 *UCLA Law Review* (2013) 1524-1585, 1536.
[84] Case 002/01 Appeal Judgment, *supra* note 9, § 418.
[85] Case 002/01 Appeal Judgment, *supra* note 9, § 419 (stating that such an approach 'would mean that an accused could be convicted merely on the basis of widespread rumours'). See further, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute", *Bemba* (ICC-01/05-01/08-3636), Appeals Chamber, 8 June 2018, Separate Opinion of Judge Van den Wyngaert and Judge Morrison, § 6; Reasons for oral decision of 15 January 2019 on the Requête de la Défense de Laurent Gbagbo afin qu'un jugement d'acquittement portant sur toutes les charges soit prononcé en faveur de Laurent Gbagbo et que sa mise en liberté immédiate soit ordonnée, *Gbagbo and Blé Goudé* (ICC-02/11-01/15-1263), Trial Chamber I, 16 July 2019, Reasons of Judge Geoffrey Henderson, § 78; McDermott, *supra* note 5, at 688.

evidence in reaching particular conclusions.[86] For example, Nuon Chea had argued that specific incidents of killings that underpinned his conviction for murder were not appropriately proven.[87] Of the 54 incidents of killing identified by the Trial Chamber:

> two were based on witness testimony and ten on civil party testimony, who gave either eyewitness or hearsay accounts of killings; three on interview records of witnesses and two on interview records of civil parties [which had been gathered by the Co-Investigating Judges but had not been examined in court]… The remaining findings of killings were based on documents, namely twenty on civil party applications, one on information contained in a submission by the Government of Norway to a United Nations body, nine on victim complaints, four on refugee accounts and three on a letter sent by the French Ambassador in Thailand.[88]

One of the arguments raised by Nuon Chea was that specific findings of killings were underpinned by only one direct evidentiary source.[89] The Supreme Court Chamber rightly noted that the evaluation of the evidence should not descend into a head-counting exercise.[90] There is no requirement in law that a finding beyond reasonable doubt can only be reached if it is based on only one source of evidence; instead, the Chamber must have regard to the reliability and relevance of the specific evidence relevant to each count in determining whether it supports a factual finding.[91] Conversely, just because a number of distinct evidentiary sources all include the same claim, there is no obligation on the Chamber to accept that claim – again, regard must be had to the probative value of that evidence, when considered and weighed collectively.[92]

In assessing the evidentiary basis for the Trial Chamber's findings on those specific instances of killings, the Supreme Court Chamber found that the Trial Chamber had relied on out-of-court evidence that was lacking in specificity, and had failed to explain how it had assessed this evidence with lower probative value than live witness evidence.[93] However, notwithstanding these weaknesses in relation to particular killings, the Supreme Court Chamber found there was sufficient (corroborated) in-court testimony underpinning the finding

[86] Case 002/01 Appeal Judgment, *supra* note 9, § 447.
[87] *Ibid*., § 384.
[88] *Ibid*., § 423.
[89] *Ibid*., § 424.
[90] *Ibid.* See also Case 002/02 Trial Judgment, *supra* note 9, § 40.
[91] Case 002/01 Appeal Judgment, *supra* note 9, § 424.
[92] *Ibid*., § 419.
[93] *Ibid*., § 447.

on other incidents[94] and, in turn, on the overall factual conclusion that killings had actually occurred.[95]

By contrast, the Supreme Court Chamber noted that the evidence relied upon by the Trial Chamber in finding that Khmer Republic soldiers had been executed *en masse* following the evacuation of Oudong in 1974 was 'ambiguous, unreliable and generally weak'.[96] The key sources upon which the Trial Chamber had relied in reaching the conclusion on execution was one expert witness's testimony and book, and witness statements.[97] The expert witness's evidence amounted to hearsay, insofar as he had not witnessed the events in question himself.[98] When examined in court, the expert witness elaborated on his sources — principally, a witness named Phy Phuon, who himself testified before the ECCC, as well as a small number of (anonymous) 'villagers'.[99] Notably, across six days of testimony, Phy Phuon had not mentioned the execution of soldiers following the fall of Oudong; in fact, he had testified that they had received 'strict instructions' that soldiers who had surrendered were not to be harmed.[100] Thus, following the principle outlined above that the probative value of hearsay evidence hinges on the credibility of its original source,[101] and noting the ambiguity of other sources,[102] the Supreme Court Chamber found that the Trial Chamber had erred in concluding that soldiers had been executed at Oudong, and that a policy existed in this regard.[103]

Similar errors were found in relation to killings of former Khmer Republic soldiers in other regions of Cambodia, and the Trial Chamber's overall conclusion that there had been a broader policy in this regard.[104] These findings of fact were based broadly on out-of-court documents, the credibility and reliability of which had not been expressly discussed by the Trial Chamber,[105] and expert testimony that was 'not supported by precise indications as to the specific and verifiable sources of knowledge underpinning the experts' opinions'.[106] Moreover, in inferring a policy to kill Khmer Republic soldiers and officials in 1975, the Trial Chamber

---

[94] Although the Trial Chamber could have explained in better detail the evidentiary basis for its factual findings, per *ibid.*, § 446: '[i]t would have been more consistent with good practice and respectful of fair trial principles if the Trial Chamber had set out more clearly its findings in relation to the individual instances of killing and explained how the live testimony was strengthened by the other evidence.'
[95] *Ibid.*, §§ 420, 447.
[96] *Ibid.*, § 884.
[97] *Ibid.*, § 879.
[98] *Ibid.*, § 880.
[99] *Ibid.*, § 879.
[100] *Ibid.*, § 880.
[101] Above, text to notes 49 and 53.
[102] Case 002/01 Appeal Judgment, *supra* note 9, § 884.
[103] *Ibid.*
[104] *Ibid.*, §§ 869-871; 914-922; 970.
[105] *Ibid.*, § 914.
[106] *Ibid.*, § 922.

referred to incidents and evidence that occurred much later, without explaining why this evidence led it to conclude that an earlier policy had existed.[107]

Recently, a debate has emerged before the ICC about the extent to which an appellate chamber can or should interfere with the factual findings of a trial chamber.[108] Given that the appellate standard for findings of fact is whether a conclusion is one that 'no reasonable trier of fact' could have reached, there is clearly a need to show deference to the lower chamber. The Supreme Court Chamber's decision in Case 002/01 provides an admirable model of clarity and precision in this regard, which traces factual findings back to their underpinning evidence before determining whether, in view of the totality of evidence, the particular finding was one that no reasonable trier of fact could have reached.[109] Other tribunals could well benefit from taking inspiration from its methodical approach.

4. Conclusions

Upon the creation of the ECCC, there was an expectation that its primarily civil law-inspired procedures would lead it to stand quite apart from other, more adversarial, international and hybrid criminal tribunals in matters relating to matters of evidence and proof. This article has demonstrated that, while practice is somewhat inconsistent in relation to certain points (such as whether it is appropriate to set out a hierarchy of evidential sources by probative value), the ECCC has mirrored the approach of other international criminal tribunals in many important respects, and has dealt with similar challenges, reaching similar results. Despite being formally a different model, based more on the inquisitorial French-derived system than any other international or hybrid tribunal, it has faced similar challenges and ended up with similar debates and solutions in the field of evidence, and matched similar levels of rigour in the evaluation of evidence. This, in turn, tells a bigger picture about the emerging persuasiveness of international criminal procedure. As that procedure has become more consistent across international criminal tribunals, it has gained traction as a source of inspiration for other tribunals, which in turn further bolsters its status as a coherent body of procedural law. It can also be surmised that the prominent international component of the ECCC's legal system, and

[107] *Ibid.*, §§ 914; 970-972.
[108] Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's 'Judgment pursuant to Article 74 of the Statute', *Bemba* (ICC-01/05-01/08-3636), Appeals Chamber, 8 June 2018, §§ 38-56; *ibid.*, Dissenting Opinion of Judges Monageng and Hofmanski, §§ 2-18.
[109] For a good example of this approach, see Case 002/01 Appeal Judgment, *supra* note 9, §§ 454-459 and 536-561. For an appraisal of the unique features of the ECCC appellate system, the possible influences of the Supreme Court Chamber's case law, and its the contribution to substantive international criminal law, see in this symposium, S. Vasiliev, 'ECCC Appeals: Appraising the Supreme Court Chamber's Interventions'.

the resultant lack of a strong shared procedural culture amongst judges, also led to the broad alignment of the ECCC with principles of evidence derived from international criminal law. Lastly, it should be noted that human rights law has borne a particular influence on the convergence of 'evidentiary defence rights' across legal systems from both adversarial and inquisitorial traditions.[110]

In that context, the case law of the ECCC — particularly the judgment of its Supreme Court Chamber in Case 002/01 on the manner in which both individual pieces of evidence and the evidentiary record as a whole should be assessed in reaching findings of fact — represents an invaluable contribution to the debate. As we begin to assess the ECCC's legacy, despite numerous fact-finding hurdles in its practice,[111] we can say with confidence that the principles of evidence and proof established in its jurisprudence ought to be instructive for future international and hybrid criminal tribunals.

[110] J. Jackson and S. Summers, *The Internationalisation of Criminal Evidence* (Cambridge University Press, 2012), 285-324.

[111] Particularly the issuance of separate closing orders from the National and International Co-Investigating Judges in Cases 003, 004, and 004/02 (*supra* note 3).