ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ

អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា
Extraordinary Chambers in the Courts of Cambodia
Chambres Extraordinaires au sein des Tribunaux Cambodgiens

Kingdom of Cambodia
Nation Religion King
Royaume du Cambodge
Nation Religion Roi

អង្គជំនុំជម្រះតុលាការកំពូល
Supreme Court Chamber
Chambre de la Cour suprême



សំណុំរឿងលេខ: ០០១/១៨ កក្កដា ២០០៧/អ.វ.ត.ក/អ.ជ.ត.ក
**Case File/Dossier N°. 001/18-07-2007-ECCC/SC**

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| **Before:** | **Judge KONG Srim, President**<br>**Judge Motoo NOGUCHI**<br>**Judge SOM Sereyvuth**<br>**Judge Agnieszka KLONOWIECKA-MILART**<br>**Judge SIN Rith**<br>**Judge Chandra Nihal JAYASINGHE**<br>**Judge YA Narin** |
| **Greffiers:** | **SEA Mao, Christopher RYAN,**<br>**PHAN Theoun, Paolo LOBBA** |
| **Date:** | **3 February 2012** |
| **Original Language(s):** | **Khmer/English** |
| **Classification:** | **PUBLIC** |

# APPEAL JUDGEMENT

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# I. INTRODUCTION

1. The Supreme Court Chamber of the Extraordinary Chambers in the Courts of Cambodia ("Chamber" and "ECCC", respectively) hereby renders its Judgement on the appeals against the Judgement of the Trial Chamber ("Trial Judgement") issued on 26 July 2010 in the case of *KAING Guek Eav alias Duch*, Case File No. 001/18-07-2007/ECCC/SC.[1]

## A. Background

2. The events giving rise to these appeals took place between October 1975 and 6 January 1979 at S-21, a security centre in Phnom Penh, Cambodia, tasked with interrogating and executing perceived opponents of the Communist Party of Kampuchea ("CPK"). S-21 included the detention centre and surrounding area (Tuol Sleng) as well as its execution and re-education camp branches on the outskirts of Phnom Penh, named Choeung Ek and Prey Sâr (S-24), respectively. No fewer than 12,272 victims, including men, women and children, were executed at S-21, the majority of who were systematically tortured.[2]

3. The Accused, KAING Guek Eav *alias* Duch, is a former mathematics teacher born on 17 November 1942 in the village of Poev Veuy, Peam Bang Sub-District, Stoeung District, in the province of Kompong Thom, Cambodia.[3] The Accused was Deputy Chairman of S-21 from 15 August 1975 to March 1976, and Chairman of S-21 from March 1976 until the collapse of the Democratic Kampuchea ("DK") regime on 7 January 1979.[4]

## B. Procedural Overview

4. On 18 July 2007, the ECCC Co-Prosecutors filed an Introductory Submission with the Co-Investigating Judges pursuant to Internal Rule 53, opening a judicial investigation against five individuals, including the Accused.[5] On 19 September 2007,

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[1] E188. In a public hearing on 3 February 2012, the Supreme Court Chamber read the Summary and signed Disposition of this Appeal Judgement, which were filed together as one document on the same day. As written on page 18 of this filing, "This Appeal Judgement becomes final on 3 February 2012." F26/3.
[2] Trial Judgement, paras 111, 119, 597.
[3] Trial Judgement, para. 1.
[4] Trial Judgement, paras 111, 119, 121, 130, 203.
[5] Co-Prosecutors' Introductory Submission, 20 July 2007, D3.

the Co-Investigating Judges ordered the separation of the case file of the Accused in relation to facts concerning S-21, which were investigated under Case File No. 001/18-07-2007 and which comprise the present case.[6] On 8 August 2008, the Co-Investigating Judges issued a Closing Order indicting the Accused for crimes against humanity and grave breaches of the Geneva Conventions of 1949.[7]

5. The Co-Prosecutors appealed against the Closing Order on 5 September 2008.[8] The Pre-Trial Chamber issued an oral decision on this appeal on 5 December 2008.[9] The Pre-Trial Chamber partially granted the Co-Prosecutors' first ground of appeal, finding that the domestic crimes of torture and premeditated murder as defined by the 1956 Penal Code of Cambodia ("1956 Penal Code") should be added to the Closing Order.[10] The Pre-Trial Chamber dismissed the Co-Prosecutors' second ground of appeal, which had alleged that the Co-Investigating Judges erred in failing to include joint criminal enterprise as a form of responsibility in the Closing Order.[11] The Pre-Trial Chamber remitted the Accused for trial on the basis of the Amended Closing Order, which established the factual allegations for the Trial Chamber to determine at trial.

6. The Initial Hearing before the Trial Chamber took place on 17 and 18 February 2009.[12] The substantive trial hearing commenced on 30 March 2009 and the hearing of the evidence concluded on 17 September 2009 after 72 trial days.[13] Ninety individuals were joined as Civil Parties and were represented by lawyers, forming four groups of Civil Parties ("Civil Parties Group(s)").[14] Closing trial statements were made by the Co-Prosecutors, the Civil Parties through their Co-Lawyers, the Accused's Co-Lawyers, and the Accused from 23 to 27 November 2009.[15]

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[6] Separation Order, 19 September 2007, D18. All other facts related to the Accused or the other individuals mentioned in the Introductory Submission were investigated under Case File No. 002/19-09-2007.
[7] Closing Order Indicting Kaing Guek Eav *alias* Duch, 12 August 2008, D99 ("Closing Order").
[8] Co-Prosecutors' Appeal of the Closing Order against Kaing Guek Eav "Duch" dated 8 August 2008, Khmer filed 5 September 2008, English translation filed 25 September 2008, D99/3/3.
[9] Decision on Appeal against the Closing Order Indicting KAING Guek Eav alias "DUCH", 8 December 2008, D99/3/42 ("Amended Closing Order").
[10] Amended Closing Order, paras 103-107.
[11] Amended Closing Order, para. 141
[12] Order Setting the Date of the Initial Hearing, 19 January 2009, E8.
[13] Trial Judgement, para. 9.
[14] Trial Judgement, paras 637-638.
[15] Scheduling Order for Closing Statements, 30 September 2009, E170.

7. The Trial Chamber delivered its Judgement on 26 July 2010. The Trial Chamber found that, as Deputy and then Chairman of S-21, the Accused managed and refined a system over the course of more than three years that resulted in the execution of no fewer than 12,272 victims, the majority of whom were also systematically tortured.[16] The Trial Chamber sentenced the Accused to 35 years of imprisonment based on convictions for the crime against humanity of persecution (subsuming the crimes against humanity of extermination (encompassing murder), enslavement, imprisonment, torture (including one instance of rape) and other inhumane acts), as well as for grave breaches of the Geneva Conventions of 1949 (wilful killing, torture and inhumane treatment, wilfully causing great suffering or serious injury to body or health, wilfully depriving a prisoner of war or civilian of the rights of fair and regular trial, and unlawful confinement of a civilian).[17] The Trial Chamber decided that a reduction in the sentence of 5 years was appropriate given the violation of the Accused's rights occasioned by his illegal detention by the Cambodian Military Court between 10 May 1999 and 30 July 2007.[18] The Trial Chamber also found that the Accused is entitled to credit for the entirety of his time spent in detention, from 10 May 1999 to 30 July 2007 (under the authority of the Cambodian Military Court) and from 31 July 2007 until the date the Trial Judgement becomes final.[19]

8. The Trial Chamber granted two reparations to the Civil Parties. The Trial Chamber declared in its Judgement that all admitted Civil Parties suffered harm as a direct consequence of the crimes for which the Accused was convicted. The Trial Chamber agreed to compile all statements of apology and acknowledgements of responsibility made by the Accused during the course of the trial and to post this compilation on the ECCC's official website within 14 days of the Trial Judgement becoming final.[20]

[16] Trial Judgement, para. 597.
[17] Trial Judgement, paras 677, 679.
[18] Trial Judgement, para. 680.
[19] Trial Judgement, para. 681.
[20] Trial Judgement, paras 682-683.

9. The Co-Prosecutors, the Accused, and Civil Parties Groups 1, 2, and 3 appealed to the Supreme Court Chamber against the Trial Judgement.[21]

10. The Supreme Court Chamber held a management meeting regarding the appeal hearing on 23 March 2011 in closed session with counsel for the Appellants. The substantive Appeal Hearing was conducted over three days from 28-30 March 2011.

[21] Group 1 – Civil Parties' Co-Lawyers' Immediate Appeal of Civil Party Status Determinations from the Final Judgement, 16 September 2010, F8 ("CPG1 Appeal") (originally filed as E188/10 under same title on 24 August 2010, but subsequently re-filed as F8 pursuant to Decision on Characterisation of Group 1 – Civil Party Co-Lawyers' Immediate Appeal of Civil Party Status Determinations in the Trial Judgment, 30 September 2010, F8/1); Group 1 – Civil Parties' Co-Lawyers' Notice of Intent Supplemental Filing, 28 October 2010, F12 ("CPG1 Notice of Intent"); Notice of Appeal by the Co-Lawyers for Civil Party Group 3, Khmer filed 20 August 2010, English translation filed 6 September 2010, E188/4 ("CPG3 Notice of Appeal"); Appeal of the Co-Lawyers for the Group 3 Civil Parties against the Judgement of 26 July 2010, Khmer filed 6 October 2010, English translation filed 10 November 2010, F9 ("CPG3 Appeal"); Co-Prosecutors' Notice of Appeal against the Judgement of the Trial Chamber in the Case of KAING Guek Eav alias Duch, 16 August 2010, E188/2; Co-Prosecutors' Appeal against the Judgement of the Trial Chamber in the Case of KAING Guek Eav alias Duch, 18 October 2010, F10 ("Co-Prosecutors' Appeal"); Notice of Appeal of Co-Lawyers for Civil Parties (Group 2) and Grounds of Appeal against Judgment, 6 September 2010, E188/12 ("CPG2 Appeal on CHUM Sirath"); Notice of Appeal of Co-Lawyers for Civil Parties (Group 2), 24 August 2010, E188/6; Appeal against Rejection of Civil Party Applicants in the Judgment – Co-Lawyers for Civil Parties – Group 2, 22 October 2010, F11 ("CPG2 Appeal on Admissibility"); Notice of Appeal of Co-Lawyers for Civil Parties (Group 2) on the Reparation Order, 6 September 2010, E188/14; Appeal against Judgment on Reparations by Co-Lawyers for Civil Parties – Group 2, 2 November 2010, F13 ("CPG2 Appeal on Reparations"); Notice of Appeal by the Co-Lawyers for Kaing Guek Eav *alias* Duch Against the Trial Chamber Judgement of 26 July 2010, 24 August 2010, E188/8 ("Defence Notice of Appeal"); Appeal Brief by the Co-Lawyers for KAING Guek Eav *alias* "Duch" against the Trial Chamber Judgement of 26 July 2010, 18 November 2010, F14 ("Defence Appeal") (filed in Khmer on 18 November 2010, and in its final corrected English translation on 3 February 2011. Request for Correction to Accused's Appeal Brief, 9 December 2010, F14/Corr-1; Request for Correction to Accused's Appeal Brief, 3 February 2011, F14/Corr-2); Response of the Lawyers for the Group 3 Civil Parties, to the Appeal of the Co-Lawyers for Duch against the Judgement of 26 July 2010, Khmer filed 3 December 2010, English translation filed 24 January 2011, F14/2 ("CPG3 Response"); Co-Prosecutors' Response to the Appeal Brief by the Co-Lawyers for KAING Guek Eav *alias* "Duch" against the Trial Chamber Judgement of 26 July 2010, 20 December 2010, F14/4 ("Co-Prosecutors' Response"); Reply by the Co-Lawyers for KAING Guek Eav *alias* "Duch" to the Co-Prosecutors' Response of 20 December 2010, Khmer filed 14 January 2011, English translation filed 17 February 2011, F14/4/2 ("Defence Reply"); Co-Prosecutors' Observations on the Corrected English Version of the Appeal Brief by the Co-Lawyers for KAING Guek Eav *alias* "Duch" Against the Trial Chamber Judgment, 16 March 2011, F14/5; Supplemental Submissions Concerning Reparations, Khmer filed 25 March 2011, English translation filed 30 March 2011, F25 ("CPG3 Supplemental Submissions").

## II. STANDARD OF APPELLATE REVIEW

11. Internal Rule 104(1) of the ECCC Internal Rules provides that the grounds of appeal to the Supreme Court Chamber against a judgement of the Trial Chamber are "an error on a question of law invalidating the judgment [...] or an error of fact which has occasioned a miscarriage of justice."[22] The adoption of these grounds of appeal implements a legislative decision made in the United Nations - Royal Government of Cambodia Agreement and ECCC Law that the review of ECCC trial judgements would be carried out at one instance only.[23] As a result, the UN-RGC Agreement and the ECCC Law depart from the two-tier review provided for in Cambodian criminal procedure,[24] yet leave little guidance as to the actual functioning of the ECCC appeal regime.

12. According to Cambodian criminal procedure, there are two levels of review of a judgement from a court of first instance. A Criminal Chamber of the Court of Appeal decides appeals *de novo* based on evidence adduced before the first instance court and, as the case may be, the Court of Appeal.[25] Through a request for cassation, the Supreme Court may review appeals judgements issued by the Court of Appeal.[26] The 2007 Code of Criminal Procedure enumerates the following grounds for which the Supreme Court of Cambodia may grant a request for cassation:

- for illegal composition of the trial panel;
- for lack of jurisdiction of the court;
- for abuse of power;
- for breaching the law or for misapplication of the law;
- for violations or failure to comply with procedure causing nullity;

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[22] ECCC Internal Rules (Rev. 8), Rule 104(1). Unless otherwise indicated, as here, all references in this Appeal Judgement to the ECCC Internal Rules ("Internal Rule(s)") are to Revision 3.
[23] Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, 10 August 2001, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006), ("ECCC Law"), Art. 9 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, signed 6 June 2003 (entered into force 29 April 2005), ("UN-RGC Agreement"), Art. 3(2)(b).
[24] Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, 10 August 2001, (NS/RKM/0801/12), ("2001 ECCC Law"), Art. 2 (providing for trial, appeals, and supreme courts).
[25] Code of Criminal Procedure of the Kingdom of Cambodia, promulgated by the King on 10 August 2007 ("2007 Code of Criminal Procedure"), Arts 373, 405-406.
[26] 2007 Code of Criminal Procedure, Art. 417.

– for failure to decide on a request made by the Prosecutor or a party, given it was unambiguous and made in writing;
– for manipulation of facts;
– for lack of reasons; or
– for contradiction between holding and ruling.[27]

13. Pursuant to the ECCC Law, which provides that the Supreme Court Chamber "shall serve as both appellate chamber and final instance,"[28] remedies available under Cambodian criminal procedure were conflated into one *sui generis* appellate system. The ECCC is therefore authorised by the UN-RGC Agreement and ECCC Law to seek guidance under this system in procedural rules established at the international level, including their interpretation by relevant international judicial bodies.[29] The resulting system of appeal in Internal Rule 104(1) retains features of appellate review by a Criminal Chamber of the Court of Appeal in that the Supreme Court Chamber may itself examine evidence and call or admit new evidence to determine an issue.[30] The grounds of appeal in Internal Rule 104(1) against a trial judgement also encompass the grounds for a request for cassation to the Supreme Court of Cambodia. At the same time, in keeping with the purposes of the Internal Rules,[31] the Supreme Court Chamber notes that these grounds of appeal are well established in international criminal law,[32] and the language adopted for Internal Rule 104(1) closely resembles grounds of appeal found in the Statutes of the International Criminal Tribunal for the former Yugoslavia ("ICTY") and of the International Criminal Tribunal for Rwanda ("ICTR").[33] Accordingly, ICTY and ICTR jurisprudence is a source of guidance in the interpretation of Internal Rule 104(1).

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[27] 2007 Code of Criminal Procedure, Art. 419.
[28] ECCC Law, Art. 9 new.
[29] UN-RGC Agreement, Art. 12(1); ECCC Law, Art. 33 new.
[30] Internal Rules 104(1), 108(7).
[31] Internal Rules, Preamble, 5th paragraph ("[T]he ECCC have adopted the following Internal Rules, the purpose of which is to consolidate applicable Cambodian procedure for proceedings before the ECCC and […] to adopt additional rules where these existing procedures do not deal with a particular matter, or if there is uncertainty regarding their interpretation or application, or if there is a question regarding their consistency with international standards").
[32] *See, e.g. Prosecutor v. Galić*, IT-98-29-A, "Judgement", Appeals Chamber, 30 November 2006, ("*Galić* Appeal Judgment"), para. 6.
[33] Statute of the International Criminal Tribunal for the Former Yugoslavia, adopted 25 May 1993, as amended at September 2009, ("ICTY Statute"), Art. 25(1); Statute of the International Criminal Tribunal for Rwanda, adopted 8 November 1994, as amended at 31 January 2010, ("ICTR Statute"), Art. 24(1) (collectively "*ad hoc* Tribunals").

14. Errors of law may be alleged against a conviction or acquittal. When a party raises such an allegation, the Supreme Court Chamber, as the final arbiter of the law applicable before the ECCC, is bound in principle to determine whether an error of law was in fact committed on a substantive or procedural issue.[34] The Supreme Court Chamber reviews the Trial Chamber's findings on questions of law to determine whether they are correct, not merely whether they are reasonable.[35] This standard of correctness means that the Supreme Court Chamber decides whether the Trial Chamber established the content of the applicable legal norms based in the appropriate sources of law and by employing rules of interpretation pertinent to those sources of law. The Supreme Court Chamber also assesses whether the result reached is precise and unambiguous.

15. The appellate powers of the Supreme Court Chamber are exercised within the limits of the issues appealed. Defence, Co-Prosecutors, or Civil Parties alleging an error of law must identify the alleged error, present arguments in support of the allegation, and explain how the error invalidates the trial judgement.[36] However, the burden of proof on appeal is not absolute with regard to errors of law. Even if the party's arguments are insufficient to support the contention of an error of law, the Supreme Court Chamber may find other reasons and come to the same conclusion, holding that there is an error of law.[37] In order to make a determination as to the issue on appeal, the Supreme Court Chamber also reviews those legal findings of the Trial Chamber which constitute necessary predicates for the impugned decision. In exceptional circumstances, the Supreme Court Chamber may raise questions *ex proprio motu*[38] or hear appeals where a party has raised a legal issue that would not lead to the invalidation of the judgement but is nevertheless of general significance to the ECCC's jurisprudence.[39]

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[34] *Prosecutor v. Krnojelac*, IT-97-25-A, "Judgement", Appeals Chamber, 17 September 2003, ("*Krnojelac* Appeal Judgement"), para. 10.
[35] *Krnojelac* Appeal Judgement, para. 10.
[36] Internal Rule 105(3).
[37] *Prosecutor v. Boškoski and Tarčulovski*, IT-04-82-A, "Judgement", Appeals Chamber, 19 May 2010, ("*Boškoski and Tarčulovski* Appeal Judgement"), para. 10; *Kambanda v. Prosecutor*, ICTR-97-23-A, "Judgement", Appeals Chamber, 19 October 2000, ("*Kambanda* Appeal Judgment"), para. 98.
[38] *Krnojelac* Appeal Judgement, para. 6; 2007 Code of Criminal Procedure, Arts 405-406, 440-441.
[39] *Galić* Appeal Judgement, para. 6.

16. Where the Supreme Court Chamber finds an error of law in a trial judgement arising from the application of the wrong legal standard by the Trial Chamber, the Supreme Court Chamber will determine the correct legal standard and review the relevant factual findings of the Trial Chamber. In so doing, the Supreme Court Chamber not only corrects the legal error, but applies the correct legal standard to the evidence contained in the trial record, where necessary, and determines whether it is itself convinced on the relevant standard of proof as to the factual finding challenged by a party before that finding is confirmed on appeal.[40] The Supreme Court Chamber may amend a decision of the Trial Chamber only if it identifies an error of law "invalidating the judgment or decision."[41] Consequently, not every error of law justifies a reversal or revision of a decision of the Trial Chamber. Where the Co-Prosecutors or Civil Parties allege an error of law in their appeals against an acquittal, the Supreme Chamber may only modify the findings of law of the Trial Chamber if the Supreme Court Chamber considers the trial judgement erroneous, but cannot modify the disposition of the Trial Chamber judgement.[42] Decisions of the Supreme Court Chamber are final and binding on all parties in the case.

17. Similar to errors of law, an error of fact may be alleged against a conviction or acquittal. The Supreme Court Chamber applies the standard of reasonableness in reviewing an impugned finding of fact, not whether the finding is correct. In determining whether or not a Trial Chamber's finding of fact was one that no reasonable trier of fact could have reached, the Supreme Court Chamber "will not lightly disturb findings of fact by a Trial Chamber."[43] The Supreme Court Chamber agrees with the following general approach to the factual findings of the Trial Chamber as articulated by the ICTY Appeals Chamber:

> Pursuant to the jurisprudence of the Tribunal, the task of hearing, assessing and weighing the evidence presented at trial is left primarily to the Trial Chamber. Thus, the Appeals Chamber must give a margin of deference to a finding of fact reached by a Trial Chamber. Only where the evidence relied on by the Trial Chamber could not have been accepted by any reasonable tribunal of fact or where the evaluation of the evidence is "wholly

[40] *Prosecutor v. Blagojević and Jokić*, IT-02-60-A, "Judgement", Appeals Chamber, 9 May 2007, ("*Blagojević and Jokić* Appeal Judgement"), para. 8.
[41] Internal Rule 104(1)(a).
[42] Internal Rule 110(4).
[43] *Prosecutor v. Furundžija*, IT-95-17/1, "Judgement", Appeals Chamber, 21 July 2000, ("*Furundžija* Appeal Judgement), para. 37.

> erroneous" may the Appeals Chamber substitute its own finding for that of the Trial Chamber.
>
> [...].
>
> The reason that the Appeals Chamber will not lightly disturb findings of fact by a Trial Chamber is well known. The Trial Chamber has the advantage of observing witnesses in person and so is better positioned than the Appeals Chamber to assess the reliability and credibility of the evidence. Accordingly, it is primarily for the Trial Chamber to determine whether a witness is credible and to decide which witness' testimony to prefer, without necessarily articulating every step of the reasoning in reaching a decision on these points. This discretion is, however, tempered by the Trial Chamber's duty to provide a reasoned opinion [...].[44]

18. Considering that the guilt of an accused must be established at trial beyond reasonable doubt, the significance of an error of fact occasioning a miscarriage of justice must be evaluated in the context of what the appellant seeks to demonstrate. This is somewhat different for an appeal by the Co-Prosecutors against acquittal than with an appeal by the Defence against conviction. An appeal against a conviction must show that the Trial Chamber's factual errors create a reasonable doubt as to an accused's guilt. An appeal against an acquittal must show that, when account is taken of the errors of fact committed by the Trial Chamber, all reasonable doubt of the accused's guilt has been eliminated.[45] However, in case of an appeal by the Co-Prosecutors or Civil Parties against an acquittal, the Supreme Chamber may only modify the findings of fact of the Trial Chamber if it considers the judgement erroneous, and cannot modify the disposition of the Trial Chamber's judgement.[46]

19. Irrespective of which party alleges an error of fact, only those facts occasioning a miscarriage of justice may result in the Supreme Court Chamber overturning the Trial Chamber's judgement in whole or in part. A miscarriage of justice is defined as "[a] grossly unfair outcome in judicial proceedings."[47] For the error of fact to be one that occasioned a miscarriage of justice, it must have been

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[44] *Prosecutor v. Kupreškić et al.*, IT-95-16-A, "Appeal Judgement", Appeals Chamber, 23 October 2001, ("*Kupreškić* Appeal Judgement"), paras 30, 32.
[45] *Prosecutor v. Bagilishema*, ICTR-95-1A, "Judgement", Appeals Chamber, 3 July 2002, ("*Bagilishema* Appeal Judgement"), para. 14.
[46] Internal Rule 110(4).
[47] *Furundžija* Appeal Judgement, para. 37, citing Black's Law Dictionary, 7th ed., 1999.

"critical to the verdict reached."[48] A party must demonstrate how the error of fact has actually occasioned a miscarriage of justice.

20. On appeal, a party may not merely repeat arguments that did not succeed at trial, unless the party can demonstrate that the Trial Chamber's rejection of them constituted such an error as to warrant the intervention of the Supreme Court Chamber. Arguments of a party which do not have the potential to cause the impugned decision to be reversed or revised may be immediately dismissed by the Supreme Court Chamber and need not be considered on the merits. In order for the Supreme Court Chamber to assess a party's arguments on appeal, the appealing party is expected to provide precise references to relevant transcript pages or paragraphs in the trial judgement to which the challenge(s) is being made.[49] Further, the Supreme Court Chamber "cannot be expected to consider a party's submissions in detail if they are obscure, contradictory, vague or suffer from other formal and obvious insufficiencies."[50] The Supreme Court Chamber has inherent discretion in selecting which submissions merit a detailed reasoned opinion in writing. The Supreme Court Chamber may dismiss arguments that are evidently unfounded without providing detailed reasoning.

[48] *Kupreškić* Appeal Judgement, para. 29.
[49] Internal Rule 105(4).
[50] *Prosecutor v. Stakić*, IT-97-24-A, "Judgement", Appeals Chamber, 22 March 2006, ("*Stakić* Appeal Judgement"), para. 12.

# III. ALLEGED ERRORS CONCERNING PERSONAL JURISDICTION (GROUND 1 OF THE DEFENCE APPEAL)

## A. Personal Jurisdiction in Trial Proceedings and Trial Judgement

21. During the Initial Hearing on 17 February 2009, the President of the Trial Chamber invited the parties to raise any objection to the jurisdiction of the Chamber, and expressly drew their attention to the provisions of Internal Rule 89(1) and to the consequences of a failure to raise such an objection at the Initial Hearing.[51] The Defence raised one preliminary objection concerning the statute of limitations for crimes under national law, and also raised an objection to the length of the Accused's pre-trial detention.[52] No objection was taken by the Defence on personal jurisdiction. In its closing statement, however, the Defence contended that the ECCC lacked jurisdiction over the Accused since he was neither one of the "senior leaders" nor one of those "most responsible" for the crimes committed during the temporal jurisdiction of the ECCC.[53] In particular, the Defence submitted that: the term "senior leaders" encompassed only members of the Standing Committee; the Accused was merely executing orders; and more people had died in other detention facilities than in S-21.[54]

22. In its Judgement, the Trial Chamber held that the Accused failed to object to the ECCC's personal jurisdiction over him as a preliminary objection during the Initial Hearing pursuant to Internal Rule 89(1)(a).[55] In view of the belated manner in which the objection was raised, the Trial Chamber declined to admit the objection,[56] but nonetheless exercised its discretion to examine the issue of personal jurisdiction *ex proprio motu*.[57] In a footnote the Trial Chamber expressed the view that the term "senior leaders of Democratic Kampuchea and those who were most responsible" in the UN-RGC Agreement and ECCC Law "refers to two distinct categories of suspects."[58] On the apparent assumption that this term constitutes a jurisdictional requirement of the ECCC, the Trial Chamber proceeded to examine whether the

[51] T. (EN), 17 February 2009, E1/3.1, pp. 5-6.
[52] T. (EN), 17 February 2009, E1/3.1, pp. 7, 11.
[53] T. (EN), 25 November 2009, E1/80.1, pp. 84-100.
[54] Trial Judgement, para. 14, fn. 19.
[55] Trial Judgement, para. 14.
[56] Trial Judgement, para. 15.
[57] Trial Judgement, para. 16.
[58] Trial Judgement, para. 22, fn. 28.

Accused fell within the definition of a "senior leader" or was one of "those most responsible." The Trial Chamber concluded that the acts and conduct of the Accused, first as Deputy and then as Chairman of S-21, placed him amongst those who were "most responsible" for the crimes committed by the DK regime during the temporal jurisdiction of the ECCC,[59] and that it was unnecessary to determine whether, in addition, the Accused qualified as a "senior leader" of the DK.[60]

### 1. Submissions of the Parties

23. The Accused contends that the Trial Chamber had no personal jurisdiction over him, and accordingly his conviction and sentence ought to be set aside by the Supreme Court Chamber. The Accused submits that, within the political structure established in the DK, neither his operational responsibilities nor the duties he performed bring him within the description of a "senior leader" of the DK during the period from 17 April 1975 to 6 January 1979.[61] He further submits that the Trial Chamber erred in concluding that he was one of "those who were most responsible" for the crimes committed during the temporal jurisdiction of the ECCC[62] and that the Trial Chamber's findings amount to an error of law reviewable by the Supreme Court Chamber. On a proper application of the law, the Accused argues that the Co-Investigating Judges had no jurisdiction to indict him, and the Trial Chamber lacked jurisdiction to try him for the crimes for which he was allegedly found responsible. He submits that in consequence of this fundamental jurisdictional error, the Supreme Court Chamber should allow his appeal and quash his conviction and sentence. Fundamental to the Accused's submissions is the proposition that the term "senior leaders of Democratic Kampuchea and those who were most responsible" lays down a jurisdictional requirement proof of which is necessary to found the Trial Chamber's jurisdiction over the Accused.[63]

24. The Co-Prosecutors, in their Response, argue that the Accused's appeal on personal jurisdiction is inadmissible since his Notice of Appeal and Appeal fail to meet the minimum standards of pleading laid down by Internal Rule 105 and

[59] Trial Judgement, paras 23-25.
[60] Trial Judgement, para. 25.
[61] Defence Appeal, para. 20.
[62] Defence Appeal, paras 13-55.
[63] Defence Appeal, paras 3, 11; Defence Reply, para. 10; T. (EN), 28 March 2011, F1/2.1, p. 16.

comparative international practice on appeal proceedings in criminal cases.[64] Without prejudice to this submission, the Co-Prosecutors also submit that: the Trial Chamber was entitled to reject the Defence submission on personal jurisdiction as untimely;[65] the Trial Chamber was right to conclude that the term "senior leaders of Democratic Kampuchea and those who were most responsible" refers to two distinct categories of suspects;[66] and the Trial Chamber was right to conclude that it had personal jurisdiction over the Accused on the basis of his status as one of those "most responsible" for the crimes committed during the temporal jurisdiction of the ECCC.[67] In their written pleadings the Co-Prosecutors did not challenge the assumption of the Trial Chamber that the term amounts in law to a jurisdictional requirement of the ECCC.

25. Civil Parties Group 3 also responded to the Defence Appeal, submitting that the Accused's appointment as Deputy Director and then Director of S-21 "by one of the permanent members of the Central Committee during the period in question, on account of his experience in managing the M-13 Detention Centre where he won the permanent member's trust" is "proof that he believed in the regime and had the qualities of 'the best interrogator'."[68] Civil Parties Group 3 also submits that the Defence failed to formally and properly object to the Trial Chamber's jurisdiction over the Accused,[69] and requests the Supreme Court Chamber to reject all the arguments in the Defence Appeal as "manifestly unfounded."[70]

26. In its scheduling order for the hearing of the present appeals, the Supreme Court Chamber invited the Appellants to make oral submissions on the question of whether the term "senior leaders of Democratic Kampuchea and those who were most responsible" "constitutes a jurisdictional requirement that is subject to judicial review, or is a guide to the discretion of the Co-Prosecutors and Co-Investigating Judges that is not subject to judicial review."[71] At the Appeal Hearing, the Defence made no

[64] Co-Prosecutors' Response, paras 7-9.
[65] Co-Prosecutors' Response, paras 12-20; T. (EN), 28 March 2011, F1/2.1, pp. 67, 72, 83. *See also* T. (EN), 28 March 2011, F1/2.1, p. 109 (Civil Parties Group 3).
[66] Co-Prosecutors' Response, paras 21-29.
[67] Co-Prosecutors' Response, paras 30-47.
[68] CPG3 Response, para. 13.
[69] CPG3 Response, para. 22.
[70] CPG3 Response, para. 24.
[71] Order Scheduling Appeal Hearing, 4 March 2011, F20, para. 1.

submissions directly addressing this particular question of law. The Co-Prosecutors, in oral argument, submitted that the term does not amount to a jurisdictional requirement reviewable by the Trial Chamber.[72]

### 2. Discussion

27. The Supreme Court Chamber will address the Co-Prosecutors' submissions that the Accused's ground of appeal on personal jurisdiction should be declared inadmissible because the jurisdictional objection was not taken at the appropriate stage of the proceedings before the Trial Chamber, as required by Internal Rule 89(1)(a), and was accordingly out of time, and/or because the Defence Notice of Appeal and Appeal fail to meet the standards of pleading required by Internal Rule 105.

### 3. Preliminary Objections under Internal Rule 89

28. At the material time, Internal Rule 89(1)(a) provided that "[a] preliminary objection concerning the jurisdiction of the Chamber [...] shall be raised in the initial hearing, failing which it shall be inadmissible."[73] The primary purpose of this provision is to provide parties, and especially the accused, with a procedural opportunity to avoid trial on the basis of a want of jurisdiction of the Trial Chamber. The provision thus promotes the orderly and efficient administration of justice by allowing questions of jurisdiction to be definitively determined before trial, thereby avoiding the waste of effort and expense that would otherwise be involved in embarking on a trial which the Trial Chamber has no jurisdiction to conduct.[74]

29. Preliminary objections to jurisdiction are generally to be determined on the face of an indictment.[75] Yet it does not follow that every jurisdictional objection can

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[72] T. (EN), 28 March 2011, F1/2.1, p. 91. *But see* T. (EN), 28 March 2011, F1/2.1, p. 104 (lines 17-24) (Civil Parties Group 3).
[73] *See also* 2007 Code of Criminal Procedure, Art. 344 ("Any objection must be raised before any defense declaration on the merits, otherwise it is inadmissible").
[74] The ICTY has observed that a comparable provision requiring jurisdictional objections to be taken prior to the commencement of trial exists "in order not to render moot the monumental undertaking of an international criminal trial." *Prosecutor v. Milutinović*, IT-05-87-T, "Decision on Nebojša Pavković's Motion for a Dismissal of the Indictment Against Him on Grounds that the United Nations Security Council Illegally Established the International Criminal Tribunal for the Former Yugoslavia", Trial Chamber, 21 February 2008, para. 15.
[75] *See Prosecutor v. Norman*, SCSL-04-14-PT-026, "Decision on the Preliminary Defence Motion on the Lack of Personal Jurisdiction Filed on Behalf of Accused Fofana", Trial Chamber, 3 March 2004, para. 44.

be finally determined as a preliminary issue before the commencement of trial. Where a jurisdictional objection depends upon the Trial Chamber's findings of fact, it will be premature to expect the Trial Chamber to rule upon such an objection before all the evidence has been heard. This is recognised in Internal Rule 89(3), which provides that the Trial Chamber may issue its decision on an objection to jurisdiction at the time of judgement. In such a situation, the rationale for the duty imposed by Internal Rule 89(1)(a) - to avoid an unnecessary trial - ceases to be relevant, since it is the trial process itself that provides the essential evidentiary foundation for the determination of the jurisdictional objection.

30. Furthermore, Internal Rule 89(1)(a) does not refer to all objections to the jurisdiction of the Trial Chamber, but only those which are raised as "preliminary objections" to jurisdiction. The concept of a preliminary objection to jurisdiction must be understood, firstly, according to the knowledge of the parties. Internal Rule 89(1)(a) presupposes that parties are able to discover the alleged lack of jurisdiction by the prescribed deadline. Practically, Internal Rule 89(1)(a) may thus be utilised to deal with an alleged lack of jurisdiction that is patent, but not with an alleged lack of jurisdiction that is latent. A patent lack of jurisdiction refers to a lack of jurisdiction that is apparent on the face of the proceedings before the deadline in Internal Rule 89(1). A latent lack of jurisdiction refers to a lack of jurisdiction that is not apparent on the face of the proceedings and therefore not discoverable before the deadline in Internal Rule 89(1).[76]

31. Secondly, the concept of a preliminary objection to jurisdiction must be understood in relation to the nature of the jurisdictional defect being challenged. The alleged lack of jurisdiction may be of the kind that does not preclude proceedings *in limine,* such as, for example, another court is competent to try the case. The parties might then be restricted from raising objections to such jurisdictional defects after the commencement of the trial (or another statute-prescribed deadline). The reason for this restriction is that the parties are deemed to have submitted to the jurisdiction of the court while the defect has been cured by virtue of the advancement of proceedings. If, however, the alleged want of jurisdiction would, if successful, nullify

[76] *Cf.* Code of Criminal Procedure of France (English translation), Updated 1 January 2006, Arts 173-1, 174, 595 <http://www.legifrance.gouv.fr/>.

the proceedings, the parties may raise an objection to such jurisdictional defects at any time in the proceedings, including for the first time on appeal. While Cambodian criminal procedure is silent on this distinction in jurisdictional defects,[77] French law, which can be used to interpret Cambodian law, indicates that the deadline in Internal Rule 89(1) should not apply to objections to jurisdiction that could nullify the proceedings.[78] Whether an accused falls within the ECCC's personal jurisdiction, like objections to the subject matter, territorial, and temporal jurisdictions of the ECCC, is clearly an absolute jurisdictional element. The Trial Chamber's duty to entertain objections to absolute jurisdictional elements ensures that any such objections can be properly considered in a case where an unduly restrictive interpretation of Internal Rule 89(1)(a) would otherwise result in the objection being declared inadmissible.

32. This limited application of Internal Rule 89(1)(a) also derives from the overriding duty of the ECCC as provided for in Internal Rule 21(1):

> The applicable [...] Internal Rules [...] shall be interpreted so as to always safeguard the interests of [...] Accused [...] and so as to ensure legal certainty and transparency of proceedings, in light of the inherent specificity of the ECCC, as set out in the ECCC Law and the Agreement. In this respect:

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[77] 2007 Code of Criminal Procedure, Art. 344 ("Any objection must be raised before any defense declaration on the merits, otherwise it is inadmissible"). *But see* Art. 419 (listing lack of jurisdiction among the grounds for cassation).

[78] There is a distinction in French criminal procedure between procedural jurisdictional elements (e.g., the summons to appear in court was not properly notified to the accused and therefore should be nullified) and absolute jurisdictional elements (e.g., amnesty and statute of limitation). While a party can waive its right to raise objections to procedural jurisdictional elements after a prescribed deadline, objections to absolute jurisdictional elements can be initiated at any time, including before the Court of Appeal. A successful objection to an absolute jurisdictional element deprives a court of its legal basis to try a crime, regardless of when or how it arises. *See* Code of Criminal Procedure of France, Arts 171, 305-1, 385, 385-1, 585, 595, 599, 802. The only exception to this rule is if the accused was a minor when the crime was committed. Cass. crim., 31 mai 1988 : Bull. crim., n° 18. Common law systems similarly distinguish between objections to want of jurisdiction. *See, e.g.* the Sri Lankan Court of Appeal in the context of a civil case:

> There is a distinction between the class of cases where a court may lack jurisdiction over the cause or matter or parties and those when court lacks competence due to failure to comply with such procedural requirements as are necessary for the exercise of the power of the court [...] [N]o waiver of objection or acquiescence can cure that [former] want of jurisdiction because parties cannot confer jurisdiction on a tribunal which has none. In the other class of cases when the want of jurisdiction is contingent only, the judgement or order of court will be void only against the party on whom it operates, but acquiescence, waiver or inaction on the part of the person may estop him from making any attempt to establish that the court was lacking in contingent jurisdiction.
> Dr. Ranaraja, J., C.A. No. 659/90, M.C. Colombo, No. 64031/5, July 14, 1997 <http://www.lawnet.lk/docs/case_law/slr/HTML/1998SLR3V320.htm>.

> a) ECCC proceedings shall be fair and adversarial and preserve a balance between the rights of the parties [...].

33. Two overriding principles emerge when Internal Rule 89(1)(a) is interpreted so as to safeguard the interests of an accused and to respect that ECCC proceedings shall be fair and adversarial and preserve a balance between the rights of the parties. First, Internal Rule 89(1)(a) cannot reverse the burden of proof in criminal proceedings before the ECCC. The Co-Prosecutors bear the burden of proving the guilt of an accused, and accused persons enjoy the right to be presumed innocent until proven guilty.[79] Thus, Internal Rule 89(1)(a) cannot be interpreted so as to force an accused to assist the Co-Prosecutors' case against him/her by providing early notice of jurisdictional deficiencies that could nullify the trial. Second, the accused's right to remain silent includes the right to decide at which time s/he will raise an objection to the jurisdiction of the Trial Chamber that could nullify the trial. While an accused will likely have legal interest in raising such an objection as a preliminary matter in order to avoid the trial, he cannot be penalized for deciding to withhold the raising of the objection until a time that s/he sees fit. If, for example, near the close of trial proceedings, an accused raises an objection to a want of jurisdiction that could nullify the trial, the law applicable before the ECCC precludes the Trial Chamber from not entertaining the objection solely because the deadline in Internal Rule 89(1) has elapsed.

34. The above interpretation of Internal Rule 89(1)(a) must also be considered alongside the inherent duty of the Trial Chamber to satisfy itself at all times that it has jurisdiction to try an accused. There may be situations in which an issue arises as to the Trial Chamber's jurisdiction at some stage subsequent to the deadline prescribed in Internal Rule 89(1). Such an issue may be raised by the parties or by the Court *ex proprio motu*. If, at any stage of the proceedings, the Trial Chamber becomes aware that it may be acting in excess of its jurisdiction, then it must examine the issue and satisfy itself that it has jurisdiction to proceed. A competent court is a prerequisite to a

[79] Constitution of the Kingdom of Cambodia (1993), adopted by the Constitutional Assembly and signed by the President on 21 September 1993, Art. 38 ("The accused shall be considered innocent until the court has judged finally on the case"). *See also Woolmington v. DPP*, [1935] AC 462 at 481, [1935] UKHL 1 (23 May 1935) ("Throughout the web of the English Criminal Law one golden thread is always to be seen that it is the duty of the prosecution to prove the prisoner's guilt [...] No matter what the charge or where the trial the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained").

fair trial. To proceed without jurisdiction would strike at the root of the ECCC's mandate, and would deprive the Trial Chamber of its legal authority to try an accused person. Accordingly, a party's failure to raise an objection to the jurisdiction of the Trial Chamber does not give the Trial Chamber jurisdiction that it did not already possess. The Trial Chamber must satisfy itself that it has jurisdiction even though a jurisdictional objection was not raised either as a preliminary issue or during the trial proceedings.

35. In summary, Internal Rule 89(1)(a) creates a procedural framework with which all parties, including accused persons, must comply in order to avoid proceeding to trial. The procedural consequence of not raising the objection pursuant to Internal Rule 89(1)(a) is that it precludes the disposing of the jurisdictional issue without the trial. However, Internal Rule 89(1)(a) is of limited application. An accused has the right to raise an objection to a patent or latent lack of jurisdiction that could nullify the trial at whatever time s/he decides safeguards his/her interests. In accordance with Internal Rule 89(3), the Trial Chamber must entertain any and all such objections to jurisdiction raised by an accused person "at the same time as the judgment on the merits" at the latest. Even if no party raises an objection to the jurisdiction of the Trial Chamber, the Trial Chamber must still satisfy itself that it possesses jurisdiction over the case before it in order to enter a judgement on the merits.

36. In the present case, the Trial Chamber rejected the Accused's objection to the ECCC's personal jurisdiction raised in the Defence's closing statement on the ground that it did not comply with Internal Rule 89(1)(a).[80] The Trial Chamber proceeded *ex proprio motu* to satisfy itself that it had personal jurisdiction over the Accused.[81] The Trial Chamber's position toward the Accused's jurisdictional objection is thus marked by equivocation. On the one hand, it seemed to acknowledge its duty to examine the jurisdiction issue *ex proprio motu*, while, on the other hand, it interpreted Internal Rule 89(1)(a) so as to render the Accused's jurisdictional objection inadmissible. As explained in the preceding paragraphs, Internal Rule 21(1) requires that any equivocation arising from an interpretation of Internal Rule 89(1)(a) be resolved in the

[80] Trial Judgement, paras 14-15.
[81] Trial Judgement, paras 17-25.

direction of the right of accused persons to decide when to raise a patent or latent lack jurisdictional objection that could nullify the trial and the Trial Chamber's duty to ascertain its jurisdiction. The Trial Chamber failed to subject its interpretation of Internal Rule 89(1)(a) to Internal Rule 21(1) and failed to consider whether the alleged lack of jurisdiction was patent or latent, or whether it could nullify the trial. Such failures constitute an error of law that invalidates the Trial Chamber's decision to not entertain the Accused's objection. While the Trial Chamber's decision to confirm its jurisdiction *ex proprio motu* does not eliminate the legal error made by the Trial Chamber, it cures its effect in that it enabled the filing of an informed appeal by the Accused.

37. The Supreme Court Chamber also notes that nothing in the Internal Rules suggests that an accused's failure to comply with an Internal Rule that is specific to trial proceedings limits the scope of his/her appeal against a trial judgement. Nor could the Internal Rules ever be interpreted otherwise, for the Accused was convicted of a crime and therefore has "the right to his conviction and sentence being reviewed by a higher tribunal according to law."[82] On the basis of this right, the Accused is entitled to appeal against any alleged error of law or fact that may invalidate the Trial Judgement or constitute a miscarriage of justice, respectively, including the Trial Chamber's decision on personal jurisdiction.[83] The Accused's appeal on personal jurisdiction satisfies both limbs of this test since it involves a mixed question of law and fact, which, if correct, would nullify the lawful basis for his conviction. Moreover, the Supreme Court Chamber has inherent power to satisfy itself that the Trial Chamber had jurisdiction to try the Accused, and therefore to review the Trial Chamber's conclusions on jurisdiction.[84] If the Accused had not appealed the jurisdictional issue, the Supreme Court Chamber would exercise that power in the present case since the issue is one of general importance to the jurisprudence and jurisdiction of the ECCC and it plainly has a sufficient nexus to the arguments raised before the Trial Chamber and in the present appeal.

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[82] International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), ("ICCPR"), Art. 14(5). *See also* United Nations Human Rights Committee, General Comment No. 32 - Article 14: Right to equality before courts and tribunals and to a fair trial, U.N. Doc. CCPR/C/GC/32 (23 August 2007), paras 45-51.
[83] Internal Rule 104(1).
[84] *See Boškoski and Tarčulovski* Appeal Judgment, para. 19 (addressing a jurisdictional issue *ex proprio motu* in the interests of justice).

38. The Supreme Court Chamber therefore rejects the submissions of the Co-Prosecutors that the Defence appeal on personal jurisdiction is inadmissible on the basis that he failed to comply with Internal Rule 89(1).

### 4. Standard of Appellate Pleading

39. The Supreme Court Chamber will next examine the Co-Prosecutors' submission that many of the Accused's appeal submissions should be declared inadmissible since his Notice of Appeal and Appeal fail to meet the minimum standards of pleading laid down by Internal Rule 105 and comparative international practice on appeal proceedings in criminal cases.[85] In particular, the Co-Prosecutors submit that the Accused's pleadings: fail to make sufficient references to identified portions of the transcript of proceedings before the Trial Chamber; make "obscure, contradictory, vague or otherwise insufficient arguments"; criticise the Trial Chamber's reasoning without substantiation or argument to the alleged error; and include misstatements of law and fact.[86]

40. The Internal Rules relevant to deciding the Co-Prosecutors' submissions are reproduced below:

> 105(3). A party wishing to appeal a judgment shall file a notice of appeal setting forth the grounds. The notice shall, in respect of each ground of appeal, specify the alleged errors of law invalidating the decision and alleged errors of fact which occasioned a miscarriage of justice. The appellant shall subsequently file an appeal brief setting out the arguments and authorities in support of each of the grounds, in accordance with paragraphs 2(a) and (c) of this Rule.
>
> (4). Appeals shall identify the findings or ruling challenged, with specific reference to the page and paragraph numbers of the decision of the Trial Chamber.
>
> 111(2). Where the Chamber finds that an appeal was filed late, or was otherwise procedurally defective, it may declare the appeal inadmissible.

41. These provisions require the parties to an appeal to plead their case with adequate specificity to enable the Supreme Court Chamber to identify the issues in dispute by reference to specific findings of the Trial Chamber. They are aimed not

[85] Co-Prosecutors' Response, paras 7-9.
[86] Co-Prosecutors' Response, paras 8-9.

only at ensuring procedural efficiency, but also that each party knows the arguments it may respond to. As the ICTY has observed in relation to comparable provisions in its rules of procedure, an appellate court "cannot be expected to consider a party's submissions in detail if they are obscure, contradictory, vague or suffer from other formal and obvious insufficiencies."[87] As a general rule, an appellant is required to identify the portions of the transcript under challenge, to identify with a reasonable degree of precision the submissions addressed to the Trial Chamber on the point, and to set out clearly and transparently the grounds of appeal against the decision and the principal arguments in support.[88] Where a party's pleadings are incoherent, or fail to set out the substance of any ground of appeal with sufficient particularity to enable the Supreme Court Chamber to identify the issues in dispute, they may be declared inadmissible as being procedurally defective.[89] The word "may" in Internal Rule 111(2) indicates that the power therein is discretionary. The Supreme Court Chamber's overriding consideration in the exercise of its discretion is to preserve the right of a convicted person to appeal his conviction and sentence. It is not the function of the Supreme Court Chamber to scrutinize the quality of a convicted person's written appellate advocacy.

42. In this case, the core issues arising for decision under the Accused's appeal on personal jurisdiction are relatively easy to identify. In substance, the Accused: (a) implicitly submits that the term "senior leaders of Democratic Kampuchea and those who were most responsible" constitutes a jurisdictional requirement of the ECCC; and (b) explicitly submits that on the facts established he was neither a "senior leader" nor one of those "most responsible" for the crimes committed by the DK regime during the temporal jurisdiction of the ECCC. Similarly, the operative passages of the Trial Judgement are readily identifiable, and set out with clarity the reasoning that led it to the conclusion that the Accused is one of those "most responsible."[90] In these particular circumstances, the Supreme Court Chamber is able to consider the merits of

[87] *Galić* Appeal Judgment, para. 11.
[88] *See Prosecutor v. Ntakirutimana*, ICTR-96-10-A and ICTR-96-17-A, "Judgement", Appeals Chamber, 13 December 2004, ("*Ntakirutimana* Appeal Judgement"), para. 396; *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-A, "Judgement", Appeals Chamber, 17 December 2004, ("*Kordić and Čerkez* Appeal Judgement"), para. 23; *Prosecutor v. Kvočka*, IT-98-30/1-A, "Judgement", Appeals Chamber, 28 February 2005, ("*Kvočka* Appeal Judgement"), para. 425.
[89] Internal Rule 111(2).
[90] Trial Judgement, paras 13-25.

the present ground of appeal and to review the reasoning of the Trial Chamber in light of the arguments put forward on behalf of the Accused, Co-Prosecutors, and Civil Parties Group 3. This is not to be taken to imply that the Supreme Court Chamber will regard departure from Internal Rule 105 with indifference. The pleading requirements laid down by that Rule are clear and mandatory, and the Supreme Court Chamber will not hesitate, in appropriate circumstances, from exercising its power under Internal Rule 111(2) to declare inadmissible an argument in a pleading that is procedurally defective due to incoherence or lack of specificity. The decisive question will always be whether an appellant has pleaded his case in a manner that enables an opposing party to know the case it has to meet, and enables the Supreme Court Chamber to identify and rule upon the issues in dispute. Whether that test is met will depend on the circumstances and, in particular, on the nature of the challenge to the Trial Chamber's judgement.

43. The Supreme Court Chamber therefore rejects the submissions of the Co-Prosecutors that the Accused's appeal on personal jurisdiction is inadmissible on the basis that his written pleadings fail to comply with the Internal Rules.

## 5. Personal Jurisdiction

44. The issue of the personal jurisdiction of the ECCC is at the core of the Defence Appeal.[91] The Accused's request for acquittal on the basis that he is not covered by the term "senior leaders of Democratic Kampuchea and those who were most responsible" presupposes the entire or part of the term constitutes a jurisdictional requirement of the ECCC that must be satisfied in order for the Trial Chamber to try the Accused. If this presupposition is correct, and if the Accused is not covered by the term, then the Trial Chamber had no jurisdiction to try him, and, consequently, his conviction and sentence are invalidated and he must be unconditionally released immediately.[92] In deciding the Accused's appeal, it is therefore necessary for the Supreme Court Chamber to evaluate the term "senior leaders of Democratic Kampuchea and those who were most responsible" to determine whether all or part of it constitutes a jurisdictional requirement of the ECCC. Firstly, however, the Supreme Court Chamber will address the dispute between the parties as to whether the term

[91] *See, e.g.* T. (EN), 28 March 2011, F1/2.1, p. 9; T. (EN), 30 March 2011, F1/4.1, pp. 122-131.
[92] Defence Appeal, paras 100-101.

"senior leaders of Democratic Kampuchea and those who were most responsible" refers to one or two categories of persons.[93]

### *a. Scope of "Senior Leaders of Democratic Kampuchea and Those Who Were Most Responsible"*

45. The Accused argues that the term refers to only one category of persons, namely, senior leaders who are most responsible.[94] According to the Accused, since he was not a senior leader of the DK, he is not covered by the term and must be acquitted and released forthwith.[95] The Co-Prosecutors,[96] Co-Investigating Judges,[97] and the Trial Chamber[98] interpreted the "and" in the term disjunctively, such that the term refers to two separate categories of persons, namely, senior leaders or those most responsible.

46. A first step to interpreting the scope of the term "senior leaders of Democratic Kampuchea and those who were most responsible" is to review the history of the negotiations relating to the intended targets for criminal prosecution before the ECCC. In a letter dated 21 June 1997, the First and Second Prime Ministers of Cambodia wrote to the Secretary General of the United Nations asking "for the assistance of the United Nations and the international community in bringing to justice those persons responsible for the genocide and crimes against humanity during the rule of the Khmer Rouge from 1975 to 1979."[99] While their request did not explicitly mention the Khmer Rouge as the intended targets of such justice, the Secretary General of the United Nations later summarized this request for assistance as "[t]he initial Cambodian request for United Nations assistance in bringing Khmer Rouge leaders to trial."[100]

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[93] T. (EN), 28 March 2011, F1/2.1, pp. 55-56, 91.
[94] T. (EN), 28 March 2011, F1/2.1, pp. 56-57.
[95] T. (EN), 28 March 2011, F1/2.1, p. 35.
[96] Co-Prosecutors' Response, paras 21-29; T. (EN), 28 March 2011, F1/2.1, pp. 85, 91-92. *See also* T. (EN), 28 March 2011, F1/2.1, p. 100 (Civil Parties Group 3).
[97] Closing Order, para. 129.
[98] Trial Judgement, paras 17-25.
[99] Kofi A. Annan, *Identical Letters dated 23 June 1997 from the Secretary-General addressed to the President of the General Assembly and to the President of the Security Council*, 51st Sess., Agenda Item 110, U.N. Doc. A/51/930 and S/1997/488 (24 June 1997), Annex ("Letter dated 21 June 1997 from the First and Second Prime Ministers of Cambodia addressed to the Secretary-General"), p. 2.
[100] Kofi A. Annan, *Human Rights Questions: Identical letters dated 15 March 1999 from the Secretary-General to the President of the General Assembly and the President of the Security Council*, 53rd Sess., Agenda Item 110(b), U.N. Doc A/53/850-S/1999/231 (16 March 1999), p. 3.

47. In its Resolution 52/135 adopted on 12 December 1997, the General Assembly of the United Nations stated that it:

> 15. *Endorses* the comments of the Special Representative that the most serious human rights violations in Cambodia in recent history have been committed by the Khmer Rouge and that their crimes, including the taking and killing of hostages, have continued to the present, and notes with concern that no Khmer Rouge leader has been brought to account for his crimes;
>
> 16. *Requests* the Secretary-General to examine the request by the Cambodian authorities for assistance in responding to past serious violations of Cambodian and international law, including the possibility of the appointment, by the Secretary-General, of a group of experts to evaluate the existing evidence and propose further measures, as a means of bringing about national reconciliation, strengthening democracy and addressing the issue of individual accountability.[101]

48. In July 1998, the Secretary-General created the Group of Experts for Cambodia with the following mandate:

> (a) To evaluate the existing evidence with a view to determining the nature of the crimes committed by Khmer Rouge leaders in the years from 1975 to 1979;
>
> (b) To assess, after consultation with the Governments concerned, the feasibility of bringing Khmer Rouge leaders to justice and their apprehension, detention and extradition or surrender to the criminal jurisdiction established;
>
> (c) To explore options for bringing to justice Khmer Rouge leaders before an international or national jurisdiction.[102]

49. The Group of Experts understood the mandate given to them by the Secretary General as follows:

> [T]he mandate is limited to the acts of the Khmer Rouge and not those of any other persons or, indeed, States, that may have committed human rights

[101] *Situation of human rights in Cambodia,* G.A. Res 52/135, U.N. G.A.O.R., 52nd Sess., 70th Plenary Mtg, Agenda Item 112(b), U.N. Doc. A/Res/52/135 (27 February 1998). In his identical letters dated 15 March 1999 to the President of the General Assembly and the President of the Security Council, the Secretary General of the United Nations recalled that General Assembly Resolution 52/135 "requested me to examine the request of the Cambodian authorities for assistance in responding to past serious violations of Cambodian and international law, and those committed by the Khmer Rouge, in particular, and to that end to examine the possibility of appointing a Group of Experts." Kofi A. Annan, *Identical letters dated 15 March 1999*, p. 1.

[102] Kofi A. Annan, *Identical letters dated 15 March 1999*, Annex ("Report of the Group of Experts for Cambodia established pursuant to General Assembly Resolution 52/135"), ("Experts' Report"), para. 6.

> abuses in Cambodia before, during, or after the period from 1975 to 1979. This mandate was based on the request of the Cambodian Government quoted above. The Group endorses this limitation as focusing on the extraordinary nature of the Khmer Rouge's crimes.[103]

50. Accordingly, the Group of Experts recommended "that, in response to the request of the Government of Cambodia of 21 June 1997, the United Nations establish an ad hoc international tribunal to try Khmer Rouge officials for crimes against humanity and genocide committed from 17 April 1975 to 7 January 1979."[104]

51. The historical record demonstrates that the Royal Government of Cambodia also intended that the Khmer Rouge would be the exclusive targets for criminal prosecution before the ECCC.[105]

52. In light of the above historical review, the Supreme Court Chamber finds that, at a minimum, the term "senior leaders of Democratic Kampuchea and those who were most responsible" reflects the intention of the United Nations and the Royal Government of Cambodia to focus finite resources on the criminal prosecution of certain surviving officials of the Khmer Rouge. The Supreme Court Chamber also finds that the term excludes persons who are not officials of the Khmer Rouge.

53. The Supreme Court Chamber will now examine whether the term refers to one or two categories of surviving Khmer Rouge officials. The drafting histories of the UN-RGC Agreement and ECCC Law provide a clear answer to this question. During the debate in the Cambodian National Assembly on the UN-RGC Agreement and amendments to the 2001 ECCC Law, H.E. Deputy Prime Minister Sok An explained the scope of the term "senior leaders of Democratic Kampuchea and those who were most responsible" as follows:

> [...] Article 2 [of the draft ECCC Law] has been prepared with full attention and clearly defined targets, which refer to senior leaders. However, there is another point of view concerning those who were not the senior leaders, but

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[103] Experts' Report, para. 10.
[104] Experts' Report, para. 219(1).
[105] *See generally The First Session of the Third Term of the Cambodian National Assembly*, 4-5 October 2004, "Debate and Approval of the Agreement between the United Nations and the Royal Government of Cambodian and Debate and Approval of Amendments to the Law on Trying Khmer Rouge Leaders" (English translation of 29 pages on file with the Supreme Court Chamber).

> who committed crimes as serious as those of the senior ones and will also be the targets of the EC. With regard to this matter, I would like to reconfirm, as His Excellency Ly Thuch mentioned yesterday, that there are two types of targets: senior leaders who are the most important targets of the EC and some others who might not be senior leaders but their actions were much more serious, and there is enough evidence to prove that they really committed much more serious crimes than others.
>
> [...].
>
> Considering senior leaders, we refer to no more than 10 people, but we don't specify that they be members of the Standing Committee. This is the task of the Co-Prosecutors [...]. However, there is still the second target. They are not the leaders, but they committed atrocious crimes. That's why we use the term those most responsible. There is no specific amount of people to be indicted from the second group. Those committing atrocious crimes will possibly be indicted.[106]

54. Similarly, the Group of Experts for Cambodia concluded the following in their Report:

> [T]he Group does not believe that the term [Khmer Rouge] "leaders" should be equated with all persons at senior levels of Government of Democratic Kampuchea or even of the Communist Party of Kampuchea. The list of top governmental and party officials may not correspond with the list of persons most responsible for serious violations of human rights in that certain top governmental leaders may have been removed from knowledge and decision-making; and others not in the chart of senior leaders may have played a significant role in the atrocities. This seems especially true with respect to certain leaders at zonal level, as well as officials of torture and interrogation centres such as Tuol Sleng.[107]

55. The Group of Experts accordingly recommended that "any tribunal focus upon those persons most responsible for the most serious violations of human rights during the reign of the Democratic Kampuchea. This would include senior leaders with responsibility over the abuses as well as those at lower levels who are directly implicated in the most serious atrocities."[108]

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[106] *The First Session of the Third Term of the Cambodian National Assembly*, 4-5 October 2004, pp. 12, 23.
[107] Experts' Report, para. 109.
[108] Experts' Report, para. 110. As the Trial Chamber pointed out in the Trial Judgement, para. 21, similar terminology was used by the Secretary-General when transmitting the Experts' Report to the Security Council and the General Assembly. Kofi Annan, *Identical letters dated 15 March 1999.*

56. Professor David Scheffer, who played an instrumental role in the creation of the ECCC as the U.S. Ambassador at Large for War Crimes Issues (1997-2001), also recently explained:

> It is important to recognize that by this time (January 2000), Duch already had been in custody for more than six months and was a constant reference point for the negotiators as a likely defendant. The assumption that Duch would appear before the ECCC held firm throughout subsequent years of negotiations. Furthermore, at no point did negotiators state to each other that any suspect must be *both* a senior leader of Democratic Kampuchea *and* an individual most responsible for the serious violations. That would have been an illogical position to take. Such a view would have been open to immediate challenge by negotiators, as we wanted to make sure that individuals like Duch who might not be among the senior Khmer Rouge leaders but were responsible for large scale commission of atrocity crimes would be eligible for investigation and prosecution by the ECCC. Both groups—the group of senior leaders and the group of those most responsible for the crimes—were to fall within the tribunal's personal jurisdiction. I do not recall a single suggestion otherwise.
>
> [...].
>
> Nonetheless, we would have been denying, or at least suggesting the denial of, the major responsibility of the senior Khmer Rouge leaders if we had used the disjunctive "or" and thus de-linked leadership identity completely from responsibility identity. That would have been unfair to those senior Khmer Rouge leaders who may not have exercised significant responsibility for the atrocity crimes and yet would be subject to the tribunal's jurisdiction solely by virtue of their leadership positions.[109]

57. The Supreme Court Chamber finds that the above drafting history demonstrates that the term "senior leaders of Democratic Kampuchea and those who were most responsible" refers to two categories of Khmer Rouge officials that are not dichotomous. One category is senior leaders of the Khmer Rouge who are among the most responsible,[110] because a senior leader is not a suspect on the sole basis of his/her leadership position. The other category is non-senior leaders of the Khmer Rouge who are also among the most responsible. Both categories of persons must be

[109] David Scheffer, "The Negotiating History of the ECCC's Personal Jurisdiction," 22 May 2011, pp. 4-5 <http://www.cambodiatribunal.org/>. *See also* Sean Morrison, "Extraordinary Language in the Courts of Cambodia: The Limiting Language and Personal Jurisdiction of the Cambodian Tribunal," *Capital University Law Review*, Vol. 37 (2008-2009), p. 627. *See generally* David Scheffer, "The Extraordinary Chambers in the Courts of Cambodia" in M. Cherif Bassiouni (ed.), *International Criminal Law*, 3rd ed., Koninklijke Brill NV, 2008, pp. 219-255; Steve Heder, "A Review of the Negotiations Leading to the Establishment of the Personal Jurisdiction of the Extraordinary Chambers in the Courts of Cambodia," 2 August 2011 <http://www.cambodiatribunal.org/blog>.

[110] Sean Morrison, "Extraordinary Language in the Courts of Cambodia", p. 627 ("Since all senior leaders must also be most responsible, the use of two phrases is technically redundant. However, the addition of 'senior leaders' to the jurisdiction of the court helps focus the prosecution").

Khmer Rouge officials and among the most responsible, and, pursuant to Article 2 new of the UN-RGC Agreement, both are "suspects" subject to criminal prosecution before the ECCC.

### *b. Evaluation of the Term "Senior Leaders of Democratic Kampuchea and Those Who Were Most Responsible"*

58. The Supreme Court Chamber will now evaluate whether the entire or part of the term "senior leaders of Democratic Kampuchea and those who were most responsible" constitutes a jurisdictional requirement of the ECCC that must be satisfied in order for the Trial Chamber to try an accused.

59. Pursuant to Article 31(1) of the Vienna Convention on the Law of Treaties, the term "senior leaders of Democratic Kampuchea and those who were most responsible" "shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty [i.e., the UN-RGC Agreement[111]] in their context and in the light of its object and purpose."[112] When the interpretation according to Article 31 "leads to a result which is manifestly absurd or unreasonable," Article 32 of the Vienna Convention permits "[r]ecourse […] to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to […] determine the meaning."[113] The Supreme Court Chamber may also seek guidance in international jurisprudence on comparable provisions in other jurisdictions.[114] The Supreme Court Chamber therefore must evaluate the term "senior leaders of Democratic Kampuchea and those who were most responsible" using these canons of interpretation.

60. Beginning with the immediate textual context of the UN-RGC Agreement, Article 2(1) reads, "The present Agreement […] recognises that the Extraordinary Chambers have *personal jurisdiction* over senior leaders of Democratic Kampuchea

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[111] UN-RGC Agreement, Art. 2(2).
[112] Vienna Convention on the Law of Treaties, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980, ("VCLT"), Art. 31(1).
[113] VCLT, Art. 32(b). *See also* Decision on Ieng Sary's Appeal Against the Closing Order, Pre-Trial Chamber, 11 April 2011, D427/1/30, para. 122 ("Pursuant to recognized principles of interpretation, 'in construing statutes, and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity or inconsistency, but not farther'.") (citations omitted).
[114] UN-RGC Agreement, Art. 12(1).

and those who were most responsible for the crimes referred to in Article 1 of the Agreement" (emphasis added). The inclusion of the words "personal jurisdiction" in Article 2(1) suggests that the term "senior leaders of Democratic Kampuchea and those who were most responsible" operates exclusively as a legal requirement of the Trial Chamber's jurisdiction over an accused. However, the Supreme Court must also consider whether interpreting the term "senior leaders of Democratic Kampuchea and those who were most responsible" as a jurisdictional requirement of the ECCC is consistent with the object and purpose of the UN-RGC Agreement and whether such an interpretation would lead to a "manifestly absurd or unreasonable" result. As explained above, the term refers to both senior leaders of the Khmer Rouge who are among the most responsible as well as to non-senior leaders of the Khmer Rouge who are also among the most responsible. The shared characteristics of these two categories are that suspects must be Khmer Rouge officials and among the most responsible. The unique characteristic of the first category is that the suspects are also senior leaders. The Supreme Court Chamber will proceed by evaluating each of these three terms to determine whether they can reasonably be interpreted as jurisdictional requirements of the ECCC.

*i. Khmer Rouge Official*

61. Each suspect before the ECCC must be a Khmer Rouge official. This term involves a question of historical fact that is intelligible, precise, and leaves little or no room for the discretion of the Trial Chamber. While an accused might contest that s/he was a Khmer Rouge official, the Trial Chamber is well suited to decide this factual issue. Thus, the Supreme Court Chamber finds that the personal jurisdiction of the ECCC covers Khmer Rouge officials, and the question of whether an accused was a Khmer Rouge official is justiciable[115] before the Trial Chamber.

*ii. Most Responsible*

62. The second shared characteristic of suspects before the ECCC is that they should be among those most responsible for the crimes referred to in Article 1 of the

[115] The term "justiciable" is defined as "capable of being disposed of judicially." Black's Law Dictionary, 9th ed., Thomson Reuters, 2009, p. 944. The term "nonjusticiable" is defined as "Not proper for judicial determination." Black's Law Dictionary, 9th ed., p. 1155. *Cf.* Black's Law Dictionary, 9th ed., p. 1277 (defining "political question" as "A question that a court will not consider because it involves the exercise of discretionary power by the executive or legislative branch of government. - Also termed *nonjusticiable question*") (italics in original).

UN-RGC Agreement. As the Trial Chamber noted, neither the UN-RGC Agreement nor ECCC Law defines "most responsible."[116] The ordinary meaning of "most responsible" denotes a degree of criminal responsibility in comparison to all Khmer Rouge officials responsible for crimes within the ECCC's jurisdiction. Contrary to the term "Khmer Rouge official," interpreting the term "most responsible" as a jurisdictional requirement of the ECCC would be inconsistent with the object and purpose of the UN-RGC Agreement and would lead to an unreasonable result for the following reasons. First, there is no objective method for the Trial Chamber to decide on, compare, and then rank the criminal responsibility of all Khmer Rouge officials. Second, the notion of comparative criminal responsibility is inconsistent with Article 29 of the ECCC Law, which states, "[t]he position or rank of any Suspect shall not relieve such person of criminal responsibility or mitigate punishment." This provision also expressly confirms the principle that superior orders do not constitute a defence to the crimes set out in Chapter II of the ECCC Law. The Accused, in effect, submits that the Trial Chamber is required to embark upon a relative assessment of his criminal responsibility within the DK. This would amount to indirectly permitting a defence of superior orders and would frustrate the express provisions of the ECCC Law, including Article 29. The third indication that "most responsible" cannot reasonably be interpreted as a jurisdictional requirement of the ECCC is that the determination of whether an accused is "most responsible" requires a large amount of discretion. There is no discretion, for example, in determining the ECCC's temporal and subject matter jurisdictions. Both are expressed through sharp-contoured definitions and, as such, are verifiable by a suspect and the ECCC because they involve pure questions of law or fact that are eminently suitable for legal determination. By contrast, neither a suspect nor the ECCC can verify whether a suspect is "most responsible" pursuant to sharp-contoured, abstract and autonomous criteria.

63. For these reasons, the Supreme Court Chamber finds that it is unreasonable to interpret "most responsible" in the term "senior leaders of Democratic Kampuchea and those who were most responsible" as a jurisdictional requirement of the ECCC. There are many indications, on the other hand, that the term "most responsible"

[116] Trial Judgement, para. 19.

should be interpreted as investigatorial and prosecutorial policy for the Co-Investigating Judges and Co-Prosecutors that is not justiciable before the Trial Chamber.

64. Chief of these latter indications is the competence afforded to the Co-Investigating Judges and Co-Prosecutors. The Co-Investigating Judges are responsible for the conduct of investigations[117] and are required to be independent in the performance of their functions.[118] Article 5(3) of the UN-RGC Agreement provides that it is "understood" that "the scope of the investigation is limited to senior leaders of Democratic Kampuchea and those who were most responsible for the crimes [...] that were committed during the period from 17 April 1975 to 6 January 1979." Thus, the Co-Investigating Judges are vested with authority to determine whether a particular investigation falls within the scope of the term "most responsible."[119] The Co-Prosecutors are responsible for the conduct of prosecutions.[120] They, too, are required to be independent in the performance of their functions,[121] and are subject to an identically worded "understanding" in Article 6(3) of the UN-RGC Agreement to the effect that "the scope of the prosecution is limited to senior leaders of Democratic Kampuchea and those who were most responsible."[122] It follows that the Co-Prosecutors are also vested with authority to determine whether a particular prosecution falls within the scope of the term "most responsible."[123]

65. The Pre-Trial Chamber's role in settling disagreements between the two Co-Prosecutors or between the two Co-Investigating Judges does not alter the conclusion that the term "most responsible" is not a jurisdictional requirement of the ECCC. In a disagreement case filed under Internal Rule 71 or 72 where the reason for

[117] ECCC Law, Art. 23 new; UN-RGC Agreement, Art. 5(1).
[118] ECCC Law, Art. 25; UN-RGC Agreement, Art. 5(3).
[119] *See* Public (Redacted Version) Considerations of the Pre-Trial Chamber Regarding the Appeal against Order on the Admissibility of Civil Party Applicant Robert Hamill, 24 October 2011, D11/2/4/4 ("Considerations on Admissibility of Applicant Hamill"), Opinion of Judge PRAK Kimsan, NEY Thol, and HUOT Vuthy, para. 7 (explaining how the Co-Investigating Judges have the power to charge any suspect named in a submission from the Co-Prosecutors, as well as unnamed persons when they consider it appropriate).
[120] ECCC Law, Art. 16; UN-RGC Agreement, Art. 6(1).
[121] ECCC Law, Art. 19; UN-RGC Agreement, Art. 6(3).
[122] UN-RGC Agreement, Art. 6(3).
[123] *See* Considerations on Admissibility of Applicant Hamill, Opinion of Judge PRAK Kimsan, NEY Thol, and HUOT Vuthy, para. 7 (explaining how the Co-Investigating Judges must seek the advice of the Co-Prosecutors before charging a suspect that was not named in one of the Co-Prosecutors' submissions).

disagreement on the execution of an action, decision, or order is whether or not a suspect or charged person is a "senior leader" or "most responsible," the Pre-Trial Chamber's role would be to settle the specific issue upon which the Co-Investigating Judges or Co-Prosecutors disagree.[124] If, for example, the Pre-Trial Chamber decides that neither Co-Investigating Judge erred in proposing to issue an Indictment or Dismissal Order for the reason that a charged person is or is not most responsible, and if the Pre-Trial Chamber is unable to achieve a supermajority on the consequence of such a scenario, "the investigation shall proceed."[125]

66. As stated above, the Supreme Court Chamber may also consult international jurisprudence and the drafting history of the UN-RGC Agreement as guidance in evaluating the term "most responsible." Turning first to the preparatory work, the Group of Experts for Cambodia recommended interpreting the term "most responsible" not as a jurisdictional requirement of the ECCC but rather as investigatorial and prosecutorial policy. Writing in 1999, the Experts recommended that "any tribunal focus upon those persons most responsible for the most serious violations of human rights during the reign of Democratic Kampuchea."[126] The Experts "believe[d]" that:

> [This] sense of the scope of investigations should be no more than a guide for prosecutors and not form an element of the jurisdiction of any tribunal. Thus, any legal instrument related to a court should give it personal jurisdiction over any persons whose acts fall within its subject matter jurisdiction, and the decision on whom to indict should rest solely with the prosecutor [...].[127]

67. In the "Summary of Principal Recommendations" of their Report, the Experts recommended that "as a matter of *prosecutorial policy*, the independent prosecutor appointed by the United Nations limit his or her investigations to those persons most responsible [...]."[128]

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[124] (Public Redacted) Considerations of the Pre-Trial Chamber Regarding the Disagreement between the Co-Prosecutors pursuant to Internal Rule 71, Case No. 001/18-11-2008-ECCC/PTC, 18 August 2009, [no document number as of this Appeal Judgement], para. 24.
[125] ECCC Law, Art. 23 new. *See also* UN-RGC Agreement, Art. 7(4); Internal Rule 72(4)(d) (Rev. 8).
[126] Experts' Report, para. 110.
[127] Experts' Report, para. 111.
[128] Experts' Report, para. 219(2) (emphasis added).

68. The Experts' Report forms an important part of the *travaux préparatoires* to the UN-RGC Agreement and the ECCC Law, and is consistent with the terms of these instruments.

69. Furthermore, a close comparison of the ICTY and ICTR with the ECCC militates in favour of treating the term "most responsible" as investigatorial and prosecutorial policy rather than a jurisdictional requirement of the ECCC. Before an Indictment is confirmed at the ICTY, it must first be scrutinised by a Bureau consisting of the President, the Vice President and the Presiding Judges of the Trial Chambers. Though the ICTY's jurisdiction extends to all "persons responsible for serious violations of international humanitarian law," Rule 28(A) of the Rules of Procedure and Evidence requires the Bureau to determine whether, *prima facie*, the indictment "concentrates on one or more of the most senior leaders suspected of being most responsible for crimes within the jurisdiction of the Tribunal."[129] Only where the indictment appears to concentrate on such a person will it be transmitted to a single judge for confirmation. If not, the indictment will be returned to the Prosecutor. Likewise, Rule 28 of the ICTR's Rules of Procedure and Evidence requires a duty judge, selected by the President of the Tribunal, to review indictments submitted from the Prosecutor.[130] The inclusion of these provisions at the ICTY and ICTR does not restrict the Trial Chambers' jurisdiction to try an accused, however, as an accused cannot object to lack of jurisdiction based on a failure to satisfy the requirements of Rule 28(A) at the ICTY or Rule 28 at the ICTR. In granting the ICTY and ICTR Chambers large discretion in determining which suspects to prosecute, these rules operate as policy guidelines intended to help the tribunals concentrate their scarce resources on trying the most serious cases falling within their jurisdiction.

70. Similarly, the ECCC's Co-Investigating Judges are responsible for "either indicting a Charged Person and sending him or her to trial, or dismissing the case," and "are not bound by the Co-Prosecutors' submissions."[131] Pursuant to the UN-RGC Agreement, "It is understood, however, that the scope of the investigation is limited to

[129] ICTY Rules of Procedure and Evidence, IT/32/Rev. 46 (20 October 2011), ("ICTY RPE"), Rule 28 (A).
[130] ICTR Rules of Procedure and Evidence, as amended on 1 October 2009, ("ICTR RPE"), Rule 28.
[131] Internal Rule 67(1) (Rev 8).

senior leaders of Democratic Kampuchea and those who were most responsible."[132] As at the ICTY and ICTR, an accused before the ECCC cannot object to the Trial Chamber's jurisdiction on the basis that the Co-Investigating Judges did not limit the indictment to "senior leaders" or the "most responsible",[133] absent a showing that the Co-Investigating Judges abused their discretion, as discussed below. This limitation on the Co-Investigating Judges' discretion is intended to help the ECCC concentrate its scarce resources on trying the most serious cases falling within its jurisdiction.

71. The referral system at the ICTY also suggests that the term "most responsible" in the UN-RGC Agreement and ECCC Law operates as investigatorial and prosecutorial policy rather than a jurisdictional requirement of the ECCC. ICTY judges have authority to refer cases to national courts, whereas the ECCC exists within the Cambodian legal system in which it exercises exclusive jurisdiction and no referral to another court is possible. Under the ICTY system, individuals who are found not to constitute one of the most serious perpetrators of international crimes may be tried instead by a national court. The Rules of Procedure and Evidence of the ICTY establish a procedure whereby a case can be referred to national authorities[134] at any time after the indictment has been confirmed and prior to the commencement of trial. To that end, Rule 11*bis*(A) allows the President of the Tribunal to appoint three judges from the Trial Chambers to a Referral Bench which then decides whether to carry out the referral.[135] The ICTY thus operates on the presumption of dual jurisdiction, providing a mechanism for allocating cases between the international tribunal and appropriate national jurisdictions. The criteria for such allocation, "the gravity of the crimes charged and the level of responsibility of the accused,"[136] operate not as jurisdictional bars but as prosecution policy.

72. The above interpretation of the term "most responsible" in the UN-RGC Agreement is also consistent with the jurisprudence of other international criminal

[132] UN-RGC Agreement, Art. 5(3).
[133] As the term "most responsible" is not a jurisdictional requirement of the ECCC, neither could a charged person appeal to the Pre-Trial Chamber under Internal Rule 74(3)(a) (Rev. 8) on the basis that s/he falls outside of the ECCC's jurisdiction because s/he is not "most responsible."
[134] This can be the authorities of the State in whose territory the crime was committed; the State in whose territory the accused was arrested; or any State having jurisdiction and being willing and adequately prepared to accept the case. ICTY RPE, Rule 11 *bis* (A)(i)-(iii).
[135] ICTY RPE, Rule 11 *bis* (A).
[136] ICTY RPE, Rule 11 *bis* (C). *Cf.* ICTR RPE, Rule 11 *bis* (C).

tribunals. Article 1(1) of the Statute of the Special Court for Sierra Leone ("SCSL") is strikingly similar to Article 1 of the UN-RGC Agreement. The former provision states:

> The Special Court shall [...] have the power to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996, including those leaders who [...] have threatened the establishment and implementation of the peace process in Sierra Leone.[137]

73. In *Prosecutor v Brima*,[138] the Appeals Chamber of the SCSL held that the only workable interpretation of the term "greatest responsibility" is that "it guides the Prosecutor in the exercise of his prosecutorial discretion" and that it would be "unreasonable and unworkable to suggest that the discretion is one that should be exercised by the Trial Chamber or the Appeals Chamber at the end of the trial."[139] The SCSL Appeals Chamber continued:

> In the opinion of the Appeals Chamber it is inconceivable that after a long and expensive trial the Trial Chamber could conclude that although the commission of serious crimes has been established beyond reasonable doubt against the accused, the indictment ought to be struck out on the ground that it has not been proved that the accused was one of those who bore the greatest responsibility.[140]

74. In light of the above, the Supreme Court Chamber finds that, while the Trial Chamber must carefully consider all valid jurisdictional objections, it is not reasonable to interpret "most responsible" in the term "senior leaders of Democratic Kampuchea and those who were most responsible" as a jurisdictional requirement of the ECCC. Rather, the term "most responsible" constitutes investigatorial and prosecutorial policy which guides the Co-Investigating Judges and Co-Prosecutors in exercising their independent discretion in investigating and prosecuting the most serious offenders falling within the ECCC's jurisdiction.

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[137] Statute of the Special Court for Sierra Leone, annexed to the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, signed 16 January 2002, 2178 UNTS 138 (entered into force 12 April 2002), ("SCSL Statute"), Art. 1(1).
[138] *Prosecutor v Brima*, SCSL-2004- 16-A, "Judgment", Appeals Chamber, 22 February 2008, ("*Brima* Appeal Judgment").
[139] *Brima* Appeal Judgment, para. 282.
[140] *Brima* Appeal Judgment, para. 283.

*iii. Senior Leaders*

75. As explained above, senior leaders who are among the most responsible is one of two categories of suspects covered by the term "senior leaders of Democratic Kampuchea and those who were most responsible." Since the Supreme Court Chamber has concluded that the term "most responsible" operates exclusively as investigatorial and prosecutorial policy, it is not possible for the ECCC Trial Chamber to refuse jurisdiction over an indicted accused on the basis that s/he was not a senior leader. Nevertheless, the proper evaluation of "senior leaders" is of sufficient importance to ECCC jurisprudence that it warrants discussion by the Supreme Court Chamber.

76. Like the term "most responsible," neither the UN-RGC Agreement nor ECCC Law defines the term "senior leaders." If "senior leaders" were limited to former members of the CPK Central and/or Standing Committees,[141] that would indicate the term is a jurisdictional requirement because it would involve a precise question of historical fact concerning which the Trial Chamber is well suited to answer. However, the term "senior leaders" is sufficiently flexible that it may not necessarily be limited to former members of the CPK Central and/or Standing Committees. By contrast, the definitions of the ECCC's temporal and subject matter jurisdictions use sharp contours, typical for legal criteria. Such flexibility inherent in the definition of "senior leaders" indicates that the term does not operate as a jurisdictional requirement of the ECCC.

77. The debates in the Cambodian National Assembly over the UN-RGC Agreement and amendments to the 2001 ECCC Law confirm that the definition of "senior leaders" is not fixed and that the characteristic should operate as investigatorial and prosecutorial policy.[142]

78. The Supreme Court Chamber therefore finds that the term "senior leaders" does not form part of the ECCC's jurisdiction. Like the term "most responsible," the

[141] *See generally* Steve Heder, "A Review of the Negotiations Leading to the Establishment of the Personal Jurisdiction of the Extraordinary Chambers in the Courts of Cambodia."
[142] *See The First Session of the Third Term of the Cambodian National Assembly*, October 4-5 2004, p. 23 (H.E. Sok An stating, "Considering senior leaders, we refer to no more than 10 people, but we don't specify that they be members of the Standing Committee. This is the task of the Co-Prosecutors").

term "senior leaders" constitutes investigatorial and prosecutorial policy that guides the Co-Investigating Judges and the Co-Prosecutors in the exercise of their discretion as to the scope of investigations and prosecutions.

*iv. Summary of Findings*

79. For the reasons set out above, the Supreme Court Chamber finds that the personal jurisdiction of the ECCC covers Khmer Rouge officials. Whether an accused is a Khmer Rouge official is therefore a justiciable issue before the Trial Chamber. The terms "senior leaders" and "most responsible" are not jurisdictional requirements of the ECCC, but operate exclusively as investigatorial and prosecutorial policy to guide the independent discretion of the Co-Investigating Judges and Co-Prosecutors as to how best to target their finite resources in order to achieve the purpose behind the establishment of the ECCC. Whether an accused is a "senior leader" or "most responsible" is therefore a nonjusticiable issue before the Trial Chamber.[143]

*v. Review of Investigatorial and Prosecutorial Discretion on Other Grounds*

80. A remaining question is whether there is any other ground on which the Trial Chamber has residual jurisdiction to review the exercise of discretion by the Co-Investigating Judges or the Co-Prosecutors in the selection of cases. In *Prosecutor v Brima*, the Appeals Chamber of the SCSL observed that in selecting cases that meet the requirements laid down in Article 1(1) of the Statute of the SCSL, the Prosecutor must exercise his discretion "in good faith, based on sound professional judgment."[144] The Supreme Court Chamber agrees. In the context of the ECCC, the Trial Chamber has the power to review the discretion of the Co-Investigating Judges and the Co-Prosecutors on the ground that they allegedly exercised their discretion under Articles

[143] The Supreme Court Chamber notes that the history of the establishment of the ECCC as described above is clear that the terms "senior leaders" and "those who were most responsible" were used in the context of contemplating wide discretion in investigatorial and prosecutorial policy, and therefore not as a jurisdictional requirement justiciable before the Trial Chamber. Such discretion, potentially allowing a large number of Khmer Rouge officials to be charged, was the preferred option in public discussion surrounding the creation of the ECCC. *See generally* Open Society Justice Initiative, *Justice Initiatives: The Extraordinary Chambers*, Spring 2006, and *especially* Kelly Dawn Askin, "Prosecuting Senior Leaders of Khmer Rouge Crimes", in *Justice Initiatives: The Extraordinary Chambers*, p. 76 ("These terms ["'senior leaders of Democratic Kampuchea' and 'those who were most responsible […]'"] can be interpreted broadly to allow some flexibility […]") <http://www.soros.org/initiatives/justice>. The Supreme Court Chamber stresses that its position as to personal jurisdiction is based in legal considerations and it does not see its role in *ex post facto* defining parameters for "senior leaders" and "those who were most responsible" in order to justify exlcuding or including cases before the ECCC.

[144] *Brima* Appeal Judgment, para. 282.

5(3) and 6(3) of the UN-RGC Agreement in bad faith or according to unsound professional judgement.[145] This power of review by the Trial Chamber is extremely narrow in scope, and would have to be exercised with full respect for the independence of the Co-Investigating Judges' and Co-Prosecutors' offices. Such power of review could never be exercised on the ground that the Co-Investigating Judges or Co-Prosecutors did not, in the opinion of the Trial Chamber, select a particular "senior leader" or person who is "most responsible." Provided the alleged crimes fall within the jurisdiction of the ECCC, the Co-Investigating Judges and Co-Prosecutors have a wide discretion to perform their statutory duties. As the Co-Prosecutors point out in their Response in the present appeal, the exercise of prosecutorial discretion is not a mechanical exercise. It requires the weighing of relevant factors such as the quantity and quality of evidence available, the *prima facie* level of culpability of the offender, the gravity of the crimes alleged, and the likelihood of apprehending the suspect.[146] Given the wide margin of discretion according to which the decision to prosecute is made, the competence to take such a decision does not belong to trial or appellate chambers that decide the merits of criminal responsibility, but stops at the pre-trial level. A trial or appellate court employing discretion as to whether or not to prosecute would assume the function of the prosecution and thus compromise its role as an impartial arbitrator in the adversarial procedure. Therefore, in the absence of bad faith, or a showing of unsound professional judgement, the Trial Chamber has no power to review the alleged abuse of the Co-Investigating Judges' or Co-Prosecutors' discretion under Articles 5(3) and 6(3) of the UN-RGC Agreement. Whether an accused is a senior leader or one of those most responsible is exclusively a policy decision for which the Co-Investigating Judges and Co-Prosecutors, and not the Trial Chamber, are accountable.

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[145] *See Prosecutor v. Ntakirutimana*, ICTR-96-17-T, "Judgement", Trial Chamber, 21 February 2003, para. 761 (dismissing the accused's complaint that the tribunal had engaged in selective prosecution because, as required by Article 15(2) of the ICTR statute, the Defence had not adduced any evidence establishing that the Prosecutor had a discriminatory or otherwise unlawful or improper motive in indicting or continuing to prosecute the Accused); *Prosecutor v. Akayesu*, ICTR-96-4, "Appeal Judgment", Appeals Chamber, 1 June 2001, ("*Akayesu* Appeal Judgment"), para. 96 (rejecting the accused's allegation that the tribunal had engaged in selective prosecution due to the absence of any evidence showing a causal relationship between the Prosecutor's policy and the alleged partiality of the Tribunal); Co-Prosecutors' Response, para. 45.
[146] Co-Prosecutors' Response, para. 44.

### *c. Conclusion*

81. In light of the principles set out in this section of the present Appeal Judgement, the Trial Chamber had no need to embark upon any assessment of whether the Accused was a senior leader or one of those most responsible.[147] The assessment that it nonetheless conducted demonstrates however that the case of the Accused falls squarely within these investigatorial and prosecutorial policy criteria. Accordingly, the Accused's ground of appeal on personal jurisdiction is untenable and therefore dismissed in its entirety.[148]

[147] Trial Judgement, paras 23-25.
[148] This includes the appeal submissions of the Defence that the Accused is exempted from criminal prosecution before the ECCC on the basis of, *inter alia*, the 1991 Paris Peace Agreement, the 1994 Law on the Outlawing of the "Democratic Kampuchea" Group, the 2007 Code of Criminal Procedure, the 1956 Penal Code, the 2009 Criminal Code, the 1993 Constitution of the Kingdom of Cambodia, and the ECCC Internal Rules. *See, e.g.* Defence Appeal, paras 14, 17, 34-39, 62, 66, 68, 70, 95; T. (EN), 28 March 2011, F1/2.1, pp. 18-23, 32, 35 (referring, *inter alia*, to the Agreement on a comprehensive political settlement of the Cambodia conflict (with annexes), concluded on 23 October 1991, 1663 UNTS 56 (entered into force 23 October 1991) and the Law on the Outlawing of the "Democratic Kampuchea" Group, promulgated by Reachkram No. 01.NS.94 on 15 July 1994).

# IV. ALLEGED ERRORS CONCERNING CRIMES AGAINST HUMANITY UNDER ARTICLE 5 OF THE ECCC LAW (GROUNDS 2 AND 3 OF THE CO-PROSECUTORS' APPEAL)

82. Under Grounds 2 and 3 of the Co-Prosecutors' Appeal, the Co-Prosecutors submit that the Trial Chamber erred as a matter of law in several respects in its disposition of the charges of crimes against humanity brought against the Accused under Article 5 of the ECCC Law.

83. First, under Ground 2 of their Appeal, the Co-Prosecutors contend that the Trial Chamber committed an error of law when it failed to convict the Accused for all of the crimes for which it found him responsible, namely, murder, extermination, enslavement, imprisonment, torture, rape and other inhumane acts as crimes against humanity, and subsumed those crimes under the crime against humanity of persecution on political grounds.[149] The Co-Prosecutors submit that the Trial Chamber misapplied the ICTY Appeals Chamber's *Čelebići* test because each crime against humanity for which it found the Accused responsible has an element materially distinct from the crime against humanity of persecution, and therefore the Accused should have been cumulatively convicted for each.[150]

84. Furthermore, the Co-Prosecutors argue that, by subsuming all these other crimes against humanity under persecution, the Trial Chamber failed to meet the twin aims of the *Čelebići* cumulative convictions test, as articulated by the ICTY Appeals Chamber in *Prosecutor v. Kordić and Čerkez*.[151] Also, the Co-Prosecutors submit that the "concerns underpinning the rationale for not allowing cumulative convictions,"[152] as articulated in the dissenting opinion to the *Čelebići* Appeals Judgement, are not applicable in this case.[153] Finally, the Co-Prosecutors argue that the Trial Chamber failed to adequately consider the societal interests in cumulative convictions, as delineated by the ICTR Trial Chamber in *Akayesu*.[154]

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[149] Co-Prosecutors' Appeal, paras 132, 134, 191, 216.
[150] Co-Prosecutors' Appeal, paras 134-166, 191.
[151] Co-Prosecutors' Appeal, paras 134, 167-169, 191.
[152] Co-Prosecutors' Appeal, para. 170.
[153] Co-Prosecutors' Appeal, paras 134, 170-174, 191.
[154] Co-Prosecutors' Appeal, paras 134, 175-191.

85. Second, the Co-Prosecutors submit under Ground 2 of their Appeal that the Trial Chamber erred as a matter of law when it characterised an instance of rape as torture as a crime against humanity and failed to convict the Accused for the distinct crime against humanity of rape.[155] Finally, the Co-Prosecutors argue in Ground 3 of their Appeal that the Trial Chamber erred in law in its definition of enslavement as a crime against humanity, thereby failing to convict the Accused for the enslavement of all the detainees at S-21.[156]

86. The Trial Chamber found that the Accused was individually responsible for the following crimes against humanity under Article 5 of the ECCC Law: murder, extermination, enslavement, imprisonment, torture (including one instance of rape), persecution on political grounds, and other inhumane acts.[157] Nevertheless, "[i]n light of the jurisprudence regarding cumulative convictions", the Trial Chamber solely convicted the Accused for "persecution as a crime against humanity (subsuming the crimes against humanity of extermination (encompassing murder), enslavement, imprisonment, torture (including one instance of rape), and other inhumane acts)."[158]

87. At the outset, the Supreme Court Chamber observes that disposing of the arguments raised under Grounds 2 and 3 of the Co-Prosecutors' Appeal, in particular with respect to the Trial Chamber's application of the ICTY *Čelebići* test, requires comparisons of the elements of the crimes against humanity for which the Trial Chamber found the Accused responsible. Consequently, the disposition of these grounds of appeal is necessarily predicated upon the Supreme Court Chamber's examination of the ECCC's subject matter jurisdiction and the appropriateness of the definitions of the crimes at issue that were used by the Trial Chamber. Such examination requires application of the *nullum crimen sine lege* principle, also known as the principle of legality, codified under Article 33 new of the ECCC Law.

88. Therefore, before turning to consider the specific issues raised by the Co-Prosecutors under these grounds of appeal, the Supreme Court Chamber will, *ex proprio motu,* firstly articulate the applicable law with respect to the principle of

[155] Co-Prosecutors' Appeal, para. 133.
[156] Co-Prosecutors' Appeal, para. 201.
[157] Trial Judgement, para. 559.
[158] Trial Judgement, para. 568.

legality. It will then examine, to the extent necessitated by the appeal before it, the scope of the ECCC's subject matter jurisdiction over crimes against humanity generally under Article 5 of the ECCC Law in light of the principle of legality. Following that, the Chamber will address its subject matter jurisdiction over the underlying crimes against humanity specifically addressed under these grounds, namely, enslavement, torture, rape and persecution. Finally, the Chamber will consider whether the Trial Chamber erred in its conclusion that cumulative convictions for persecution and other underlying crimes against humanity are impermissible.

### A. The Principle of Legality

89. The Supreme Court Chamber recalls that Article 33 new of the ECCC Law provides that the ECCC shall exercise its "jurisdiction in accordance with international standards of justice, fairness and due process of law, as set out in Articles 14 and 15 of the ICCPR."[159] Article 15(1) of the ICCPR codifies and defines the principle of legality under international law and stipulates, in relevant part, that "[n]o one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed."[160] Furthermore, Article 15(2) adds that "[n]othing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations."[161]

90. The main purpose of the principle of legality so defined is protection of individual rights in criminal law. It takes effect in three functional respects. First, it ensures that one who wishes to avoid criminal liability may do so by receiving notice of what acts lawmakers will deem to be criminal. Second, as a procedural matter, the legality principle protects the individual against arbitrary exercise of political or judicial power[162] by preventing legislative targeting or conviction of specific persons without stating legal rules in advance. Third, the principle provides an analogue to the

[159] ECCC Law, Art. 33 new.
[160] ICCPR, Art. 15(1).
[161] ICCPR, Art. 15(2) (often referred to as the "Nuremberg/Tokyo sentence").
[162] M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law*, 2nd ed., Kluwer Law International, 1999, pp. 127-130.

protection afforded by separation of powers in national courts applying national laws.[163] The Supreme Court finds that the restraining function of the international principle of legality is of particular importance in international criminal law as it prevents international or hybrid tribunals and courts from unilaterally exceeding their jurisdiction by providing clear limitations on what is criminal.

91. The international principle of legality, with its focus on guarantee of human rights in criminal proceedings, is connected to general principles of law concerning prohibition of retroactive crimes and punishments and of collective punishments meted against non-participants in crime. As such, it applies equally to offences as well as to forms of responsibility that are charged against an individual accused.[164] Therefore, offences and modes of liability charged before the ECCC must have existed either under national law[165] or international law[166] at the time of the alleged criminal conduct occurring between 17 April 1975 and 6 January 1979.[167]

92. With respect to national law, the Supreme Court Chamber agrees with the Trial Chamber's finding that Cambodia's 1956 Penal Code was the applicable law from 1975 to 1979.[168] As for the applicable international law, the plane of reference is broader, encompassing international conventions, customary international law and general principles of law recognised by the community of nations applicable at the relevant time.[169] Complex questions that arise regarding the emergence of international criminal law norms from these sources and the relations among them have been, to a large extent, addressed in the jurisprudence of the *ad hoc* Tribunals. When looking to conventional international law, the Chamber may rely upon a treaty where it "(i) was unquestionably binding on the parties at the time of the alleged

[163] Kenneth S. Gallant, *The Principle of Legality in International and Comparative Criminal Law*, Cambridge University Press, 2009, p. 26.
[164] *See, e.g. Prosecutor v. Milutinović et al.*, IT-99-37-AR72, "Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction – Joint Criminal Enterprise", Appeals Chamber, 21 May 2003, ("*Milutinović* Jurisdiction Appeal Decision (Joint Criminal Enterprise)"), paras 34-44 (as applied to joint criminal enterprise); *Prosecutor v. Aleksovski*, IT-95-14/1-A, "Judgement", Appeals Chamber, 24 March 2000, ("*Aleksovski* Appeal Judgement"), para. 126 (as applied to grave breaches of the Geneva Conventions of 1949 as well as violations of the laws or customs of war).
[165] ICCPR, Art. 15(1).
[166] ICCPR, Art. 15(1)-(2); *Milutinović* Jurisdiction Appeal Decision (Joint Criminal Enterprise), paras 10, 38.
[167] ECCC Law, Art. 1.
[168] Trial Judgement, para. 29.
[169] ICCPR, Art. 15. *See also* Annex to U.N. Charter, Statute of the International Court of Justice, 26 June 1945, ("ICJ Statute"), Art. 38 <http://www.icj-cij.org/homepage/index.php>.

offence; and (ii) was not in conflict with or derogated from peremptory norms of international law."[170]

93. With respect to customary international law, the Supreme Court Chamber considers that in evaluating the emergence of a principle or general rule concerning conduct that offends the laws of humanity or the dictates of public conscience in particular, the traditional requirement of "extensive and virtually uniform" state practice may actually be less stringent than in other areas of international law, and the requirement of *opinio juris* may take pre-eminence over the *usus* element of custom.[171] The Chamber finds this particularly relevant to the question of individual criminal responsibility under international law. Where the *usus* element of an international crime is manifest, in large part, through actual prosecution, one has to bear in mind that this requirement presupposes not only the existence of an established legal norm proscribing the conduct as criminal, but also the record of an infraction, followed by a plethora of complex factors that render the prosecution possible, starting with the identification of the accused, availability of evidence and political will.[172] Taking all of these inherent difficulties into account, a paucity of prosecution cannot be found to disprove automatically the existence of State practice in this regard under international law.

94. It must be recognised that treaty law and customary international law often mutually support and supplement each other.[173] As such, treaty law may serve as evidence of customary international law either by declaring the *opinio juris* of States Parties, or articulating the applicable customary international law that had already crystallised by the time of the treaty's adoption.[174] That being said, while the Supreme Court Chamber may rely on both customary and conventional international law as a legal basis for charged offences and modes of liability, there is no requirement that

[170] *Prosecutor v. Tadić*, IT-94-1-A, "Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction", Appeals Chamber, 2 October 1995, ("*Tadić* Appeal Decision on Jurisdiction"), para. 143. *See also Kordić and Čerkez* Appeal Judgement, para. 44.
[171] Antonio Cassese, *International Law*, 2nd ed., Oxford University Press, 2005, p. 161.
[172] In the context of the conduct of armed forces, *cf. Tadić* Appeal Decision on Jurisdiction, para. 99. The difficulties are paramount where atrocities amounting to crimes against humanity are committed outside any institutionalised agency.
[173] *Tadić* Appeal Decision on Jurisdiction, para. 98.
[174] *Galić* Appeal Judgement, para. 85. *See also Tadić* Appeal Decision on Jurisdiction, paras 112, 117.

the offences or modes of liability at issue be found under each in order to be charged.[175]

95. Once a Chamber has determined that a charged offence or mode of liability existed as a matter of national or international law at the time of the alleged criminal conduct, the international principle of legality does not prohibit it from interpreting and clarifying the law or from relying on those decisions that do so in other cases.[176] This principle, however, does prevent a Chamber "from creating new law or from interpreting existing law beyond the reasonable limits of acceptable clarification."[177]

96. Finally, as an additional safeguard, fairness and due process concerns underlying the international principle of legality require that charged offences or modes of responsibility were "sufficiently foreseeable and that the law providing for such liability [was] sufficiently accessible [to the accused] at the relevant time."[178] "[A]s to foreseeability, […] [the accused] must be able to appreciate that the conduct is criminal in the sense generally understood, without reference to any specific provision."[179] As for the accessibility requirement, in addition to treaty laws, laws based on custom or general principles can be relied on as sufficiently available to the accused.[180] Furthermore, a Chamber may "have recourse to domestic law for the purpose of establishing that the accused could reasonably have known that the offense in question or the offense committed in the way charged in the indictment was prohibited and punishable."[181] Finally, "[a]lthough the immorality or appalling character of an act is not a sufficient factor to warrant its criminalisation […], it may

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[175] *Prosecutor v. Hadžihasanović and Kubura*, IT-01-47-A, "Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility", Appeals Chamber, 16 July 2003, ("*Hadžihasanović and Kubura* Jurisdiction Appeal Decision (Command Responsibility)"), para. 35.
[176] *Aleksovski* Appeal Judgement, paras 126-127.
[177] *Prosecutor v. Ojdanić et al.*, IT-99-37-AR72, "Appeal Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction-Joint Criminal Enterprise", Appeals Chamber, 21 May 2003 ("*Ojdanić* Jurisdiction Appeal Decision (Joint Criminal Enterprise)"), para. 38.
[178] *Ojdanić* Jurisdiction Appeal Decision (Joint Criminal Enterprise), paras 21, 37. *See also Prosecutor v. Blagojević and Jokić*, IT-02-60-T, "Judgement", Trial Chamber, 17 January 2005, ("*Blagojević and Jokić* Trial Judgement"), para. 695, fn. 2145; *S.W. v. United Kingdom*, ECtHR, "Chamber Judgment", App. No. 20166/92, 22 November 1995, paras 35-36 (indicating that the term "law" in Article 7 of the European Convention on Human Rights "comprises written as well as unwritten law and implies qualitative requirements, notably those of accessibility and foreseeability").
[179] *Hadžihasanović and Kubura* Jurisdiction Appeal Decision (Command Responsibility), para. 34.
[180] *Hadžihasanović and Kubura* Jurisdiction Appeal Decision (Command Responsibility), para. 34. *See also Ojdanić* Jurisdiction Appeal Decision (Joint Criminal Enterprise), paras 37-39.
[181] *Ojdanić* Jurisdiction Appeal Decision (Joint Criminal Enterprise), para. 40.

in fact play a role [...] insofar as it may refute any claim by the Defence that it did not know of the criminal nature of the acts."[182]

97. The Supreme Court Chamber notes that, in this case, the Trial Chamber relies heavily upon *ad hoc* Tribunal jurisprudence when determining the existence of crimes or modes of liability or interpreting the law relating to them. As a preliminary matter, this Chamber emphasises that these cases are non-binding and are not, in and of themselves, primary sources of international law for the ECCC.[183] Furthermore, while the ECCC clearly benefits from the reasoning of the *ad hoc* Tribunals in their articulation and development of international criminal law, in light of the protective function of the principle of legality, Chambers in this Tribunal are under an obligation to determine that the holdings on elements of crimes or modes of liability therein were applicable during the temporal jurisdiction of the ECCC. Furthermore, they must have been foreseeable and accessible to the Accused. In addition, the Supreme Court Chamber stresses that careful, reasoned review of these holdings is necessary for ensuring the legitimacy of the ECCC and its decisions.[184] As such, in the sections that follow, the Supreme Court Chamber will evaluate whether the Trial Chamber's reliance on *ad hoc* Tribunal jurisprudence with respect to the specific issues raised in this appeal was appropriate.

### B. Crimes Against Humanity as an International Crime from 1975-1979

98. The Supreme Court Chamber now turns to consider, as a general matter, the scope of ECCC jurisdiction over crimes against humanity in the context of the international principle of legality. In doing so, the Supreme Court Chamber agrees with the Trial Chamber that, in order for charged offences and modes of participation to fall within the ECCC's subject matter jurisdiction, they must: 1) "be provided for in

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[182] *Ojdanić* Jurisdiction Appeal Decision (Joint Criminal Enterprise), para. 42.
[183] ICJ Statute, Art. 38.
[184] As noted by Guénaël Mettraux in the context of the *ad hoc* Tribunals: "[T]he enduring jurisprudential legacy of the Tribunals will largely depend on their ability to base their decisions upon a body of pre-existing rules, and not upon the theoretical eagerness of their drafters. The two Tribunals could become historically and legally anecdotal if they seemed to shelter intellectual complacency or judicial activism." Guénaël Mettraux, "Crimes Against Humanity in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda", *Harvard International Law Journal*, Vol. 43 (Winter 2002), p. 239. *See also* Kenneth S. Gallant, *The Principle of Legality in International and Comparative Criminal Law*, p. 24 (on the value of the most restrictive interpretation as opposed to the judiciary usurping the legislature's position by applying unclear laws).

the [ECCC Law], explicitly or implicitly";[185] *and* 2) have existed under Cambodian or international law[186] between 17 April 1975 and 6 January 1979.[187]

99. The Chamber recalls that pursuant to Article 5 of the ECCC Law, the ECCC has explicit subject matter jurisdiction over crimes against humanity. In accordance with the principle of legality, however, that enumeration of crimes against humanity is not itself a source of criminalisation of conduct and, as such, does not constitute an autonomous basis for entering convictions before the ECCC. Whereas Article 5 grants the ECCC *a priori* jurisdiction over the acts so listed, its exercise of jurisdiction is subject to determining whether crimes against humanity were proscribed under international law[188] from 1975-1979 at the time of the alleged criminal conduct.

100. Second, assuming that crimes against humanity did exist under international law at the relevant time, the exercise of jurisdiction by the ECCC is limited by the definition of crimes against humanity as it stood under international law at the time of the alleged criminal conduct. In other words, Article 5 of the ECCC Law with its catalogue of crimes against humanity over which the ECCC has *a priori* jurisdiction may not be interpreted as a retroactive amendment to that definition.

101. With respect to the first question of the existence of crimes against humanity under international law by 1975, the Supreme Court Chamber recalls that the antecedents to crimes against humanity date back to the writings of Hugo Grotius.[189]

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[185] *Ojdanić* Jurisdiction Appeal Decision (Joint Criminal Enterprise), para. 21. *See also Blagojević and Jokić* Trial Judgement, para. 695, fn. 2145; *Prosecutor v. Stakić*, IT-97-24-T, "Judgement", Trial Chamber, 31 July 2003, ("*Stakić* Trial Judgement"), para. 431.

[186] ICCPR, Art. 15. *See also Ojdanić* Jurisdiction Appeal Decision (Joint Criminal Enterprise), paras 10, 38.

[187] Trial Judgement, para. 28.

[188] The Chamber does not consider the definition of crimes against humanity under national law as they were not prohibited under Cambodian law at the applicable time.

[189] Hugo Grotius, *De Jure Belli ac Pacis* (Francis W. Kelsey trans, Oxford University Press, 1925) Book II, Ch. 20, XL(1) [first published 1625] <http://www.lonang.com/exlibris/grotius/index.html>:

> The fact must also be recognised that kings, and those who possess rights equal to kings, have the right of demanding punishments not only on account of injuries committed against themselves or their subjects, but also on account of injuries which do not directly affect them but excessively violate the law of nature or of nations in regard to any persons whatsoever.

*See also* Hugo Grotius, *De Jure Belli ac Pacis*, Book II, Ch. 25, VIII(2) ("If, however, the wrong is obvious, in case some Busiris, Phalaris, or Thracian Diomede should inflict upon his subjects such treatment as no one is warranted in inflicting, the exercise of the right vested in human society is not precluded"); Emerich de Vattel, *Le Droit des Gens; ou, Principes de la Loi Naturelle Appliqués à la*

In the nineteenth century, in the preamble of the Declaration of St. Petersburg of 1868, reference is made to violations of the "laws of humanity."[190] A similar term also appears in the Martens Clause in the Hague Conventions of 1899[191] and 1907.[192]

102. However, the actual term "crimes against humanity" first appeared in 1915, in a joint Declaration by France, Great Britain, and Russia decrying the massacres of Armenians.[193] After World War I, the 1919 Versailles Preliminary Peace Conference created a Commission on the Responsibilities of the Authors of the War and the Enforcement of Penalties ("the Commission"), which advanced, to a limited degree, the concept of crimes against humanity. In its published report, the Commission found that Germany and its allies waged war "by barbarous or illegitimate methods in violation of [...] the elementary laws of humanity."[194] The Commission further suggested that Ottoman and German belligerents be tried for "violations of the laws and customs of war *and* the laws of humanity,"[195] and that an international tribunal be established for that purpose.[196] Thus, the atrocities committed by belligerents during World War I helped lay the conceptual framework whereby crimes against humanity became positive international law in the aftermath of World War II. Furthermore, the

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*Conduite et aux Affaires des Nations et des Souverains,* Philadelphia, 1883, Book II, Ch. 4, p. 298 (affirming that a sovereign did not have complete discretion in the treatment of subjects: "if the prince, attacking the fundamental laws, gives his people a legitimate reason to resist him, if tyranny becomes so unbearable as to cause the Nation to rise, any foreign power is entitled to help an oppressed people that has requested assistance").

[190] International Military Commission, *Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes in Weight,* 29 November 1868, reprinted in *American Journal of International Law*, Vol. 1:2 (Supp.: Official Documents) (April 1907) 95-96, Preamble (declaring that "the employment of such arms would, therefore, be *contrary to the laws of humanity*") (emphasis added).

[191] Hague Convention (II) with Respect to the Laws and Customs of War on Land, opened for signature 29 July 1899, 32 Stat. 1803, 1 Bevans 247, 26 Martens Nouveau Recueil (ser. 2) 949, 187 Consol. T.S. 429 (entered into force 4 September 1900), ("1899 Hague Convention II"), Preamble.

[192] Hague Convention (IV) Respecting the Laws and Customs of War on Land, opened for signature 18 October 1907, 36 Stat. 2277, 1 Bevans 631, 205 Consol. T.S. 277, 3 Martens Nouveau Recueil (ser. 3) 461 (entered into force 26 January 1910), ("1907 Hague Convention IV"), Preamble.

[193] France, Great Britain, and Russia Joint Declaration, Telegram from United States Department of State, Washington to United States Embassy, Constantinople, 29 May 1915: "In view of these new *crimes* of Turkey *against humanity* and civilization the Allied governments announce publicly to the Sublime Porte that they will hold personally responsible [for] these crimes all members of the Ottoman government and those of their agents who are implicated in such massacres" (emphasis added) <http://www.armenian-genocide.org/>.

[194] Commission on the Responsibilities of the Authors of the War and the Enforcement of Penalties, *Report Presented to the Preliminary Peace Conference,* 29 March 1919, quoted in *American Journal of International Law*, Vol. 14 (1920), pp. 95, 115.

[195] Commission on the Responsibilities of the Authors of the War and the Enforcement of Penalties, *Report Presented to the Preliminary Peace Conference,* pp. 95, 118 (emphasis added).

[196] Commission on the Responsibilities of the Authors of the War and the Enforcement of Penalties, *Report Presented to the Preliminary Peace Conference,* pp. 95, 122.

juxtaposition of "laws and customs of war" and "laws of humanity" clearly presupposed that the crimes so envisaged would result from offending against two different legal regimes.

103. The Supreme Court Chamber recalls that, following their first appearance in international law in the 1945 Nuremberg International Military Tribunal ("IMT") Charter,[197] appended to the 1945 Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, which was endorsed by 19 States, [198] crimes against humanity were subsequently included in the 1945 Law No. 10 of the Allied Control Council,[199] the 1946 International Military Tribunal for the Far East ("IMTFE") Charter,[200] and the 1950 Nuremberg Principles.[201] Furthermore, they were prosecuted before the IMT[202] and the Nuremberg Military Tribunals ("NMTs") under the Control Council Law No. 10 in the occupied zones in Germany.[203] Finally, in the immediate aftermath of World War II, several peace treaties with Axis countries and their allies prohibited crimes against humanity, and obligated States Parties to prosecute those crimes, including the Peace Treaties with Italy, Romania and

[197] Charter of the International Military Tribunal for the Trial of the Major War Criminals, appended to the London Agreement, 8 August 1945, *Trial of the Major War Criminals Before the International Military Tribunal*, 14 November 1945 – 1 October 1946, Vol. I, pp. 10-18, ("IMT Charter"), Art. 6(c) <http://avalon.law.yale.edu/subject_menus/imt.asp>.
[198] Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal, 8 August 1945, 82 U.N.T.C. 280, ("London Agreement") (signatory states: Australia, Belgium, Czechoslovakia, Denmark, Ethiopia, Greece, Haiti, Honduras, India, Luxembourg, Netherlands, New Zealand, Norway, Panama, Paraguay, Poland, Republic of Serbia, Uruguay, Venezuela).
[199] Allied Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, 20 December 1945, (1946) 3 *Official Gazette Control Council for Germany* 50-55, ("Control Council Law No. 10"), Art. II(1)(c).
[200] Charter of the International Military Tribunal for the Far East, 26 April 1946, ("IMTFE Charter"), reprinted in Neil Boister and Robert Cryer (eds.), *Documents on the Tokyo International Military Tribunal: Charter, Indictment and Judgments*, Oxford University Press, 2008, pp. 7-11, Art. 5(c).
[201] Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, in Report of the International Law Commission covering its second session, 5 June to 29 July 1950, U.N. Doc. A/CN.4/34, Part III, Principle VI(c), "[p]rinted with slight drafting changes as document A/1316" in *Yearbook of the International Law Commission,* 1950, Vol. II, U.N. Doc. A/CN.4/SER.A/1950/Add.1 (6 June 1957), pp. 374–378. *See also Affirmation of the Principles of International Law Recognized by the Charter of the Nürnberg Tribunal*, G.A. Res. 1/95 (I), UN GAOR, 1st Sess., 123rd Plenary Mtg, U.N. Doc. A/RES/1/95 (11 December 1946) ("*Affirmation of Principles*").
[202] *See, e.g. Trial of the Major War Criminals Before the International Military Tribunal*, 14 November 1945 – 1 October 1946, Vols. I-XXII, ("IMT Judgement"), Vol. I, pp. 173-174, 253-255.
[203] *See, e.g.* cases under the Control Council Law No. 10 cited later in this Judgement reaching convictions for enslavement, torture and persecution as crimes against humanity.

Bulgaria.[204] Subsequently, national courts reached convictions for crimes against humanity with respect to conduct that occurred prior to 1975.[205]

104. Based on the aforementioned, the Supreme Court Chamber agrees with the Trial Chamber[206] that crimes against humanity were established as an international crime during the ECCC's temporal jurisdiction.

105. Regarding the second issue, namely, how crimes against humanity were defined under customary international law by 1975, the Supreme Court Chamber recalls that under Article 5 of the ECCC Law, crimes against humanity are:

> any acts committed as part of a widespread or systematic attack directed against any civilian population, on national, political, ethnical, racial or religious grounds, such as: murder; extermination; enslavement; deportation; imprisonment; torture; rape; persecutions on political, racial, and religious grounds; other inhumane acts.[207]

106. Not only does this definition specify the underlying acts that constitute a crime against humanity, but it also lays out the contextual or *chapeau* requirements that must be found to exist in order to set crimes against humanity apart from domestic crimes or other international crimes. The *chapeau* requirements here are: 1) the existence of a widespread or systematic attack; 2) directed against a civilian population; 3) on national, political, ethnical, racial or religious grounds; and 4) the underlying acts were committed as "part of" the attack.

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[204] *See, e.g.* Treaty of Peace with Italy, Art. 45; Treaty of Peace with Rumania, Art. 6; and Treaty of Peace with Bulgaria, Art. 5, quoted in Amelia C. Leiss and Raymond Dennett (eds.), *European Peace Treaties after World War II: Negotiations and Texts of Treaties with Italy, Bulgaria, Hungary, Rumania, and Finland,* World Peace Foundation, 1954, pp. 177, 252, 300.
[205] *See, e.g., Poland v. Greiser,* Case No. 74, "Judgment", 7 July 1946, *Law Reports of Trials of War Criminals: Selected and Prepared by the United Nations War Crimes Commission*, United Nations War Crimes Commission, 1949, Vol. XIII, ("*Greiser* Case"), pp. 104-106; *Attorney-General (Israel) v. Adolf Eichmann*, Judgment of the Supreme Court, May 29, 1962, *International Law Reports*, Vol. 36, pp. 277-342 ("*Eichmann* Case"); *Republique Francaise au nom du Peuple Francais v. Barbie,* French Court of Cassation (Criminal Chamber) (3 June 1988), "Confirmation de la Condamnation", *International Law Reports*, Vol. 100, ("1988 *Barbie* Case"), pp. 330-337; *Prosecutor v. Kupreškić et al.*, IT-95-16-T, "Judgement", Trial Chamber, 14 January 2000, ("*Kupreškić* Trial Judgement"), para. 602, citing *Artuković*, Zagreb District Court, Doc. No. K-1/84-61, 14 May 1986, ("*Artuković* Case"), pp. 23, 26.
[206] Trial Judgement, paras 285-289.
[207] ECCC Law, Art. 5.

107. In the following sections, this Chamber will examine, in response to the Co-Prosecutors' Appeal, whether the underlying crimes against humanity of persecution, torture, rape and enslavement found under Article 5 of the ECCC Law constituted crimes against humanity under customary international law by 1975. Consideration of whether other underlying acts in Article 5 constituted crimes against humanity at the relevant time is beyond the scope of this appeal.

108. In determining the scope of crimes against humanity during the ECCC's temporal jurisdiction, the Supreme Court Chamber notes that the IMT Charter articulated crimes against humanity as follows:

> (c) Crimes against humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.[208]

109. Two months after issuance of the IMT Judgement on 1 October 1946, in which convictions for crimes against humanity were reached, the General Assembly unanimously adopted General Assembly Resolution 95 (I) evidencing *opinio juris* among UN Member States that the IMT Charter and Judgement reflected general principles of international law at the time.[209] Following Resolution 95 (I), the General Assembly directed its International Law Commission ("ILC") to formulate and interpret those principles.[210] Consequently, in 1950, the ILC adopted the Nuremberg Principles.

110. The Supreme Court Chamber recognises that the IMT Judgement itself does not constitute binding precedent for the ECCC. However, coupled with the IMT Charter and General Assembly Resolution 95 (I), it provides strong evidence of existent and newly emerging principles of international criminal law.[211] As concerns

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[208] IMT Charter, Art. 6(c). This definition was also codified in the IMTFE Charter, Art. 5(c), however convictions for crimes against humanity were never reached by the IMTFE.
[209] *Affirmation of Principles.*
[210] *Formulation of the Principles Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal*, G.A. Res. 2/177 (II), UN GAOR, 2nd Sess., 123rd Plenary Mtg, U.N. Doc. A/RES/2/177 (21 November 1947) ("Formulation of the Principles").
[211] For opposition to the IMT Judgement as precedent, *see* Hans Kelsen, "Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law?", *International Law Quarterly*, Vol. 1:2

the 1950 Nuremberg Principles, the Supreme Court Chamber notes that Resolution 95 (I) did not endorse any specific articulation or interpretation of general principles of international law found in the IMT Charter and Judgement. The 1950 Nuremberg Principles were adopted by the ILC in the aftermath of that resolution and never formally adopted by the General Assembly. Consequently, it is open to the ECCC to determine the general principles of international law found in the IMT Charter and Judgement as of 1946, and whether the 1950 Nuremberg Principles are an accurate reflection of those principles.

111. With respect to crimes against humanity in particular, the Supreme Court Chamber recalls that the 1950 Nuremberg Principles stipulate that crimes against humanity are:

> [m]urder, extermination, enslavement, deportation and other inhuman acts done against any civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connexion with any crime against peace or any war crime.[212]

112. The Supreme Court Chamber observes that this definition largely mirrors the definition found in the IMT Charter.[213] National and regional courts have subsequently interpreted the 1950 Nuremberg Principles as reflective of customary international law.[214] The Supreme Court Chamber agrees, and finds that the definition

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(Summer 1947), pp. 153-171; Egon Schwelb, "Crimes Against Humanity", *British Yearbook of International Law*, Vol. 23 (1946), pp. 178-226. Other authors stress the impetus the IMT Judgement provided for the development of doctrine in international law, specifically with regard to crimes against humanity. *See, e.g.* Otto Kranzbuhler, "Nuremberg Eighteen Years Afterwards", *DePaul Law Review*, Vol. 14 (1964-1965), pp. 333-347.

[212] 1950 Nuremberg Principles, Principle VI(c).

[213] The only difference is that the definition in the 1950 Nuremberg Principles omits the "before or during the war" requirement, which clearly became unnecessary in light of the IMT Judgement. Judges refrained from reaching any convictions with respect to conduct "before" the war; furthermore "during the war" was redundant with the requirement that crimes against humanity be committed in "connexion with any crime against peace or any war crime." Report of the International Law Commission covering its second session, 5 June to 29 July 1950, para. 123 ("In its definition of crimes against humanity the Commission has omitted the phrase "before or during the war" contained in article 6 (c) of the Charter of the Nürnberg Tribunal because this phrase referred to a particular war, the war of 1939. The omission of the phrase does not mean that the Commission considers that crimes against humanity can be committed only during a war. On the contrary, the Commission is of the opinion that such crimes may take place also before a war in connexion with crimes against peace").

[214] *See, e.g. Eichmann* Case, pp. 277-278; *Touvier,* French Court of Cassation (Criminal Chamber), 27 November 1992, *International Law Reports*, Vol. 100, p. 338; *Fédération Nationale Des Déportés et Internés Résistants et Patriotes and Others v. Barbie,* "Arrêt", French Court of Cassation (Criminal Chamber), *International Law Reports*, Vol. 78 (1985), ("*Barbie* Case"), p. 139; *Kolk and Kislyiy v.*

of crimes against humanity found in the 1950 Nuremberg Principles retrospectively reflects the state of customary international law on the definition of crimes against humanity as it existed in 1946.

113. Having confirmed the definition of crimes against humanity in the 1950 Nuremberg Principles, it still falls on the Supreme Court Chamber, in the sections that follow addressing the Co-Prosecutors' specific grounds of appeal, to determine whether that definition remained during the period 1975-1979, or whether State practice and *opinio juris* indicate that the definition had evolved and new rules had crystallised by 1975. To the extent that it may be argued that at the relevant period, norms had changed such that crimes against humanity encompassed a broader scope of human conduct under customary international law than that found under the definition in the 1950 Nuremberg Principles, the Chamber must be satisfied that such a contention is based in evidence.

114. In that regard, the Supreme Court Chamber recalls that from 1954-1996, the ILC produced and adopted several versions of a draft code of international offences pursuant to the General Assembly's direction in 1947 under Resolution 177 (II).[215] While none of those drafts were ever endorsed by the General Assembly in the end, the Chamber considers that nevertheless, they *may* reflect State practice and *opinio juris* with respect to the definition of crimes against humanity over the years, given that one of the mandates of the ILC is to work retrospectively by providing a "*more precise* formulation and systematization of rules of international law in fields where

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*Estonia*, ECtHR, "Chamber Decision", App. Nos. 23052/04 and 24018/04, 17 January 2006, p. 3 (in which *the* Tallinn Court of Appeal of Estonia considered that "[d]eportations perpetrated by the applicants had been considered crimes against humanity by civilised nations in 1949. Such acts had been defined as criminal in Article 6 (c) of the Charter of the International Military Tribunal (Nuremberg Tribunal) and affirmed as principles of international law by the General Assembly of the United Nations on 11 December 1946 in its resolution 95"); *Prosecutor v. Ivica Vrdoljak*, Court of Bosnia and Herzegovina, Section I for War Crimes X-KR-08488, 10 July 2008, p. 12; *Korbely v. Hungary*, ECtHR, "Grand Chamber Judgment", App. No. 9174/02, 19 September 2008, para. 81 (relying on Article 6(c) of the Charter of the International Military Tribunal annexed to the London Agreement of 8 August 1945 as one of the primary formulations of crimes against humanity), "Dissenting Opinion of Judge Loucaides" (expressly relying on the 1950 Nuremberg principles, stating, "[t]he view that the Nuremberg principles were customary international law became indisputable after Resolution 3074 (XXVIII) of the United Nations General Assembly of 3 December 1973, which proclaimed the need for international cooperation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity").

[215] *Formulation of the Principles*.

there *already has been* extensive State practice, precedent and doctrine" as it did with the 1950 Nuremberg Principles.[216]

115. However, the Chamber further recalls that the ILC is also tasked with "the promotion of the progressive development of international law and its codification."[217] Consequently, the draft codes of international offences produced by the ILC between 1954-1996 reflect fluctuation between these two mandates, especially as it broadened the scope of international crimes over time, including crimes against humanity.[218] In the end, however, it is worth noting that the ILC's efforts remained the product of "laboring under the long shadow of Nuremberg"[219] when, in 1996,[220] it produced its Draft Code of Crimes against the Peace and Security of Mankind following the creation of the *ad hoc* Tribunals by the Security Council. Both the ICTY Statute[221] and the ICTR Statute[222] resemble, to some extent, the IMT Charter in their definition of crimes against humanity, and, on the occasion of the Tribunals' creation, the United Nations Secretary-General expressly noted its

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[216] Statute of the International Law Commission, 1947, adopted by the General Assembly in G.A. Res. 174 (II) (21 November 1947), as amended by G.A. Res. 485 (V) (12 December 1950), 984 (X) (3 December 1955), 985 (X) (3 December 1955) and 36/39 (18 November 1981), ("ILC Statute"), Art. 15 (emphasis added).
[217] ILC Statute, Art. 1.
[218] Compared to the 1950 Nuremberg Principles, the International Law Commission's 1954 Draft Code of Offences aimed at refining contextual elements. *Draft Code of Offences against the Peace and Security of Mankind*, Third Report of J. Spiropoulos, Special Rapporteur, U.N. Doc. A/CN.4/85 (30 April 1954), Part Two, XI, Art. 2(10), printed in *Yearbook of the International Law Commission,* 1954, Vol. II, U.N. Doc. A/CN.4/SER.A/1954/Add.l, p. 118. The General Assembly did not adopt the draft, although the main reason was not related to crimes against humanity but to the lack of agreement regarding the definition of aggression. *Draft Code of Offences against the Peace and Security of Mankind*, U.N. G.A. Res. 897 (IX) (4 December 1954). It was not until 1981 that it called upon the International Law Commission to resume work on the Draft Code of Offences. *Draft Code of Offences against the Peace and Security of Mankind*, U.N. G.A. Res. 36/106 (10 December 1981), Art. 1. Succeeding drafts were submitted in 1986 and again in 1991, which included a considerably altered definition of crimes against humanity, comprising new heads of crimes against humanity such as genocide, apartheid, and drug related offences. *Fourth report on the draft Code of Offences against the Peace and Security of Mankind,* by Mr. Doudou Thiam, Special Rapporteur, U.N. Doc A/CN.4/398 (11 March 1986), printed in *Yearbook of the International Law Commission*, 1986, Vol. II (Part I), U.N. Doc A/CN.4/SER.A/1986/Add.l (Part 1), pp. 55-61, 85-86; *Report of the International Law Commission on the Work of its Forty-Third Session*, 29 April to 19 July 1991, UN GAOR, 46th Sess., Supp. No. 10, U.N. Doc. A/46/10, pp. 101-103.
[219] M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law,* 2nd ed., p. 188.
[220] *Draft Code of Crimes against the Peace and Security of Mankind*, in Report of the International Law Commission on the work of its forty-eighth session, 6 May to 26 July 1996, U.N. Doc. A/51/10, printed in *Yearbook of the International Law Commission*, 1996, Vol. II (Part II), U.N. Doc. A/CN.4/SER.A/1996/Add.l (Part 2), pp. 15-56 (see in particular Article 18 on pages 47-50 regarding crimes against humanity).
[221] ICTY Statute, Art. 5
[222] ICTR Statute, Art. 3.

customary international law status.[223] Subsequently, the definition of crimes against humanity in the 1996 Draft Code of Crimes for the Peace and Security of Mankind returned to earlier versions that more closely resembled the definition found in the 1950 Nuremberg Principles, but with increased specification.

116. In light of this dynamic, and the fact that the ILC did not clearly distinguish in its work when it was working under which of these mandates,[224] the Supreme Court Chamber may not automatically conclude that the ILC draft codes of international offences always capture "extensive State practice, precedent and doctrine." Therefore, when considering specific issues surrounding the elements of crimes against humanity that existed during the ECCC's temporal jurisdiction in the sections that follow, the Chamber will carefully assess the ILC draft codes in light of evidence of State *opinio juris* and practice at the time in order to be able to determine when the drafts reflect customary international law as opposed to when they merely evidence the ILC's efforts towards prospective development of the law.

### C. Enslavement as a Crime Against Humanity from 1975-1979 (Ground 3 of the Co-Prosecutors' Appeal)

117. Under Ground 3 of the Co-Prosecutors' Appeal, the Co-Prosecutors submit that the Trial Chamber "erred in law in not convicting the [Accused] for the enslavement of all the detainees of S-21."[225] The Co-Prosecutors base their claim on the argument that the Trial Chamber "erred in law in its definition of enslavement as a crime against humanity" by "read[ing] an element of forced labour into the

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[223] *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, U.N. SCOR, U.N. Doc. S/25704 (3 May 1993), para. 35.

[224] ILC Statute, Art. 15 (in which the ILC articulated its goal as "the more precise formulation and systematization of rules of international law in fields where there already has been extensive State practice, precedent and doctrine"). *But see* ILC Statute, Art. 1, stating the ILC's purpose was "the promotion of the progressive development of international law and its codification." *See also Report of the International Law Commission covering its second session*, 5 June to 29 July 1950, para. 96: "[S]ince the Nürnberg principles had been affirmed by the General Assembly, the task entrusted to the Commission [...] was not to express any appreciation of these principles as principles of international law but merely to formulate them"; *Report of the International Law Commission Covering the Work of its Third Session*, 16 May to 27 July 1951, U.N. Doc. A/1858, printed in *Yearbook of the International Law Commission*, 1951, Vol. II, U.N. Doc. A/CN.4/SER.A/1951/Add.1, paras 55, 57-58 [para. 58 erroneously labelled as para. 52 in original] (in formulating the offences in the draft Code, the ILC looked beyond mere codification of the 1950 Nuremberg Principles and contemporaneously pursued progressive development of the law. The Commission did not think it "necessary to indicate the exact extent to which the various Nürnberg principles had been incorporated in the draft [Code of Offences against the Peace and Security of Mankind]. Only a general reference to the corresponding Nurnberg principles was deemed practicable").

[225] Co-Prosecutors' Appeal, para. 10.

definition"[226] and "requiring forced labour as an essential element of that crime."[227] The Co-Prosecutors contend that this "is inconsistent with international jurisprudence" and that, during the relevant period, enslavement as a crime against humanity covered the status of all S-21 detainees.[228] The Co-Prosecutors assert that the correct definition of enslavement as a crime against humanity is "the exercise of any or all of the powers attaching to the right of ownership over a person"[229] and conclude that, under this definition, the Trial Chamber's factual findings with respect to all S-21 detainees "fulfill[…] the definitional requirements for enslavement."[230] Accordingly, the Co-Prosecutors request that the Supreme Court Chamber find that the Trial Chamber erred in its definition of enslavement as a crime against humanity and convict the Accused for enslavement of all detainees at S-21 "irrespective of whether they were subjected to forced or involuntary labour."[231]

118. The Supreme Court Chamber recalls that, pursuant to Article 5 of the ECCC Law, the ECCC has jurisdiction "to bring to trial all Suspects who committed crimes against humanity during the period 17 April 1975 to 6 January 1979 […] such as: […] enslavement […]."[232] The Trial Chamber found the Accused responsible for enslavement as a crime against humanity on the basis of direct modes of liability as well as on the basis of his superior responsibility under Article 29 of the ECCC Law.[233]

119. When articulating the applicable law with respect to enslavement as a crime against humanity, the Trial Chamber concluded that "[t]he prohibition against slavery is unambiguously part of customary international law."[234] Under customary international law, the *actus reus* element of enslavement "is characterised by the

[226] Co-Prosecutors' Appeal, para. 201.
[227] Co-Prosecutors' Appeal, para. 202.
[228] Co-Prosecutors' Appeal, paras 206, 209.
[229] Co-Prosecutors' Appeal, para. 201, quoting *Prosecutor v. Kunarac et al.*, IT-96-23&23/1, "Judgement", Trial Chamber, 22 February 2001, ("*Kunarac* Trial Judgement"), para. 539.
[230] Co-Prosecutors' Appeal, paras 208-209, citing *Kunarac* Trial Judgement, para. 539.
[231] Co-Prosecutors' Appeal, para. 209.
[232] ECCC Law, Art. 5.
[233] Trial Judgement, paras 548-549.
[234] Trial Judgement, para. 342, citing *Prosecutor v. Krnojelac*, IT-97-25-T, "Judgement", Trial Chamber, 15 March 2002, ("*Krnojelac* Trial Judgement"), para. 353.

exercise of any or all powers attaching to the right of ownership over a person."[235] Furthermore, the Chamber held that the following are indicia of the exercise of such powers:

> control of someone's movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour.[236]

120. With respect to acts of forced or involuntary labour in particular, the Chamber noted that this "may also constitute enslavement."[237] The Trial Chamber found that, when determining whether labour is forced or involuntary, and rises to the level of enslavement, a Chamber must turn to the "factors outlined above."[238] Furthermore, the Trial Chamber clarified that, in certain circumstances, enslavement through forced or involuntary labour can be established "without evidence of additional ill-treatment."[239] Finally, the Chamber held that "[p]roof that the victim did not consent to being enslaved is not required, as enslavement is characterised by the perpetrator's exercise of power."[240]

121. As for the *mens rea* element of enslavement, the Trial Chamber stated that the Co-Prosecutors must show that the "perpetrator intentionally exercised any or all of the powers attaching to the right of ownership."[241]

122. When applying this definition of enslavement as a crime against humanity to the facts, the Trial Chamber's factual findings were limited to "[c]ertain detainees at S[-]21 and Prey Sâr […] forced to work," consistent with the factual allegations contained in the Amended Closing Order under the enslavement charge.[242] The Trial

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[235] Trial Judgement, para. 342, citing *Prosecutor v. Kunarac et al.*, IT-96-23&23/1-A, "Judgement", Appeals Chamber, 12 June 2002, ("*Kunarac* Appeal Judgement"), para. 116.
[236] Trial Judgement, para. 342, quoting *Kunarac* Appeal Judgement, para. 119.
[237] Trial Judgement, para. 344, citing *Prosecutor v. Sesay*, SCSL-04-15-T, "Judgement", Trial Chamber, 2 March 2009, ("*Sesay* Trial Judgement"), para. 202.
[238] Trial Judgement, para. 344, citing *Sesay* Trial Judgement, para. 202.
[239] Trial Judgement, para. 344, citing *U.S. v. Pohl et al.*, "Judgment", 3 November 1947, reprinted in *Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10*, Nuernberg, October 1946 – April 1949, Vol. V, United States Government Printing Office, 1949-1953, ("*Pohl* Case"), p. 970; *Sesay* Trial Judgement, para. 203.
[240] Trial Judgement, para. 343, citing *Kunarac* Appeal Judgement, para. 120.
[241] Trial Judgement, para. 345, citing *Kunarac* Appeal Judgement, para. 116.
[242] Trial Judgement, para. 225, quoting Amended Closing Order, para. 135.

Chamber determined that the "forced or involuntary labour, coupled with [...] detention" of the S-24 detainees and a "small number of detainees assigned to work within the S-21 complex" constituted enslavement.[243] The staff at S-21 "exercised total power and control" over these detainees who "had no right to refuse to undertake the work assigned to them, and did not consent to their conditions of detention."[244]

123. In disposing of this ground of appeal, the Supreme Court Chamber considers that the issues before it are two-fold: 1) whether the Trial Chamber's definition of enslavement as a crime against humanity from 1975-1979 is in error; and 2) whether the Trial Chamber erred in finding the Accused guilty of enslavement as a crime against humanity only with respect to those S-21 detainees who were subjected to forced labour and not all S-21 detainees. The Supreme Court Chamber will now examine each in turn.

### 1. The Trial Chamber's Definition of Enslavement

124. In determining whether the Trial Chamber's definition of enslavement as a crime against humanity was the applicable definition under national or international law from 1975-1979 pursuant to the principle of legality, the Supreme Court Chamber will consider, as a preliminary matter, the Co-Prosecutors' submission that the Trial Chamber "erroneously read an element of forced labour into the definition of enslavement as a crime against humanity"[245] as an essential element of the crime.[246]

125. The Supreme Court Chamber notes that the text of the Trial Judgement itself resolves this issue. The Trial Chamber neither expressly nor implicitly invoked forced labour as a necessary element of enslavement when it defined the crime's *actus reus* as "the exercise of any or all powers attaching to the right of ownership over a person."[247] When articulating the considerations relevant to the enslavement analysis, the Trial Chamber noted that "forced labour" is merely one factor to be considered

[243] Trial Judgement, para. 346.
[244] Trial Judgement, para. 346.
[245] Co-Prosecutors' Appeal, para. 201.
[246] Co-Prosecutors' Appeal, para. 202.
[247] Trial Judgement, para. 342, citing *Kunarac* Appeal Judgement, para. 116.

among several "[i]ndicia of enslavement."[248] No factor was singled out by the Trial Chamber as being of greater relative importance for establishing enslavement.[249]

126. Further, the Trial Chamber explicitly stated that "[f]orced [...] labour may *also* constitute enslavement."[250] The Trial Chamber noted that forced labour, when looking to other relevant indicia, could rise to the level of enslavement without any additional evidence of mistreatment.[251] The implication of these determinations is that forced labour is a sufficient but not a necessary prerequisite for enslavement as a crime against humanity.

127. The Supreme Court Chamber acknowledges that the Trial Chamber solely considered whether there was enslavement in this case with respect to detainees at S-24 and S-21 who were subjected to forced labour. This limited factual analysis, however, does not lead to the conclusion that the Chamber read in forced labour as an essential element of its legal definition of enslavement. Rather, the Trial Chamber, when applying its definition of enslavement to its factual findings, followed the scope of the Amended Closing Order's enslavement charge, which had been limited to detainees at S-24 and S-21 as follows:

> Certain detainees at S21 and Prey Sâr were forced to work. Strict control and constructive ownership was exercised over all aspects of their lives by: limiting their movement and physical environment; taking measures to prevent and deter their escape; and subjecting them to cruel treatment and abuse. As a result of these acts, detainees were stripped of their free will.[252]

128. That said, the Supreme Court Chamber recognises that, although Internal Rule 98(2) limits the Trial Chamber's factual findings in the Judgement to "the facts set out in the Indictment", it does not limit the Trial Chamber only to those facts which the Amended Closing Order explicitly linked to the relevant charged crime.[253] Indeed, "[t]he Chamber may [...] change the legal characterisation of the crime as set out in the Indictment."[254] Consequently, the Supreme Court Chamber will later consider

[248] Trial Judgement, para. 342.
[249] Trial Judgement, para. 342.
[250] Trial Judgement, para. 344, citing *Sesay* Trial Judgement, para. 202 (emphasis added).
[251] Trial Judgement, para. 344, citing *Pohl* Case, p. 970; *Sesay* Trial Judgement, para. 203.
[252] Amended Closing Order, para. 135.
[253] Internal Rule 98(2).
[254] Internal Rule 98(2).

whether the Trial Chamber's full factual findings with respect to S-21 under other charges support a legal determination that all S-21 detainees were enslaved.

129. On the basis of the foregoing, the Supreme Court Chamber finds that the Co-Prosecutors' assertion that the Trial Chamber's definition of enslavement as a crime against humanity requires proof of forced labour is without merit.

130. Turning to the Trial Chamber's definition of enslavement, as noted previously, Article 33 new of the ECCC Law requires that the Chamber exercise its subject matter jurisdiction in accordance with the international principle of legality codified under Article 15 of the ICCPR, which stipulates that no one shall be held guilty of any criminal offence which did not constitute an offence under national or international law at the time of the alleged act or omission.[255]

131. The 1926 Convention to Suppress the Slave Trade and Slavery, which entered into force in 1927, defined slavery as "the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised."[256] The Slavery Convention was augmented by the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, which entered into force in 1957 and affirms the definition of slavery found in the Slavery Convention.[257] By 1975, there were 56 States Parties to the Slavery Convention[258] and 82 States Parties to the Supplementary Slavery Convention.[259] Cambodia acceded to the Supplementary Slavery Convention in 1957.[260] The

[255] ECCC Law, Art. 33(2)(new); ICCPR, Art. 15.
[256] Convention to Suppress the Slave Trade and Slavery, opened for signature 25 September 1926, 60 LNTS 254 (entered into force 9 March 1927), ("Slavery Convention"), Art. 1(1).
[257] Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, opened for signature 7 September 1956, 226 UNTS 3 (entered into force 30 April 1957), ("Supplementary Slavery Convention"), Art. 7(a).
[258] United Nations Treaty Collection, MTDSG, Status of Treaties, Chap. XVIII.3, "Penal Matters: Slavery Convention" <http://treaties.un.org/Home.aspx?lang=en>. This number includes accessions, successions and ratifications.
[259] United Nations Treaty Collection, MTDSG, Status of Treaties, Chap. XVIII.4, "Penal Matters: Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery".
[260] United Nations Treaty Collection, MTDSG, Status of Treaties, Chap. XVIII.4, "Penal Matters: Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery".

definition of slavery under these treaties has persisted,[261] and has been consistently recognised as the basic formulation for the definition of enslavement as a crime against humanity under customary international law, including from 1975 to 1979.[262]

132. Subsequent to the Slavery Convention, enslavement was first codified as a crime against humanity under Article 6(c) of the IMT Charter, Article 5(c) of the IMTFE Charter, Article II(1)(c) of the Control Council Law No. 10 and Principle VI(c) of the 1950 Nuremberg Principles.[263] The post-World War II tribunals, the first to prosecute crimes against humanity, do not expressly state the legal elements of enslavement as a crime against humanity or interpret the definition articulated in the Slavery Convention. However, they provide substantive analyses from which subsequent international tribunals have discerned factors considered indicative of enslavement as a crime against humanity.[264] The Supreme Court Chamber considers that the conclusions reached by these post-World War II tribunals, coupled with the definition of slavery found in the Slavery Convention, evidence the state of customary international law relating to the definition of enslavement as a crime against humanity at the time.

133. In the IMT Judgement, twelve defendants were convicted for enslavement as a crime against humanity and a war crime through their involvement in the Nazi's slave labour programme. An additional defendant, Baldur Von Shirach, was only convicted for enslavement as a crime against humanity.[265] In its factual findings, the Tribunal focused on the following aspects of the programme: the extent, if at all, the labourers had free choice to work for the Germans; the conditions under which the labourers

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[261] *See, e.g.* Rome Statute of the International Criminal Court, opened for signature 17 July 1998, 2187 UNTS 3 (entered into force on 1 July 2002), ("ICC Statute"), Art. 7(2)(c).
[262] *See, e.g. Kunarac* Appeal Judgement, paras 117-124; *Sesay* Trial Judgement, paras 196-200; *Krnojelac* Trial Judgement, paras 350, 353; *Kunarac* Trial Judgement, paras 519-537, 539-543. While these cases explicate the evolution of various indicia of modern forms of enslavement as a crime against humanity under international law since the Slavery Convention and beyond the ECCC's temporal jurisdiction, they all confirm verbatim the fundamental definition of slavery first articulated under the Slavery Convention as the applicable definition under customary international law.
[263] IMT Charter, Art. 6(c); IMTFE Charter, Art. 5(c); Control Council Law No. 10, Art. II(1)(c); 1950 Nuremberg Principles, Principle VI(c).
[264] *Kunarac* Trial Judgement, paras 523-525, 542. *See also Kunarac* Appeal Judgement, para. 119.
[265] IMT Judgement, Vol. I, pp. 279-282, 288-301, 304-307, 317-322, 327-333, 338-341. The Supreme Court Chamber notes that in reaching its convictions against the defendants for enslavement, the IMT did not distinguish analytically between war crimes and crimes against humanity.

were transferred and treated; and the purpose for which the labourers were recruited and exploited.[266]

134. The Tribunal found that at least five million persons were deported to Germany to work in German industry and agriculture.[267] After weighing the evidence, including the statement from defendant Fritz Saukel, Pleni-potentiary-General for the Utilization of Labour, that, "'[o]ut of the five million workers who arrived in Germany, not even 200,000 came voluntarily'",[268] the Tribunal concluded that although some workers from western Europe were at first recruited voluntarily, the vast majority of workers were forced to leave home to work for the German industries and war effort.[269] In many cases, the conscription of labour was accomplished by drastic and violent methods.[270]

135. The Tribunal also found that the workers were generally treated in a cruel and inhumane way when they were deported to Germany and worked in German industries.[271] The treatment of the labourers was governed by the instructions of defendant Sauckel requiring that "'[a]ll the men must be fed, sheltered and treated in such a way as to exploit them to the highest possible extent, at the lowest conceivable degree of expenditure.'"[272] The workers were often provided with inadequate heating, food, clothing, and sanitary facilities, and were cruelly punished.[273] The concentration camps were also used to provide labour, and the camp inmates were forced to work "to the limits of their physical power."[274] In addition, evidence was proffered that female labourers, deported to work as house servants and farm labourers, were

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[266] IMT Judgement, Vol. I, pp. 243-247.
[267] IMT Judgement, Vol. I, p. 243.
[268] IMT Judgement, Vol. I, p. 244.
[269] IMT Judgement, Vol. I, pp. 244-245.
[270] "Man-hunts took place in the streets, at motion picture houses, even at churches and at night in private houses. Houses were sometimes burnt down, and the families taken as hostages, practices which were described by the Defendant Rosenberg as having their origin 'in the blackest periods of the slave trade'." IMT Judgement, Vol. I, p. 245.
[271] IMT Judgement, Vol. I, p. 246:

> The evidence showed that workers destined for the Reich were sent under guard to Germany, often packed in trains without adequate heat, food, clothing, or sanitary facilities. The evidence further showed that the treatment of the laborers in Germany in many cases was brutal and degrading. The evidence relating to the Krupp Works at Essen showed that punishments of the most cruel kind were inflicted on the workers.

[272] IMT Judgement, Vol. I, p. 245.
[273] IMT Judgement, Vol. I, p. 246.
[274] IMT Judgement, Vol. I, p. 246.

afforded no free time, save for the rare opportunity, granted as reward for good work, to be away from the home for a few hours.[275]

136. Furthermore, the Tribunal found that:

> The general policy underlying the mobilization of slave labor was stated by [defendant] Sauckel [as follows]: '[…] to use all the rich and tremendous sources conquered and secured for us by our fighting Armed Forces, […] for the armament of the Armed Forces, and also for the nutrition of the Homeland. The raw materials, as well as the fertility of the conquered territories and their human labor power, are to be used completely and conscientiously to the profit of Germany and her allies […].'[276]

137. As such, compulsory labour service was instituted in occupied territories "to assist the German war economy"; foreign labourers were also deported to Germany to meet the need of German industries for manpower.[277] At least 500,000 women were deported to Germany to work as "female domestic workers" and farm labourers.[278] Finally, an additional purpose of the slave labour programme was, as stated by defendant Hermann Wilhelm Göring,[279] "for security reasons so that they would not be active in their own country and would not work against us."[280]

138. Convictions for enslavement as a crime against humanity by the Tribunal were largely based on the defendants' roles in planning, ordering, executing, controlling or otherwise participating in the systematic transfer, employment, and abuse of involuntary labourers under the Nazi's slave labour policy.[281] With respect to their *mens rea,* each defendant was found to have intentionally participated in the slave labour programme, on the basis of evidence that the defendants had knowledge of the programme and willingly participated in it.[282]

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[275] IMT Judgement, Vol. III, Proceedings, 1 December 1945 – 14 December 1945, p. 452.
[276] IMT Judgement, Vol. I, p. 247.
[277] IMT Judgement, Vol. I, pp. 243-244.
[278] IMT Judgement, Vol. I, p. 340.
[279] The Tribunal found him to be "the most prominent man in the Nazi regime" after Hitler. IMT Judgement, Vol. I, p. 279.
[280] IMT Judgement, Vol. I, p. 281.
[281] IMT Judgement, Vol. I, pp. 279-341.
[282] *See, e.g.* IMT Judgement, Vol. I, pp. 281, 290, 293, 296, 298, 301, 306-307, 318-321, 329-330, 339-340.

139. Subsequently, several Judgements issued by the NMTs under Control Council Law No. 10 further developed the factors relevant to the definition of enslavement as a crime against humanity under customary international law. While consideration of acts amounting to enslavement at times occurred within the war crimes section, those same acts were held to constitute crimes against humanity.[283] Similar to the IMT Judgement, concerning the *actus reus* of enslavement, the NMTs considered the conditions under which labourers were conscripted, transferred and treated in the Nazi slave labour programme, as well as the purposes for the programme, in determining whether the forced labour amounted to enslavement.[284] As for the *mens rea* element, the NMTs looked to see whether there was intent—that the defendant knew of the slave labour policy and willingly participated in it.[285]

140. For example, in the *Milch* case, defendant Erhard Milch, who controlled the German aircraft industry,[286] was convicted of slave labour and deportation to slave labour as a crime against humanity.[287] In an oft-quoted passage, the Tribunal, when rejecting the defendant's claim that the workers had free choice to enter "labour contracts" with the Germany military industry, stated that:

> [The Slavic Jews] were slaves, nothing less—kidnapped, regimented, herded under armed guards, and worked until they died from disease, hunger, and exhaustion. […]. As to non-Jewish foreign labor, […] they were deprived of the right to move freely or to choose their place of residence; to live in a household with their families; to rear and educate their children; to marry; to visit public places of their own choosing; to negotiate, either individually or through representatives of their own choice, the conditions of their own employment; to organize in trade unions; to exercise free speech or other free expression of opinion; to gather in peaceful assembly; and they were frequently deprived of the right to worship according to their own

[283] *See, e.g. U.S. v. Milch*, reprinted in *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10*, Vol. II, ("*Milch* Case"), p. 791.
[284] *See, e.g. Milch* Case, pp. 779-785, 789-790; *Pohl* Case, p. 970; *U.S. v. Flick et al.*, reprinted in *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10*, Vol. VI, ("*Flick* Case"), pp. 1195-1196; *U.S. v. Krauch et al.*, reprinted in *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10*, Vol. VIII, ("*I.G. Farben* Case"), pp. 1172-1173; *U.S. v. Krupp et al.*, reprinted in *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10*, Vol. IX, ("*Krupp* Case"), pp. 1396-1409; *U.S. v. von Weizsaecker et al.*, reprinted in *Trials of War Criminals before the Nuernberg Military Tribunals Under Control Council Law No. 10*, Vol. XIV, ("*Ministries* Case"), pp. 794-800.
[285] *See, e.g. Milch* Case, pp. 785-788; *Pohl* Case, pp. 980-984, 990, 993-995, 997-999, 1000-1001, 1005-1009, 1014-1015, 1021-1023, 1045-1048, 1050-1051; *Flick* Case, p. 1202; *I.G. Farben* Case, pp. 1179-1195; *Krupp* Case, pp. 1438-1442, 1449; *Ministries* Case, pp. 800-854.
[286] *Milch* Case, pp. 779, 785.
[287] *Milch* Case, pp. 779, 790.

> conscience. All these are the sign-marks of slavery, not free employment under contract.[288]

141. With respect to evidence of the defendant's *mens rea* for enslavement, the NMT noted that he was aware of how the workers were conscripted and treated.[289] The defendant attended at least fifteen meetings where it was disclosed that cruel and barbarous methods were used in forcing civilians of foreign countries to come and work for the German industry.[290] In addition, the defendant personally urged the adoption of more stringent and coercive means to secure the supply of workers.[291]

142. Additionally, in the *Pohl et al.* case, when convicting several of the defendants who were members of "one of the twelve main departments of the SS"[292] for enslavement as a crime against humanity, the NMT noted that the defendants viewed the civilian population of occupied countries deported for purposes of slave labour as "merely a part of the victor's spoils."[293] In determining the scope of the *actus reus* of enslavement, the NMT concluded that, with respect to concentration camp inmates utilised as slave labour for German industries, "[w]e might eliminate all proof of ill-treatment, overlook the starvation, beatings, and other barbarous acts, but the admitted fact of slavery—compulsory uncompensated labor—would still remain. […]. Involuntary servitude, even if tempered by humane treatment, is still slavery."[294]

143. As for the defendants' *mens rea* for enslavement, with respect to defendant Oswald Pohl, the NMT noted that he was head of a main SS department.[295] As such, he had jurisdiction over the administration of the concentration camps,[296] and exercised substantial supervision and control over exploitation of the labour of the camp inmates for purposes of supplying the war industries.[297] The NMT also noted that Pohl visited the camps and had a detailed knowledge of happenings related to the

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[288] *Milch* Case, p. 789.
[289] *Milch* Case, pp. 785-787.
[290] *Milch* Case, pp. 785-786.
[291] *Milch* Case, pp. 786-787.
[292] *Pohl* Case, p. 962.
[293] *Pohl* Case, p. 970.
[294] *Pohl* Case, p. 970.
[295] *Pohl* Case, p. 980.
[296] *Pohl* Case, p. 981.
[297] *Pohl* Case, pp. 982, 990.

camps.[298] He "energetically set about driving the inmates to the limit of endurance in order to further the economic and war efforts of the Reich,"[299] and "constantly fought for longer hours, more intense effort, more production, selection of specialized skills, less loafing, and more strict supervision."[300] Similarly, the NMT convicted other leading members in the SS, including defendants August Frank, Heinz Karl Fanslau, Hans Loerner, Georg Loerner, Erwin Tschentscher, Max Kiefer, Hans Baier and Leo Volk, for enslavement as a crime against humanity on the basis that they knew of the slave labour programme, especially the policy goals of the programme, the conscription methods of the labourers, and the events related to the concentration camps. They also helped administer or facilitate the programme in an active and responsible fashion.[301]

144. While, as demonstrated here, the Nuremberg-era jurisprudence focused on the forced and compulsory labour element of enslavement, the findings are nonetheless underlined by general pronouncements of treating the victims as commodities ("victor's spoils",[302] akin to "raw materials, as well as the fertility of the conquered territories"[303] that were to be "exploit[ed] […] to the highest possible extent, at the lowest conceivable degree of expenditure"[304]), thereby confirming that enslavement as crime against humanity and the definition of slavery in the Slavery Convention share the same roots.

145. More recently, Chambers in the *ad hoc* international criminal Tribunals have distilled the elements of the definition of enslavement as a crime against humanity and the factors that are indicative of the *actus reus* of the exercise of powers that attach to the right of ownership under that definition. The ICTY Chambers survey the conceptual development of enslavement under customary international law and seek to connect the definition of slavery found in the Slavery Convention and the Supplementary Slavery Convention with post-World War II jurisprudence on

[298] *Pohl* Case, pp. 983-984.
[299] *Pohl* Case, p. 982.
[300] *Pohl* Case, pp. 982-983.
[301] *Pohl* Case, pp. 993-995, 997-1001, 1004-1010, 1014-1015, 1021-1023, 1045-1048, 1050-1051.
[302] *Pohl* Case, p. 970.
[303] IMT Judgement, Vol. I, p. 247.
[304] IMT Judgement, Vol. I, p. 245.

enslavement as a crime against humanity, all of which constituted customary international law by 1975.

146. Notably, the ICTY *Prosecutor v. Kunarac et al.* case[305] concerned, in relevant part, charges of enslavement for holding captive women and girls for a period of months, during which time the victims were raped, forced to perform household chores and obey all commands.[306] Affirming the established definition of slavery found in the Slavery Convention, the *Kunarac* Trial Chamber held that, "at the time relevant to the indictment, enslavement as a crime against humanity in customary international law consisted of the exercise of any or all powers attaching to the right of ownership over a person."[307] Furthermore, "[t]he *mens rea* of the violation consists in the intentional exercise of such powers."[308] It added that the broader scope of enslavement was "evidenced in particular by the various cases from the Second World War [...], which have included forced or compulsory labour."[309] Thus, though issued well after 1979, *Kunarac's* articulation of the factors relevant to the enslavement inquiry,[310] discussed below, is grounded in part in the very post-World War II jurisprudence to which the Supreme Court Chamber turns for conclusive evidence of the state of customary international law during the period relevant to this appeal.

147. The *Kunarac* Trial Chamber concluded that, under the contemporary definition of enslavement:

> [i]ndications of enslavement include elements of control and ownership; the restriction or control of an individual's autonomy, freedom of choice or freedom of movement; and, often, the accruing of some gain to the perpetrator. The consent or free will of the victim is absent. It is often rendered impossible or irrelevant by, for example, the threat or use of force or other forms of coercion; the fear of violence, deception or false promises; the abuse of power; the victim's position of vulnerability; detention or captivity, psychological oppression or socio-economic conditions. Further indications of enslavement include exploitation; the exaction of forced or compulsory labour or service, often without remuneration and often, though

[305] *Kunarac* Trial Judgement, paras 518-538.
[306] *Kunarac* Trial Judgement, paras 8-9.
[307] *Kunarac* Trial Judgement, para. 539.
[308] *Kunarac* Trial Judgement, para. 540.
[309] *Kunarac* Trial Judgement, para. 541.
[310] *Kunarac* Trial Judgement, paras 541-542.

> not necessarily, involving physical hardship; sex; prostitution; and human trafficking.[311]

148. Further, the Chamber expressed "general agreement" with factors recommended by the Prosecution, which were:

> control of someone's movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertions of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour.[312]

149. In convicting the defendants of enslavement, the *Kunarac* Trial Chamber accepted that the facts of the case, including involuntary performance of household services and sexual acts, were consistent with treating women and girls as personal property[313] and amounted to enslavement as a crime against humanity.[314]

150. The *Kunarac* Appeals Chamber affirmed the *Kunarac* Trial Chamber's conceptualisation of enslavement and its multi-factor analytical approach, [315] considering that "whether a particular phenomenon is a form of enslavement will depend on the operation of the factors or indicia of enslavement identified by the Trial Chamber."[316]

151. Subsequent international jurisprudence has likewise affirmed the *Kunarac* approach.[317] Most recently, in the *Prosecutor v. Sesay* case before the SCSL, the Trial Chamber held that:

> [t]he *actus reus* of the offence is that the Accused exercised any or all of the powers attaching to the right of ownership over a person or persons while the *mens rea* is the intention to exercise such powers. In determining whether or not enslavement has occurred, the Chamber is mindful of the following indicia of enslavement that have been identified by the ICTY in the Kunarac et al. case: "control of someone's movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of

[311] *Kunarac* Trial Judgement, para. 542.
[312] *Kunarac* Trial Judgement, para. 543 (citations omitted).
[313] *Kunarac* Trial Judgement, para. 742.
[314] *Kunarac* Trial Judgement, paras 883, 886; *Kunarac* Trial Judgement, Annex IV – Third Amended Indictment (IT-96-23-PT), paras 10.1-11.7.
[315] *Kunarac* Appeal Judgement, paras 117-118, 122.
[316] *Kunarac* Appeals Judgement, para. 119.
[317] *Sesay* Trial Judgement, para. 199; *Krnojelac* Trial Judgement, paras 350, 358-359.

> exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour."[318]

152. In light of this apposite jurisprudence, the Supreme Court Chamber affirms the fundamental definition of enslavement as a crime against humanity employed by the Trial Chamber as the operative one from 1975-1979. The *actus reus* of enslavement is "characterised by the exercise of any or all powers attaching to the right of ownership over a person"[319] and the *mens rea* is the intentional exercise of "any or all of the powers attaching to the right of ownership."[320] This definition is drawn from the Slavery Convention which, as discussed above, has been consistently recognised as the source for the basic formulation of enslavement as a crime against humanity.

153. The Supreme Court Chamber clarifies, however, that with respect to the *actus reus* element of the Trial Chamber's definition, international law does not recognise a "right of ownership over a person."[321] Therefore, the more precise language should be "the exercise over a person of any or all powers attaching to the right of ownership."[322] This language is consistent with the wording of Article 1(1) of the Slavery Convention, which defines slavery as "the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised."[323]

154. With respect to the Trial Chamber's indicia of enslavement, the Supreme Court Chamber notes that the Trial Chamber restated some of the factors identified by the ICTY Trial Chamber in *Kunarac*.[324] In examining post-World War II jurisprudence, the Supreme Court Chamber considers that those factors of enslavement as a crime against humanity highlighted by the Trial Chamber are consistent with customary international law during 1975-1979. These factors help distinguish enslavement from other international crimes.

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[318] *Sesay* Trial Judgement, paras 198-199.
[319] Trial Judgement, para. 342, citing *Kunarac* Appeal Judgement, para. 116.
[320] Trial Judgement, para. 345, citing *Kunarac* Appeal Judgement, para. 116.
[321] *Kunarac* Appeal Judgement, para. 118.
[322] *Kunarac* Appeal Judgement, para. 118 ("Article 1(1) of the 1926 Slavery Convention speaks more guardedly 'of a person over whom any or all of the powers attaching to the right of ownership are exercised.' That language is to be preferred").
[323] Slavery Convention, Art. 1(1).
[324] Trial Judgement, para. 342; *Kunarac* Appeal Judgement, para. 119, quoting *Kunarac* Trial Judgement, para. 543.

155. The Supreme Court Chamber finds however that, although its restatement of certain *Kunarac* factors was proper, the Trial Chamber's analysis failed to prioritize explicitly the essence of the *mens rea* and the *actus reus* elements of enslavement as a crime against humanity, that is, the exercise over another human being of the powers that attach to *the right of ownership*. That said, the Supreme Court Chamber echoes the *Kunarac* Appeal Judgement in that the notion of enslavement centred on ownership is not coterminous with "chattel slavery".[325] Chattel slavery connotes outright ownership of a human being, which is only sustainable by at least some endorsement from society, through the legal system in particular. In its most advanced form, chattel slavery goes as far as to comprise: the ownership of slave offspring; succession in ownership, including through inheritance; the existence of a slave market; and protection against infringement on existing ownership rights through criminal law. In modern times, given the universal condemnation of slavery, societal mechanisms and circumstances enabling enslavement based on the exercise of full, in the civil law sense, powers of ownership, rarely occur. The exercise over a person of some of the powers attaching to ownership rights is usually possible only within the margins of criminal activity and/or in the situation of failing or deficient state systems.

156. In any event, enslavement necessarily implies the presence of behavioural aspects of ownership and, therefore, the facts of an enslavement charge must be evaluated in accordance with the meaning of ownership understood as a category of civil law and economy. Therefore, in going through the checklist of indicia of enslavement, a Chamber must above all identify the indicia of "ownership", that is, facts pointing to the victim being reduced to a commodity, such that the person is an object of "enjoyment of possession"; that she or he can be used (for example, for sexual purposes); economically exploited; consumed (for purposes of organ harvesting, for example); and ultimately disposed of. Clearly, the exercise over a person of powers attaching to ownership requires a substantial degree of control over the victim. There is no enslavement, however, where the control has an objective other than enabling the exercise of the powers attaching to ownership.

[325] *Kunarac* Appeal Judgement, para. 117.

157. Consistent with enslavement being premised on the notion of ownership, enslavement as it existed in the post-World War II jurisprudence required the element of seeking economic benefit or an effort to "accru[e][…] some gain" through exercising the powers of ownership and control over the victim.[326] Importantly, such economic gain did not need to be monetary.[327] Under that jurisprudence, there were no findings of enslavement as a crime against humanity in which an effort to accrue some gain was not of principal importance. In the *Kunarac* list of indicia of enslavement, the element of economic benefit is also present even if not as prominently put forth, given that this passage deals simultaneously with the conditions and means of asserting control over the victim, the exercise of such control, the effect it has on the victim and the purpose of enslavement.[328] However, at no point does the *Kunarac* jurisprudence part with the concept of the victim as a commodity. Under the facts of the *Kunarac* case, the victims were indeed treated as property; they were used for sexual purposes and exploited for domestic chores[329]; could be made available for the sexual use of others[330]; and at any time disposed of, including through sale.[331]

158. The Supreme Court Chamber therefore concludes that the Trial Chamber, in its analysis of enslavement as a crime against humanity, did not articulate with precision that the requisite element of the *actus reus* of the crime before it is an effort to accrue some gain through the exercise over the victim of the powers that attach to the right of ownership. Nevertheless, the Trial Chamber's reliance, in particular on the exploitation of forced labour in conditions denying the victims any rights and subjecting them to total control as the premise for its finding of enslavement implies adoption of this same concept. Therefore, the requisite element of the *mens rea* and *actus reus* of the crime before it is an effort to accrue some gain through the exercise over the victim of the powers that attach to the right of ownership. The gain element is not an additional element of crime but rather the purpose implicit in the ownership powers as such.

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[326] *Kunarac* Trial Judgement, para. 542.
[327] IMT Judgement, Vol. I, p. 281.
[328] *Kunarac* Trial Judgement, para. 543.
[329] *Kunarac* Trial Judgement, paras 8-9.
[330] *Kunarac* Trial Judgement, paras 742, 749.
[331] *Kunarac* Trial Judgement, paras 756, 781.

159. Having ascertained that definition, the Supreme Court Chamber now addresses the additional requirement under the principle of legality that charged offences were sufficiently foreseeable and the law providing for such liability was sufficiently accessible to the Accused at the relevant time. Although the Trial Chamber properly identified this requirement,[332] it was not followed with sufficient analysis.

160. The Supreme Court Chamber endorses the understanding of the foreseeability requirement as elaborated upon in prior ECCC jurisprudence. To wit, to satisfy foreseeability, an accused "must be able to appreciate that the conduct is criminal in the sense generally understood, without reference to any specific provision."[333] In other words, "the criminal consequences of the alleged acts [must be] foreseeable."[334] Accessibility can be demonstrated by the existence of an applicable treaty or customary international law during the relevant period.[335]

161. The Supreme Court Chamber first considers that the record of charges and convictions for enslavement as a crime against humanity under customary international law were well established by 1975. In the IMT Judgement, as noted above, thirteen defendants were convicted for enslavement, although the IMT Judgement often did not distinguish between enslavement as a crime against humanity and as a war crime. Importantly, however, the conduct for which defendant Baldur Von Shirach was convicted was specifically categorized under crimes against humanity.[336] Further, in the *Milch* Case, the NMT found the defendant guilty of crimes against humanity for his role in the Nazi's slave labour apparatus.[337] The Supreme Court Chamber thus finds that, in the wake of the Judgements issued by the post-World War II tribunals discussed previously, it would have been foreseeable that certain acts, especially those involving forced labour, were punishable as enslavement as a crime against humanity under customary international law by 1975.

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[332] Trial Judgement, para. 28.
[333] *Prosecutor v. Nuon Chea et al.*, Case File No. 002/19-09-2007-ECCC/OCIJ (PTC 145 & 146), "Decision on Appeals by Nuon Chea and Ieng Thirith Against the Closing Order", Pre-Trial Chamber, 15 February 2011, Doc. D427/2/15, ("PTC Jurisdiction Decision"), para. 106, quoting Decision on the Appeals Against the Co-Investigative Judges Order on Joint Criminal Enterprise (PTC 38), 20 May 2010, D97/15/9, ("PTC JCE Decision"), para. 45.
[334] PTC Jurisdiction Decision, para. 120.
[335] PTC Jurisdiction Decision, para. 106, quoting PTC JCE Decision, para. 45.
[336] IMT Judgement, Vol. I, pp. 318-320.
[337] *Milch* Case, p. 857.

162. Additionally, the Supreme Court Chamber recalls that applicable international law during the relevant period rendered the fact of enslavement as a crime against humanity accessible to the Accused. It is beyond doubt that enslavement as a crime against humanity was part of international law applicable to Cambodia by 1975. Cambodia acceded to the Supplementary Slavery Convention in 1957, which states in Article 6 that "[t]he act of enslaving another person [...], or of attempting these acts [...], shall be a criminal offence."[338] The Supplementary Slavery Convention's definition of slavery, mirroring the Slavery Convention, constituted the basic formulation of enslavement as a crime against humanity under customary international law during the relevant period.[339] Moreover, as noted previously, enslavement was identified as a crime against humanity under Article 6(c) of the IMT Charter, Article 5(c) of the IMTFE Charter, Article II(1)(c) of the Control Council Law No. 10 and Principle VI(c) of the 1950 Nuremberg Principles. The *Affirmation of Principles* by the General Assembly in 1946 and the definition of crimes against humanity that was adopted by the ILC in the 1950 Nuremberg Principles pursuant to UN General Assembly Resolution 177 (II), paragraph (a) reflect the general principles of international law on crimes against humanity at the time.[340] Based on the foregoing, the Supreme Court Chamber finds that it was both foreseeable and accessible to the Accused that he could be charged with enslavement as a crime against humanity from 1975-1979.

### 2. The Trial Chamber's Findings on S-21 Detainees and Enslavement

163. Finally, the Supreme Court Chamber turns to consider whether the Trial Chamber, based on its factual findings in the Trial Judgement on S-21, erred in failing to find the Accused guilty for enslavement as a crime against humanity with respect to all S-21 prisoners. As stated previously, although it was reasonable for the Trial Chamber to limit its enquiry to those detainees subjected to forced labour as specifically alleged in the Amended Closing Order under that charge,[341] the Trial Chamber was not bound to limit itself to those facts. Internal Rule 98(2) requires that "the judgment shall be limited to the facts set out in the Indictment. The Chamber

[338] Supplementary Slavery Convention, Art. 6.
[339] Supplementary Slavery Convention, Art. 7(a).
[340] 1950 Nuremberg Principles, Principle VI(c).
[341] Trial Judgement, para. 225, citing Amended Closing Order, para. 135.

may, however, change the legal characterisation of the crime[s] as set out in the Indictment."[342] Thus, the Trial Chamber would have been acting within its authority in combing the entire factual record for other indications of enslavement. As the Co-Prosecutors now claim error in the Trial Court's limitation of its enslavement findings with respect to S-21 detainees subjected to forced labour, the Supreme Court Chamber will address the issue, applying the proper definition of enslavement as a crime against humanity set forth above.

164. By the Co-Prosecutors' admission, the Trial Chamber made factual findings regarding those detainees not subjected to forced labour demonstrating only intentional "control of the detainees' movement, the control of physical environment, psychological control, measures taken to prevent or deter escape, threat of force and coercion, and subjection to cruel treatment and abuse."[343] The Trial Chamber unequivocally concluded that the Accused was responsible for: keeping detainees "chained and shackled to a metal bar in their cells," "under constant armed guard" and "consistently handcuffed and blindfolded" when moved;[344] "scarcity of food,"[345] detainees' inability to "wash in hygienic conditions"[346] and degradation from being made to "defecate and urinate in the cells";[347] detainees' "impaired [...] psychological health [...] and a permanent climate of fear" due to "the living conditions, combined with the detention, interrogation and disappearance of detainees";[348] "severe beating, mutilation, bruises and cuts" from interrogations;[349] deprivation of basic rights, torture and murder.[350]

165. The Supreme Court Chamber notes that the facts detailed above are indicative of the policy of torture and extermination that existed, with imprisonment and maltreatment employed as means to achieve both objectives.[351] The Supreme Court Chamber further notes that the facts detailed above were fully accounted for by the

[342] Internal Rule 98(2).
[343] Co-Prosecutors' Appeal, para. 207 (citations omitted).
[344] Trial Judgement, paras 260, 263.
[345] Trial Judgement, para. 268.
[346] Trial Judgement, para. 270.
[347] Trial Judgement, para. 272.
[348] Trial Judgement, para. 258.
[349] Trial Judgement, para. 264.
[350] Trial Judgement, paras 208, 241, 259.
[351] Trial Judgement, paras 205-206, 346.

Trial Chamber in holding the Accused responsible for the crimes against humanity of extermination (subsuming murder); imprisonment; torture; other inhumane acts; and persecution.[352] Yet, nowhere in these factual findings is there evidence of efforts by the Accused to accrue some gain from the totality of S-21 detainees or of otherwise treating them as commodity.

166. Conversely, with respect to the detainees of S-24, even though they had been confined, shackled at night, debased and treated cruelly,[353] the overall purpose of exercising control over them was not to bring about their death but to "reform and re-educate combatants and farming rice to supply Office S-21 and its branches."[354] The same concerned a small group of detainees at S-21 who had been selected for forced labour, enjoyed better conditions than the rest of the S-21 detainees and who, notably, survived.[355] The Supreme Court Chamber therefore concludes that, while the Accused's acts against S-21 detainees as detailed in the Trial Judgement were criminal, such acts, insofar as concerns the detainees not subjected to forced labour, did not amount to enslavement as a crime against humanity. Consequently, the Trial Chamber did not commit an error in limiting its finding of enslavement only to those detainees at S-21 who had been subjected to forced labour.

#### 3. Conclusion

167. On the basis of the foregoing, the Supreme Court Chamber dismisses Ground 3 of the Co- Prosecutors' Appeal.

### D. Rape as a Crime Against Humanity from 1975-1979 (Ground 2 of the Co-Prosecutors' Appeal)

168. Ground 2 of the Co-Prosecutors' Appeal alleges that the Trial Chamber erred in law by characterising an act of rape committed at S-21 as the crime against humanity of torture.[356] Although the Co-Prosecutors acknowledge international jurisprudence holding that "the act of rape may amount to the crime of torture," they argue that "international tribunals have consistently characterized rape as a crime against humanity distinct from torture even if the same criminal act amounts both to

[352] Trial Judgement, paras 341, 351, 360, 372-373, 389-390.
[353] Trial Judgement, paras 227, 229-230.
[354] Trial Judgement, para. 226.
[355] Trial Judgement, paras 232-233.
[356] Co-Prosecutors' Appeal, para. 133.

rape and torture,"[357] thereby "reflecting in full the gravity of the conduct."[358] Accordingly, they request that the Supreme Court Chamber cumulatively convict the Accused for both rape and torture as crimes against humanity.[359]

169. The Supreme Court Chamber recalls that, pursuant to Article 5 of the ECCC Law, the ECCC has subject matter jurisdiction over "crimes against humanity during the period 17 April 1975 to 6 January 1979 [...] such as: [...] torture; rape [...]."[360]

170. In the Trial Judgement, the Trial Chamber found that one instance of rape was proven by the Co-Prosecutors:

> The Amended Closing Order also alleges that there is evidence of at least one incident of rape at S-21. The Accused acknowledged that an S-21 staff member inserted a stick into the vagina of a detainee during an interrogation. [...]. The Chamber is satisfied that this allegation of rape has been proved to the required standard.[361]

171. Articulating the applicable law with respect to rape, the Trial Chamber found that "[r]ape has long been prohibited in customary international law"[362] and further held that:

> [w]hile rape comprises a separate and recognized offence both within ECCC Law and international criminal law, it is undisputed that rape may also constitute torture where all other elements of torture are established (Section 2.5.3.7). The Chamber considers that the conduct alleged in the Amended Closing Order to constitute rape clearly satisfy the legal ingredients of both rape and also of torture. It has further evaluated the evidence in support of this charge to be credible (Section 2.4.4.1.1). The Chamber considers this instance of rape to have comprised, in the present case, an egregious component of the prolonged and brutal torture inflicted upon the victim prior to her execution and has characterized this conduct accordingly.[363]

172. Subsequently, the Trial Chamber found that, with respect to this proven instance of rape, the Accused is responsible for torture as a crime against humanity

[357] Co-Prosecutors' Appeal, para. 196.
[358] Co-Prosecutors' Appeal, para. 197.
[359] Co-Prosecutors' Appeal, para. 200.
[360] ECCC Law, Art. 5.
[361] Trial Judgement, para. 246.
[362] Trial Judgement, para. 361.
[363] Trial Judgement, para. 366.

(encompassing rape), pursuant to Articles 5 and 29 of the ECCC Law. The Trial Chamber did not convict the Accused for rape as a distinct crime against humanity.[364]

173. In disposing of this part of Ground 2 of the Co-Prosecutors' Appeal, the Supreme Court Chamber considers the issues before it as follows: 1) whether, in light of the principle of legality, the Trial Chamber erred in holding that rape was a crime against humanity within the ECCC's subject matter jurisdiction from 1975-1979; 2) if the Trial Chamber did not err on this first issue, whether the Trial Chamber erred in failing to convict the Accused cumulatively for the distinct crime against humanity of rape as well as for the crime against humanity of torture with respect to the rape that occurred at S-21; and 3) if the Trial Chamber did not err on this second issue, whether the Trial Chamber erred in subsuming rape as an act of torture constituting a crime against humanity within the ECCC's subject matter jurisdiction from 1975-1979. The Supreme Court Chamber will now address each issue in turn.

### 1. Rape as a Distinct Crime Against Humanity

174. With respect to the question of whether the Trial Chamber erred in holding that rape was a distinct crime against humanity within the ECCC's subject matter jurisdiction, the Supreme Court Chamber recalls, as noted previously, that the exercise of the Trial Chamber's jurisdiction under Article 5 of the ECCC Law is subject to the principle of legality codified under Article 33 new of the ECCC Law.[365] The Supreme Court Chamber cannot uphold rape as a distinct crime against humanity on the basis of its gravity alone. Rather, this Chamber must also examine whether rape existed as a crime against humanity under international law, Cambodian municipal law, or general principles of law at the time of the alleged criminal conduct during the period 1975-1979.

175. The Supreme Court Chamber notes that by the start of the ECCC's temporal jurisdiction, rape's prohibition as a war crime had long been established under international law,[366] albeit not always in express terms.[367] Rape was explicitly

[364] Trial Judgement, para. 677.
[365] ECCC Law, Art. 33 new (referencing the ICCPR, Art. 15).
[366] *Instructions for the Government of Armies of the United States in the Field*, prepared by Francis Lieber, promulgated as General Order No. 100 by President Abraham Lincoln, Washington D.C., 24 April 1863, ("Lieber Code"), Art. 44 ("All wanton violence committed against persons in the invaded

prohibited in armed conflict under the 1949 Geneva Convention IV[368] as well as the 1977 Additional Protocols I[369] and II[370] to the 1949 Geneva Conventions. While the IMT Charter, the IMTFE Charter and the Control Council Law No. 10 did not reference rape as a war crime, the IMTFE and United States Military Commission convicted Japanese leaders, including General Iwane Matsui and Foreign Minister Kōki Hirota, for war crimes due to their failure to prevent the military forces under their command from instituting sexual enslavement of approximately 20,000 women at Nanking (Rape of Nanking).[371]

176. Although rape had thus been well established as a war crime by 1975, its status as a crime against humanity under international law had not yet crystallised. Although the Control Council Law No. 10 listed rape as a crime against humanity after World War II,[372] "none of the defendants in the trials [before the NMTs] were ever charged with rape."[373] Furthermore, neither the IMT Charter nor the IMTFE Charter reference rape as a crime against humanity. Consequently, although evidence

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country, […] all *rape*, wounding, maiming or killing of such inhabitants, are prohibited under the penalty of death, or such severe punishment as may seem adequate for the gravity of the offense" (emphasis added)); *The Laws of War on Land*, Oxford, 9 September 1880, ("Oxford Manual"), Art. 49; *Project of an International Declaration concerning the Laws and Customs of War*, Brussels, 27 August 1874, ("Brussels Declaration"), Art. 38; Regulations respecting the Laws and Customs of War on Land, Annex to 1907 Hague Convention IV, Art. 46; Regulations respecting the Laws and Customs of War on Land, Annex to 1899 Hague Convention II, Art. 46; 1899 Hague Convention II, Preamble; 1907 Hague Convention IV, Preamble ("Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience").

[367] M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law*, 2nd ed., p. 348 (pointing out the euphemistic terms which connoted rape).

[368] Geneva Convention Relative to the Protection of Civilian Persons in Time of War, adopted 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950), ("1949 Geneva Convention IV"), Art. 27.

[369] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, adopted 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978), ("Additional Protocol I to the 1949 Geneva Conventions"), Art. 76(1).

[370] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, adopted 8 June 1977, 1125 UNTS 609 (entered into force 7 December 1978), ("Additional Protocol II to the 1949 Geneva Conventions"), Art. 4(2)(e).

[371] On the "Rape of Nanking" and rape more generally, see Neil Boister and Robert Cryer (eds.), *Documents on the Tokyo International Military Tribunal: Charter, Indictment and Judgments*, pp. 535-539, 604, 612. *See also* Trial of General Tomoyuki Yamashita, Case No. 21, United States Military Commission, Manila, 8 Oct. 1945 - 7 Dec. 1945, reprinted in *Law Reports of Trials of War Criminals*, Selected and prepared by the United Nations War Crimes Commission, Vol. IV, London, 1948; *In re Yamashita*, 327 U.S. 1 (1946) (LexisNexis).

[372] Control Council Law No. 10, Art. II(1)(c).

[373] Kevin Jon Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law*, Oxford University Press, 2011, p. 381.

of rape was read into the record by prosecutors before the IMT,[374] the Tribunal did not convict any of the defendants for this crime. This is also true of proceedings before the IMTFE. As a result, rape as a crime against humanity was not included in the 1950 Nuremberg Principles. The Supreme Court Chamber further notes that, by 1975 and through 1979, no international treaty or convention was adopted which prohibited rape as a crime against humanity.

177. The Co-Prosecutors' Appeal cites to several cases from the *ad hoc* international criminal tribunals as authority for the proposition that "'[d]epending upon the circumstances, under international criminal law rape may acquire the status of a crime distinct from torture,'"[375] including as a separate crime against humanity.[376] The Trial Chamber cited to the same cases, as well as to additional cases from the ICTY, ICTR and SCSL, when articulating its definition of rape as a crime against humanity.[377]

178. The Supreme Court Chamber notes that this jurisprudence, which contains multiple convictions for rape as a discrete crime against humanity, extends well beyond the ECCC's temporal jurisdiction. The ICTY was established in 1993 and its temporal jurisdiction extends to criminal acts committed since 1991.[378] The ICTR was established in 1994, with its jurisdiction covering criminal acts committed during the same year.[379] The SCSL's temporal jurisdiction applies with respect to criminal acts committed since 30 November 1996.[380] Thus, these particular convictions do not lend support to a finding that rape was a crime against humanity under international law

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[374] Transcript 31 January 1946, IMT Judgement, Vol. VI, pp. 404-407; Transcript 14 February 1946, IMT Judgement, Vol. VII, pp. 456-457 (reading into evidence "The Molotov Note" dated 6 January 1942).
[375] Co-Prosecutors' Appeal, para. 194, quoting *Prosecutor v. Furundžija,* IT-95-17/1-T, "Judgement", Trial Chamber, 10 December 1998, ("*Furundžija* Trial Judgement"), para. 164.
[376] Specifically, the Co-Prosecutors point to the ICTR cases, *Prosecutor v. Akayesu,* ICTR-94-4-T, "Judgement", Trial Chamber, 2 September 1998, ("Akayesu Trial Judgement") and *Prosecutor v. Semanza*, ICTR-97-20-T, "Judgement and Sentence", Trial Chamber, 15 May 2003, ("*Semanza* Trial Judgement and Sentence"), and the ICTY case, *Kunarac* Trial Judgement. Co-Prosecutors' Appeal, paras 197-198.
[377] The Trial Chamber also cited: *Furundžija* Trial Judgement; *Prosecutor v. Muhimana*, ICTR-95-1B-T, "Judgement and Sentence", Trial Chamber, 28 April 2005, ("*Muhimana* Judgement and Sentence"); *Prosecutor v. Bagosora et al.*, ICTR-98-41-T, "Judgement and Sentence", Trial Chamber, 18 December 2008, ("*Bagosora* Judgement and Sentence"); and *Sesay* Trial Judgement. Trial Judgement, paras 361-365.
[378] ICTY Statute, Art. 1.
[379] ICTR Statute, Art. 1.
[380] SCSL Statute, Art. 1.

during 1975-1979. Furthermore, in convicting for rape as a distinct crime against humanity, these tribunals did not rely upon additional sources of international or municipal law evidencing rape as a crime against humanity prior to or during the ECCC's temporal jurisdiction.[381]

179. To the contrary, the jurisprudence relied upon by the Co-Prosecutors and by the Trial Chamber indicates that by the era of the *ad hoc* tribunals, rape as a crime against humanity still remained a nascent notion.[382] In fact, recognition of rape as a crime against humanity did not begin to take shape until the 1990s,[383] following reports of rape being used as a tool in carrying out widespread or systematic attacks on civilian populations in Haiti,[384] Bosnia,[385] and Rwanda.[386]

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[381] Notably, the seminal ICTR *Akayesu* Trial Judgement and the seminal ICTY *Kunarac* Trial Judgement accept the Tribunals' respective Statutes as the source of criminalization of rape as a crime against humanity. In *Akayesu* Trial Judgement, the ICTR Trial Chamber, considering "crimes against humanity (rape)," wrote that the crime was "punishable by Article 3(g) of the Statute of the Tribunal" (para. 685), finding "[t]he Accused is judged criminally responsible under Article 3(g) of the Statute for [...] incidents of rape" (para. 696). In *Kunarac* Trial Judgement, the ICTY wrote, "Rape has been charged against the three accused as a violation of the laws or customs of war under Article 3 and *as a crime against humanity under Article 5 of the Statute*. The Statute refers explicitly to rape as a crime against humanity within the Tribunal's jurisdiction in Article 5(g)" (para. 436) (emphasis added).

[382] Kelly D. Askin, "Prosecuting Wartime Rape and other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles", *Berkeley Journal of International Law*, Vol. 21 (2003), pp. 318-21 (on the history of the rape charge in *Akayesu*).

[383] *See, e.g.* the 1995 Report of the Fourth World Conference on Women, which stated, "Parties to conflict often rape women with impunity, sometimes using systematic rape as a tactic of war and terrorism." U.N. Report of the Fourth World Conference on Women, U.N. Doc. A/CONF.177/20 (17 October 1995), para. 135. *See also* UNICEF's "The State of the World's Children Report 1996", which stated, "In the midst of conflict, specific community-based measures are necessary to monitor the situation and needs of girls and women and especially to ensure their security because of the terrible threat they face of sexual violence and rape." UNICEF, "Anti-War Agenda" in The State of the World's Children Report 1996 <http://www.unicef.org/sowc96/antiwar.htm>.

[384] *See, e.g.* a 1994 Report from the Special Rapporteur of the Commission on Human Rights on the situation of human rights in Haiti to the UN General Assembly, which observed, "Most disturbing to the Special Rapporteur was a new phenomenon seen in Haiti in 1994: the emergence of politically motivated rape and the use of sexual abuse as an instrument of repression and political persecution." *Interim report on the situation of human rights in Haiti, submitted by the Special Rapporteur of the Commission on Human Rights pursuant to Commission resolution 1994/80 and Economic and Social Council decision 1994/266*, U.N. Doc. A/49/513 (14 October 1994), Annex, para. 16; a 1996 Report of the International Law Commission which stated that the UN General Assembly "unanimously reaffirmed that rape constitutes a crime against humanity under certain circumstances" and cited a 1994 report by the National Commission for Truth and Justice, which found that "sexual violence committed against women in a systematic manner for political reasons in Haiti constituted a crime against humanity." Report of the International Law Commission on the work of its forty-eighth session, 6 May to 26 July 1996, p. 50.

[385] *See, e.g.* a 1994 report by the UN Commission on Breaches of Geneva Law in Former Yugoslavia that stated, "Some of the reported rape and sexual assault cases committed by Serbs, mostly against Muslims, are clearly the result of individual or small group conduct [...]. However, many more seem to be a part of an overall pattern [...]" which "strongly suggest[s] that a systematic rape policy existed." UN Commission of Experts on Breaches of Geneva Law in Former Yugoslavia, Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), U.N. Doc.

180. In conclusion, the Supreme Court Chamber finds that a survey of custom and treaties before and during the ECCC's temporal jurisdiction indicates that rape was not a distinct crime against humanity under those sources of international law at the relevant time.

181. The next question is whether it would comport with the principle of legality to derive criminalisation of rape as a crime against humanity from Cambodian municipal law or pursuant to the general principles of law recognised by the community of nations as an alternative source of international law.[387] The Supreme Court Chamber recalls that rape was criminalised under Cambodia's 1956 Penal Code,[388] which was in effect during the ECCC's temporal jurisdiction. Furthermore, rape had been widely criminalised in other municipal jurisdictions by 1975.[389]

182. Nevertheless, municipal law cannot provide relevant authority in this case. The Supreme Court Chamber concurs with the Pre-Trial Chamber in that "where the constitutive elements are not identical, domestic and international crimes are to be treated as distinct crimes."[390] Here, there is discrepancy between the elements of the crime of rape under municipal criminal codes, including the 1956 Penal Code of

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S/1994/674 (27 May 1994), paras 252-253; UNICEF's "The State of the World's Children Report 1996", which stated, "Sexual violence is particularly common in ethnic conflicts. In fighting in Bosnia and Herzegovina and Croatia, it has been deliberate policy to rape teenage girls and force them to bear 'the enemy's' child." UNICEF, "Torture and Rape" in The State of the World's Children Report 1996 <http://www.unicef.org/sowc96/3torrape.htm>.

[386] *See, e.g.* the Final Report of the Commission of Experts for Rwanda, which records, "Disturbing reports have been filed with the Commission of Experts that document the abduction and rape of women and girls in Rwanda [...]." Final report of the Commission of Experts [on Rwanda] established pursuant to Security Council resolution 935 (1994), U.N. Doc. S/1994/1405 (9 December 1994), Annex, para. 136; the UN Special Rapporteur's report about Rwanda, in which it was noted that "rape was the rule and its absence the exception." Report on the situation of human rights in Rwanda, submitted by Rene Degni-Segui, Special Rapporteur of the Commission on Human Rights, under paragraph 20 of resolution S-3/1 of 25 May 1994, U.N. Doc. E/CN.4/1996/68 (29 January 1996), para. 16. *See also* Kelly D. Askin, "Prosecuting Wartime Rape and other Gender-Related Crimes under International Law", p. 346 ("Ten years ago, because there had been so little attention to wartime rape, there was debate as to whether rape was even a war crime. Since that time, the Tribunals have developed immensely the jurisprudence of war crimes, crimes against humanity, and genocide. The extraordinary progress made in the Tribunals on redressing gender-related crimes is largely the result of extremely hard work by scholars, activists, and practitioners inside and outside the Tribunals who have fought long, difficult battles to ensure that gender and sex crimes are properly investigated, indicted, and prosecuted").

[387] ICCPR, Art. 15(2).

[388] 1956 Penal Code of Cambodia, Art. 443.

[389] PTC Jurisdiction Decision, para. 153, fn. 360 (containing examples of municipal criminalisation of rape).

[390] PTC Jurisdiction Decision, para. 153.

Cambodia, and the elements of crimes against humanity in 1975-1979.[391] Unlike the criminalisation of rape in municipal law, all categories of crimes against humanity under international criminal law require chapeau elements that link them to the broader context in which the crimes occurred. Consequently, proscriptions against rape at the municipal level are insufficient to show the emergence of rape as a category of crimes against humanity by recourse to the general principles of law recognised by the community of nations.[392] Patterns of criminalisation on the municipal level, on the other hand, might help clarify the definition of rape as a crime against humanity, specifically the *actus reus* and *mens rea*, once the existence of rape as a crime against humanity has already been established under municipal or international law.[393]

183. Given this lack of support under international and municipal law for the existence of rape as a distinct crime against humanity during the ECCC's temporal jurisdiction, the Supreme Court Chamber finds that the Trial Chamber erred in law in concluding that the rape that occurred at S-21 constituted rape as a crime against humanity prohibited under customary international law. Accordingly, the Supreme Court Chamber rejects this part of Ground 2 of the Co-Prosecutors' Appeal, which argues that the Trial Chamber erred in failing to cumulatively convict the Accused for rape and torture as distinct crimes against humanity for the rape that took place at S-21.

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[391] There is a notable exception to the municipal silence during 1975-1979 on rape's criminalisation as a crime against humanity. In its 1973 International Crimes (Tribunal) Act, Bangladesh provided for the jurisdiction of a Tribunal established under the Act as including "Crimes against Humanity," defined therein to include "namely, murder, extermination, enslavement, deportation, imprisonment, abduction, confinement, torture, *rape* or other inhumane acts committed against any civilian population or persecutions on political, racial, ethnic or religious ground," although no prosecutions actually took place pursuant to this law. Bangladesh International Crimes (Tribunal) Act of 1973 (Act No. XIX of 1973), Sec. 3(2)(a) (emphasis added).

[392] *See* PTC Jurisdiction Decision, para. 153 (on the inappropriateness of importing municipal crimes into the international criminal legal order). As an example to illustrate how opposite reasoning would lead to erroneous conclusions, the Supreme Court Chamber considers the ancient and universal criminalisation of theft or murder which, pursuant to the logic of importation, would give rise to an international crime.

[393] *Furundžija* Trial Judgement, para. 177 ("to arrive at an accurate definition of rape based on the criminal law principle of specificity [...] it is necessary to look for principles of criminal law common to the major legal systems of the world"); *Kunarac* Trial Judgement, paras 439-460.

### 2. Rape as an Act of Torture as a Crime Against Humanity

184. As a final matter under this ground of appeal, the Supreme Court Chamber will determine, *ex proprio motu,* whether the Trial Chamber erred in finding that an act of rape such as occurred at S-21 could constitute the crime against humanity of torture during the ECCC's temporal jurisdiction. In other words, the Chamber will consider whether, in light of the principle of legality, torture existed as a crime against humanity from 1975-1979 and, if so, whether its definition covered acts of rape.

185. The Supreme Court Chamber notes that, as with rape, torture is explicitly proscribed under the laws of war.[394] Although torture was not prohibited as a crime against humanity under the IMT or IMTFE Charters, Article II(1)(c) of the Control Council Law No. 10 included torture within the definition of "Crimes against Humanity" as follows: "Atrocities and offenses, including but not limited to [...] torture [...]." Under that law, convictions were reached for torture as a crime against humanity in a number of cases before the NMTs.[395]

186. In the *Medical* Case, for example, the Tribunal frequently referred to torture as a crime against humanity when reaching its factual findings under the charges of war crimes and crimes against humanity. The defendants, doctors affiliated with the Third Reich, used non-consenting individuals imprisoned in concentration camps to conduct medical experimentation,[396] including "High Altitude" experiments[397] and "Poison

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[394] Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, adopted 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950) Arts 3(1)(a), 12, 50; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, adopted 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950) Arts 3(1)(a), 12, 51; Geneva Convention (III) relative to the Treatment of Prisoners of War, adopted 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) Arts 3(1)(a), 13, 14, 130; 1949 Geneva Convention IV, Arts 3(1)(a), 27, 147; Additional Protocol I to the 1949 Geneva Conventions, Art. 75(2)(ii); Additional Protocol II to the 1949 Geneva Conventions, Art. 4(2)(a).

[395] *See, e.g. U.S. v. Brandt et al.*, "Judgement", 19 August 1946, reprinted in *Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10*, Vol. II, ("*Medical* Case"), pp. 198, 216-217, 240, 247-248, 271; *U.S. v. Altstoetter et al.*, "Judgement", 3-4 December 1947, reprinted in *Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No.* 10, Vol. III, ("*Justice* Case"), pp. 3-4, 23-25, 1087-1088, 1092-1093, 1107, 1155-1156, 1166, 1170; *Ministries* Case, pp. 467-469, 471; *Pohl* Case, pp. 965-966, 970-971, 1036-1038.

[396] *Medical* Case, Vol. II, pp. 183, 223-227, 240, 248.

[397] In these experiments, "[m]any victims died [...] and others suffered grave injury, torture, and ill treatment" after being placed in a low-pressure chamber designed to simulate conditions at extremely high altitudes; the goal of the experiment was to "investigate the limits of human endurance and existence" in those conditions. *Medical* Case, Vol. II, p. 175.

Experiments."[398] In convicting the lead defendant, Karl Brandt, the Tribunal found that he was:

> responsible for, aided and abetted, took a consenting part in, and was connected with plans and enterprises involving medical experiments conducted on non-German nationals against their consent, and in other atrocities, in the course of which murders, brutalities, cruelties, *tortures* and other inhumane acts were committed. To the extent that these criminal acts did not constitute war crimes they constituted crimes against humanity.[399]

Similar language appears elsewhere in the Judgement for convictions reached against a number of Brandt's co-defendants.[400]

187. Additionally, in the *Justice* Case, several defendants who were formerly members of the Reich Ministry of Justice, Special Courts and People's Courts, were charged and convicted for crimes against humanity, including torture, committed against German civilians and nationals of occupied countries.[401] Among other things, the defendants were convicted for their role in implementing Hitler's "Night and Fog" decree, whereby "civilians of occupied countries accused of alleged crimes in resistance activities against German occupying forces were spirited away for secret trial" [402] with the intent "to terrorize, torture, and in some occupied areas to exterminate the civilian population."[403]

188. This practice, coupled with the conceptual shell of "other inhumane acts" as crimes against humanity that was included in the statute of the IMT Charter,[404] confirms the existence of torture as a crime against humanity under customary international law by 1975.

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[398] In these experiments, "subjects were shot with poison bullets and suffered torture and death" in a procedure whereby the doctors shot prisoners in the upper thigh with aconitin nitrate projectiles and then recorded their observations as the poison slowly and painfully killed the prisoners. *Medical Case*, Vol. II, pp. 178, 245-246.
[399] *Medical* Case, Vol. II, p. 198.
[400] *Medical* Case, Vol. II, pp. 216-217, 240, 247-248, 271, 281, 285, 290, 292, 295, 297.
[401] *Justice Case,* Vol. III, p. 23. *See also* pp. 3-4, 24-25, 1087-1088, 1092-1093, 1107, 1155-1156, 1166, 1170.
[402] *Justice Case*, Vol. III, p. 1031.
[403] *Justice Case*, Vol. III, p. 1060.
[404] The IMT Charter defines crimes against humanity as being "namely, murder, extermination, enslavement, deportation, and *other inhumane acts* committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated." IMT Charter, Art. 6(c) (emphasis added).

189. The Supreme Court Chamber now turns to consider the definition of torture at the relevant time. With respect to this issue, the Supreme Court Chamber notes that the Trial Chamber found that:

> [t]he crime of torture is proscribed and defined by numerous international instruments, including the 1975 United Nations General Assembly Declaration on Torture, adopted by consensus, and the 1984 Convention against Torture. The definition in the 1984 Convention against Torture, which closely mirrors that of the 1975 General Assembly Declaration, has been accepted by the ICTY as being declaratory of customary international law. The Chamber accordingly finds that this definition had in substance been accepted as customary by 1975.[405]

190. The Trial Chamber provided no support for its holding that the definition in the 1984 Convention Against Torture constituted customary international law in 1975, save for the text of the 1975 Declaration on Torture itself. The Trial Chamber then relied upon jurisprudence from the *ad hoc* international tribunals to interpret the definition in the 1984 Convention Against Torture as well as to distil the requisite *actus reus* and *mens rea* for torture as a crime against humanity.[406]

191. The Supreme Court Chamber considers that while it is true that the definition of torture found in the 1984 Convention Against Torture resembles the definition found in the 1975 Declaration on Torture, there are important differences. Article 1 of the 1975 Declaration on Torture defines torture as:

> any act by which severe pain or suffering, whether physical or mental, [that] is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons. […]. Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment.[407]

Whereas, the 1984 Convention Against Torture defines torture as:

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[405] Trial Judgement, para. 353 (citations omitted).
[406] Trial Judgement, paras 354-358.
[407] Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 3452 (XXX), 9 December 1975, ("1975 Declaration on Torture"), Art. 1.

> any act by which severe pain or suffering, whether physical or mental, [that] is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.[408]

192. The 1975 Declaration on Torture provides a more restrictive definition of torture. For example, the list of purposes or specific reasons for which severe pain or suffering is inflicted upon another human being is broader under the 1984 Convention Against Torture. Like the 1975 Declaration on Torture, the 1984 Convention Against Torture specifies the purposes of: obtaining information or a confession; punishment; and intimidation. The 1984 Convention Against Torture, however, also provides for coercion or "for any reason based on discrimination of any kind,"[409] language which does not appear in the 1975 Declaration on Torture.

193. The 1984 Convention Against Torture also includes a broader public official requirement.[410] Unlike the definition in the 1975 Declaration on Torture, under the 1984 Convention Against Torture, torture may also be inflicted "with the *consent or acquiescence*" of such an official.[411] In addition, a public official or any other person "*acting in an official capacity*" may inflict, instigate, consent or acquiesce to torture.[412]

194. Furthermore, even if the Trial Chamber was correct that the definitions of torture in the 1975 Declaration on Torture and 1984 Convention Against Torture closely mirror each other, it does not follow that, because the 1984 Convention Against Torture was declaratory of customary international law at that time, therefore the definition of torture in the 1975 Declaration on Torture was also declaratory of customary international law almost ten years earlier. The 1975 Declaration on Torture

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[408] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987), ("1984 Convention Against Torture"), Art. 1.
[409] Convention Against Torture, Art. 1.
[410] *See generally* Manfred Nowak and Elizabeth McArthur, *The United Nations Convention Against Torture: A Commentary,* Oxford University Press, 2008, p. 44, para. 39; pp. 77-79, paras 116-119.
[411] Convention Against Torture, Art. 1 (emphasis added). *See also Elmi v. Australia*, United Nations Committee Against Torture, Views, U.N. Doc. CAT/C/22/D/120/1998 (25 May 1999), para. 6.5.
[412] Convention Against Torture, Art. 1 (emphasis added).

is a non-binding General Assembly resolution and thus more evidence is required to find that the definition of torture found therein reflected customary international law at the relevant time.

195. Consequently, the question before the Supreme Court Chamber is whether the more restrictive definition of torture found in the 1975 Declaration on Torture was declaratory of customary international law during the ECCC's temporal jurisdiction. The Chamber notes that, under the 1975 Declaration on Torture, the elements of torture are as follows:

> a) any act causing severe pain or suffering, whether physical or mental (*actus reus*);
> b) that is intentionally inflicted upon on a person (*mens rea*);
> c) by or at the instigation of a public official;
> d) for such purposes as obtaining information or a confession; punishment; or intimidation.

196. The Supreme Court Chamber recalls that while a number of international treaties and declarations enacted before 1975 prohibited torture, they did not define it.[413] Thus, the Chamber finds it instructive to look to: the NMTs' jurisprudence from 1946-1949 on torture as a crime against humanity under the Control Council Law No. 10; the International Committee of the Red Cross ("ICRC") Commentary to 1949 Geneva Convention IV; the 1969 *Greek Case* by the European Commission on Human Rights; and the process surrounding the adoption of the 1975 Declaration on Torture. This evidence, taken as a whole, demonstrates that the definition and elements of torture provided in the 1975 Declaration on Torture were declaratory of customary international law by the time of the ECCC's temporal jurisdiction.

197. First, with respect to the cases under the Control Council Law No. 10, the facts imply that the definition of torture as a crime against humanity, as applied by the Tribunals, included not only the intentional infliction of severe pain or suffering on

[413] Universal Declaration on Human Rights, G.A. Res. 217A (III), UN GAOR, 3rd Sess., 10 December 1948, Art. 5; 1949 Geneva Conventions I-IV, Art. 3(1)(a); 1949 Geneva Convention IV, Arts 32, 147; Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature on 4 November 1950, 213 UNTS 221 (entered into force on 3 September 1953), as amended by Protocols Nos. 11 and 14, ("ECHR"), Art. 3; ICCPR, Art. 7.

another human being,[414] but also the active involvement of a state official and an unlawful purpose, in particular, obtaining a confession or punishment. All of the above-mentioned cases assign criminal responsibility for torturous acts inflicted by or at the instigation of German government officials in the context of concentration camps.[415] In the *Medical Case*, for instance, the experiments:

> were not the isolated and casual acts of individual doctors and scientists working solely on their own responsibility, but were the product of coordinated policy-making and planning at high governmental, military, and Nazi Party levels, conducted as an integral part of the total war effort. They were ordered, sanctioned, permitted, or approved by persons in positions of authority.[416]

The *Justice Case* further affirms that, for all crimes against humanity, "government participation is a material element."[417]

198. As for prohibited purposes, torture in the cases under the Control Council Law No. 10 appears to be correlated with extracting confessions from prisoners[418] as well as with punishment. Punishment as a prohibited purpose is elucidated in the *Medical Case*:

> The defendant attempts to meet this charge with the defense that the subjects used in this experiment were persons who had been condemned to death and that he, Mrugowsky, had been appointed as their legal executioner.
>
> [...] the defense has no validity. This was not a legal execution [...] but a criminal medical experiment [...]. The hapless victims of this dastardly torture were Russian prisoners of war, entitled to the protection afforded by the laws of civilized nations [...] [which] will not under any circumstances countenance the infliction of death by maiming or torture.[419]

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[414] *See, e.g. Medical Case,* Vol. II, pp. 175, 178, 245-246; *Justice Case,* Vol. III, pp. 1061, 1094; *Pohl Case,* Vol. V, pp. 970-971, 1036-1037, 1086 (Concurring Opinion by Judge Michael A. Musmanno).
[415] *See, e.g. Ministries Case*, Vol. XIV, p. 338 ("It must be apparent to everyone that the many diverse, elaborate, and complex Nazi programs of aggression and exploitation were not self-executing, but their success was dependent in a large measure upon the devotion and skill of men holding positions of authority in the various departments of the Reich government charged with the administration or execution of such programs [...] The principles [here] stated are equally applicable to the defendants here who were members of the Cabinet and to those defendants who occupied positions of responsibility and power in the various ministries"); *Pohl Case*, Vol. V, p. 962 ("The indictment further avers that all of the defendants were associated with the Economic and Administrative Main Office, commonly known as the "WVHA" which was one of twelve main departments of the SS").
[416] *Medical Case*, Vol. II, p. 181.
[417] *Justice Case*, Vol. III, p. 984.
[418] *See, e.g. Justice Case*, Vol. III, pp. 1088-1093.
[419] *Medical Case*, Vol. II, pp. 246-247.

199. Second, according to the ICRC Commentary to Articles 32 and 147 of 1949 Geneva Convention IV:

> [T]orture is an attack on the human person which infringes fundamental human rights. […]. There need not necessarily be any attack on physical integrity since the "progress" of science has enabled the use of procedures which, while they involve physical suffering, do not necessarily cause bodily injury.[420]

200. In addition, the legal meaning of torture includes:

> the infliction of suffering on a person to obtain from that person, or from another person, confessions or information. […]. It is more than a mere assault on the physical or moral integrity of a person. What is important is not so much the pain itself as the purpose behind its infliction […].[421]

201. These explanations of the definition of torture under 1949 Geneva Convention IV support, in part, the *actus reus* and *mens rea* elements in the 1975 Declaration on Torture as well as the requirement that torture be inflicted for the purpose of obtaining information or a confession.

202. Third, in the 1969 *Greek Case*, when interpreting and applying the prohibition against torture found under Article 3 of the European Convention on Human Rights, the European Commission set forth the following definition of torture that closely resembles the 1975 Declaration on Torture:

> [A]ll torture must be inhuman and degrading treatment, and inhuman treatment also degrading. The notion of inhuman treatment covers at least such treatment as deliberately causes severe suffering, mental or physical, which, in the particular situation, is unjustifiable.
>
> The word "torture" is often used to describe inhuman treatment, which has a purpose, such as the obtaining of information or confessions, or the infliction of punishment, and it is generally an aggravated form of inhuman treatment.[422]

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[420] Pictet (ed.), *Commentary on IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, 1958, p. 223 <http://www.icrc.org/eng/>.
[421] Pictet (ed.), *Commentary on IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, 1958, p. 598.
[422] *Greek* Case, *Yearbook of the European Convention on Human Rights*, Vol. 12 (1969), p. 186.

203. This definition notably contains the following elements: deliberate infliction on an individual person (*mens rea*); of aggravated physical or mental suffering (*actus reus*); for a purpose, specifically for purposes of obtaining information or confessions or infliction of punishment. Elsewhere in the Commission's Report, the requirement of official involvement is discussed, albeit in the context of explaining that the Greek government had violated its treaty obligations, rather than as a constituent element of torture.[423]

204. Finally, although the definition of torture in the 1975 Declaration on Torture was adopted by UN Member States as a non-binding General Assembly resolution, the resolution's adoption "without a vote" (that is, unanimously)[424] is arguably itself evidence that the definition in the 1975 Declaration on Torture was widely accepted by the international community. The Supreme Court Chamber notes that, at the time, the total voting membership of the General Assembly consisted of 144 States.[425]

205. Therefore, on the basis of the foregoing, the Supreme Court Chamber holds that the definition of torture found in the 1975 Declaration on Torture was declaratory of customary international law from 1975-1979.

206. Having established that the definition of torture in the 1975 Declaration on Torture was the applicable definition under customary international law for purposes of this case, the final matter before this Chamber is whether an act of rape such as that which was perpetrated at S-21 could constitute torture as a crime against humanity under the 1975 Declaration on Torture.

207. In this case, the Trial Chamber held that, with respect to the *actus reus* of torture, "[c]ertain acts are considered *by their nature* to constitute severe pain and suffering. These acts include rape [...]."[426] Thus, "it is undisputed that rape may also constitute torture where all other elements of torture are established."[427]

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[423] *Greek* Case, pp. 195-96, 504.
[424] *Furundžija* Trial Judgement, para. 160. *See also* UNBISnet, the United Nations Bibliographic Information System, Voting Record Search for UN Resolution Symbol: A/RES/3452(XXX).
[425] United Nations, *Growth in United Nations Membership, 1945-Present* <http://www.un.org/en/members/growth.shtml>.
[426] Trial Judgement, para. 355 (emphasis added).
[427] Trial Judgement, para. 366.

208. The Supreme Court Chamber agrees. Rape is defined by the Trial Chamber as the non-consensual sexual penetration of the victim,[428] committed by the perpetrator with intent and knowledge of lack of consent.[429] As noted by the ICTY Appeals Chamber in the *Kunarac* case, "some acts establish *per se* the suffering of those upon whom they were inflicted. Rape is obviously such an act. […]. Sexual violence necessarily gives rise to severe pain or suffering, whether physical or mental, and in this way justifies its characterisation as an act of torture."[430] Furthermore, as stated by the ICTR Trial Chamber in *Akayesu*, rape is often "used for such purposes as intimidation [or] punishment […]. Like torture, rape is a violation of personal dignity, and rape in fact constitutes torture when it is inflicted by or at the instigation of […] a public official […]."[431]

209. In this case, the Trial Chamber found that at S-21, "[a] variety of torture techniques"[432] for interrogation purposes "were applied in an environment of extreme fear where threats were routinely put into practice and caused detainees severe pain and suffering, both physical and mental."[433] These interrogation methods included "one proven instance of rape."[434] Furthermore, the Trial Chamber found that "the S-21 interrogators […] who perpetrated acts of torture acted in official capacity."[435] These officials carried out acts constituting torture "for the purpose of obtaining a confession or of punishment."[436]

210. The factual findings of the Trial Chamber demonstrate that interrogation techniques were intentionally inflicted by public officials at S-21 for a specific

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[428] The definition in full states that rape is the "sexual penetration, however slight of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or the mouth of the victim by the penis of the perpetrator, where such sexual penetration occurs without the consent of the victim." Trial Judgement, para. 362 (citations omitted).
[429] Trial Judgement, para. 365.
[430] *Kunarac* Appeal Judgement, para. 150.
[431] *Akayesu* Trial Judgement, para. 687. *See also* Valerie Oosterveld's discussion on gender-based crimes against humanity, in which she writes, "It is important to maintain the ability to prosecute gender-based acts under the umbrella of other prohibited acts [...] such as [...] torture [...]" for a variety of reasons, including "the commission of other prohibited acts may take place in a gendered manner" and that "a particular act may be proven using, among various kinds of evidence, gender-based acts." Valerie Oosterveld, "Gender-Based Crimes Against Humanity", in Leila Nadya Sadat (ed.), *Forging a Convention for Crimes Against Humanity,* Cambridge University Press, 2011, p. 100.
[432] Trial Judgement, para. 241.
[433] Trial Judgement, para. 359.
[434] Trial Judgement, paras 359-360.
[435] Trial Judgement, para. 359.
[436] Trial Judgement, para. 360.

purpose and caused severe pain or suffering. The Trial Chamber further established that the act of rape had been carried out for the purpose of extracting information from the victim. Accordingly, the Supreme Court Chamber finds that the Trial Chamber did not err in holding that the act of rape constituted torture as a crime against humanity. Given, however, that, as established above, rape did not constitute a discrete crime against humanity at that time, this act of rape cannot be subsumed as a crime against humanity under the conviction for the crime against humanity of torture.

211. With regard to the principle of legality, the Supreme Court Chamber notes that because of post-World War II jurisprudence under the Control Council Law No. 10, it was foreseeable to the Accused that he could be prosecuted for torture as a crime against humanity at the time of his criminal conduct. Furthermore, at the relevant time the Accused had access to: the definition of torture in the 1975 Declaration on Torture as reflected in and supported by the definition of torture inferred from the facts of the cases under the Control Council Law No. 10; the definition of torture as a grave breach under the 1949 Geneva Conventions I-IV; and the definition of torture under Article 3 of the 1950 European Convention on Human Rights as explicated in the 1969 *Greek Case*. In addition, it was foreseeable that under the definition of torture in effect in 1975, the Accused could be prosecuted for torture as a crime against humanity where the *actus reus* constituted an act of rape and all other elements had been met.

212. Finally, the Supreme Court Chamber agrees with the Trial Chamber that, "[a]lthough the immorality or appalling character of an act is not a sufficient factor to warrant its criminalisation under customary international law, it may in fact play a role in that respect, insofar as it may refute any claim by the Defence that it did not know of the criminal nature of the acts."[437] The Supreme Court Chamber notes that, at the time of the Accused's criminal conduct, it was clear that torture constituted a grave violation of an individual's fundamental human rights. As noted previously, by 1975 there was an absolute prohibition on torture as one of the most serious human

[437] Trial Judgement, para. 32 (citation omitted).

rights violations in several international treaties and declarations.[438] Thus, this widespread recognition by the community of States of the gravity of torture contributed to the foreseeability of criminal prosecution for such conduct as a crime against humanity.

### 3. Conclusion

213. The Supreme Court Chamber finds that the Trial Chamber erred in holding that rape was a distinct crime against humanity under customary international law from 1975-1979. Accordingly, the Trial Chamber erred in subsuming rape as a distinct crime against humanity under the crime against humanity of torture. However, the Trial Chamber did not err in concluding that an instance of rape was covered by the definition of torture that existed under customary international law by 1975, as articulated in the 1975 Declaration Against Torture. Furthermore, given that rape as a crime against humanity had not yet crystallised at the time, the Trial Chamber did not err when it did not cumulatively convict the Accused for torture and rape as separate crimes against humanity.

214. Therefore, on the basis of the foregoing, the Supreme Court Chamber dismisses this part of Ground 2 of the Co-Prosecutors' Appeal.

## E. Persecution as a Crime Against Humanity from 1975-1979

215. In response to the specific issues raised in the Co-Prosecutors' Appeal concerning the Accused's conviction for persecution as a crime against humanity, the Supreme Court Chamber turns to consider whether, in line with the principle of legality, persecution existed as a distinct crime against humanity under international law during the ECCC's temporal jurisdiction. If so, the Chamber will then determine the crime's requisite elements under its definition, as they stood from 1975-1979. As noted previously, persecution on political, racial or religious grounds is clearly listed as an underlying crime against humanity in Article 5 of the ECCC Law.[439]

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[438] The Supreme Court Chamber notes that Article 7 of the 1975 Declaration on Torture went so far as to call on all States to "ensure that all acts of torture as defined in article 1 are offences under its criminal law. The same shall apply in regard to acts which constitute participation in, complicity in, incitement to or an attempt to commit torture." 1975 Declaration on Torture, Art. 7.
[439] ECCC Law, Art. 5.

### 1. The Existence of Persecution as a Crime Against Humanity

216. Persecution's roots in international law began centuries before the IMT Charter first codified crimes against humanity as an international crime.[440] In 1625, Hugo Grotius wrote his seminal work, *De jure belli ac pacis*, one of the foundational works of international law.[441] Grotius authored this work during the Reformation, which saw the rise of various Christian sects, accompanied by waves of persecution. Regarding these events, Grotius deemed it "unjust to persecute with punishments those who receive the law of Christ as true, but entertain doubts or errors on some external points, taking them in an ambiguous meaning or different from the ancient Christians in their explanation of them."[442] Grotius extended this principle of non-persecution to non-Christians, reasoning that, "Christ being the author of a new law, will have no one brought to embrace his doctrine by the fear of human punishments."[443]

217. In addition, long before tribunals prosecuted international crimes, States often protested other States' acts of persecution, especially when the victims belonged to a minority group that shared a bond with the protesting State. In some instances, States concluded bilateral treaties to regulate the treatment of a particular minority population and protect it from State-sponsored persecution.[444] Moreover, nations that persecuted Christians gave Christian countries a *casus belli* upon the persecuting country.[445] In extreme instances, countries would seek to protect minority groups in other countries by declaring war.[446]

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[440] IMT Charter, Art. 6(c).
[441] Hedley Bull, Benedict Kingsbury and Adam Roberts, *Hugo Grotius and International Relations,* Oxford University Press, 1992, p. 95.
[442] Grotius, *De jure belli ac pacis*, Book II, Ch. 20, para. L.
[443] Grotius, *De jure belli ac pacis*, Book II, Ch. 20, para. XLVIII.
[444] *See, e.g. Treaty of Friendship, Commerce and Navigation*, France-Korea, signed 4 June 1886, Parry Consolidated Treaty Series, Vol. 168, p. 49, Art. 4(2) (ensuring that in the future, French citizens will have "la liberte de pratiquer leur religion").
[445] Grotius, *De jure belli ac pacis*, Book II, Ch. 20, para. XLIX ("Wars are justly waged against those who treat Christians with cruelty for the sake of their religion alone").
[446] *See, e.g.* the Bohemian Revolt of 1618 mushroomed into a larger war when neighbouring Protestant princes sent military forces to aid their religious compatriots in Bohemia, who feared religious persecution by the Catholic Holy Roman Empire. This conflict eventually became the Thirty Years' War, which ended with the signing of the treaties of the 1648 Peace of Westphalia. These treaties contain provisions prohibiting religious persecution. *See, e.g. Treaty of Peace*, Sweden-Holy Roman Empire, signed 24 October 1648, Parry Consolidated Treaty Series, Vol. 1, p. 209, Arts XXVIII-XXXIV.

218. Thus, States have sought to guard against persecution under customary international law, long before the world wars of the twentieth century. It was, however, treated as a *delict* under public international law, viewed in the context of just reasons for a country waging war against another country, rather than as an international crime entailing individual criminal liability.

219. Not until the aftermath of World War I was it first suggested that persecution is a crime against humanity. When examining breaches of the laws and customs of war and the laws of humanity by Germany and her allies during World War I, the Commission of Fifteen Members established in 1919 by the Preliminary Peace Conference concluded in its report that, "'all persons belonging to enemy countries [...] who have been guilty of offences against the laws and customs of war or the *laws of humanity*, are liable to criminal prosecution'."[447] The Commission then appended a list of violations to its report, and those categorised as crimes against humanity included, "the massacres of Armenians by the Turks and the massacres, *persecutions*, and expulsions of the Greek-speaking population of Turkey, both European and Asiatic."[448] However, it was only after World War II that individual criminal responsibility for persecution as a crime against humanity was actually realised under international law. "[P]ersecutions on political, racial or religious grounds" was included in the definition of crimes against humanity codified under the IMT Charter,[449] IMTFE Charter,[450] Control Council Law No. 10[451] and the 1950 Nuremberg Principles.[452]

220. In the end, the IMTFE did not convict any of the Japanese defendants for persecution or any other crime against humanity. In contrast, the trials of the Nazis provide a significant source of evidence for the development of persecution as a crime against humanity. In the IMT Judgement, the Court convicted defendants such as Hermann Wilhelm Göring, Joachim Von Ribbentrop, Alfred Rosenberg, Hans Frank, Wilhelm Frick, Julius Streicher, Walter Funk, Arthur Seyss-Inquart and Martin

[447] Schwelb, "Crimes Against Humanity", p. 181.
[448] Schwelb, "Crimes Against Humanity", p. 181 (emphasis added).
[449] IMT Charter, Art. 6(c).
[450] IMTFE Charter, Art. 5(c). The Supreme Court Chamber notes, however, that the IMTFE Charter does not include religion as a ground for persecution.
[451] Control Council Law No. 10, Art. II(1)(c).
[452] 1950 Nuremberg Principles, Principle VI(c).

Bormann for crimes against humanity. Their crimes included persecutory acts directed against the Jewish and Polish civilian populations in Germany and in the occupied territories on racial and political grounds.[453] Furthermore, Defendant Bormann, Adolf Hitler's secretary, "was extremely active in the persecution of the Jews not only in Germany but also in the absorbed or conquered countries. He took part in the discussions which led to the removal of 60,000 Jews from Vienna to Poland."[454] In addition, he "devoted much of his time to the persecution of the Churches [...] within Germany."[455]

221. Similarly, in the NMT trials in the German-occupied zones, several convictions were reached for persecution as a crime against humanity on racial, political or religious grounds. For example, in the *Justice* Case, Defendant Oswald Rothaug was convicted for racial persecution of Poles and Jews.[456] His Co-Defendant, Curt Rothenberger, was also convicted for persecution of Poles and Jews because he deprived them of their rights in civil and penal cases.[457] Furthermore, in the *RuSHA* Case, the Tribunal reached convictions against several defendants who were members of one of four agencies of the SS concerned with various aspects of the Nazi racial program.[458] The Tribunal convicted them for the crime of persecution on racial grounds against Jews and Poles.[459]

222. Another example is the *Ministries* Case whereby Defendants Richard Walther Darré, Otto Dieterich, Hans Heinrich Lammers, Wilhelm Stuckart and Lutz Schwerin von Krosigk, were found guilty for persecution[460] of Jews, Poles and "enemies and opponents of national socialism" on racial and political grounds.[461] In addition, while

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[453] IMT Judgement, Vol. I, pp. 66-67, 282, 287-288, 295-298, 300-307, 328-330, 339-341.
[454] IMT Judgement, Vol. XXII, p. 586.
[455] IMT Judgement, Vol. XXII, p. 585. The Supreme Court Chamber notes that the IMT made this finding within the context of its discussion of Defendant Bormann's guilt under the "Crimes Against Peace" section. Nevertheless it is indicative of their view that facts had been proved demonstrating that he engaged in religious persecution.
[456] *Justice* Case, Vol. III, pp. 23-25, 1144-1156.
[457] *Justice* Case, Vol. III, pp. 1110-1114, 1118.
[458] *U.S. v. Greifelt, et al.*, "Judgment", 10 March 1948, reprinted in *Trials of War Criminals Before the Nuernberg Military Tribunals Under Council Control Law No. 10*, Vols. IV-V, ("*RuSHA* Case"), Vol. V, pp. 152-153, 155, 158-162.
[459] *RuSHA* Case, Vol. V, pp. 152-153, 155, 158-162.
[460] *Ministries* Case, Vol. XIV, pp. 563-565, 575-576, 600-605, 645-646, 675-680; *Trials of War Criminals Before the Nuernberg Military Tribunals Under Council Control Law No. 10*, Vol. XIII, p. 118 (the relevant count in the indictment includes persecution as a crime against humanity).
[461] *Ministries* Case, Vol. XIV, p. 604.

Defendants Gustav Adolf Steengracht von Moyland, Ernst von Weizsaecker and Ernst Woermann were found not guilty for persecution on religious grounds because there was insufficient proof of individual criminal responsibility,[462] the Tribunal nevertheless found that the Nazi regime had a "definite governmental plan"[463] to persecute the Catholic Church, its dignitaries, priests, nuns and communicants, in Germany and the occupied territories.[464]

223. Furthermore, the Supreme Court Chamber notes that the application of persecution as a crime against humanity to Nazi officials and their allies continued after the IMT and NMT proceedings. In 1946, the Supreme National Tribunal of Poland convicted Artur Greiser for acts of persecution against Poles, Jews, Catholics and Protestants.[465] Later, in 1968, the Israeli Supreme Court convicted Adolf Eichmann for persecution and supported the conviction by pointing to the fact that "in carrying out the above-mentioned activities [of 'murder, extermination, enslavement, starvation, and deportation of the civilian Jewish population'] he persecuted Jews on national, racial, religious and political grounds."[466]

224. Likewise, in 1985, the French Court of Cassation allowed the charge against Klaus Barbie of "persecution against innocent Jews carried out for racial and religious motives with a view to their extermination, [...] in furtherance of the 'final solution'" during World War II to proceed.[467] He was convicted and sentenced to life imprisonment for persecution as a crime against humanity in 1987, which was confirmed by the Court of Cassation in 1988.[468] In 1986, the Zagreb District Court in Croatia sentenced to death Andrija Artuković, a high-level member of the Ustaša movement in World War II.[469] The Court found that because of Artuković's Ustaša orientation, he ordered mass killings and deportations of individuals to concentration camps as part of a program to create a pure Croatia.[470] The program implemented

[462] *Ministries* Case, Vol. XIV, pp. 526-528.
[463] *Ministries* Case, Vol. XIV, p. 520.
[464] *Ministries* Case, Vol. XIV, pp. 520-522.
[465] *Greiser* Case, pp. 2-4, 105.
[466] *Eichmann* Case, pp. 277-78.
[467] *Barbie* Case, p. 139.
[468] 1988 *Barbie* Case, p. 332.
[469] *Kupreškić* Trial Judgement, para. 602, citing *Artuković* Case, p. 23.
[470] *Kupreškić* Trial Judgement, para. 602, citing *Artuković* Case, p. 23.

"persecutions, concentration camps and mass killings of Serbs, Jews, Gypsies, as well as Croats who did not accept the ideology."[471]

225. Thus, the Supreme Court Chamber finds that by 1975, there was evidence of State *opinio juris* and practice recognizing persecution on racial, religious or political grounds as a crime against humanity under customary international law. As noted previously, not only was persecution codified by international treaty in the IMT Charter,[472] which was endorsed by 19 States,[473] it was then prosecuted by the IMT, an international tribunal, with respect to several defendants. Furthermore, the General Assembly unanimously adopted Resolution 95 (I) finding that the IMT Charter and Judgment reflect principles of international law.[474] Finally, persecution's status as a crime against humanity under customary international law was confirmed by State practice reaching convictions for persecution against a number of defendants both before the hybrid military NMTs and in national courts for criminal conduct perpetrated during World War II.[475]

### 2. The Definition of Persecution as a Crime Against Humanity

226. Turning to the definition of persecution as a crime against humanity during the ECCC's temporal jurisdiction, the Supreme Court Chamber recalls that when convicting the Accused for persecution on political grounds in this case,[476] the Trial Chamber articulated the elements of the crime as follows:

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[471] *Kupreškić* Trial Judgement, para. 602, citing *Artuković* Case, p. 23.
[472] Persecution as a crime against humanity was also codified in the IMTFE Charter, although the Tribunal did not reach any convictions for this crime. IMTFE Charter, Art. 5(c).
[473] Australia, Belgium, Czechoslovakia, Denmark, Ethiopia, Greece, Haiti, Honduras, India, Luxembourg, Netherlands, New Zealand, Norway, Panama, Paraguay, Poland, Republic of Serbia, Uruguay, Venezuela. International Committee of the Red Cross, "Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal. London, 8 August 1945 – States Parties / Signatories" <http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=350&ps=P>.
[474] *Affirmation of Principles* ("*The General Assembly* [...] *Affirms* the principles of international law recognized by the Charter of the Nürnberg Tribunal and the judgment of the Tribunal").
[475] The Supreme Court Chamber notes that it looks to some national trials that took place after the ECCC's temporal jurisdiction in reaching this conclusion. Nevertheless, the Chamber considers these cases to be evidence of customary international law during the ECCC's temporal jurisdiction because these national courts reached convictions on criminal conduct that was committed prior to 1975, looking to the law that existed at that time.
[476] Trial Judgement, para. 677.

> (i) an act or omission which [...] discriminates in fact and which denies or infringes upon a fundamental right laid down in international customary or treaty law[477] (*actus reus*); and
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> (ii) deliberate perpetration of an act or omission with the intent to discriminate on political, racial or religious grounds (*mens rea*).[478]

227. With respect to the *actus reus*, the Chamber stated that persecutory acts include, *but are not limited to*, other underlying crimes against humanity such as extermination, enslavement and torture.[479] Consequently, they may also include "harassment, humiliation and psychological abuse, confinement in inhumane conditions, cruel and inhumane treatment, deportation, forcible transfer and forcible displacement, and forced labour."[480] As such, the list of possible persecutory acts is not comprehensive. However, conduct that is not enumerated as one of the other underlying crimes against humanity "must be of equal gravity or severity to the specified underlying offences to constitute persecution."[481] In determining whether certain acts or omissions are severe enough to constitute persecution, they "must be evaluated not in isolation but in context, by looking at their cumulative effect."[482] Furthermore, the conduct should "generally" constitute a "gross or blatant denial of a fundamental human right."[483]

228. In addition, when stating that a persecutory act or omission must "discriminat[e] in fact", the Trial Chamber clarified that "[t]his act or omission must *actually* discriminate: a discriminatory intention is not sufficient, the act or omission must have discriminatory consequences."[484] An act or omission is discriminatory when the victim is targeted because of the victim's membership in a group as subjectively defined by the perpetrator on "political, racial or religious" grounds.[485]

229. With respect to the *mens rea,* the Trial Chamber held that in addition to the deliberate intent required for the act or omission, "[t]he existence of a 'specific intent

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[477] Trial Judgement, para. 376 (quotations and citations omitted).
[478] Trial Judgement, para. 379.
[479] Trial Judgement, para. 378.
[480] Trial Judgement, para. 378.
[481] Trial Judgement, para. 378 (quotation marks omitted).
[482] Trial Judgement, para. 378.
[483] Trial Judgement, para. 378.
[484] Trial Judgement, paras 376-377 (emphasis added).
[485] Trial Judgement, para. 377.

to cause injury to a human being because he belongs to a particular community or group' is sufficient to establish the intent required for the crime of persecution."[486] However, "[t]his specific intent is not a legal element of the other underlying crimes against humanity."[487] Finally, to establish the existence of specific discriminatory intent, the intent may not be inferred simply by looking to the general discriminatory nature of a broader attack.[488] Rather, it may be inferred in the context of such an attack if the facts of the case indicate that the specific circumstances "'surrounding commission of the alleged acts substantiate the existence of such [discriminatory] intent.'"[489]

230. The Supreme Court Chamber notes that the Trial Chamber derived this definition from the jurisprudence of the *ad hoc* Tribunals. The Trial Chamber acknowledged that, while persecution was clearly a crime against humanity under international law following World War II, the elements of the offence had received limited explicit elaboration by the post-World War II Tribunals or national courts prior to the *ad hoc* Tribunals' jurisprudence in the 1990s.[490] As a result, it was up to the *ad hoc* Tribunals to "outline the *contours* of this offence."[491] Simultaneously, when adopting the *ad hoc* Tribunals' articulation of persecution, the Trial Chamber endorsed the following statement in the ICTY Trial Judgement in *Kordić and Čerkez*, noting that

> [n]either international treaty law nor case law provides a comprehensive list of illegal acts encompassed by the charge of persecution, and persecution as such is not known in the world's major criminal justice systems. The Trial Chamber agrees [...] that the crime of persecution needs careful and sensitive development in light of the principle of *nullum crimen sine lege*.[492]

231. The Supreme Court Chamber agrees that post-World War II international or national jurisprudence does not explicitly outline the elements of persecution as a

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[486] Trial Judgement, para. 379.
[487] Trial Judgement, para. 379.
[488] Trial Judgement, para. 380.
[489] Trial Judgement, para. 380, quoting *Prosecutor v. Blaškic*, IT-95-14-A, "Judgement", Appeals Chamber, 29 July 2004, ("*Blaškic* Appeal Judgement"), para. 164; *Krnojelac* Appeal Judgement, para. 184.
[490] Trial Judgement, para. 375.
[491] Trial Judgement, para. 375 (emphasis added).
[492] Trial Judgement, para. 375, citing *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-T, "Judgement", Trial Chamber, 26 February 2001, ("*Kordić and Čerkez* Trial Judgement"), para. 192.

crime against humanity. The Chamber notes that in addition to the *Kordić and Čerkez* Trial Judgement, other ICTY jurisprudence has recognised the lack of clearly articulated elements.[493] This is due in part to uncertainty over persecution's relationship vis-à-vis other underlying crimes against humanity from the very beginning of its codification as an international crime. Indeed, during the drafting of the IMT Charter, the United Nations War Crimes Commission ("UNWCC") first defined crimes against humanity as "crimes committed against any person without regard to nationality, stateless persons included, because of race, nationality, religious or political belief, irrespective of where they have been committed."[494] As such, this draft definition indicates that initially, all crimes against humanity were understood to require a special discriminatory intent such that each would constitute persecution.

232. However, in the final draft of the IMT Charter, persecution was distinguished from other crimes against humanity as follows:

> (c) Crimes against humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; *or* persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.[495]

233. Under this text, persecution was clearly separated from other crimes against humanity by the semi-colon and disjunctive "or". Moreover, the special approach to persecution included the nexus requirement to war crimes or crimes against peace in the Charter. This nexus requirement was subsequently extended to apply to the entirety of crimes against humanity under the Berlin Protocol of 6 October 1945 with the replacement of the semi-colon with a comma;[496] the IMT's interpretation of the IMT Charter;[497] and, ultimately, the 1950 Nuremberg Principles.[498] However, as one

[493] *Prosecutor v. Tadić*, IT-94-1-T, "Judgement", Trial Chamber, 7 May 1997, ("*Tadić* Trial Judgement"), para. 694, reaffirmed in *Kordić and Čerkez* Trial Judgement, para. 192; *Prosecutor v. Blaškić*, IT-95-14-T, "Judgement", Trial Chamber, 3 March 2000, ("*Blaškić* Trial Judgement"), para. 219.
[494] The United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War,* London: His Majesty's Stationery Office, 1948, p. 176.
[495] IMT Charter, Art. 6(c) (emphasis added).
[496] IMT Judgement, Vol. I, p. 11.
[497] IMT Judgement, Vol. I, p. 254.
[498] 1950 Nuremberg Principles, Principle VI(c).

commentator has noted, "the removal of the semi-colon was never interpreted as extending the requisite political, racial or religious motive to all forms of crimes against humanity in conformity with previous drafts."[499] Rather, after the passage of the Berlin Protocol, the Legal Committee of the UNWCC concluded that there remained two types of crimes against humanity, "those of the 'murder-type' (murder, extermination, enslavement, deportation and the like), and those of the 'persecution type' committed on racial political or religious grounds."[500]

234. In light of this uncertainty, as well as the lack of clear guidance as to the substance of the elements of persecution in the post-World War II case law, the Supreme Court Chamber emphasises that under the principle of legality, the content of the elements of the crime must be carefully deduced from the reasoning and factual findings of the post-World War II tribunals. This is required in order to determine whether, by 1975, they were reasonably foreseeable and accessible to the Accused in this case. The Supreme Court Chamber recalls that the principle of legality does not prohibit a Chamber from interpreting or clarifying the law or the contours of the elements of a crime.[501] Furthermore, it does not prevent the Chamber from progressive development of the law.[502] However, the principle does not go so far as to allow a Chamber *to create new law* or to interpret existing law in such a way as to go beyond the reasonable bounds of clarification.[503]

235. As such, the present task before the Supreme Court Chamber is to determine whether the definition of the elements of persecution as a crime against humanity adopted by the Trial Chamber from the *ad hoc* Tribunals' jurisprudence is correct. In doing so, the Chamber notes that the *ad hoc* Tribunals began their determination of that definition in the 1990s, reaching resolution only after a process of internal variation in the case law over several years, some 20 years or more *after* the ECCC's temporal jurisdiction. Where the principle of legality is concerned, the Chamber must

[499] Ken Roberts, "Striving for Definition: The Law of Persecution from its Origins to the ICTY" in Hirad Abtahi and Gideon Boas (eds.), *The Dynamics of International Criminal Justice*, Martinus Nijhoff Publishers, 2006, p. 263.
[500] *History of the United Nations War Crimes Commission and the Development of the Laws of War*, p. 178.
[501] *Aleksovski* Appeal Judgment, paras 126-127.
[502] *Ojdanić* Jurisdiction Appeal Decision (Joint Criminal Enterprise), para. 38.
[503] *Ojdanić* Jurisdiction Appeal Decision (Joint Criminal Enterprise), para. 38.

consider whether the debate over that definition was with respect to interpreting or clarifying the contours of the elements of persecution as they existed in law by 1975. Alternatively, the Chamber must determine whether the elaboration of those elements is, in effect, new law that did not exist at the time relevant for the ECCC and therefore violates the principle of legality.

### *a. The Mens Rea Element*

236. First, with respect to the *mens rea* requirement that there be "deliberate" perpetration of an act or omission with the specific intent to persecute on racial, religious or political grounds, the Supreme Court Chamber finds that this element of persecution is supported by post-World War II jurisprudence. The IMT and NMTs' factual findings consistently indicated that perpetrators were convicted for knowingly and wilfully committing the persecutory act or omission, with discriminatory intent, which was indicated within the context of their knowing and voluntary participation in the German government's persecutory plan.[504] The tribunals inferred that discriminatory intent not simply from the existence of the plan, but also from specific circumstances surrounding the commission of the alleged persecutory acts. As noted below, defendants targeted victims solely because of their membership in a specific group, often making public statements that were clearly discriminatory in nature when doing so. The requisite specific intent does not however extend to require that the perpetrator identify himself with the specific underlying tyrannical motives of a regime pursuing a persecutory policy or campaign.[505]

237. Furthermore, as noted previously, under the express language of their charters, the post-World War II tribunals considered acts or omissions as persecutory in nature where they were perpetrated against individuals on political, racial or religious

[504] IMT Judgement, Vol. I, pp. 282, 287-288, 295-298, 300-307, 328-330, 339-341; Vol. XXII, p. 576; *Justice* Case, Vol. III, pp. 1081, 1110-1114, 1144-1156; *Ministries* Case, Vol. XIV, pp. 555-556, 563-564, 575-576, 645-646, 678-680.

[505] *Attorney-General of Israel v. Enigster*, District Court of Tel Aviv (1952), *International Law Reports*, Vol. 18, ("*Enigster* Case"), p. 542 ("[A] person who was himself persecuted and confined in the same camp, can, from the legal point of view be guilty of crimes against humanity if he performs inhumane acts against his fellow prisoners. In contrast to a war criminal, the perpetrator of a crime against humanity does not have to be a man who identified himself with the persecuting regime or its evil intention."); *J and R* (1948), Supreme Court in the British Occupied Zone, *Entscheidungen des Obersten Gerichtshofes fur die Britishe Zone –Enteschеidungen in Strafsachen*, Walter de Gruyter, 1949-51, Vol. I, pp. 167-171 ("This connection [to violence and tyranny] does not need […] to lie in support for the tyranny, but may, for example, also consist of the use of the system of violence and tyranny").

grounds.[506] Subsequent national prosecutions of former Nazis in Poland, Israel, France and Croatia for persecution replicated this required discriminatory animus.[507] On this issue, the Supreme Court Chamber notes that, "[t]he experience of Nazi Germany [also] demonstrated that crimes against humanity may be committed on discriminatory grounds other than those enumerated [...], such as physical or mental disability, age or infirmity, or sexual preference."[508] That said, the Supreme Court Chamber notes that the ECCC's jurisdiction is circumscribed by the discriminatory grounds expressly included under the ECCC Law, namely, "persecutions on political, racial or religious grounds."[509]

238. In addition, the Supreme Court Chamber agrees with the Trial Chamber that there is no requirement that the specific discriminatory intent apply to all other underlying crimes against humanity.[510] The plain language of Article 5 of the ECCC Law, as well as the clear separation of persecution from other underlying crimes against humanity in the drafting history and text of the IMT Charter, Control Council Law No. 10 and 1950 Nuremberg Principles, confirm this holding. Not only does the plain meaning of these instruments dictate this result, but it would be "illogical" and "superfluous" for the drafters to specifically indicate that persecution is carried out "on political, racial or religious grounds" if indeed that specific intent requirement were to apply to all underlying crimes against humanity.[511] Interpretation of these instruments in light of their humanitarian object and purpose further supports this conclusion. The aim of the drafters was:

> to make all crimes against humanity punishable, including those which, while fulfilling all the conditions required by the notion of such crimes, may not have been perpetrated on political, racial or religious grounds [...]. [O]ne fails to see why they should have seriously restricted the class of offences coming within the purview of "crimes against humanity", thus leaving outside this class all the possible instances of serious and widespread

[506] IMT Judgement, Vol. I, pp. 282, 287-288, 295-298, 300-307, 328-330, 339-341; *Justice* Case, Vol. III, pp. 1110-1114, 1118, 1144-1156; *RuSHA* Case, Vol. V, pp. 152-153, 155, 158-162; *Ministries* Case, Vol. XIV, pp. 520-522, 526-528, 563-565, 575-576, 600-601, 603-605, 645-646, 675-680.
[507] *Greiser* Case, p. 105; *Eichmann* Case, p. 278; *Barbie* Case, p. 139; *Kupreškić* Trial Judgement, para. 602, citing *Artuković* Case, p. 26.
[508] *Prosecutor v. Tadić*, IT-94-1-A, "Judgement", Appeals Chamber, 15 July 1999, ("*Tadić* Appeal Judgment"), para. 285.
[509] ECCC Law, Article 5.
[510] Trial Judgement, para. 379.
[511] *Tadić* Appeal Judgement, paras 283-284.

> or systematic crimes against civilians on account only of their lacking a discriminatory intent.[512]

239. Also, in national jurisprudence immediately after World War II, courts found that crimes against humanity do not necessarily consist of persecutory or discriminatory actions.[513] Finally, the Supreme Court Chamber notes that the Trial Chamber's *mens rea* for persecution is bolstered by the relatively uncontroversial adoption of this same formulation of the *mens rea* in *ad hoc* Tribunal jurisprudence.[514]

240. Consequently, the Supreme Court Chamber affirms the Trial Chamber's articulation of the requisite *mens rea* for persecution by 1975. Furthermore, having reviewed the factual findings of the Trial Chamber in this case, the Chamber concludes that the majority did not err in its application of the requisite *mens rea* for persecution to its findings[515] in reaching the conclusion that "the Accused shared the intent motivating CPK policy to eliminate all political enemies as identified by the Party Centre, and to imprison, torture, execute and otherwise mistreat S-21 detainees on political grounds";[516] moreover, he "influenced the definition of the groups

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[512] *Tadić* Appeal Judgement, para. 285.
[513] *See, e.g. In re Ahlbrecht (No. 2)* (1949), Dutch Special Court of Cassation, *International Law Reports*, Vol. 16, pp. 396-398; *Enigster* Case, p. 541 ("As to crimes against humanity, we have no hesitation in rejecting the argument of the defence that any of the acts detailed in the definition of crime against humanity have to be performed with an intention to persecute the victim on national, religious or political grounds. It is clear that this condition only applies when the constituent element of the crime is persecution itself").
[514] *See, e.g. Stakić* Appeal Judgement, paras 327-328; *Prosecutor v. Deronjić,* IT-02-61-A, "Judgement on Sentencing Appeal", Appeals Chamber, 20 July 2005, ("*Deronjić* Appeal Judgement"), para. 109; *Kvočka* Appeal Judgement, paras 319-320; *Kordić and Čerkez* Appeal Judgement, paras 101-102, 110; *Blaškič* Appeal Judgement, para. 131; *Krnojelac* Appeal Judgement, para. 185; *Prosecutor v. Vasiljević,* IT-98-32-A, "Judgement", Appeals Chamber, 25 February 2004, ("*Vasiljević* Appeal Judgement"), para. 113; *Nahimana v. Prosecutor*, ICTR-99-52-A, "Judgement", Appeals Chamber, 28 November 2007, ("*Nahimana* Appeal Judgement"), para. 985; *Prosecutor v. Nyiramasuhuko et al.*, ICTR-98-42-T, "Judgement and Sentence", Trial Chamber, 24 June 2011, ("*Nyiramasuhuko* Trial Judgement"), para. 6096; *Bagosora* Trial Judgement and Sentence, para. 2208; *Prosecutor v. Bikindi,* ICTR-01-72-T, "Judgement", Trial Chamber, 2 December 2008, ("*Bikindi* Trial Judgement"), para. 391. The Supreme Court Chamber notes that two Trial Chambers in the ICTY and one Trial Chamber in the ICTR also found that the *mens rea* for persecution requires evidence that the deprivation of rights must "have as its aim the removal of those persons from the society in which they live alongside the perpetrators, or eventually even from humanity itself." *Kupreškić* Trial Judgement, para. 634. *See also Kordić and Čerkez* Trial Judgement, para. 214; *Prosecutor v. Ruggiu*, ICTR-97-32-I, "Judgement and Sentence", Trial Chamber, 1 June 2000, ("*Ruggiu* Trial Judgement"), para. 22. However, other ICTY and ICTR Trial Chambers and Appeals Chambers did not adopt this requirement. Furthermore, the Supreme Court Chamber finds that while this became the ultimate goal of the Nazi plan of persecution of the Jews in particular, post-World War II tribunals did not seem to require evidence of this for each and every defendant vis-à-vis the specific persecutory acts for which they were convicted.
[515] Trial Judgement, paras 391-396.
[516] Trial Judgement, para. 392.

subjected to them [i.e., "discriminatory CPK policies"]."[517] This Chamber agrees that the "overwhelming inference" that is to be drawn from the Accused's conscious, willing and zealous implementation of the discriminatory CPK policy against its enemies, of which he was aware, demonstrates that the "Accused possessed the specific intent required for the offence of persecution."[518] The specific motive out of which he engaged in the persecution, that is, whether he internalised the goals of the CPK behind the persecutory policy or only wanted to prove himself as a loyal and efficient member of the Party,[519] is immaterial for finding that he possessed the requisite specific intent.

### *b. The Actus Reus Element*

241. Second, regarding the *actus reus* element of persecution as a crime against humanity, the Supreme Court Chamber observes that the content of this element in post-World War II jurisprudence is less clear. This is evidenced not only by the text and reasoning of that jurisprudence, but also by the gradual and controversial debate within the forum of the *ad hoc* Tribunals over several years. Therefore, in light of the principle of legality, this Chamber must carefully consider whether the Accused in this case could have reasonably foreseen by 1975 the articulation of the *actus reus* adopted by the Trial Chamber, which only became settled law in the *ad hoc* Tribunals by 2003.[520] As noted above, when expounding on the *actus reus* of persecution, the Trial Chamber determined that it constitutes an act or omission: 1) "which denies or infringes upon a fundamental right laid down in international customary or treaty law"; and 2) "discriminates in fact."[521]

#### *i. An Act or Omission that Denies or Infringes Upon a Fundamental Right under Customary International Law or Treaty Law*

242. Turning to the first prong of this element, which defines the universe of acts or omissions that could constitute persecution, the Supreme Court Chamber recalls that the IMT described the persecutory acts of the Nazi regime as follows:

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[517] Trial Judgement, para. 395.
[518] Trial Judgement, para. 396.
[519] Trial Judgement, Dissenting Opinion of Judge Silvia Cartwright, para. 399.
[520] In 2003, after several years of varying interpretations of the definition of persecution between the Trial Chambers, the ICTY Appeals Chamber definitively established the definition of persecution in the *Krnojelac* Appeal Judgment, para. 185.
[521] Trial Judgement, para. 376.

> The persecution of the Jews at the hands of the Nazi Government [...] is a record of consistent and systematic inhumanity on the greatest scale.[522]
>
> With the seizure of power, the persecution of the Jews was intensified. A series of discriminatory laws were passed, which limited the offices and professions permitted to Jews; and restrictions were placed on their family life and their rights of citizenship. By the autumn of 1938, the Nazi policy towards the Jews had reached the stage where it was directed towards the complete exclusion of Jews from German life. Pogroms were organized, which included the burning and demolishing of synagogues, the looting of Jewish businesses, and the arrest of prominent Jewish businessmen. A collective fine of one billion marks was imposed on the Jews, the seizure of Jewish assets was authorized, and the movement of Jews was restricted by regulations to certain specified districts and hours. The creation of ghettos was carried out on an extensive scale, and by an order of the Security Police, Jews were compelled to wear a yellow star to be worn on the breast and back.[523]
>
> The Nazi persecution of Jews in Germany before the war, severe and repressive as it was, cannot compare, however, with the policy pursued during the war in the occupied territories. *Originally the policy was similar to that which had been in force inside Germany.* Jews were required to register, were forced to live in ghettos, to wear the yellow star, and were used as slave laborers. In the summer of 1941, however, plans were made for the "final solution" of the Jewish question in all of Europe. This "final solution" meant the extermination of the Jews [...].[524]

243. The IMT noted that the Nazis employed different atrocious methods, including medical experimentation, to exterminate the Jews. For example, in the concentration camps, Jews fit for work were used as slave labourers, while Jews not fit for work were destroyed in gas chambers.[525] Many Jews also died from disease and starvation.[526] "Beating, starvation, torture, and killing were general" in the camps;[527] the clothes, money and valuables of the inmates were salvaged, and even the hair of the Jewish female inmates and the ashes of Jews who died were taken for economic use.[528] The Tribunal also noted that special missions were sent to occupied countries to organize massive deportation of Jews for "liquidation."[529] Adolf Eichmann, who was in charge of this programme, estimated that as a result of the anti-Jewish policy, a

[522] IMT Judgement, Vol. XXII, p. 491.
[523] IMT Judgement, Vol. XXII, p. 492.
[524] IMT Judgement, Vol. XXII, p. 493 (emphasis added).
[525] IMT Judgement, Vol. XXII, p. 495.
[526] IMT Judgement, Vol. XXII, p. 495.
[527] IMT Judgement, Vol. XXII, p. 495.
[528] IMT Judgement, Vol. XXII, p. 496.
[529] IMT Judgement, Vol. XXII, p. 496.

total of six million Jews were killed, four million of whom "were killed in the extermination institutions."[530]

244. This corpus of facts, along with information about other persecutions, underlay convictions of multiple defendants for persecution as a crime against humanity for discriminatory acts that amounted to violations of individual rights. These violations were progressively more serious in nature ranging from abrogation of civil, political, economic and social rights to deportation to slave labour to extermination.

245. The Supreme Court Chamber observes that in several instances, the IMT found that Nazi officials committed persecution through acts such as economic discrimination, which were not crimes against humanity in their own right. However, these acts were committed in the context of a broader persecutory State policy or plan and in the furtherance of other acts that do constitute crimes against humanity such as deportation, enslavement and ultimately extermination.

246. For example, Defendant Göring discussed with Nazi Economic Minister Walther Funk the banning of Jews from all business activities as part of the solution to the Jewish problem.[531] Defendant Funk himself "participated in the early Nazi program of economic discrimination against the Jews" and "proposed a decree providing for the banning of Jews from all business activities."[532] In a public speech he declared "that the elimination of the Jews from economic life followed logically their elimination from political life."[533] In addition, Defendant Göring fined the Jews one billion marks collectively as part of the ultimate goal of bringing "about a complete solution of the Jewish question."[534] Similarly, the "rabidly anti-Semitic" Defendant Frick was convicted in part for having "drafted, signed, and administered many laws designed to eliminate Jews from German life and economy,"[535] which "paved the way for the 'final solution.'"[536] He was also found responsible for

[530] IMT Judgement, Vol. XXII, p. 496.
[531] IMT Judgement, Vol. XXII, p. 551.
[532] IMT Judgement, Vol. XXII, p. 551.
[533] IMT Judgement, Vol. XXII, p. 551.
[534] IMT Judgement, Vol. XXII, pp. 492, 527.
[535] IMT Judgement, Vol. XXII, p. 545.
[536] IMT Judgement, Vol. XXII, p. 546.

prohibiting Jews from following various professions and for confiscating their property.[537] The IMT further found that as Reich Commissioner of The Netherlands, Defendant Seyss-Inquart issued a series of decrees to persecute the Jews, including "imposing economic discriminations against the Jews", "requiring their registration", "compelling them to reside in ghettos and to wear the star of David."[538]

247. Subsequent trials of German war criminals under the Control Council Law No. 10 before the NMTs recognised a similarly broad interpretation of persecutory acts, which covered numerous different acts beyond other crimes against humanity, including civil, political and socio-economic forms of persecution that were often imposed as part of a broader plan of total annihilation of a race.[539] For example, in the *Ministries* Case, the Tribunal found that:

> [t]he persecution of Jews went on steadily from step to step and finally to death in foul form. The Jews of Germany were first deprived of the rights of citizenship. They were then deprived of the right to teach, to practice professions, to obtain education, to engage in business enterprises; they were forbidden to marry except among themselves and those of their own religion; they were subject to arrest and confinement in concentration camps, to beatings, mutilation and torture; their property was confiscated; they were herded into ghettos; they were forced to emigrate and to buy leave to do so; they were deported to the East, where they were worked to exhaustion and death; they became slave laborers; and finally over six million were murdered.[540]

248. Furthermore, the NMT found that the "judicial persecution" that formed the core of the *Ministries* Case sufficed to convict Defendant Hans Lammers of crimes against humanity, reasoning that:

> [i]t was by means of this corruption of the courts of justice that Jews and other enemies and opponents of national socialism were deprived of the ordinary and commonly recognized rights to fair trial and received sentences, including that of death, shockingly disproportionate to the offenses committed.[541]

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[537] IMT Judgement, Vol. XXII, pp. 545-546.
[538] IMT Judgement, Vol. XXII, p. 576.
[539] *See, e.g. Justice* Case, Vol. III, p. 1063; *RuSHA* Case, Vol. V, p. 152; Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law*, pp. 245-249.
[540] *Ministries* Case, Vol. XIV, p. 471.
[541] *Ministries* Case, Vol. XIV, p. 604.

249. Similarly, the Supreme Court Chamber recalls that in the *Justice* Case, German judges were convicted of persecution of Poles and Jews as a crime against humanity under charges of discriminatory application of the law.[542] The Tribunal first examined the national plan or programme for racial persecution.[543] The Tribunal noted that, "[f]undamentally, the program was one for the actual extermination of Jews and Poles, either by means of killing or by confinement in concentration camps."[544] In the meantime, the Tribunal noted that "lesser forms of racial persecution" systematically practiced by governmental authority also constituted an integral part of the general policy or programme.[545] These forms included: exclusion of Jews from the legal profession; prohibition of intermarriage between Jews and persons of German blood; severe punishment for sexual intercourse between Jews and German nationals; exclusion of Jews from public office, "from educational institutions, and from many business enterprises"; and confiscation of the property of Jews.[546] With regard to the enforcement and application of the discriminatory laws against the Jews, the Tribunal noted that:

> [t]he law against Poles and Jews [...] was rigorously enforced. Poles and Jews convicted of specific crimes were subjected to different types of punishment from that imposed upon Germans who had committed the same crimes. Their rights as defendants in court were severely circumscribed. Courts were empowered to impose death sentences on Poles and Jews even where such punishment was not prescribed by law, if the evidence showed "particularly objectionable motives." And, finally, the police were given *carte blanche* to punish all "criminal" acts committed by Jews without any employment of the judicial process.[547]

250. In other instances, the IMT convicted Defendants for persecutory acts that *did* constitute other underlying crimes against humanity, such as murder, extermination and deportation. For example, Defendant Von Ribbentrop "played an important part in Hitler's 'final solution' of the Jewish question."[548] He ordered the German diplomatic representatives to "Axis satellites to hasten the deportation of Jews to the East."[549] Similarly, with respect to Defendant Rosenberg, the Tribunal found that:

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[542] *Justice* Case, Vol. III, p. 1063.
[543] *Justice* Case, Vol. III, p. 1063.
[544] *Justice* Case, Vol. III, p. 1063.
[545] *Justice* Case, Vol. III, p. 1063.
[546] *Justice* Case, Vol. III, pp. 1063-1064.
[547] *Justice* Case, Vol. III, p. 1064.
[548] IMT Judgement, Vol. I, p. 287.
[549] IMT Judgement, Vol. I, p. 287.

> [h]is subordinates engaged in mass killings of Jews, and his civil administrators in the East considered that cleansing the Eastern Occupied Territories of Jews was necessary. In December 1941, he made the suggestion to Hitler that in a case of shooting 100 hostages, Jews only be used.[550]

251. Likewise, Defendant Bormann was "extremely active in the persecution of the Jews," and advocated the use of "ruthless force" to secure "the permanent elimination of Jews."[551] His persecutory acts included participating in mass deportation of the Jewish people from Vienna.[552] Defendant Frank, the German Governor-General of Poland, was found guilty for "the persecution of the Jews [which] was immediately begun" when he assumed control of Poland.[553] In its Judgement, the IMT noted that Frank's persecution depleted the Jewish population of Poland from between two and a half million to three and a half million when he assumed office, to 100,000 by the beginning of 1944.[554] The IMT also found that he economically exploited the Poles to such an extent that they starved and "epidemics were widespread."[555] The Tribunal similarly found that Defendant Seyss-Inquart "advocated the persecution of the Jews"[556] and as Reich Commissioner of the Netherlands, he enabled the "mass deportation of almost 120,000 of Holland's 140,000 Jews to Auschwitz and the 'final solution.'"[557]

252. Trials before the NMTs likewise recognised persecutory acts to encompass other crimes against humanity, such as murder, extermination and enslavement. In the *Justice* Case, Defendant Rothaug was convicted for, among other things, adjudicating a case in which the Defendant was condemned and executed merely because he was Jewish.[558] Similarly, in the *Ministries* Case, the IMT found that Defendant Richard Walther Darré knew of the plans to "unlawfully deprive Jews and Poles of their land and reduce them to serfdom"[559] as well as relegate them to slave labour, and was a

[550] IMT Judgement, Vol. I, pp. 295-296.
[551] IMT Judgement, Vol. XXII, p. 586.
[552] IMT Judgement, Vol. XXII, p. 586.
[553] IMT Judgement, Vol. XXII, pp. 542-543.
[554] IMT Judgement, Vol. XXII, p. 543.
[555] IMT Judgement, Vol. XXII, p. 542.
[556] IMT Judgement, Vol. XXII, p. 575.
[557] IMT Judgement, Vol. XXII, p. 576.
[558] *Justice* Case, Vol. III, p. 1155.
[559] *Ministries* Case, Vol. XIV, p. 563.

conscious and willing participant in the plans by assuming a leading position in the agencies carrying out these plans.[560] Meanwhile, Defendant Otto Dietrich was found guilty for participating in persecution of the Jews by approving of press directives calling for their annihilation.[561]

253. The Supreme Court Chamber considers that this breadth of treatment of the *actus reus* of persecution as a crime against humanity is particularly noteworthy in two respects. First, the post-World War II jurisprudence speaks to the wide variety of underlying acts that could constitute persecution as a crime against humanity.[562] These include other international crimes, such as other underlying crimes against humanity,[563] or war crimes[564] already found in the IMT Charter and Control Council Law No. 10. They also include acts not expressly listed in those instruments, as long as they meet the other requirements under the definition of persecution.

254. Second, the other acts not found in the instruments constituted a broad range of breaches of individual rights including rights to property, a fair trial, equal

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[560] *Ministries* Case, Vol. XIV, pp. 563-564.
[561] *Ministries* Case, Vol. XIV, pp. 575-576.
[562] Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law*, pp. 245-249.
[563] *See, e.g.* reasoning on this issue in the *Kupreškić* Trial Judgement, para. 594:
> [w]ith regard to the question of whether persecution can include acts laid out in the other subheadings of Article 5, and particularly the crimes of murder and deportation, the Trial Chamber notes that there are numerous examples of convictions for the crime of persecution arising from the Second World War. The IMT in its findings on persecution included several of the crimes that now would fall under other subheadings of Article 5. These acts included mass murder of the Jews by the *Einsatzgruppen* and the *SD*, and the extermination, beatings, torture and killings which were widespread in the concentration camps. Similarly, the judgements delivered pursuant to Control Council Law No. 10 included crimes such as murder, extermination, enslavement, deportation, imprisonment and torture in their findings on the persecution of Jews and other groups during the Nazi era. Thus the Military Tribunals sitting at Nuremberg found that persecution could include those crimes that would be covered by the other subheadings of Article 5 of the Statute.

[564] *See, e.g.* the analysis on this point in the *Tadić* Trial Judgement, paras 700-701:
> [a]s pointed out by a United States Military Tribunal in the *Justice* case, the definition of crimes against humanity in Control Council Law No. 10 prohibited "not only war crimes, but also acts not included in the preceding definition of war crimes". The commentary to this case states that "it is clear that war crimes may also constitute crimes against humanity; the same offences may amount to both types of crime." This is also the approach followed by the Nürnberg Tribunal. Indictment Number 1 contained charges of both war crimes and crimes against humanity and included the statement that "[t]he prosecution will rely upon the facts pleaded under Count Three [war crimes] as also constituting Crimes Against Humanity."[…] Similar statements occur in other cases tried on the basis of Control Council Law No. 10, for example, the *Trial of Otto Ohlendorf and Others* ("*Einsatzgruppen* case") and the *Pohl* case" (emphasis added; citations omitted).

protection of the law, citizenship, work, education, marriage, privacy and freedom of movement. That said, "not every denial of a human right [...] constitute[d] a crime against humanity"[565] under post-World War II jurisprudence. Rather, as laid out in the *Flick* Case, and later reiterated in the *I.G. Farben* Case, the doctrine of *ejusdem generis* was used to interpret the charters of the tribunals to set "clearly defined limits on the types of acts which qualify as persecution."[566] This doctrine requires that, at a minimum, acts of persecution as a crime against humanity must be equal in gravity or severity to other enumerated crimes against humanity.[567] As reasoned in the *Flick* Case with respect to taking of Jewish industrial property:

> Not even under a proper construction of the section of [Control Council] Law No. 10 relating to crimes against humanity, do the facts [compulsory taking of Jewish industrial property] warrant conviction. The "atrocities and offenses" listed therein, "murder, extermination," etc., are all offenses against the person. Property is not mentioned. Under the doctrine of *ejusdem generis* the catch-all words "other persecutions" must be deemed to include only such as affect the life and liberty of the oppressed peoples. Compulsory taking of industrial property, however reprehensible, is not in that category.[568]

255. Consequently, the *Kupreškić* Trial Chamber held that the only conclusion that may be drawn from this use of the doctrine of *ejusdem generis* is that "only gross or blatant denials of fundamental human rights" affecting individual life and liberty may be deemed to rise to the level of gravity or severity of other enumerated crimes against humanity.[569]

256. The Supreme Court Chamber notes that the post-World War II tribunals never considered persecutory acts in isolation. Rather, the tribunals considered them in the context of furthering a larger persecutory campaign, the ultimate goal and end result of which was the gross violation of fundamental rights, often constituting other underlying crimes against humanity. The tribunals assessed the acts as part of a chain of events, as a series of acts the consequences of which were extremely grave. Similarly, the tribunals analysed them in connection with other serious violations of human rights for the role they played in being the means by which violation of

[565] *Kupreškić* Trial Judgement, para. 618.
[566] *Kupreškić* Trial Judgement, para. 618 (emphasis removed).
[567] *Kupreškić* Trial Judgement, para. 619.
[568] *Flick* Case, p. 1215. *See also I.G. Farben* Case, pp. 1129-1130.
[569] *Kupreškić* Trial Judgement, para. 620 (emphasis removed).

fundamental rights was made possible. Furthermore, the tribunals did not consider persecutory acts individually, but rather examined them as a whole in conjunction with one another, looking at their cumulative effect on an entire population.

257. In sum, the Supreme Court Chamber generally agrees with the Trial Chamber that the first prong of the *actus reus* of persecution is that it constitutes an act or omission that denies or infringes upon a fundamental right laid down in customary international law or treaty. That said, the Supreme Court Chamber emphasises that under post-World War II precedent, the crux of the analysis lies not in determining whether a specific persecutory act or omission *itself* breaches a human right that is fundamental in nature. Rather, it lies in determining whether or not the persecutory acts or omissions, when considered cumulatively and in context, result in a gross or blatant breach of fundamental rights such that it is *equal in gravity or severity to other underlying crimes against humanity*. Indeed:

> it is the context of the individual acts and the necessity that the acts, as well as the violations occasioned by them be examined collectively that determines the gravity of the acts as a whole, and that it is this gravity which determines whether or not the rights violated are therefore "fundamental" for the purposes of the crime of persecution.[570]

258. Of course, as evidenced by the post-World War II jurisprudence referenced previously, although persecution often constitutes a series of acts, a single act or omission may be grave or serious enough to be persecution where it results in the gross or blatant denial of a fundamental human right under treaty or customary international law.[571] Similarly, acts or omissions that constitute other international crimes, particularly other underlying crimes against humanity, may also constitute persecution.[572]

259. To reiterate, in analysing the gravity or severity of the conduct, other factors that must be considered include whether the act or omission was committed in the context of, or as part of a chain of events in a larger persecutory campaign the

[570] *Prosecutor v. Brđanin*, IT-99-36-T, "Judgement", Trial Chamber, 1 September 2005, ("*Brđanin* Trial Judgement"), fn. 2585.
[571] *Kordić and Čerkez* Appeal Judgement, para. 102, quoting *Prosecutor v. Blaškić*, IT-95-14-A, "Judgement", Appeals Chamber, 29 July 2004, ("*Blaškić* Appeal Judgement"), para. 135, quoting *Vasiljević* Appeal Judgement, para. 113.
[572] Trial Judgement, para. 378.

ultimate goal and end result of which was extremely grave, resulting in gross violation of fundamental rights, often other underlying crimes against humanity. In addition, it is important to note the cumulative effect of the persecutory act or omission when committed in conjunction with other similar acts or omissions. Finally, it must be considered that whether an act or omission rises to the level of persecution is not only "a function of its apparent cruelty, but of the discriminatory effect the act seeks to encourage within the general populace"[573] against a targeted group. In other words, the fact that an act or omission is targeted at a particular individual merely because of that individual's membership in a particular group intensifies its gravity or severity.

260. The Supreme Court Chamber observes that in the *ad hoc* Tribunals' jurisprudence, Chambers consistently have held that the crime of persecution may consist of other underlying crimes against humanity,[574] crimes listed elsewhere in the Tribunals' statutes,[575] or other acts not found in those statutes.[576] They also

[573] Fausto Pocar, "Persecution as a Crime Under International Criminal Law," *Journal of National Security Law & Policy,* Vol. 2 (2008), p. 360 (paraphrasing *Blaškić* Trial Judgement, para. 227).
[574] *See, e.g. Prosecutor v. Brđanin*, IT-99-36-A, "Judgement", Appeal Chamber, 3 April 2007, ("*Brđanin* Appeal Judgement"), para. 296; *Kordić and Čerkez* Appeal Judgement, para. 106; *Blaškić* Appeal Judgement, para. 143; *Krnojelac* Appeal Judgement, para. 219; *Prosecutor v. Perišić*, IT-04-81-T, "Judgement", Trial Chamber, 6 September 2011, ("*Perišić* Trial Judgement"), para. 119; *Prosecutor v. Gotovina et al.*, IT-06-90-T, "Judgement", Trial Chamber, 15 April 2011, ("*Gotovina* Trial Judgement"), para. 1803; *Prosecutor v. Đorđević*, IT-05-87/1-T, "Judgement", Trial Chamber, 23 February 2011, ("*Đorđević* Trial Judgement"), para. 1757; *Prosecutor v. Popović*, IT-05-88-T, "Judgement", Trial Chamber, 10 June 2010, ("*Popović* Trial Judgement"), para. 966; *Prosecutor v. Lukić and Lukić,* IT-98-32/1-T, "Judgement", Trial Chamber, 20 July 2009, ("*Lukić and Lukić* Trial Judgement"), para. 993; *Prosecutor v. Milutinović et al*, IT-05-87-T, "Judgement", Trial Chamber, 26 February 2009, ("*Milutinović* Trial Judgement"), paras 178-179; *Prosecutor v. Martić,* IT-95-11-T, "Judgement", Trial Chamber, 12 June 2007, ("*Martić* Trial Judgement"), para. 115; *Prosecutor v. Krajišnik*, IT-00-39-T, "Judgement", Trial Chamber, 27 September 2006, ("*Krajišnik* Trial Judgement"), para. 735; *Blagojević and Jokić* Trial Judgement, para. 580; *Prosecutor v. Simić et al.*, IT-95-9-T, "Judgement", Trial Chamber, 17 October 2003, ("*Simić* Trial Judgement"), para. 48; *Stakić* Trial Judgement, para. 735; *Prosecutor v. Naletilić and Martinović*, IT-98-34-T, "Judgement", Trial Chamber, 31 March 2003, ("*Naletilić and Martinović* Trial Judgement"), para. 635; *Prosecutor v. Vasiljević,* IT-98-32-T, "Judgement", Trial Chamber, 29 November 2009, ("*Vasiljević* Trial Judgement"), para. 246; *Krnojelac* Trial Judgement, para. 433; *Prosecutor v. Kvočka et al.*, IT-98-30/1-T, "Judgement", Trial Chamber, 2 November 2001, ("*Kvočka* Trial Judgement"), paras 185-186; *Kupreškić* Trial Judgement, paras 594, 600, 604-605, 615, 617; *Nyiramasuhuko* Trial Judgement, paras 6098-6099. *But see Tadić* Trial Judgement, para. 702 (in which the Chamber found that it was the intent of the Security Council for the ICTY Statute to be interpreted such that acts that were crimes against humanity under other sections of Article 5 would not be included in the consideration of persecution as a crime against humanity). This finding was held to be in error by the *Tadić* Appeals Chamber and has not been followed in subsequent ICTY jurisprudence. *Tadić* Appeal Judgement, paras 281, 305.
[575] *See, e.g. Brđanin* Appeal Judgement, para. 296; *Kronjelac* Appeal Judgement, para. 219; *Perišić* Trial Judgement, para. 119; *Gotovina* Trial Judgement, para. 1803; *Đorđević* Trial Judgement, para. 1757; *Popović* Trial Judgement, para. 966; *Lukić and Lukić* Trial Judgement, para. 993; *Milutinović* Trial Judgement, para. 179; *Martić* Trial Judgement, para. 115; *Krajišnik* Trial Judgement, para. 735; *Simić* Trial Judgement, para. 48; *Stakić* Trial Judgement, para. 735; *Naletilić and Martinović* Trial

consistently have found that these acts need to be equal in severity and gravity to other underlying crimes against humanity.[577] Where they have differed somewhat is with respect to what sort of conduct rises to the requisite level of gravity and severity. A few of the ICTY Chambers have found that only other international crimes should fit into this category of conduct.[578] Meanwhile, the *Stakić* Trial Chamber held that conduct resulting in the breach of *any* human right under treaty or customary international law may constitute persecution.[579] Still another Chamber, the *Krnojelac* Trial Chamber, determined that there is no separate requirement of a gross or blatant denial of a fundamental human right; rather, what is important is for a persecutory act or omission to rise to the requisite level of gravity or seriousness as other crimes against humanity.[580] However, that Chamber then concluded that only "gross or blatant denial of fundamental human rights" would meet the gravity test.[581]

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Judgement, para. 635; *Vasiljević* Trial Judgement, para. 246; *Krnojelac* Trial Judgement, para. 433; *Kvočka* Trial Judgement, paras 185-186; *Kordić and Čerkez* Trial Judgement, para. 198; *Kupreškić* Trial Judgement, para. 617; *Tadić* Trial Judgement, paras 699-700, 702; *Prosecutor v. Serugendo*, ICTR-2005-84-I, "Judgement and Sentence", Trial Chamber, 12 June 2006, ("*Serugendo* Trial Judgement"), paras 4, 9, 30, 83.

[576] *See, e.g. Brđanin* Appeal Judgement, para. 296; *Kvočka* Appeal Judgment, paras 321-323; *Kupreškić* Trial Judgement, paras 581, 614-615, 617; *Tadić* Trial Judgement, paras 703-710; *Kordić and Čerkez* Trial Judgement, paras 193-194; *Krnojelac* Trial Judgement, para. 433; *Vasiljević* Trial Judgement, para. 246; *Naletilić and Martinović* Trial Judgement, para. 635; *Stakić* Trial Judgement, para. 735; *Simić* Trial Judgement, para. 48; *Krajišnik* Trial Judgement, para. 735; *Martić* Trial Judgement, para. 115; *Milutinović* Trial Judgement, para. 179; *Lukić and Lukić* Trial Judgement, para. 993; *Popović* Trial Judgement, para. 966; *Đorđević* Trial Judgement, para. 1757; *Gotovina* Trial Judgement, para. 1803; *Perišić* Trial Judgement, para. 119; *Bikindi* Trial Judgement, para. 392.

[577] *See, e.g. Brđanin* Appeal Judgement, para. 296; *Prosecutor v. Simić et al.*, IT-95-9-A, "Judgement", Appeals Chamber, 28 November 2006, ("*Simić* Appeals Judgment"), para. 177; *Prosecutor v. Naletilić and Martinović*, IT-98-34-A, "Judgement", Appeals Chamber, 3 May 2006, ("*Naletilić and Martinović* Appeal Judgement"), para. 574; *Kordić and Čerkez* Appeal Judgement, paras 102, 105; *Blaškić* Appeal Judgement, para. 135; *Kvočka* Appeal Judgement, paras 321-325; *Krnojelac* Appeal Judgement, para. 221; *Perišić* Trial Judgement, para. 119; *Gotovina* Trial Judgement, para. 1803; *Đorđević* Trial Judgement, para. 1757; *Popović* Trial Judgement, para. 966; *Lukić and Lukić* Trial Judgement, para. 993; *Milutinović* Trial Judgement, paras 178-179; *Martić* Trial Judgement, para. 116; *Krajišnik* Trial Judgement, para. 735; *Blagojević and Jokić* Trial Judgement, para. 580; *Simić* Trial Judgement, para. 48; *Stakić* Trial Judgement, para. 736; *Vasiljević* Trial Judgement, para. 247; *Krnojelac* Trial Judgement, para. 434; *Kupreškić* Trial Judgement, para. 619; *Nahimana* Appeal Judgement, para. 987; *Ruggiu* Trial Judgement, para. 21; *Prosecutor v. Nahimana et al.*, ICTR-99-52-T, "Judgement", Trial Chamber, 3 December 2003, ("*Nahimana* Trial Judgement"), para. 1072; *Bikindi* Trial Judgement, paras 392-394; *Nyiramasuhuko* Trial Judgement, para. 6096.

[578] *Kordić and Čerkez* Appeal Judgement, para. 103; *Blaškić* Appeal Judgement, para. 200; *Kordić and Čerkez* Trial Judgement, paras 192, 209-210.

[579] *Stakić* Trial Judgement, para. 773.

[580] *Krnojelac* Trial Judgement, para. 434, fn. 1303.

[581] *Krnojelac* Trial Judgement, para. 434.

261. While it is now settled that persecutory acts need not be international crimes[582] but simply must result in breaches of fundamental human rights under treaty or customary international law in order to rise to the requisite level of gravity and severity,[583] the Supreme Court Chamber finds that the debate among a handful of chambers in the *ad hoc* Tribunals preceding this result does not violate the principle of legality in this case. As noted above, by 1975, it was clear under post-World War II case law that persecution may consist of "other acts" outside of the Tribunals' charters in addition to other underlying crimes against humanity or war crimes as long as under the doctrine of *ejusdem generis* the conduct rose to the level of gravity and severity of other underlying crimes against humanity, resulting in breaches to fundamental human rights. This principle, first applied after World War II in the *Flick* Case, prevents the category of persecutory acts under the ECCC Law from being too broad or vague. It also sets specific limits on the types of acts that may qualify as persecution. The debate in the *ad hoc* Tribunals has merely been about interpretation of this well-established gravity and severity test as Chambers have sought to define the contours of the category of persecutory acts under the complex facts of their specific cases.

262. In conclusion, the Supreme Court Chamber affirms the first prong of the Trial Chamber's definition of the *actus reus* of persecution as a crime against humanity in light of these clarifications. Furthermore, in finding that this part of the *actus reus* was fulfilled under the facts of this case because the underlying acts of persecution for which the Accused was found responsible are themselves discrete crimes against

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[582] *See, e.g. Nahimana* Appeal Judgement, para. 985*; Brđanin* Appeal Judgement, para. 296; *Kvočka* Appeal Judgement, paras 323, 325; *Naletilić and Martinović* Appeal Judgement, para. 574.

[583] *Simić* Appeal Judgement, para. 177; *Stakić* Appeal Judgement, para. 327; *Deronjić* Appeal Judgement, para. 109; *Kvočka* Appeal Judgement, paras 320-321; *Vasiljević* Appeal Judgement, para. 113; *Krnojelac* Appeal Judgement, paras 185, 221; *Perišić* Trial Judgement, paras 118-119; *Gotovina* Trial Judgement, paras 1802-1803; *Đorđević* Trial Judgement, paras 1755, 1757; *Popović* Trial Judgement, paras 964, 966; *Lukić and Lukić* Trial Judgement, paras 992-993; *Milutinović* Trial Judgement, paras 175, 178-179; *Bikindi* Trial Judgement, paras 391, 393, 435; *Martić* Trial Judgement, paras 113, 116; *Krajišnik* Trial Judgement, paras 734-735; *Blagojević and Jokić* Trial Judgement, paras 579-580; *Brđanin* Trial Judgement, paras 992, 995; *Simić* Trial Judgement, paras 47-48; *Stakić* Trial Judgement, paras 732-733, 736; *Naletilić and Martinović* Trial Judgement, paras 634-635; *Vasiljević* Trial Judgement, paras 244, 247; *Krnojelac* Trial Judgement, paras 431, 433; *Kvočka* Trial Judgement, paras 184-185; *Kupreškić* Trial Judgement, paras 616, 619-621, 627; *Nahimana* Appeal Judgement, paras 985-987; *Nyiramasuhuko* Trial Judgement, para. 6096; *Bagosora* Trial Judgement and Sentence, para. 2208; *Serugendo* Trial Judgement, para. 10; *Nahimana* Trial Judgement, para. 1072; *Ruggiu* Trial Judgement, paras 21-22.

humanity,[584] and therefore are clearly acts of significant gravity which result in the violation of fundamental rights, the Trial Chamber did not err.[585]

*ii. An Act or Omission that Discriminates in Fact*

263. Turning to the second prong of the Trial Chamber's definition of the *actus reus*, namely, that the persecutory act or omission must "discriminate in fact" such that there are actual discriminatory consequences, the Supreme Court Chamber finds that the factual findings in post-World War II jurisprudence, as surveyed in part above, support such a requirement. The Chamber is unable to identify any case before the IMT or NMTs in which defendants were convicted for persecution on the basis of the existence of specific discriminatory intent alone. These tribunals always pointed to acts by the defendants that were clearly aimed at individuals who were members of a targeted group, resulting in the intended discrimination. As noted by one commentator, citing by way of example to the *Ministries* Case, persecution was used to describe *discriminatory acts* or the "*treatment suffered* by the *Jews and other groups* specifically targeted by the Nazis."[586]

264. In line with this precedent, the requirement of discrimination in fact was articulated by the Trial Chamber in the ICTY's very first case, the *Tadić* case,[587] and was explicitly noted or applied by Trial Chambers in subsequent cases,[588] until the *Kvočka* Trial Chamber distinctly rejected this aspect of the *actus reus* in contrast to earlier jurisprudence.[589] The *Kvočka* holding was due to the reality that the ICTY Statute does not explicitly state whether an act committed on political, racial or religious grounds must actually result in discrimination against an individual of a targeted group. The Trial Chamber reasoned that under the ICTY Statute, "discriminatory grounds form the requisite criteria, not membership in a particular

[584] The underlying acts of persecution for which the Accused was found responsible are murder, extermination, enslavement, imprisonment, torture, and other inhumane acts as crimes against humanity.
[585] Trial Judgement, paras 280, 381, 677.
[586] Roberts, "Striving for Definition: The Law of Persecution from Its Origins to the ICTY", pp. 264, 266 (emphasis added).
[587] *Tadić* Trial Judgement, para. 715.
[588] *See, e.g. Prosecutor v. Krstić*, IT-98-33-T, "Judgement", Trial Chamber, 2 August 2001, ("*Krstić* Trial Judgement"), paras 534-535; *Kordić and Čerkez* Trial Judgement, para. 195; *Kupreškić* Trial Judgement, para. 621.
[589] *Kvoćka* Trial Judgement, para. 195.

group," implying that "discriminatory grounds" applies to the *mens rea* alone and not the *actus reus*.[590]

265. The *Krnojelac* Trial Chamber responded by finding that such an approach to statutory interpretation would result in individuals being convicted for persecution where no one was actually persecuted and that "the relevant discriminatory intent necessarily assumes that the victim is a member of a political, racial or religious group."[591] Indeed, often, discriminatory intent is proved in part on the basis of the victim belonging to a particular group. Furthermore, the Trial Chamber reasoned that the *Kvoćka* Trial Chamber approach, by only requiring discriminatory intent and not a discriminatory act, blurs the clear distinction between persecution and other crimes against humanity first established in the IMT Charter. In addition, it is not in line with the object and purpose of persecution as a crime against humanity, which is specifically to protect "members of political, racial and religious groups from discrimination on the basis of belonging to one of these groups."[592]

266. Subsequent to the *Krnojelac* Trial Judgement's rejection of the *Kvoćka* Trial Chamber's approach, the *Krnojelac* Appeals Chamber affirmed the requirement that the *actus reus* for persecution requires discrimination in fact,[593] and ICTY and ICTR jurisprudence has followed this holding since.[594]

267. On the basis of the foregoing, the Supreme Court Chamber concludes that by 1975, "discrimination in fact" or the required demonstration of actual discriminatory consequences was indeed a required part of the *actus reus* of persecution as

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[590] *Kvoćka* Trial Judgement, para. 197.
[591] *Krnojelac* Trial Judgement, para. 432, fn. 1294. *See also Blaškić* Trial Judgement, para. 235.
[592] *Krnojelac* Trial Judgement, para. 432, fn. 1293. *See also Blaškić* Trial Judgement, para. 235 (stating that "the perpetrator of acts of persecution does not initially target the individual but rather membership in a specific racial, religious or political group").
[593] *Krnojelac* Appeal Judgement, para. 185.
[594] *See, e.g. Simić* Appeal Judgement, para. 177; *Stakić* Appeal Judgement, para. 327; *Deronjić* Appeal Judgement, para. 109; *Kvočka* Appeal Judgement, para. 320; *Kordić and Čerkez* Appeal Judgement, paras 101-102; *Blaškić* Appeal Judgement, paras 131, 135; *Vasiljević* Appeal Judgement, para. 113; *Perišić* Trial Judgement, para. 118; *Gotovina* Trial Judgement, para. 1802; *Đorđević* Trial Judgement, paras 1755, 1758; *Popović* Trial Judgement, para. 964; *Lukić and Lukić* Trial Judgement, paras 992-993; *Milutinović* Trial Judgement, paras 175, 177; *Martić* Trial Judgement, paras 113, 117; *Krajišnik* Trial Judgement, para. 734; *Blagojević and Jokić* Trial Judgement, para. 579; *Naletilić and Martinović* Trial Judgement, para. 636; *Nahimana* Appeal Judgement, para. 985; *Bikindi* Trial Judgement, paras 391, 435; *Bagosora* Trial Judgement and Sentence, para. 2208; *Nyiramasuhuko* Trial Judgement, para. 6096.

highlighted by the Trial Chamber in this case. Not only do the factual findings for the convictions reached for persecution in the post-World War II jurisprudence support this holding, but so does the largely consistent *ad hoc* Tribunals' jurisprudence subsequent to the ECCC's temporal jurisdiction. While one ICTY Trial Chamber clearly departed from such a requirement, it was overruled by the Appeals Chamber as the final arbiter of the law. Thus, the Supreme Court Chamber does not find that this instance of disagreement calls into question its holding under the principle of legality.

268. In addition, the Chamber notes that this conclusion is in line with the 1948 Genocide Convention's definition of genocide, which belongs to the same *genus* as persecution in the sense that perpetrators of genocide target their victims on the basis of group membership.[595] Under that definition, the *actus reus* of genocide must *in fact* target a member or members of a group.[596] "While it is clear that the necessary intent for genocide is more extreme than that required for persecution [with specific intent to destroy a group], it is not at all clear why genocide would necessitate a result corresponding to the [discriminatory intent], while persecution would not."[597]

269. Finally, the Supreme Court Chamber acknowledges that *ad hoc* Tribunal jurisprudence has lacked some internal cohesion with respect to *interpretation* and application of the "discriminatory in fact" requirement as opposed to its existence in law. Some debate has centred around whether there can be discrimination in fact

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[595] *Kupreškić* Trial Judgement, para. 636 (stating that "[b]oth persecution and genocide are crimes perpetrated against persons that belong to a particular group and who are targeted because of such belonging"); *Prosecutor v. Jelišić*, IT-95-10-T, "Judgement", Trial Chamber, 14 December 1999, ("*Jelišić* Trial Chamber"), para. 68 (finding that "genocide is closely related to the crime of persecution" because the perpetrator "also chooses his victims because they belong to a specific human group").

[596] 1948 Genocide Convention, Art. II, which stipulates that:

> Genocide means any of the following acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such:
> (a) killing members of the group;
> (b) causing serious bodily or mental harm to members of the group;
> (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
> (d) imposing measures unintended to prevent births within the group;
> (e) forcibly transferring children of the group to another group.

[597] Roberts, "Striving for Definition: The Law of Persecution from its Origins to the ICTY", p. 275.

when the perpetrator is objectively mistaken as to the victim's membership in the targeted group.[598]

270. Again, the Supreme Court Chamber does not consider this debate to call into question its affirmation of the "discrimination in fact" requirement within the *actus reus* of persecution by 1975 under the principle of legality. The incoherence in the *ad hoc* Tribunals' jurisprudence does not challenge that discrimination in fact is legally required; rather, it calls into question what circumstances actually constitute discrimination in fact. As such, the debate has been with respect to clarifying the substance and contours of this established requirement in the face of applying it to the factual circumstances of a given case.

271. Consequently, the Supreme Court Chamber finds that the Trial Chamber did not err when it adopted the discrimination in fact requirement under the *actus reus* for persecution.

272. Furthermore, with respect to the interpretation of the discrimination in fact requirement, this Chamber agrees with the Trial Chamber that an act or omission is discriminatory in fact where "a victim is targeted because of the victim's membership in a group *defined by the perpetrator* on specific grounds, namely on political, racial or religious basis."[599] With regard to political grounds specifically, the perpetrator may define the targeted victims based on a subjective assessment as to what group or groups pose a political threat or danger. The group or groups persecuted on political grounds may include various categories of persons, such as: officials and political activists; persons of certain opinions, convictions and beliefs; persons of certain ethnicity or nationality; or persons representing certain social strata ("intelligentsia",

[598] *See, e.g. Krnojelac* Trial Judgement, para. 432, fn. 1293 (contending that if the perpetrator mistakenly identifies a victim as part of the targeted group "to argue that this amounts nonetheless to persecution if done with a discriminatory intent needlessly extends the protection afforded by that crime to a person who is not a member of the listed group requiring protection in that instance"). *But see Krnojelac* Appeal Judgement, para. 185; *Milutinović* Trial Judgement, para. 177; *Martić* Trial Judgement, paras 117-118; *Blagojević and Jokić* Trial Judgement, paras 579, 583; *Brđanin* Trial Judgement, para. 993; *Stakić* Trial Judgement, paras 733-734; *Simić* Trial Judgement, para. 49; *Naletilić and Martinović* Trial Judgement, para. 636, fn. 1572 (noting that the perpetrator defines the targeted group and "[i]f a certain person is defined by the perpetrator as belonging to the targeted group, this definition thus becomes 'discriminatory in fact' for the victim as it may not be rebutted, even if such classification may be incorrect under objective criteria"); *Kvočka* Trial Judgement, para. 195.

[599] Trial Judgement, para. 377 (emphasis added).

clergy, or bourgeoisie, for example). Furthermore, the targeted political group or groups may be defined broadly by a perpetrator such that they are characterised in negative terms and include close affiliates or sympathisers as well as suspects.[600] In practice, acts against suspects, sympathizers and affiliates also have an impact on the primary targets of the persecution, adding to their overall oppression and isolation. As such, specific acts or omissions of the perpetrator committed against the suspects, sympathizers or affiliates remain acts or omissions committed against the targeted group or groups as whole.

273. Accordingly, the Supreme Court Chamber finds that the Trial Chamber did not err in finding under the discrimination in fact requirement that the targeted political groups in this case encapsulated "*all real or perceived political opponents [to the CPK], including their close relatives or affiliates*" as defined by the Party Centre.[601] The Supreme Court Chamber stresses, however, that under the facts of the case, the more accurate description of the targeted groups is "all political enemies as defined by the Party Centre,"[602] including their close relatives or affiliates; that is, emphasising that the CPK was focused not only on actual political activity or political convictions of the targeted group, but on its own designation of certain classes of persons who it considered to pose a political threat.[603]

274. In addition, the Supreme Court Chamber emphasizes that the requirement of discrimination in fact is connected to the requirement that the victim *actually belong* to a sufficiently *discernible* political, racial or religious group. This latter requirement is articulated in the jurisprudence that accepts the "discrimination in fact" approach and in the doctrine.[604] It has also been expressly included in the ICC Statute, which

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[600] *Simić* Trial Judgement, para. 49, fn. 89; *Stakić* Trial Judgement, paras 733-734; *Naletilić and Martinović* Trial Judgement, para. 636; *Krnojelac* Trial Judgement, para. 50; *Kvočka* Trial Judgement, para. 195, affirmed in *Kvočka* Appeal Judgement, para. 363; *Justice* Case, Vol. VI, p. 81, fn. 1.
[601] Trial Judgement, para. 390 (emphasis added).
[602] Trial Judgement, paras 382-388.
[603] Groups so defined encompassed the following classes of persons: officials and soldiers of the previous regime; intellectuals; students; diplomatic staff; foreigners, in particular, Vietnamese nationals; Buddhist monks; religious and other minorities; city dwellers. Trial Judgement, paras 383, 386-388.
[604] *Krnojelac* Trial Judgement, para. 432, fn. 1294 ("the relevant persecutory intent necessarily assumes that the victim is a member of a political, racial or religious group"); *Blaškić* Trial Judgement, para. 235 ( "the perpetrator of acts of persecution does not initially target the individual but rather membership in a specific racial, religious or political group"). *See also* M. Cherif Bassiouni, *Crimes against Humanity in International Criminal Law*, 2nd ed., p. 327 (proposing that victims are targeted

defines persecution as an act that is perpetrated against a person belonging to an "*identifiable* group or collectivity."[605]

275. Therefore, the Supreme Court Chamber does not agree with the Trial Chamber's statement, in reliance on the *Naletilić and Martinović* Trial Judgement, that, where "the perception of the perpetrator provides the basis of the discrimination in question, the [discriminatory] consequences are real for the victim even if the perpetrator's classification may be incorrect under objective criteria."[606] The Supreme Court accepts this statement only in so far as it means that it is the perpetrator that determines the criteria for targeting on political grounds. This Chamber rejects, however, the Trial Chamber's holding to the extent that it allows for persecutory intent alone to suffice for establishing the crime of persecution regardless of whether the victim is actually a member of a discernible targeted group.

276. Consequently, the Supreme Court holds that, consistent with the requirement that the persecutory act must discriminate in fact, and that "a victim is targeted because of the victim's membership in a group defined by the perpetrator on specific grounds, namely on political, racial or religious basis,"[607] the requisite persecutory consequences must occur for the group, in that denying the individual victim's fundamental right has an impact on the discrimination of the group as a whole. Conversely, where the act or omission undertaken with persecutory intent is committed against an individual who does not belong to the targeted group, the consequences of the act "are real for the victim" in the sense of the denial of the fundamental right, but not discriminatory in fact as is required for persecution.[608] Thus, this Chamber agrees with the position taken on this point by the ICTY Trial

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because of beliefs, views or membership in a given identifiable group or a category singled out by the perpetrator); Gerhard Werle, *Principles of International Criminal Law*, 1st ed., TMC Asser Press, 2005, p. 254 ("The material element requires the persecution of an identifiable group or community").

[605] ICC Statute, Art. 7(1)(h) (emphasis added). *See also* ICC Elements of Crime, Art. 7(1)(h), Element 2.

[606] Trial Judgement, para. 317, citing *Naletilić and Martinović* Trial Judgement, para. 636, fn. 1572.

[607] Trial Judgement, para. 377.

[608] Such acts discriminate, in a general sense, in as much as any crime or attack discriminates against those who have been subjected to it *vis-à-vis* those who are not.

Chamber in the *Krnojelac* Trial Judgement,[609] whose logic this Chamber finds persuasive over ICTY jurisprudence to the contrary.[610]

277. In sum, for the occurrence of persecution, it is necessary that the act or omission discriminates in fact and discriminates against a discernible group defined pursuant to given criteria. Conversely, there is no discrimination in fact where: 1) there is a mistake of fact by the perpetrator as to whether a victim actually belongs to the defined target group;[611] or 2) the perpetrator targets victims irrespective of whether they fall under the discriminatory criterion, in other words, where the targeting is *indiscriminate*.[612]

#### *c. Conclusion*

278. In conclusion, the Supreme Court Chamber finds that the Trial Chamber's articulation of the definition of persecution as a crime against humanity by 1975 under customary international law was not in error. That said, this Chamber finds that the Trial Chamber erred, in part, in its *interpretation* of the discrimination in fact requirement under the *actus reus* element of persecution.

### 3. Foreseeability and Accessibility of Persecution as a Crime Against Humanity

279. Having affirmed the Trial Chamber's definition of persecution as a crime against humanity under customary international law for the period of 1975-1979, the Supreme Court Chamber further assesses whether, as required by the principle of legality, persecution on political grounds as a criminal offense was sufficiently foreseeable to the Accused, and whether the law providing for the content of persecution was sufficiently accessible to the Accused at the relevant time.

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[609] *Krnojelac* Trial Judgement, para. 432, fn. 1293. *See also* Roberts, "Striving for Definition: The Law of Persecution from its Origins to the ICTY", pp. 272-274 (criticising the opposite approach by pointing out that where only "mistaken" victims were harmed, there is no ground to convict for persecution).
[610] Footnote 597 above.
[611] The SCC agrees here with the ICTY in the *Krnojelac* Trial Judgement, para. 432, fn. 1293. *See also* Roberts, "Striving for Definition: The Law of Persecution from its Origins to the ICTY", pp. 272-274 (criticising the opposite approach by pointing out that where only "mistaken" victims were harmed, there is no ground to convict for persecution and further discussing the lack of ICTY jurisdiction over an "attempted persecution").
[612] Such as, to a certain extent, in the present case, as discussed in the section that follows.

280. The Supreme Court Chamber notes that in light of the convictions reached in post-World War II jurisprudence at the IMT and NMT trials as well as before national courts prior to 1975, individual criminal responsibility for persecution on political grounds as a crime against humanity was clearly established under customary international law at the time of the Accused's criminal conduct. In addition, persecution on political grounds was codified in the IMT Charter,[613] IMTFE Charter,[614] Control Council Law No. 10,[615] and 1950 Nuremberg Principles.[616] Thus, it was sufficiently foreseeable to the Accused, as a member of Cambodia's governing authority, that he could be prosecuted for his persecutory acts or omissions from 1975-1979. Furthermore, the Chamber notes that although the Trial Chamber adopted the definition of persecution from the *ad hoc* Tribunals' jurisprudence, the elements of persecution as affirmed and clarified above were deduced from the reasoning and factual findings of the post-World War II tribunals that were part of customary international law applicable to Cambodia in 1975.[617] Therefore, the law defining the crime of persecution was sufficiently accessible to the Accused at the time of the alleged crimes.

#### 4. The Trial Chamber's Factual Findings on Persecution of S-21 Detainees

281. Finally, the Supreme Court Chamber turns to consider whether the Trial Chamber erred in its conclusion that *every* individual detained at S-21 was targeted on political grounds and therefore was a victim of persecution.[618] The Trial Chamber found that over the course of the CPK regime, different groups of individuals were targeted as designated political enemies and detained at S-21 under various criteria. Individuals were targeted because they were: former LON Nol officials and soldiers; suspected of having or did have contact with foreigners or alliances with foreign powers; intellectuals, students, and diplomatic staff who were recalled to Cambodia; combatants and cadres of DK and CPK who had certain suspicious backgrounds or

[613] IMT Charter, Art. 6(c).
[614] IMTFE Charter, Art. 5(c).
[615] Control Council Law No. 10, Art. II(1)(c).
[616] 1950 Nuremberg Principles, Principle VI(c).
[617] *See generally* Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law*, pp. 387-388.
[618] Trial Judgement, para. 389.

relationships with other perceived Party enemies; foreigners; Buddhist monks; members of Cambodian ethnic or religious minorities;[619] or city dwellers.[620]

282. However, the Trial Chamber also found that the victims included S-21 staff deemed to be sabotaging the Party after being implicated in confessions or making mistakes while working, or were individuals failing to demonstrate sufficient enthusiastic support for the CPK. By the end of the regime, "[t]he process of elimination of Party enemies turned into paranoia"[621] as "the Party Centre began to perceive enemies everywhere and became more concerned about internal rather than external enemies."[622] Individuals were identified and found guilty "simply by virtue of having been accused."[623] Based on these facts, the Supreme Court Chamber considers that as long as political enemies were defined pursuant to a policy employing some kind of general criteria, while other members of the population enjoyed a degree of freedom, there are grounds to find persecution on political grounds.

283. As the revolution wore on, however, individuals were indiscriminately apprehended, mistreated and eliminated without any attempt at rational or coherent justification on political grounds, in actions that were no longer persecution but constituted a reign of terror where no discernible criteria applied in targeting the victims. As found unanimously by the Trial Chamber, the Accused knew that not all those held at S-21 were in fact enemies of the Party, but that they were in any event detained, interrogated and executed.[624] He used all possible means, including torture, to strive assiduously to implement CPK ideology and continuously provided his superiors with the names of all persons whom he well understood would then inevitably be considered as traitors and political enemies.[625] It follows that the Accused, in his criminal activity, consciously mistreated persons who did not fall under any persecutory category and did so, not in order to discriminate against political enemies, but to demonstrate his loyalty and efficiency to the Party. Absent

[619] Trial Judgement, paras 383, 385-388.
[620] Trial Judgement, para. 105 (noting "emphasis on 'new' people from the cities").
[621] Trial Judgement, para. 388.
[622] Trial Judgement, para. 384.
[623] Trial Judgement, para. 388.
[624] Trial Judgement, paras 394, 398.
[625] Trial Judgement, paras 394, 398.

any general criteria for targeting these victims, atrocities committed against them neither discriminate in fact nor originate from a discriminatory, persecutory intent. With respect to acts against these persons, the Supreme Court Chamber considers that the Trial Chamber committed an error of law by qualifying them as persecution on political grounds.

284. Therefore, on the basis of the foregoing, the Chamber strikes the Trial Chamber's conviction of the Accused for persecution as a crime against humanity with respect to an unspecified number of individuals who had been detained, interrogated, enslaved and executed at S-21, not on political grounds, but as a result of indiscriminate targeting by the Accused. The Chamber therefore orders that convictions shall be entered for the other crimes against humanity perpetrated against them for which the Trial Chamber found the Accused responsible, namely, extermination, enslavement, imprisonment, torture and other inhumane acts.

## F. Cumulative Convictions

285. Having established the definitions of persecution, torture, and enslavement as distinct crimes against humanity under customary international law during the ECCC's temporal jurisdiction, the Supreme Court Chamber now turns to address the argument under Ground 2 of the Co-Prosecutors' Appeal that the Trial Chamber committed an error of law by failing to cumulatively convict the Accused for all of the crimes against humanity for which he was ultimately found responsible.[626] As noted previously, the Trial Chamber found the Accused individually criminally responsible for the following offences as crimes against humanity under Article 5 of the ECCC Law: "murder, extermination, enslavement, imprisonment, torture (including one instance of rape), persecution on political grounds, and other inhumane acts."[627] However, when looking to the ICTY *Čelebići* test and subsequent jurisprudence of the *ad hoc* Tribunals applying that test, the Trial Chamber concluded that it could only convict the Accused for persecution on political grounds as the more specific crime,[628] thereby subsuming extermination (subsuming murder under the

[626] Co-Prosecutors' Appeal, para. 132.
[627] Trial Judgement, para. 559.
[628] Trial Judgement, paras 560-561, 563-564.

*Čelebići* test),[629] enslavement, imprisonment, torture (including one instance of rape), and other inhumane acts as crimes against humanity.[630]

286. The Supreme Court Chamber notes that this part of the Co-Prosecutors' Appeal implicates *concursus delictorum,* the law concerning concurrence or the adjudication of multiple offences against one accused with respect to the same set of factual circumstances.[631] *Concursus delictorum* "involve[s] either the coincidence of several nominally distinct offences or of several units of factual behaviour or both."[632] Under this ground of appeal, the specific issue before this Chamber is to identify the rule for determining concurrence of offences and the appropriate result where the *same* factual conduct fulfils the legal definition of more than one statutory offence under the ECCC law. Establishing the applicable rules on this issue is especially important in light of the ECCC's subject matter jurisdiction over the international crimes of war crimes, crimes against humanity, and genocide which, "[d]espite their differences in origin […] have grown ever closer and much criminal conduct would […] satisfy the requirements of more than one of them."[633] As such, this Chamber must determine, as a preliminary matter, whether the Trial Chamber erred in looking to the *Čelebići* test for resolving this issue.

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[629] The Supreme Court Chamber notes that in paragraph 132 of the Co-Prosecutors' Appeal, the Co-Prosecutors state that the Trial Chamber should have cumulatively convicted the Accused for murder as a crime against humanity with the other charged crimes against humanity. Furthermore, at paragraphs 134, 138-142, the Co-Prosecutors argue that murder and persecution have materially distinct elements such that cumulative convictions for both would be appropriate. In the Trial Judgement, the Trial Chamber ultimately found the Accused responsible for murder as subsumed under extermination as a crime against humanity, which was subsumed by persecution. Trial Judgement, paras 566, 568. However, the Co-Prosecutors do not challenge or present arguments with respect to that specific holding by the Trial Chamber in their Appeal, as they do with respect to the Trial Chamber's inclusion of rape within torture as a crime against humanity. Co-Prosecutors' Appeal, paras 192-200. Furthermore, in their request for relief, they ask that the Supreme Court Chamber cumulatively convict the Accused for extermination (subsuming murder) with the other charged crimes against humanity. Co-Prosecutors' Appeal, para. 216. Thus, looking to the Co-Prosecutors' Appeal as a whole, the Supreme Court Chamber does not consider that the issue of whether murder as a crime against humanity was appropriately subsumed by the Trial Chamber under exterminations as a crime against humanity has been properly raised before it. Nevertheless, the Supreme Court Chamber will examine the issue *ex proprio motu* when reviewing the Trial Chamber's application of the *Čelebići* test. Co-Prosecutors' Appeal, paras 132, 134, 216.

[630] Trial Judgement, para. 568.

[631] Carl-Friedrich Stuckenberg, "Multiplicity of Offences: Concursus Delictorum", in Horst Fischer, Claus Kreß and Sascha Rolf Lüder (eds.), *International and National Prosecution of Crimes Under International Law,* BWV, 2004, p. 559.

[632] Stuckenberg, "Multiplicity of Offences: Concursus Delictorum", p. 563.

[633] Guénaël Mettraux, *International Crimes and the Ad Hoc Tribunals*, Oxford University Press, 2006, p. 315. For example, the act of killing another human being may, in the right circumstances, constitute: genocide; murder or extermination as crimes against humanity; or wilful killing as a grave breach of the 1949 Geneva Conventions. ECCC Law, Arts 3 new-6.

### 1. The *Čelebići* Test

287. The ICTY Appeals Chamber in the *Prosecutor v. Delalić et al.* Appeal Judgement first established the *Čelebići* test as follows:

> [M]ultiple criminal convictions entered under different statutory provisions but based on the same conduct are permissible only if each statutory provision involved has a materially distinct element not contained in the other. An element is materially distinct from another if it requires proof of a fact not required by the other.
>
> Where this test is not met, the Chamber must decide in relation to which offence it will enter a conviction. This should be done on the basis of the principle that the conviction under the more specific provision should be upheld. Thus, if a set of facts is regulated by two provisions, one of which contains an additional materially distinct element, then a conviction should be entered only under that provision.[634]

288. Pursuant to this test, where the same factual conduct meets the definitions of multiple statutory offences, a Trial Chamber may enter cumulative convictions with respect to those offences. It may only do so, however, where the crimes are considered sufficiently distinct or possess "a materially distinct element" not found in the other. On the other hand, where two crimes do not each have materially distinct elements, the crime with the materially distinct element as the more specific crime subsumes the other and only one conviction is entered. This determination involves comparing legal elements of the relevant statutory provisions; the specific facts of the case play no role.[635] Under the jurisprudence of the *ad hoc* tribunals, the *Čelebići* test has been applied first with respect to the *chapeau* elements of international crimes and, where the same conduct fulfils the definition of statutory offences intra-article, "the test is also applied to the *actus reus* and *mens rea* for the underlying offences charged within that one statutory provision."[636]

289. The Supreme Court Chamber observes that, although the ECCC Law or Internal Rules do not expressly address *concursus delictorum*, the ECCC Law does

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[634] *Prosecutor v. Delalić, Mučić, Delic and Landžo* ("*Čelebići*"), IT-96-21-A, "Judgement", Appeals Chamber, 20 February 2001, ("*Čelebići* Appeal Judgement"), paras 412-413.
[635] *Kordić and Čerkez* Appeal Judgement, para. 1040. As a matter of law, cumulative convictions are mandatory. As stated by the ICTY Appeals Chamber, "[w]hen the evidence supports convictions under multiple counts for the same underlying acts, the test as set forth in *Čelebići* [...] does not permit the Trial Chamber discretion to enter one or more of the appropriate convictions, unless the two crimes do not possess materially distinct elements." *Stakić* Appeal Judgement, para. 358.
[636] Mettraux, *International Crimes and the Ad Hoc Tribunals*, p. 318.

instruct the Trial Chamber as to the applicable law that it must follow, both substantive[637] and procedural.[638] The Supreme Court Chamber agrees that the law regulating adjudication of a multiplicity of offences for the same conduct is an issue of substantive criminal law, "situated in the border zone between the general part of criminal law and sentencing rules" with procedural ramifications.[639] As such, because the only crimes at issue within this part of the Co-Prosecutors' Appeal are international crimes, it was appropriate for the Trial Chamber to look to rules found in international law rather than in the Cambodian Penal Code.

290. This pronouncement, however, does not entirely dispose of the matter. The question still arises whether the Trial Chamber was correct in resorting to rules established in *ad hoc* jurisprudence as opposed to primary sources of international law. In this regard, the Supreme Court Chamber finds that there is no treaty or customary international law specifically addressing *concursus delictorum* for international crimes. The IMT and NMTs convicted a number of defendants for war crimes and crimes against humanity on the basis of the same conduct without discussion of the question of concurrence,[640] and were concerned with adherence to the required nexus of crimes against humanity to other crimes under the IMT Charter or Council Control Law No. 10 rather than articulating a doctrinal basis for entering cumulative convictions.[641] Furthermore, when looking to general principles of law

[637] ECCC Law, Arts 2 new-8 (stipulating that for domestic crimes, the applicable law is the Cambodian 1956 Penal Code, while for international crimes it is international treaty and custom).
[638] ECCC Law, Art. 33 new (providing that the Trial Chamber shall look first to Cambodian procedural law in force but, if it does not deal with a particular matter, is unclear with regard to interpretation or application, or is inconsistent with international standards, then guidance may be sought from international procedural rules).
[639] Stuckenberg, "Multiplicity of Offences: Concursus Delictorum", p. 559. This law may have procedural ramifications on, for example, the form of the indictment and charging practice by the Prosecution or on the scope of *ne bis in idem*. *Cf. Kupreškić* Trial Judgement, para. 670.
[640] IMT Judgement, Vol. I, pp. 281-282, 287-298, 300-301, 305-307, 320-322, 324-325, 327-330, 331-336; *Justice* Case, Vol. III, pp. 1087, 1107, 1118, 1128, 1132, 1134, 1142, 1170; Vol. VI, 74-76; *Pohl* Case, Vol. V, pp. 962, 992, 997, 999, 1001, 1010, 1015, 1023, 1031, 1034-1035, 1039-1040, 1042, 1047, 1051, 1056, 1059.
[641] According to Henri Donnedieu de Vabres, the French Judge on the IMT, this approach allowed the Judges to remain in keeping with the spirit and the letter of the principle of *nullum crimen, nulla poena sine lege*. "In accordance with Article 6 of the Statute, the tribunal did not exclude the notion of 'crimes against humanity'", he wrote, "but it is instructive to explain the effort it made to minimize its consequences. […] As for the wartime period, the Tribunal gathered 'war crimes' and 'crimes against humanity' under the same heading for most of the accused, thus side-stepping a problematic distinction and, practically merging, the crimes against humanity into the 'war crimes' category." Henri Donnedieu de Vabres, "The Nuremberg Trial and the Modern Principles of International Criminal Law", in Guénaël Mettraux (ed.), *Perspectives on the Nuremberg Trial*, Oxford University Press, 2008, p. 241.

common to all major national legal systems, while there is fairly uniform practice with respect to recognizing concurrence of multiple offences for the same conduct so long as they are sufficiently distinct under a nation's law,[642] there are "divergent and often seemingly incompatible conceptualizations found in national legal orders"[643] as to the legal *consequences* of that concurrence.[644] This is true both with respect to entry of multiple convictions for crimes and to sentencing,[645] due in part to concerns

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[642] Civil law countries tend to do so under the concept of "ideal concurrence". *See, e.g.* 1956 Penal Code of Cambodia, Art. 14(2)(1) ("There is no multiplicity of offences where the same facts fall under multiple legal descriptions in such way that the same act could be punishable multiple times"); *Oliveira v. Switzerland*, ECtHR, Chamber Judgement, (84/1997/868/1080), 30 July 1998, para. 26:

> That is a typical example of a single act constituting various offences (*concours idéal d'infractions*). The characteristic feature of this notion is that a single criminal act is split up into two separate offences, in this case the failure to control the vehicle and the negligent causing of physical injury. In such cases, the greater penalty will usually absorb the lesser one. There is nothing in that situation which infringes Article 4 of Protocol No. 7 since that provision prohibits people being tried twice for the same offence whereas in cases concerning a single act constituting various offences (*concours idéal d'infractions*) one criminal act constitutes two separate offences.

*See also* the survey of national systems in *Kupreškić* Trial Judgement, paras 662, 685; Stuckenberg, "Multiplicity of Offences: Concursus Delictorum", pp. 596-597. Similarly, several common law countries do so under the concept of bilateral specialty, in other words, where the legal definition of offences each contains an element not found in the other. *See e.g.* in the United States, *Blockburger v. U.S.*, United States Supreme Court (1932), 284 U.S. 299, 304 ("[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not"); in Canada, *R. v. Prince*, Supreme Court of Canada, [1986] 2 S.C.R. 480, para. 32 (The rule in Kienapple will be applicable to bar multiple convictions only "if there is no additional and distinguishing element that goes to guilt contained in the [additional] offence"); in New Zealand, *R v. Moore*, Court of Appeal, Wellington, [1974] 1 NZLR 417, 1973 NZLR LEXIS 751, p. 18 ("[W]hether the offence in respect of which the accused has been convicted or acquitted, as the case may be, on the first charge, is the same, or practically or in substance the same, as that with which he is subsequently charged"); in Australia, *R. v. Lucy Dudko*, Supreme Court of New South Wales Court of Criminal Appeal, [2002] NSWCCA 336, paras 109, 113 (allowing double convictions for multiple crimes stemming from the same act, when additionally the "gist or gravamen" of each charged crime was distinct). *See also Kupreškić* Trial Judgement, paras 680-682; Stuckenberg, "Multiplicity of Offences: Concursus Delictorum", pp. 597-598.

[643] Stuckenberg, "Multiplicity of Offences: Concursus Delictorum", p. 563.

[644] *Kupreškić* Trial Judgement, para. 717; Stuckenberg, "Multiplicity of Offences: Concursus Delictorum", pp. 596-598.

[645] *See, e.g.* Japanese Penal Code, Art. 54(1) ("When a single act constitutes two or more separate crimes, or when an act as the means or results of a crime constitutes another crime, the greatest among the punishments prescribed for such crimes shall be imposed"); Swiss Criminal Code, Art. 49 ("If the offender, by committing one or more offences, has fulfilled the requirements for two or more penalties of the same form, the court shall impose the sentence for the most serious offence at an appropriately increased level"); Criminal Code of the Republic of Hungary, Section 85(1)-(3) ("In case of cumulation of crime [...], one punishment shall be inflicted. The principal punishment shall be inflicted taking for [its] basis the gravest from among the items of punishment of the crimes being in cumulation of crimes. If, in respect of multiple count of charges, the imposition of imprisonment for a specific term is prescribed by law in respect of at least two of such criminal acts, the upper limit of applicable punishment [...] shall be increased by one-half, but may not reach the total duration of the maximum sentences established for such criminal acts"); Criminal Code of the Kingdom of Belgium, Art. 62 ("In the event of concurrence of felonies the most severe penalty shall be imposed as a single punishment. This penalty may yet be increased by five years over the maximum"); Criminal Code of the Federal

regarding *ne bis in idem*.[646] Consequently, even though it has been proposed that treatment of the problem of multiple offences in common law and civil law jurisdictions differs less in outcome than in form,[647] it may not be said that a general principle of law exists on concurrence of multiple, distinct offences for the same conduct.[648]

291. Given this lack of guidance from treaty, custom or general principles of law, the Supreme Court Chamber turns to examine the appropriateness of the Trial Chamber's reliance on the ICTY *Čelebići* test. The Chamber notes that there has been criticism of the test because it "permits cumulative convictions based on the same

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Republic of Germany, Section 52(1)-(2) ("If the same act violates more than one law or the same law more than once, only one sentence shall be imposed. If more than one law has been violated the sentence shall be determined according to the law that provides for the most severe sentence. The sentence may not be more lenient than the other applicable laws permit"); Republic of Zambia Penal Code Act, Ch. VI, Sec. 36 (stating that where one act constitutes several crimes or where several acts are done in execution of one criminal purpose, the person shall be punished for each act so charged as a separate crime and the court shall upon conviction award a separate punishment for each act. If the court orders imprisonment, the order may be for concurrent or consecutive terms of imprisonment. If the terms of imprisonment ordered are consecutive, the total of the terms so ordered shall not exceed the maximum term of imprisonment allowed by law in respect of that conviction for which the law allows the longest term); United States Sentencing Commission's Guidelines Manual of 2011, Chapter 3, Part D ("Multiple Counts") (stating that where an individual is convicted of two or more crimes with regard to a single conduct or transaction, the court shall group closely related offences and apply the penalty provided for the group with the highest offense level and increasing that offense level by the amount indicated in the provided table. According to the commentary, "ordinarily the court will have latitude to impose added punishment by sentencing toward the upper end of the range authorized for the most serious offense"); Crimes Act 1961 of New Zealand, Sec. 10(3) ("Where an act or omission constitutes an offence under two or more provisions of this Act or of any other Act, the offender may be prosecuted *and punished* under any one of those provisions") (emphasis added). *See also* survey of national approaches found in *Čelebići* Appeal Judgement, paras 406-409; *Kupreškić* Trial Judgement, paras 714-716; Stuckenberg, "Multiplicity of Offences: Concursus Delictorum", pp. 596-599.

[646] *See, e.g.* in the United Kingdom, *R. v. Thomas*, [1950] 1 K.B. 26, p. 31 ("It is not the law that a person shall not be liable to be punished twice for the same act; it has never been so stated in any case, and the Interpretation Act itself does not say so. What s. 33 [of the Interpretation Act] says is: 'No person shall be liable to be punished twice for the 'same offence''"); in New Zealand, Crimes Act 1961, Sec. 10(3) and (4) ("Where an act or omission constitutes an offence under 2 or more provisions of this Act or of any other Act, the offender may be prosecuted and punished under any one of those provisions", however, "[n]o one shall be liable, whether on conviction on indictment or on summary conviction, to be punished twice in respect of the same offence"); Republic of Zambia Penal Code Act, Ch. IV, Sec. 20 ("A person cannot be punished twice either under the provisions of this Code or under the provisions of any other law for the same act or omission, except in the case where the act or omission is such that by means thereof he causes the death of another person, in which case he may be convicted of the offence of which he is guilty by reason of causing such death, notwithstanding that he has already been convicted of some other offence constituted by the act or omission"). On the other hand, in civil law jurisdictions, *ne bis in idem* refers to "protection against multiple prosecutions and punishments for the *same set of facts*." Stuckenberg, "Multiplicity of Offences: Concursus Delictorum", p. 561, fn. 4 (emphasis added).

[647] Gerhard Werle, *Principles of International Criminal Law*, 2nd ed., TMC Asser Press, 2009, p. 242, fn. 568.

[648] *Čelebići* Appeal Judgement, para. 406; *Kupreškić* Trial Judgement, para. 718; Stuckenberg, "Multiplicity of Offences: Concursus Delictorum", p. 563; Fulvio Maria Palombino, "Should Genocide Subsume Crimes Against Humanity?", *Journal of International Criminal Justice*, Vol. 3 (2005), p. 783.

conduct to be entered under potentially many different headings" through comparison of the *chapeau* elements of international crimes rather than just the *actus reus* and *mens rea* elements of the underlying offences, many of which are the same but are located under different headings.[649] Consequently, it has been argued that the *Čelebići* test allows cumulative convictions on the basis of the same conduct for international crimes that are not *genuinely* distinct, thereby prejudicing an accused.[650]

292. The Supreme Court Chamber observes that the challenge posed is not with respect to the logic of the test as such but rather with regard to how it functions when applied in the context of international crimes, the definitions of which are often broad, complex and imprecise. Crimes such as genocide or crimes against humanity describe multiple categories of conduct, capable of encompassing several criminal transactions, often spanning long periods of time. Moreover, owing to the processes from which they originate, such as custom or treaty marked with political compromise, these definitions do not maintain the same level of systemic coherence as exists on the national level. As observed by the *Kupreškić* Trial Chamber with reference to crimes under the ICTY Statute, legal descriptions of a given conduct overlap:

> [u]nlike provisions of national criminal codes or, in common-law countries, rules of criminal law crystallised in the relevant case-law or found in statutory enactments, each Article […] does not confine itself to indicating a single category of well-defined acts such as murder, voluntary or involuntary manslaughter, theft, etc. Instead the Articles embrace broad clusters of offences sharing certain *general* legal ingredients. […]. For instance, murder, torture or rape of enemy civilians normally constitutes war crimes; however, if these acts are part of a widespread or systematic practice, they may also be defined as crimes against humanity.[651]

293. In the face of this overlap, efforts have been undertaken, both in the jurisprudence and in the literature, to provide formulas for resolving the concurrence of international crimes derived from national criminal law concepts such as

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[649] Mettraux, *International Crimes and the* Ad Hoc *Tribunals*, p. 318.
[650] *See generally Čelebići* Appeal Judgement, Separate and Dissenting Opinion of Judge David Hunt and Judge Mohamed Bennouna. *See also* Mettraux, *International Crimes and the* Ad Hoc *Tribunals*, p. 318.
[651] *Kupreškić* Trial Judgement, paras 697-698.

distinction by virtue of protected interests [652] and apparent, ideal, and real concurrence.[653] It has also been suggested that legal prerequisites or contextual elements contained in the definition of crimes, which do not have a bearing on the actual conduct of the accused, should be excluded from consideration,[654] or that criteria should be devised for consumption in order to identify a prevailing crime.[655] The application of these latter concepts has not gained wide support in the case law.[656]

294. The Supreme Court Chamber limits its judgement to the appeal currently before it, that is, the application of the *Čelebići* test to the *actus reus* and *mens rea* of underlying crimes against humanity that share the same *chapeau* elements. The discourse surrounding cumulative convictions is nonetheless relevant as the same concerns have arisen in *ad hoc* criminal tribunals in respect of convictions for persecution and other crimes against humanity and occasioned a split in jurisprudence, as noted in the Trial Judgement and in the Co-Prosecutors' Appeal.

295. In general, the international jurisprudence considers that the *Čelebići* test serves the interests of justice by ensuring that convictions entered against an accused reflect, accurately and in full, the extent of his or her criminal culpability.[657] At the same time, it is recognized that cumulative convictions create three principal dangers to an accused's rights: first, an accused faces the social stigma of being convicted of additional crimes; second, multiple convictions may lead to increased sentencing and negatively affect the possibility of early release under the law of the state enforcing the sentence; and third, there may be a risk of increased sentencing in subsequent convictions based on habitual offender laws.[658] At this point, the Supreme Court shall

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[652] *See, e.g. Prosecutor v. Kayishema and Ruzindana,* ICTR-95-I-T, "Judgement", Trial Chamber, 21 May 1999, para. 635; *Akayesu* Trial Judgement, para. 468.
[653] *See, e.g. Čelebići* Appeal Judgement, para. 407; *Kupreškić* Trial Judgement, paras 662, 678-695; *Akayesu* Trial Judgement, para. 467.
[654] *Čelebići* Appeal Judgement, Separate and Dissenting Opinion of Judge David Hunt and Judge Mohamed Bennouna, para. 26 *et seq.*
[655] *Semanza* Trial Judgement and Sentence, Separate and Dissenting Opinion of Judge Dolenc, paras 14, 17-19, 22-26; Olaoluwa Olusanya, *Double Jeopardy Without Parameters: Re-characterisation in International Criminal Law*, Intersentia, 2004, pp. 241-255; Fulvio Maria Palombino, "Should Genocide Subsume Crimes Against Humanity?", p. 789.
[656] Gerhard Werle, *Principles of International Criminal Law*, 2nd ed., pp. 244-245, fns 583-585.
[657] *Kordić and Čerkez* Appeal Judgement, para. 1033 ("The cumulative convictions test serves twin aims: ensuring that the accused is convicted only for distinct offences, and at the same time, ensuring that the convictions entered fully reflect his criminality").
[658] *Čelebići* Appeal Judgement, Separate and Dissenting Opinion of Judges Hunt and Bennouna, para. 23; *Prosecutor v. Mučić, Delic and Landžo*, IT-96-21-A*bis*, "Judgement on Sentence Appeal", Appeals

address two of these points of general concern while the specific impact of the cumulative convictions on the situation of the Accused will be addressed below.

296. Considering the social stigma that an accused faces being convicted of "additional" crimes, the Supreme Court Chamber finds that the application of the *Čelebići* test does not result in undue prejudice to the accused. Where the conduct of an accused fulfils elements of several crimes, the resulting stigma is an appropriate consequence of lawful convictions. The Supreme Court Chamber considers that the challenge to *concursus delictorum* lies instead in providing appropriate legal descriptions of criminal conduct such that they are accurate and exhaustive while not confusing or misleading as to the criminal transactions actually attributed to the accused. Noting that "[t]he incidence of *concursus delictorum* and the techniques for its resolution are indicators for the internal consistency, sophistication and over-all rationality of a given criminal law,"[659] and that "[t]his is not a mere aesthetic or theoretical matter, since lack of internal rationality may cause annoyance, judicial error, and injustice,"[660] the Supreme Court Chamber considers, however, that no injustice is automatically incurred by imposing cumulative convictions pursuant to the *Čelebići* test.

297. Turning to the next potential danger to the rights of the accused related to the use of the *Čelebići* test, the Supreme Court Chamber notes that "[t]here is no clear evidence that multiple convictions for the same [conduct] have led to stiffer sentences" or subsequent trials against accused before international tribunals on the same set of facts.[661] Like in national systems, which apply various formulas by which punishment for cumulative convictions is mitigated,[662] the *Čelebići* Appeals Chamber stipulates that "the overarching goal in sentencing must be to ensure that the final or aggregate sentence reflects the totality of the criminal *conduct* and overall culpability of the offender."[663] Absent specific norms regulating the consequences of cumulative

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Chamber, 8 April 2003, para. 25; *Kordić and Čerkez* Appeal Judgement, Joint Dissenting Opinion of Judge Schomburg and Judge Güney on Cumulative Convictions, para. 2.
[659] Carl-Friedrich Stuckenberg, "A Cure for Concursus Delictorum in International Criminal Law?", *Criminal Law Forum*, Vol. 16 (2005), p. 362.
[660] Stuckenberg, "A Cure for Concursus Delictorum in International Criminal Law?", p. 362.
[661] Stuckenberg, "A Cure for Concursus Delictorum in International Criminal Law?", p. 362.
[662] Stuckenberg, "Multiplicity of Offences: Concursus Delictorum", pp. 586-603.
[663] *Čelebići* Appeal Judgement, para. 430 (emphasis added).

convictions on punishment, it is thus the role of the court to ensure that the accused "is not prejudiced by reason of the multiple convictions entered against him on the basis of the same facts."[664]

298. In conclusion, the Supreme Court Chamber finds that the Trial Chamber did not err in looking to the *Čelebići* test for guidance. The test guarantees, at a minimum, that offences are sufficiently distinct in order to be adjudicated concurrently with respect to the same conduct, and also prescribes the appropriate result—entry of cumulative convictions, which fully describe the extent of the violated legal norms. Furthermore, the test provides for the proper result where multiple offences are not sufficiently distinct—entry of one conviction for the more specific offence—through its incorporation of the rule of *lex specialis*, a general principle of international law.[665]

299. Where charged offences are sufficiently distinct, a single conviction, on the other hand, fails to protect the different societal values at play with respect to different crimes. As reasoned by Judge Shahabuddeen in the *Jelisić* case at the ICTY:

> [e]ven though the actual conduct may be the same, [crimes] could injure different public interests; the existence of these differences in public interests may well be signalled by the presence of the unique elements [...]. The full protection of these distinct societal interests requires cumulative convictions. To convict of one offence only is to leave unnoticed the injury to the other interest of international society and to fail to describe the true extent of the criminal conduct of the accused.[666]

300. Finally, the suitability of the test for international crimes is evidenced by the fact that subsequent to the issuance of the *Čelebići* Appeal Judgement in 2001, Chambers in the ICTY, ICTR, SCSL and ICC have uniformly applied the test, and have permitted cumulative charging and entered cumulative convictions with respect to the same conduct where it meets the definition of multiple international crimes that are deemed materially distinct.[667]

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[664] Mettraux, *International Crimes and the* Ad Hoc *Tribunals*, p. 319.
[665] *Kupreškić* Trial Judgement, paras 683-684; Stuckenberg, "Multiplicity of Offences: Concursus Delictorum", pp. 586-588; Antonio Cassese, *International Criminal Law*, 2nd ed., Oxford University Press, 2008, p. 182.
[666] *Prosecutor v. Jelisić*, IT-95-10-A, "Judgement", Appeals Chamber, 5 July 2001, Partial Dissenting Opinion of Judge Shahabuddeen, para. 42.
[667] *See, e.g. Jelisić* Appeal Judgement, para. 82; *Kordić and Čerkez* Appeal Judgement, para. 1033; *Naletilić and Martinović* Appeal Judgement, paras 589-590 (allowing cumulative convictions for

### 2. Persecution and other Crimes Against Humanity under the *Čelebići* Test

301. The Supreme Court Chamber will now examine whether the Trial Chamber erred as a matter of law in its application of the *Čelebići* test to persecution and other crimes against humanity for which the Accused was found responsible, namely, murder, extermination, enslavement, imprisonment, torture, and other inhumane acts.[668] In applying the *Čelebići* test, the Trial Chamber held that cumulative convictions for persecution and other crimes against humanity are impermissible, reasoning that:

> The additional element of persecution when compared to all other offences as crimes against humanity is the specific discriminatory intent required by the perpetrator [...].
>
> The jurisprudence of the *ad hoc* tribunals has given detailed consideration to the relationship between persecution and other component offences that may comprise a charge of persecution. While prior jurisprudence adopted another point of view, the ICTY Appeals Chamber has recently entered cumulative convictions for both persecution and other underlying crimes against humanity, on grounds that the offence of persecution contains materially distinct elements not contained in other crimes against humanity.
>
> Two of five members of the Appeals Chamber in the *Kordić et al.* Appeal Judgement, reflecting the previously-settled jurisprudence of that Chamber, disagreed that a conviction for persecution can be cumulated with other convictions as crimes against humanity if both convictions are based on the same criminal conduct. While the ingredients of persecution and underlying offences may appear distinct when considered in the abstract, the question,

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persecution and torture); *Stakić* Appeal Judgement, para. 366 (allowing cumulative convictions for persecution, murder and other inhumane acts); *Prosecutor v. Strugar*, IT-01-42-A, "Judgement", Appeals Chamber, 17 July 2008, ("*Strugar* Appeal Judgement"), paras 321-322; *Prosecutor v. Krajišnik*, IT-00-39-A, "Judgement", Appeals Chamber, 17 March 2009, (" *Krajišnik* Appeal Judgement"), para. 386 (affirming the *Čelebići* test); *Prosecutor v. D. Milošević*, IT-98-29/1-A, "Judgement", Appeals Chamber, 12 November 2009, ("*D. Milošević* Appeal Judgement"), para. 39; *Prosecutor v. Popović*, IT-05-88-T, "Judgement", Trial Chamber, 10 June 2010, ("*Popović* Trial Judgement"), para. 2111; *Prosecutor v. Musema*, ICTR-96-13, "Judgement", Appeals Chamber, 16 November 2001, ("*Musema* Appeal Judgement"), paras 358-369 ("The Appeals Chamber confirms that [the *Čelebići* test] is the test to be applied with respect to multiple convictions arising under [the] ICTR Statute"); *Nahimana* Appeal Judgement, paras 1026-1027; *Prosecutor v. Brima et al. (AFRC Case)*, SCSL-04-16-T, "Judgement", Trial Chamber, 20 June 2007, ("*AFRC Case* Trial Judgement"), para. 2099 (adopting the *Čelebići* test for cumulative convictions); *Prosecutor v. Sesay et al.*, SCSL-04-15-A, "Judgement", Appeals Chamber, 26 October 2009, ("*Sesay* Appeal Judgement"), para. 1190; *Prosecutor v. Bemba Gombo*, ICC-01/05-01/08-424, "Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges Against Jean-Pierre Bemba Gombo", Pre-Trial Chamber, 15 June 2009, para. 202 ("The Chamber considers that, as a matter of fairness and expeditiousness of the proceedings, only distinct crimes may justify a cumulative charging approach and, ultimately, be confirmed as charges. This is only possible if each statutory provision allegedly breached in relation to one and the same conduct requires at least one additional material element not contained in the other").

[668] Trial Judgement, para. 677.

> according to the *Čelebići* test, is whether they are *materially* distinct; that is, whether each offence contains elements that require proof of a fact not required by the other offences. Where, for example, the charge of persecution is premised on murder or inhumane acts, and such charge is proven, the Prosecution need not prove any additional fact in order to secure a conviction for murder or inhumane acts as well. The proof that the accused committed persecution through murder or inhumane acts *necessarily* includes proof of murder or inhumane acts. These offences become subsumed within the offence of persecution. The Chamber endorses this application of the *Čelebići* test, but concurs that there is need for a precise description of the convicted person's full culpability in the disposition, and hence express identification of the underlying conduct upon which the conviction for persecution has been based.[669]

302. The Co-Prosecutors argue that the *Čelebići* test in fact leads to the opposite result such that persecution may not be found to subsume any of the other crimes against humanity for which Accused was found individually responsible because "each crime against humanity [...] has a materially distinct element not found in the others."[670] Additionally, the Co-Prosecutors argue that: failing to convict the Accused for other crimes against humanity "undermines the twin aims of the cumulative convictions test [...]; the rationale for not allowing cumulative convictions does not apply in this case"; and the decision to subsume the crimes does not reflect the societal interests in a complete historical record of the Accused's criminal conduct.[671]

303. In disposing of this part of the Co-Prosecutor's second ground of appeal, the Supreme Court Chamber emphasizes that the permissibility of cumulative convictions for the same criminal conduct turns on the requirement that "each statutory provision involved has a materially distinct element not contained in the other."[672] As such, it is critical to have a proper understanding of what is meant by a "materially distinct element." As noted previously, the *Čelebići* Appeals Chamber defined it as an element that "requires proof of a fact not required by the other."[673]

304. Here, the Trial Chamber relied upon *ad hoc* tribunal jurisprudence for its application of that requirement within the context of whether there may be cumulative convictions for persecution and other crimes against humanity. Although it

[669] Trial Judgement, paras 563-565 (citations omitted).
[670] Co-Prosecutors' Appeal, para. 134.
[671] Co-Prosecutors' Appeal, para. 134.
[672] *Čelebići* Appeal Judgement, para. 412.
[673] *Čelebići* Appeal Judgement, para. 412.

acknowledged that the Appeals Judgement in the ICTY *Kordić and Čerkez* case and subsequent decisions both at the ICTY and ICTR have found that persecution and other crimes against humanity have materially distinct elements,[674] it nevertheless found persuasive the reasoning to the contrary in the *Kordić and Čerkez* dissent to the Appeal Judgement, stating that it reflected "previously-settled jurisprudence of that Chamber."[675]

305. Consequently, this Chamber will first consider the relevant line of case law for guidance in determining whether the Trial Chamber was correct in its understanding of the "materially distinct element" requirement under the *Čelebići* test in the context of cumulative convictions for persecution and other crimes against humanity. The Chamber notes that it is not bound by the holding in the *Kordić and Čerkez* Appeal Judgement and its progeny or any other previous *ad hoc* jurisprudence to the contrary. As such, the Chamber will treat these decisions as persuasive authority and will adopt the approach that it finds to be correct as a matter of law. The Chamber will then apply that reasoning to the crimes against humanity for which the Accused was found responsible in this case, looking to the elements of those crimes as established by the Trial Chamber or in this appeal.[676]

### *a. Ad Hoc Tribunal Jurisprudence*

306. In the first case to address the issue, the ICTY Trial Chamber in *Prosecutor v. Kupreškić et al.* reached cumulative convictions for persecution and murder as crimes against humanity.[677] The Trial Chamber held that murder and persecution are distinct offences reasoning that both have "unique elements" such that murder requires evidence of "wilful taking of life of innocent civilians" while persecution requires evidence of "discriminatory intent."[678] Consequently, both offences meet the

[674] Trial Judgement, para. 564.
[675] Trial Judgement, para. 565.
[676] As noted previously in this Judgement, the scope of the appeal before the Supreme Court Chamber with respect to underlying acts that constitute crimes against humanity under Article 5 of the ECCC Law is limited to consideration of persecution, torture, and enslavement. As such, in this section on cumulative convictions, the Chamber will apply the elements of those specific crimes against humanity as they have been determined in this appeal. As for the remaining charged crimes against humanity for which the Accused was found responsible, namely, extermination (encompassing murder), imprisonment and other inhumane acts, the Chamber will apply the elements articulated by the Trial Chamber and not challenged on appeal by the Co-Prosecutors.
[677] *Kupreškić* Trial Judgement, paras 705-710.
[678] *Kupreškić* Trial Judgement, paras 706, 708.

requirements of the civil law doctrine of reciprocal specialty reflected in the U.S. *Blockburger* test.[679] As a result, the Chamber found that an individual may be charged cumulatively with persecution (for a number of alleged acts including murder) and murder as crimes against humanity, and the same acts of killing proved beyond reasonable doubt may result in convictions for both crimes.[680] On appeal, the Appeals Chamber affirmed that, in general, cumulative charging for persecution and other crimes against humanity is permissible.[681] The Chamber ultimately declined to rule on the defendant's specific cumulative convictions for persecution and murder, however, because the defendant abandoned the appeal.[682]

307. In contrast to the *Kupreškić* Trial Judgement, several subsequent ICTY Judgements rejected cumulative convictions for persecution and other crimes against humanity by looking to the underlying conduct forming the basis for the convictions. In *Prosecutor v. Krnojelac,* the Trial Chamber applied the *Čelebići* test to charges of persecution and imprisonment as well as other inhumane acts as crimes against humanity with respect to the same criminal conduct.[683] Ultimately, it only entered a conviction for persecution as opposed to the other charged crimes against humanity reasoning that "it is clear that neither the crime of imprisonment nor that of inhumane acts contains an element which is materially distinct from the crime of persecution. As persecution requires the materially distinct elements of a discriminatory act and discriminatory intent, it is the more specific provision."[684] Likewise, although cumulative convictions was not one of the issues raised in the grounds of appeal, the Appeals Chamber held that a conviction for persecution in the form of inhumane acts through beatings subsumes a conviction for the crime against humanity of other inhumane acts when both convictions are based on the same facts.[685]

308. Similarly, in *Prosecutor v. Vasiljević*, the defendant was charged with the crimes against humanity of murder, inhumane acts, and persecution on the basis of the

[679] *Kupreškić* Trial Judgement, paras 706, 708.
[680] *Kupreškić* Trial Judgement, paras 706, 708.
[681] *Kupreškić* Appeal Judgement, para. 394.
[682] *Kupreškić* Appeal Judgement, para. 395.
[683] *Krnojelac* Trial Judgement, paras 502-503.
[684] *Krnojelac* Trial Judgement, para. 503.
[685] *Krnojelac* Appeal Judgement, para. 188 (in reaching this decision, however, the Chamber did not refer to or apply the *Čelebići* test).

same acts.[686] Applying the *Čelebići* test, the Trial Chamber found persecution to be the more specific crime on the grounds that in addition to the elements required for the other underlying crimes against humanity, a persecution conviction requires "materially distinct elements of a discriminatory act and a discriminatory intent."[687] Accepting the Trial Chamber's contention, the Appeals Chamber held that the defendant could not be cumulatively convicted of crimes against humanity.[688]

309. The Appeals Chamber in *Prosecutor v. Krstić* took a similar approach in rejecting the Prosecution's bid for cumulative convictions of murder and other inhumane acts with persecution, where persecution was committed through those other underlying crimes against humanity.[689] In *Krstić*, the Trial Chamber declined to convict the defendant, a Bosnian Serb General, for murder and other inhumane acts as crimes against humanity on grounds that both of these crimes were "subsumed within the conviction for persecution."[690] When affirming the Trial Chamber in this respect, the Appeals Chamber looked to the underlying conduct.[691] The Chamber found that when "persecution is premised on murder or inhumane acts, and such charge is proven, the Prosecution need not prove any additional fact in order to secure the conviction for murder or inhumane acts as well."[692]

310. However, more recent ICTY Judgements have consistently interpreted and applied the *Čelebići* test as allowing for cumulative convictions for persecution and other crimes against humanity where persecution is perpetrated through acts constituting other crimes against humanity. In 2004, the Appeals Chamber in *Kordić and Čerkez* rejected earlier decisions subsuming other crimes against humanity within persecution, and allowed cumulative convictions entered at trial for persecution as a crime against humanity, as well as for murder, inhumane acts, and imprisonment as crimes against humanity, to stand.[693] The Chamber found that "cogent reasons" warranted a departure from these previous cases because they misapplied the *Čelebići*

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[686] *Vasiljević* Appeal Judgement, para. 135.
[687] *Vasiljević* Appeal Judgement, para. 146.
[688] *Vasiljević* Appeal Judgement, paras 135, 146.
[689] *Prosecutor v. Krstić,* Case No. IT-98-33-A, "Judgement", Appeals Chamber, 19 April 2004, ("*Krstić* Appeal Judgement"), paras 231-233.
[690] *Krstić* Appeal Judgement, para. 230.
[691] *Krstić* Appeal Judgement, para. 232.
[692] *Krstić* Appeal Judgement, para. 232.
[693] *Kordić and Čerkez* Appeal Judgement, para. 1044.

test, which "expressly rejected an approach that takes into account the actual conduct of the accused as determinative of whether multiple convictions for that conduct are permissible."[694] Furthermore, these cases were contrary to settled jurisprudence in the *Jelisić, Kupreškić, Kunarać* and *Musema* cases with respect to their application of the *Čelebići* test, because they looked to the defendants' conduct rather than to the actual legal elements of the underlying statutory offences.[695] Consequently, the Appeals Chamber found that under a proper application of the *Čelebići* test, persecution has materially distinct elements from the other crimes against humanity of murder, other inhumane acts and imprisonment because it requires proof of specific intent to discriminate and discrimination in fact while these other crimes against humanity each require proof of a specific *actus reus* not required under the definition of persecution.[696]

311. Subsequent ICTY Judgements have consistently followed the *Kordić and Čerkez* Appeal Judgement's line of reasoning regarding cumulative convictions for persecution and other crimes against humanity. The Appeals Chamber in *Prosecutor v. Stakić* relied directly on the holding in the *Kordić and Čerkez* Appeal Judgement in allowing cumulative convictions for persecution, extermination, deportation, and other inhumane acts on the basis that each crime requires proof of materially distinct elements not required by the other crimes.[697]

312. Likewise, in *Prosecutor v. Naletilić and Martinović*, the Appeals Chamber followed the *Kordić and Čerkez* Appeals Chamber interpretation of the *Čelebići* test and upheld cumulative convictions for persecution and torture based purely on a comparison of the legal elements for each crime.[698] The Chamber in *Naletilić and Martinović* similarly held that looking to underlying conduct was not an appropriate consideration under the *Čelebići* test in this context.[699]

313. The ICTY Appeals Chamber similarly rejected *Amicus Curiae* arguments against cumulative convictions for persecution and other crimes against humanity in

[694] *Kordić and Čerkez* Appeal Judgement, para. 1040.
[695] *Kordić and Čerkez* Appeal Judgement, para. 1040.
[696] *Kordić and Čerkez* Appeal Judgement, paras 1041-1043.
[697] *Stakić* Appeal Judgement, paras 356, 359-366.
[698] *Naletilić and Martinović* Appeal Judgement, para. 590.
[699] *Naletilić and Martinović* Appeal Judgement, para. 590.

*Prosecutor v. Krajišnik.*[700] The Chamber pointed to the increasing number of cases that have followed the *Kordić and Čerkez* Appeals Chamber's interpretation of the *Čelebići* test, finding "no cogent reason to depart from the current jurisprudence with respect to intra-Article 5 cumulative convictions."[701]

314. Two recent cases decided by the ICTY Trial Chambers have also addressed cumulative convictions for persecutions and other crimes against humanity. The Trial Chamber in *Prosecutor v. Popović* found that persecution and other crimes against humanity are not impermissibly cumulative without going into a specific discussion of materially distinct elements.[702] The Trial Chamber similarly cited to the *Kordić and Čerkez* Appeal Judgement in *Prosecutor v. Dordević*, finding that cumulative convictions were appropriate for persecution and other crimes against humanity, even if both crimes were based on the same underlying conduct.[703] Although both cases are still pending before the Appeals Chamber, it is clear that the *Kordić and Čerkez* Appeals Chamber's application of the *Čelebići* test for cumulative convictions has become established jurisprudence within the ICTY.

315. The ICTR has also considered the issue of cumulative convictions for persecutions and other crimes against humanity under the *Čelebići* test. In 2007, the Appeals Chamber followed the *Kordić and Čerkez* approach to cumulative convictions for persecution and other crimes against humanity in *Prosecutor v. Nahimana et al.*, wherein three defendants accused of inciting violence against Tutsis were charged *inter alia* with extermination and persecution as crimes against humanity.[704] Two of the defendants in *Nahimana* appealed their cumulative convictions for extermination and persecution as crimes against humanity on the basis that persecution lacks "any materially distinct element to be proved that is not present as an element of the crime of extermination."[705] In upholding the cumulative convictions, the Appeals Chamber directly cited the ICTY's settled jurisprudence laid out in *Kordić and Čerkez,* holding that "extermination requires proof that the accused

[700] *Prosecutor v. Krajišnik*, IT-00-39-A, "Judgement", Appeals Chamber, 17 March 2009, ("*Krajišnik* Appeal Judgement"), paras 389-391.
[701] *Krajišnik* Appeal Judgement, paras 389, 391.
[702] *Popović* Trial Judgement, para. 2113.
[703] *Dordević* Trial Judgement, paras 2196-2200.
[704] *Nahimana* Appeal Judgement, paras 2-4, 6.
[705] *Nahimana* Appeal Judgement, para. 1024.

caused the death of a large number of people," unlike persecution, which "requires proof that an act or omission was in fact discriminatory and that the act or omission was committed with specific intent to discriminate."[706] In adopting this application of the *Čelebići* test, the ICTR rejected an analysis of cumulative convictions based on underlying conduct.[707]

### *b. Cumulative Convictions in this Case*

316. For the reasons that follow, the Supreme Court Chamber agrees with the ICTY and ICTR's current interpretation and application of the *Čelebići* test such that there may be convictions reached for persecution and other crimes against humanity on the basis of the same criminal conduct.

317. First, when relying upon the reasoning in the *Kordić and Čerkez* dissent, the Trial Chamber fundamentally misapplied the "materially distinct element" requirement under the *Čelebići* test.[708] The *Kordić and Čerkez* and *Naletilić and Martinović* dissents reason that persecution as a crime against humanity must be understood as an "empty hull," acting as "a residual category designed to cover all possible underlying offences."[709] According to this understanding, the *actus reus* and *mens rea* for persecution is the *actus reus* and *mens rea* of the crime against humanity upon which it is factually premised, and therefore the finding of persecution necessarily includes all of the elements for the underlying offence. The only difference between persecution and the crimes against humanity it subsumes would therefore be the added, specific requirements of proof of discriminatory animus in the *mens rea* and proof of discrimination in fact in the *actus reus*. In this sense, persecution may be interpreted as a contextual element or aggravating intent factor for crimes against humanity rather than a crime of materially independent content. The Supreme Court Chamber notes that, in addition to the earlier line of jurisprudence in the ICTY, serious scholarly views support this or similar understandings of

[706] *Nahimana* Appeal Judgement, para. 1026, citing *Stakić* Appeal Judgement, paras 364, 367.
[707] *Nahimana* Appeal Judgement, para. 1026.
[708] Trial Judgement, para. 565.
[709] *Naletilić and Martinović* Appeal Judgement, Separate and Partly Dissenting Opinion of Judge Schomburg, para. 9; *Kordić and Čerkez* Appeal Judgement, Joint Dissenting Opinion of Judge Schomburg and Judge Guney, para. 6.

persecution.[710] The Chamber stresses, however, that this was not what the Trial Chamber accepted as the operative definition of persecution for the period relevant to the ECCC's jurisdiction. The Trial Chamber accepted that persecution was a separate and specific crime[711] and comparisons under the *Čelebići* test should have been done in respect to the adopted material definition and not in respect to an understanding of persecution as an "empty hull."

318. As accepted by the Trial Chamber,[712] when comparing persecution with another crime against humanity under the *Čelebići* test, the "materially distinct element" requirement for cumulative convictions means that *an element* in the definition of persecution must *require* proof of a fact not found in an element of another crime against humanity and vice versa.[713] Here, the Trial Chamber misapplied the "requires proof of a fact not required by the other" test for a materially distinct element[714] by failing to distinguish between facts that are *sufficient* as opposed to those that are *required* to prove the elements for persecution and other crimes against humanity, which is key to understanding the *Čelebići* test.

319. By way of example, the Supreme Court Chamber will compare the elements of persecution with extermination as a crime against humanity, one of the other crimes against humanity for which the Accused was found responsible in this case. As previously established in this Judgement, persecution is:

> (i) An act or omission which [...] discriminates in fact and which, when considered in context and in light of its cumulative effect, is of equal gravity or severity to other enumerated crimes against humanity such that it results in the denial or infringement of a fundamental right laid down in international customary or treaty law (*actus reus*); and

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[710] *See, e.g.* M. Cherif Bassiouni, *Crimes Against Humanity*, 2nd ed., Kluwer Law International, 1999, p. 259 ("Article 6(c) refers to 'persecution,' and the question arises as to whether the term is intended to create another specific crime or whether it is meant to evidence 'state action or policy.' In the opinion of this writer, it is more logically intended to refer to 'state action or policy' and thus to be read in addition to the term 'discrimination,' [...]. But that does not exclude consideration of 'persecution' as a separate specific crime, whose contents in this case have to be identified with some degree of specificity in order to satisfy the 'principle of legality.'" *See also* M. Cherif Bassiouni, *Crimes Against Humanity*, 2nd ed., p. 327.
[711] Trial Judgement, paras 376-380.
[712] Trial Judgement, para. 560.
[713] *Čelebići* Appeal Judgement, paras 412-413.
[714] *Čelebići* Appeal Judgement, para. 412.

(ii) Deliberate perpetration of an act or omission with the intent to discriminate on political, racial or religious grounds (*mens rea*).

320. Whereas, the Trial Chamber found that extermination constitutes:

(i) An "act, omission or combination of each that results in the death of persons on a massive scale" [715] (*actus reus*); and

(ii) "[I]ntent to kill persons on a massive scale, or to inflict serious bodily injury or create conditions of life that lead to death in the reasonable knowledge that such act or omission is likely to cause the death of a large number of persons" (*mens rea*).[716]

321. With respect to the *actus reus* for persecution, while proof that the accused caused the death of persons on a massive scale, or the *actus reus* for extermination, is *sufficient* to fulfil in part the *actus reus* of persecution, proof of that fact is not *required*. It would still be possible to prove persecution if an act or omission leads to results just short of causing actual death. Indeed, if a perpetrator undertook an act in which the victims were only severely maimed, an accused could not be convicted of extermination because the *actus reus* requirement is not fulfilled. However, assuming that all of the other aspects of the definition of persecution were met, he or she could still be found guilty of persecution because the maiming would fulfil persecution's *actus reus* requirement that an act or omission be of equal gravity or severity to other enumerated crimes against humanity such that it results in the denial or infringement of a fundamental right. Thus, proving that persons were killed on a massive scale would be sufficient to satisfy in part the *actus reus* of persecution, but it would not be necessary.

322. On the other hand, the actual death of massive numbers of people is *required* to fulfil extermination's *actus reus*, making it a materially distinct element according to the *Čelebići* test requiring proof of a fact not required for persecution. Similarly, while the proof of the death of large numbers of people would satisfy the *actus reus* for extermination, it would not be sufficient to satisfy the *actus reus* for persecution if

[715] Trial Judgement, para. 334, citing *Blagojević and Jokić* Trial Judgement, para. 572; *Prosecutor v. Seromba*, ICTR-01-66-A, "Judgement," Appeals Chamber, 12 March 2008, ("*Seromba* Appeal Judgement"), para. 189.
[716] Trial Judgement, para. 338, quoting *Bagosora* Trial Judgement and Sentence, para. 2191. The Trial Chamber's definition of extermination as a crime against humanity is not before the Supreme Court Chamber in this appeal. Therefore, this Chamber refrains, at this stage, from reviewing whether or not this definition is correct as a matter of law.

the killing failed to effectuate discrimination in fact. Thus, the *actus reus* for persecution is also materially distinct, requiring proof of a fact not found in other crimes against humanity such as extermination.

323. Furthermore, this example of materially distinct elements is not limited to an examination of persecution's *actus reus*. Persecution's *mens rea* requirement of deliberate intent with specific intent to discriminate on political racial or religious grounds is materially distinct from extermination's *mens rea* of intent to kill persons on a massive scale, or to inflict serious bodily injury or create conditions of life that lead to death with the reasonable knowledge that the act or omission will likely cause the death of a large number of persons. To continue the prior example where charges of persecution and extermination are based on the same conduct, a perpetrator who commits an act or omission against a targeted group on political grounds with deliberate intent to inflict serious bodily injury or create conditions of life that lead to death but without reasonable knowledge as to whether the act or omission would likely cause the death of a large number of persons could not be held responsible for extermination. However, this scenario would still satisfy persecution's *mens rea* requirement. Reasonable knowledge that the act or omission would cause the death of a large number of persons is therefore a fact that must be proven that is not required for persecution, making the *mens rea* for extermination a materially distinct element. On the other hand, where reasonable knowledge is proven but specific discriminatory intent is not, the *mens rea* requirement for extermination is met, but the *mens rea* for persecution is not. Consequently, this required proof of specific discriminatory intent makes persecution's *mens rea* a materially distinct element as well.

324. Second, in applying the *Čelebići* test, the Trial Chamber incorrectly focused on the factual circumstances of the criminal conduct at issue rather than the legal elements of each charged crime against humanity as is required under the test. Although the Trial Chamber acknowledged that it must look to the "legal elements of each crime that may be the subject of a cumulative conviction rather than the underlying conduct"[717] in its holding, it nevertheless proceeded to then look to the

[717] Trial Judgement, para. 561.

facts of the underlying acts at issue when it considered cumulative convictions, concluding that:

> [w]hile the ingredients of persecution and underlying offences may appear distinct when considered in the abstract, the question, according to the *Čelebići* test, is whether they are *materially* distinct; that is, whether each offence contains elements that require proof of a fact not required by the other offences. Where, for example, the charge of persecution is premised on murder or inhumane acts, and such charge is proven, the Prosecution need not prove any additional fact in order to secure a conviction for murder or inhumane acts as well. The proof that the accused committed persecution through murder or inhumane acts *necessarily* includes proof of murder or inhumane acts. These offences become subsumed within the [more specific] offence of persecution.[718]

325. The Supreme Court Chamber again disagrees. It is clear from the Trial Chamber's holding that they eschewed the legal elements and the proof of facts required to establish those elements as an evidentiary matter in favour of the underlying conduct for the murder or inhumane acts charges and found that no additional *conduct* needed to be shown to reach convictions for those crimes.[719] However, it is indeed the "abstract" legal elements and the requisite proof of facts under those elements that must be compared when analysing cumulative convictions, rather than the factual circumstances surrounding the underlying conduct.[720]

326. While these legal elements may appear to exist in the abstract, they create very real and distinct requirements for the prosecutor to prove for each separate crime. Continuing the example of extermination and persecution, the prosecutor must prove actual death of a large number of persons as a result of an accused's actions for extermination while, for persecution, the prosecutor must show that the act breached a fundamental right and discriminated in fact. In this example, the underlying conduct is the same: the accused killed a number of persons from a targeted group. But these materially distinct legal elements require proof of different facts by the prosecutor. The Trial Chamber therefore improperly centred its analysis of cumulative convictions on the conduct underlying the charges, rather than focusing on the proof of facts required for the distinct legal elements. Having accepted that persecution is a distinct crime against humanity with its own *actus reus* and *mens rea* elements as

[718] Trial Judgement, para. 565 (citations omitted).
[719] Trial Judgement, para. 565.
[720] *Kordić and Čerkez* Appeal Judgement, para. 1040.

opposed to a mere contextual crime or "empty hull," it was illogical for the Trial Chamber to then fail to enter cumulative convictions for persecution *vis-à-vis* other crimes against humanity under the *Čelebići* test.

327. Finally, convicting the Accused cumulatively for each of the crimes against humanity for which the Trial Chamber found him responsible does not cause prejudice to the Accused's rights. First, the danger of social stigma to the Accused is not materially enhanced by cumulative convictions for murder, extermination, enslavement, imprisonment, torture and other inhumane acts in addition to persecution because the Trial Chamber has already found the Accused criminally responsible for those crimes.[721] Although there is generally an inherent social stigma in being convicted of a crime that may exceed the stigma of mere criminal responsibility, the gravity of the Accused's conduct and its profound impact on Cambodia make it unlikely that he could be further stigmatized by formal convictions.

328. Second, a risk to the accused traditionally comes from the possibility that national jurisdictions enforcing the sentence will decide upon the opportunity for early release under national law based in part on the number of convictions, with less of a chance for early release the more convictions there are.[722] In the ECCC context, however, pursuant to Article 33 new of the ECCC Law, the specific question of the Accused's eligibility for early release is governed by the criminal procedure law of Cambodia.[723] In accordance with that law, eligibility for early release is determined by looking at the duration of the single sentence pronounced and not the multiplicity of counts in concurrence.[724] Thus the applicable legal framework contains protections that eliminate any risk that cumulative convictions will negatively affect the possibility of early release.

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[721] Trial Judgement, para. 567.
[722] *Čelebići* Appeal Judgement, Separate and Dissenting Opinion of Judges Hunt and Bennouna, para. 23.
[723] ECCC Law, Art. 33 new.
[724] 2007 Code of Criminal Procedure, Arts 512 and 513 (providing that a convicted person who is serving one or more imprisonment sentences may be paroled if: (a) s/he has shown good behaviour during imprisonment; (b) s/he appears to be able to reintegrate into society; (c) a certain portion of his/her sentence has already been served); 2009 Criminal Code of Cambodia, Article 137 ("If, in the course of a single prosecution, the accused is found guilty of several concurrent offences, each of the penalties incurred may be imposed. However, if several penalties of a similar nature are incurred, only one such penalty not exceeding the highest maximum penalty allowed by law shall be imposed").

329. Finally, the Accused does not face a risk of habitual offender laws or increased sentences in subsequent convictions because, while the Trial Chamber may consider prior convictions for crimes under its jurisdiction as aggravating factors at sentencing,[725] under the circumstances of this case, it is highly unlikely that the Accused will be convicted of subsequent crimes in Cambodia or elsewhere after serving his current sentence.

330. While, however, cumulative convictions will not substantially impinge on the Accused's rights, a failure to convict the Accused cumulatively undermines the societal interests in describing "the full culpability of a particular accused or provid[ing] a complete picture of his criminal conduct."[726] Considering all of the charges of crimes against humanity for which the Accused was found responsible by the Trial Chamber, solely convicting him for persecution does not accurately provide the full picture of the severity of his criminal conduct because persecution can encompass such varying degrees of criminality. The broad definition of persecution allows for a wide range of conduct to qualify as persecution, meaning that while particularly heinous acts can constitute persecutory conduct, so too can less grave breaches of fundamental rights as long as, when considered cumulatively and in context, they are equal in severity to other crimes against humanity. The resulting effect is that a conviction for persecution may be based on deprivation of the right to equality before the law or it may be based on conduct as severe as extermination.

331. In this case, the Accused was found criminally responsible for some of the gravest underlying acts that constitute crimes against humanity: murder, extermination, enslavement, imprisonment, torture and other inhumane acts. However, the Accused's actual conviction only reflects the crime of persecution. While subsumption as a legal principle still imparts guilt for criminal conduct, this legal distinction is not readily apparent. Therefore, subsuming all of the other crimes against humanity for which the Accused was found responsible within a sole conviction for persecution instead of reaching cumulative convictions fails to

[725] Trial Judgement, para. 583, citing International Criminal Court, Rules of Procedure and Evidence, signed and entered into force on 9 September 2002, ("ICC RPE"), Rule 145(2)(b).
[726] Trial Judgement, para. 560, quoting *Kunarac* Appeal Judgement, para. 169.

sufficiently address the injury to each individual societal interest represented by proscriptions constituting different crimes against humanity.

332. In sum, the Supreme Court Chamber finds that a proper application of the *Čelebići* test leads to the conclusion that the Accused should be cumulatively convicted for the crimes of extermination (encompassing murder), enslavement, imprisonment, torture, other inhumane acts, and persecution, as each offence charged has a materially distinct element not contained in the other. This Chamber has already demonstrated the materially distinct elements found in extermination and persecution above. Turning to extermination and murder, the Trial Chamber found that extermination constitutes:

> (i) "[A]n act, omission or combination of each that results in the death of persons on a massive scale" (*actus reus*);[727] and
>
> (ii) "[I]ntent to kill persons on a massive scale, or to inflict serious bodily injury or create conditions of life that lead to death in the reasonable knowledge that such act or omission is likely to cause the death of a large number of persons" (*mens rea*).[728]

333. Whereas, the Trial Chamber defined murder as:

> (i) An act or omission that results in the death of the victim (*actus reus*);[729] and
>
> (ii) "[I]ntent either to kill or to cause serious bodily harm in the reasonable knowledge that the act or omission would likely lead to death" (*mens rea*).[730]

334. The Supreme Court Chamber agrees that, under the *Čelebići* test, extermination as a crime against humanity, as the more specific offence, subsumes murder as a crime against humanity.[731] Both crimes share the same *actus reus* and

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[727] Trial Judgement, para. 334, citing *Blagojević and Jokić* Trial Judgement, para. 572; *Seromba* Appeal Judgement, para. 189.
[728] Trial Judgement, para. 338, quoting *Bagosora* Trial Judgement and Sentence, para. 2191.
[729] Trial Judgement, para. 331.
[730] Trial Judgement, para. 333, citing *Blagojević and Jokić* Trial Judgement, para. 556. The Trial Chamber's definition of murder as a crime against humanity is not before the Supreme Court Chamber in this appeal. Therefore, this Chamber refrains, at this stage, from reviewing whether or not this definition is correct as a matter of law.
[731] Trial Judgement, para. 566.

*mens rea* elements except that extermination has the additional requirement of *mass* killing, which makes it materially distinct from murder.[732]

335. With respect to the five crimes the Trial Chamber subsumed under persecution, each of these has at least one materially distinct element from persecution and therefore cumulative convictions for all six offences are appropriate. None of these five crimes requires a demonstration of specific discriminatory intent, a required element of persecution.[733] Similarly, at least one element of the *actus reus* of each of the five offences goes beyond the minimum requirement of "an act or omission which [...] discriminates in fact and which denies or infringes upon a fundamental right," the sole requirement of the *actus reus* of persecution.[734] Thus, the Accused is properly convicted of persecution as well as extermination, enslavement, imprisonment, torture and other inhumane acts.

### 3. Conclusion

336. On the basis of the foregoing, the Supreme Court Chamber accepts this part of Ground 2 of the Co-Prosecutors' Appeal and finds that the Trial Chamber erred in subsuming other crimes against humanity for which it found the Accused responsible beyond reasonable doubt within its conviction against the Accused for persecution as a crime against humanity. Consequently, the Chamber orders that, in addition to the Accused's conviction for persecution as a crime against humanity, separate convictions shall also be entered against the Accused for extermination (encompassing murder), enslavement, imprisonment, torture and other inhumane acts.[735]

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[732] Trial Judgement, para. 566.
[733] Sections above articulate this Chamber's definition of enslavement, torture and persecution as crimes against humanity. *See also* Trial Judgement, para. 347 (articulating the Trial Chamber's definition of imprisonment) and paras 367-371 (articulating the Trial Chamber's definition of other inhumane acts). The Trial Chamber's definitions of imprisonment and other inhuman acts as crimes against humanity are not before the Supreme Court Chamber in this Appeal. Therefore, this Chamber refrains, at this stage, from reviewing whether or not these definitions are correct as a matter of law.
[734] *See* prior section in this Judgement on persecution as a crime against humanity.
[735] In so ordering, the Supreme Court notes that it is acting in accordance with Internal Rule 110(4) when modifying the Trial Chamber's disposition in this case because the Trial Chamber did not acquit the Accused for these crimes. Furthermore, the Supreme Court Chamber notes that entering formal convictions here is in accordance with Internal Rule 110(2) and Article 401 of the 2007 Code of Criminal Procedure whereby a court of appeal may change the legal characterization of crimes without introducing new constitutive elements that were not submitted to the Trial Chamber.

# V. ALLEGED ERRORS CONCERNING SENTENCING (GROUND 2 OF THE DEFENCE APPEAL AND GROUND 1 OF THE CO-PROSECTUORS' APPEAL)

## A. Ground 2 of the Defence Appeal

337. As a preliminary matter, the Supreme Court Chamber notes that KAING Guek Eav's second ground of appeal, as identified in his Notice of Appeal, is entitled "Error concerning the determination of a single prison sentence of 35 years."[736] However, the arguments made under this second ground of appeal, presumably in order to "specify the alleged errors of law invalidating" the sentence,[737] appear to relate more directly to KAING Guek Eav's first ground of appeal on personal jurisdiction. For example, Defence for KAING Guek Eav addresses alleged mitigating factors – the "real functions of [the Accused] during the Democratic Kampuchea regime"[738] and "the fact that he fully cooperated with the Chamber"[739] – in their pleadings on personal jurisdiction. The Defence Appeal also focuses on personal jurisdiction under the section titled "Ground 2: Error Concerning Conviction and Sentence."[740]

338. In accordance with the legal interest of KAING Guek Eav and the presumed intention of his Appeal, the Supreme Court Chamber nonetheless considers that the Defence submits, as an alternative ground of appeal that, in determining sentence, the Trial Chamber failed to consider as mitigating factors KAING Guek Eav's position in the hierarchy of the DK[741] and alleged lack of decision-making powers.[742] The Defence also submitted during the Appeal Hearing that the Trial Chamber erred by failing to give proper weight to KAING Guek Eav's cooperation and expressions of remorse.[743] The Defence submits that these mitigating factors permit a maximum sentence of 30 years, but argues that a 15-year prison term would be most

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[736] Defence Notice of Appeal, heading related to paras 8-9.
[737] Internal Rule 105(3).
[738] Defence Notice of Appeal, para. 8.
[739] Defence Notice of Appeal, para. 8.
[740] Such focus is in line with the Defence strategy expressed in its oral submissions. T. (EN), 28 March 2011, F1/2.1, p. 9 (lines 8-12); T. (EN), 29 March 2011, F1/3.2, p. 28 (lines 24-25) and p. 29 (lines 1-5).
[741] Defence Appeal, para. 36 (affirming that under Cambodian customary law perpetrators can be exonerated of criminal liability or can be granted a mitigation in sentence if crimes were committed while acting under the orders of another person. Reference is also made by way of footnote 23 to a Cambodian folk tale that is intended to give evidence to such a customary rule).
[742] Defence Appeal, paras 87-90.
[743] T. (EN), 29 March 2011, F1/3.2, p. 33 (lines 16-17).

appropriate.[744] The Supreme Court Chamber will attach due consideration to these submissions and address them in conjunction with the Co-Prosecutors' appeal against the sentence.

339. The Defence does, however, explicitly argue that the Trial Chamber erred by imposing an arbitrary sentence due to its failure to give adequate regard to Article 95 of the 2009 Criminal Code of Cambodia ("2009 Criminal Code").[745] The Supreme Court Chamber understands this particular submission to mean that international law, including the jurisprudence of international criminal tribunals, is not applicable to sentencing before the ECCC. On this issue, the Supreme Court Chamber invited the parties[746] to express their opinion on the effect of Article 668 of the 2009 Criminal Code that entered into force after the Trial Judgement was delivered. In response, at the Appeal Hearing, the Defence argued that, while it saw no conflict between the 2009 Criminal Code and the ECCC Law, KAING Guek Eav should benefit from any provision of the 2009 Criminal Code that is more favourable to him.[747]

340. In response, the Co-Prosecutors argue that KAING Guek Eav's second ground of appeal is evidently unfounded, otherwise fails to meet minimum pleading requirements, and should therefore be disregarded by the Supreme Court Chamber.[748] The Co-Prosecutors additionally contend that the Defence's appeal submissions, purportedly in relation to sentencing, are in fact not distinct from its submissions on personal jurisdiction, and should accordingly be rejected.[749]

341. On the applicability of the 2009 Criminal Code, and in particular Articles 10, 95 and 668 thereof, the Co-Prosecutors argue that these domestic provisions do not form part of the sentencing regime applicable to proceedings before the ECCC and should consequently not be considered. First, they assert that the ECCC Law qualifies as "special criminal legislation" as provided for in Article 668(3) of the Criminal

[744] T. (EN), 29 March 2011, F1/3.2, p. 33 (lines 9-25) to p. 34 (lines 1-8) and p. 86 (lines 13-21).
[745] Defence Appeal, para. 91; T. (EN), 29 March 2011, F1/3.2, p. 86 (lines 4-21), p. 87 (lines 5-9), and p. 88 (lines 3-12).
[746] Order Scheduling Appeal Hearing, p. 4.
[747] T. (EN), 29 March 2011, F1/3.2, p. 80 (line 9) to p. 82 (line 25).
[748] Co-Prosecutors' Response, paras 7-9.
[749] Co-Prosecutors' Response, paras 50-51.

Code.[750] As such, the "prevalency clause"[751] in Article 668(2), which would otherwise establish the primacy of Book 1 of the 2009 Criminal Code in cases of conflict with other criminal legislation, including the ECCC Law, does not apply.[752] Second, the Co-Prosecutors contend that the sentencing provisions contained in the 2009 Criminal Code are not binding upon the ECCC because the UN-RGC Agreement and the ECCC Law created a "*sui generis* institution"[753] to which a specific sentencing regime applies, which is envisaged in Article 10 of the UN-RGC Agreement and Article 39 of the ECCC Law.[754] The arguments laid down in the Defence Reply are not related to sentencing.[755]

### 1. The Applicable Law for Sentencing

342. In addressing Ground 2 of the Defence Appeal, the Supreme Court Chamber will first examine the submissions concerning the law applicable to sentencing. Internal Rule 98(5) provides:

> If the Accused is found guilty, the Chamber shall sentence him or her in accordance with the Agreement, the ECCC Law and these IRs.[756]

343. Article 10 of the UN-RGC Agreement stipulates that the maximum penalty shall be life imprisonment.[757] Moreover, Article 39 of the ECCC Law more specifically states:

> Those who have committed any crime as provided in Articles 3, 4, 5, 6, 7 and 8 shall be sentenced to a prison term from five years to life imprisonment.[758]

344. These provisions empower the Trial Chamber to select any fixed term of imprisonment that is equal to or greater than five years, or to impose a life sentence.

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[750] T. (EN), 29 March 2011, F1/3.2, p. 42 (lines 11-14), p. 48 (lines 2-7), and p. 75 (lines 14-22).
[751] T. (EN), 29 March 2011, F1/3.2, p. 41 (lines 11-12).
[752] T. (EN), 29 March 2011, F1/3.2, p. 41 (line 2) to p. 48 (line 7), p. 74 (line 11) to p. 76 (line 22), and p. 79 (lines 11-17).
[753] T. (EN), 29 March 2011, F1/3.2, p. 43 (line 10).
[754] T. (EN), 29 March 2011, F1/3.2, p. 43 (line 8) to p. 46 (line 22).
[755] The Defence Reply focuses instead on personal jurisdiction over KAING Guek Eav.
[756] Internal Rule 98(5).
[757] UN-RGC Agreement, Art. 10.
[758] ECCC Law, Art. 39.

345. The issue before the Supreme Court Chamber is whether certain provisions in Book 1 of the 2009 Criminal Code,[759] specifically Articles 10 and 95, are applicable to the determination of sentence. As such, the Supreme Court Chamber will discuss the applicability of these Articles in the paragraphs below.

346. Article 10(1) of the 2009 Criminal Code guarantees the *lex mitior* principle, according to which "[a] new provision which prescribes a lighter penalty shall be applicable immediately."[760] Article 95 provides that where the penalty incurred for an offence is life imprisonment, a judge who grants "the benefit of mitigating circumstances may impose a sentence of between fifteen and thirty years imprisonment."

347. Relying upon these provisions, the Defence contends that the range of the length of imprisonment envisioned by the 2009 Criminal Code should prevail, as it is less severe than what is envisioned in the ECCC legal framework. Despite the absence of explicit mention by the Defence, the Supreme Court Chamber interprets the Defence argument as also based on another provision of the 2009 Criminal Code under which a fixed-term sentence higher than 30 years is not permissible. Article 46 (Definition of Felony) provides:

> A felony is an offense for which the maximum sentence of imprisonment incurred is: (1) life imprisonment; (2) imprisonment for more than five years, but no more than thirty years.

348. The Supreme Court Chamber finds, however, that the relationship between Article 39 of the ECCC Law and Article 46 of the 2009 Criminal Code needs to be considered, instead, in light of the principle of *lex specialis*. Whereas the 2009 Criminal Code is a law of general application binding on all Cambodian domestic courts, the ECCC Law was legislated specifically for the unique purposes of the ECCC under its mandate, jurisdiction, character and structure. Therefore, in

[759] While Book 1 (General Provisions) of the 2009 Criminal Code entered into force in December 2009, the other provisions of the 2009 Criminal Code became applicable one year thereafter. 2009 Criminal Code, Art. 672; Preah Reach Kram, NS/RKM/1109/022, 30 November 2009, 5 January 2010 (filing date), E180.1; Constitution of the Kingdom of Cambodia, Art. 93 (New).
[760] 2009 Criminal Code, Art. 10(1). *See also* ICCPR, Art. 15(1).

accordance with the principle of *lex specialis*, the ECCC Law shall govern the range of penalty in proceedings before the ECCC.

349. This conclusion is supported by the interpretation of two relevant provisions in the 2009 Criminal Code, namely, Articles 8 and 668. Article 668 (Application of other criminal legislation) of the 2009 Criminal Code provides:

> (1) Other criminal legislation and criminal provisions in force shall be applicable to the offenses defined and punished under such legislation and provisions.
> (2) In the event of conflict between other criminal legislation and criminal provisions and the provisions of this Code, the provisions of Book 1 (General Provisions) of this Code shall prevail.
> (3) The provision of paragraph 668(2) above shall not be applicable to special criminal legislation.

350. In addition, Article 8 (No impunity for serious violations of international humanitarian law) of the 2009 Criminal Code states:

> The provisions of this Code may not have the effect of denying justice to the victims of serious offences which, under special legislation, are characterized as violations of international humanitarian law, international custom, or international conventions recognized by the Kingdom of Cambodia.

351. In light of the language and content of these provisions, the Supreme Court Chamber agrees with the Co-Prosecutors that the ECCC Law is "special criminal legislation" within the meaning of Article 668(3) of the 2009 Criminal Code. Hence, the provisions of Book 1 (General Provisions) of the 2009 Criminal Code do not prevail over any provisions of the ECCC Law in the event of a conflict between the 2009 Criminal Code and the ECCC Law. Clearly, there is a conflict between Article 39 of the ECCC Law, which does not restrict the ECCC from imposing a fixed-term sentence of more than 30 years imprisonment, while Article 46 of the 2009 Criminal Code does preclude such a sentence. Accordingly, Article 46 of the 2009 Criminal Code shall not be applicable to cases before the ECCC and the range of penalty may be anywhere from five years imprisonment to life imprisonment as provided by Article 39 of the ECCC Law. Having held that Article 46 of the 2009 Criminal Code

does not bind the ECCC, the Supreme Court Chamber finds that the issue of *lex mitior* does not arise in the present case.[761]

### 2. Conclusion

352. For the foregoing reasons, KAING Guek Eav's second ground of appeal on sentence, which requests limiting the range of sentence to what is authorised in the 2009 Criminal Code, is dismissed.

## B. The Standard of Appellate Review for Sentencing

353. Before turning to examine Ground 1 of the Co-Prosecutors' Appeal, the Supreme Court Chamber must first articulate the applicable standard of review that it is to follow when assessing the sentence decided by the Trial Chamber. In this regard, the Supreme Court Chamber notes that an appeal against sentence is also subject to Internal Rule 104, which provides:

> (1) The Supreme Court Chamber shall decide an appeal against a judgment or a decision of the Trial Chamber on the following grounds:
> (a) an error on a question of law invalidating the judgment or decision; or
> (b) an error of fact which has occasioned a miscarriage of justice.
>
> [...].
>
> (2) The Supreme Court Chamber may either confirm, annul or amend decisions in whole or in part, as provided in Rule 110.
> (3) Decisions of the Chamber are final, and shall not be sent back to the Trial Chamber.[762]

354. There is no guidance, however, in the UN-RGC Agreement, ECCC Law, Internal Rules, or Cambodian law and jurisprudence on the application of Internal Rule 104(1)(a)-(b) to an appeal against sentence. In such circumstances, the Supreme Court Chamber seeks guidance at the international level. The Chamber agrees with and adopts the following standard articulated by the ICTY Appeals Chamber as an interpretation of the proper application of Internal Rule 104(1)(a)-(b) with respect to appeals against sentence:

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[761] *See Prosecutor v. Nikolić*, IT-94-02-A, "Judgement on Sentencing Appeal", Appeals Chamber, 4 February 2005, ("*Nikolić* Appeal Judgement"), para. 81 (holding that the principle of *lex mitior* relates only to laws that are binding upon the court).
[762] Internal Rule 104.

> Due to their obligation to individualise the penalties to fit the circumstance of an accused and the gravity of the crime, Trial Chambers are vested with broad discretion in determining the appropriate sentence, including the determination of the weight given to mitigating or aggravating circumstances. As a general rule, the Appeals Chamber will not revise a sentence unless the Trial Chamber has committed a discernible error in exercising its discretion or has failed to follow the applicable law. It is for the appellant to demonstrate that the Trial Chamber gave weight to extraneous or irrelevant considerations, failed to give weight or sufficient weight to relevant considerations, made a clear error as to the facts upon which it exercised its discretion, or that the Trial Chamber's decision was so unreasonable or plainly unjust that the Appeals Chamber is able to infer that the Trial Chamber must have failed to exercise its discretion properly.[763]

### C. Ground 1 of the Co-Prosecutors' Appeal

355. Under Ground 1 of the Co-Prosecutors' Appeal, it is argued that: the Trial Chamber erred in failing to impose the highest sentence available to it under the ECCC Law, namely, life imprisonment; the sentence of thirty-five years fails to give sufficient weight to the objective gravity of the crimes, which warrants the highest penalty; the Trial Chamber erred in imposing a lenient and plainly unjust sentence by ignoring KAING Guek Eav's specific circumstances; and the Trial Chamber, having assessed the aggravating circumstances based on the factors suggested by the Co-Prosecutors, failed to assign sufficient weight to them, in particular to the abuse of authority and that no mercy was shown to the victims, victims were defenceless and vulnerable, and crimes were committed with discriminatory intent.[764]

356. The Co-Prosecutors also submit that: the Trial Chamber, despite finding that "limited" or "diminished" weight attached to the mitigating circumstances submitted by KAING Guek Eav, in its final finding on sentencing, chose to describe these circumstances as "significant" and erroneously came to a conclusion that imprisonment for life needed to be reduced to "a finite term" of thirty-five years; the Trial Chamber failed to consider the Co-Prosecutors' initial submission that only minimal allowance should be made for KAING Guek Eav's "general" cooperation with the Court, limited acceptance of responsibility and its potential impact on national reconciliation; the Trial Chamber also failed to consider the Co-Prosecutors'

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[763] *D. Milošević* Appeal Judgement, para. 297.
[764] Co-Prosecutors' Appeal, paras 32, 34, 43, 50-55.

concluding submission that, given KAING Guek Eav's change of defence and request for acquittal, no mitigating factors should be considered.[765]

357. The Co-Prosecutors further argue that: the Judgement fails to give reasons for the Trial Chamber's decision to impose a thirty-five year sentence on KAING Guek Eav, and has therefore determined the sentence arbitrarily without relying upon any jurisprudence from comparable cases and the relevant law cited by the Co-Prosecutors at trial; the Trial Chamber has committed a discernible error of law in arriving at a manifestly unjust sentence for KAING Guek Eav that is clearly outside the range of sentences available to the Trial Chamber in the circumstances of this case; the sentence imposed by the Trial Chamber does not adequately reflect the fundamental goals of international criminal sentencing, in particular the goals of deterrence and retribution; anything less than life imprisonment would not sufficiently reflect the domestic and international outrage expressed in respect of his crimes and would not sufficiently deter the commission of future crimes of this nature.[766]

358. On the basis of the foregoing reasons, the Co-Prosecutors request that the Supreme Court Chamber:

> (a) revise the sentence imposed by the Trial Chamber to a sentence of life imprisonment;
> (b) order that this sentence be reduced to a term of forty-five years to provide an appropriate remedy for the Accused's unlawful detention under the Military Court;
> (c) order that a further reduction be made as appropriate for the very limited mitigating circumstances established in this case with an absolute maximum reduction of up to five years; and
> (d) hold that the Accused will serve this sentence without the possibility of parole.[767]

359. The Defence did not file a written response to the Co-Prosecutors' Appeal. Their rather sparse submissions regarding mitigating factors and appropriate sentence in the Defence Appeal have been summarised above and will be addressed below in conjunction with those submitted by the Co-Prosecutors.

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[765] Co-Prosecutors' Appeal, paras 61, 63.
[766] Co-Prosecutors' Appeal, paras 92, 121.
[767] Co-Prosecutors' Appeal, para. 216.

### 1. The Trial Chamber's Determination of Sentence

360. In its Judgement, the Trial Chamber agreed with the Co-Prosecutors that the role of KAING Guek Eav in the commission of the crimes, their impact on the victims and their families, and KAING Guek Eav's individual circumstances were relevant in determining the gravity of crimes. It found KAING Guek Eav criminally responsible for crimes of a particularly shocking and heinous character and considered that his crimes were extremely grave. It also weighed aggravating factors as argued by the Co-Prosecutors, namely: (a) the Accused's abuse of power or official capacity; (b) the cruelty of the crimes committed; (c) the defencelessness of the victims; and (d) the discriminatory intent with which the crimes were committed.[768] Regarding mitigating factors, the Chamber: (a) placed limited weight on the coercive climate in DK and the Accused's subordinate position within the CPK; (b) considered that his cooperation with the ECCC may serve as a mitigating factor; (c) found that the mitigating impact of his remorse was undermined and diminished by his failure to offer a full and unequivocal admission of his responsibility; and (d) accorded limited consideration to his propensity for rehabilitation.[769]

361. When determining the sentence, the Trial Chamber concluded as follows:

> In deciding on an appropriate sentence, the Chamber has taken into account the entirety of the circumstances of this case, including all relevant sentencing principles and factors previously discussed.
>
> The Chamber has concluded unanimously that there are significant mitigating factors which mandate the imposition of a finite term of imprisonment rather than a life sentence. These factors include the Accused's cooperation with the Chamber, admission of responsibility, expressions of remorse (although undermined by his request for acquittal during closing statements), the coercive environment in DK in which he operated, and his potential for rehabilitation.
>
> The Chamber has further noted a number of aggravating features, including the shocking and heinous character of the offences, which were perpetrated against at least 12,273 victims over a prolonged period. Such factors, when considered cumulatively, warrant a substantial term of imprisonment.

[768] Trial Judgement, paras 596-597, 600-605.
[769] Trial Judgement, paras 608-611.

> On the basis of the foregoing, the majority of the Chamber (Judge LAVERGNE dissenting) considers the appropriate sentence to be 35 years of imprisonment.[770]

362. According to the Trial Chamber's descriptions, two mitigating factors were of "limited" impact only and the impact of a third was "undermined" and "diminished." However, further on in its Judgement the Trial Chamber, without explanation, described the totality of the mitigating factors as "significant."[771] Presumably the cumulative effect of these three "limited" and/or "undermined" factors, in combination with KAING Guek Eav's cooperation, led the Trial Chamber to the finding of "significant" mitigating factors.

363. Notwithstanding the broad discretion vested with the Trial Chamber in determining the weight of mitigating factors, the Supreme Court Chamber finds that the effect that mitigating factors had on the Trial Chamber's determination of the sentence constituted an error of law. The Supreme Court Chamber will now examine each of these mitigating factors in turn in order to dispose of the Co-Prosecutors' submission that these factors received excessive weight in the meting out of the punishment.

364. First, although duress was not established, the Trial Chamber did accord limited consideration to "the coercive climate in DK and his subordinate position within the CPK."[772] This finding is embedded in the paragraph on duress, as it shares its core rationale, albeit to a lesser degree, that the sentence should be adjusted to reflect KAING Guek Eav's diminished ability to effectuate a different moral choice, since refusal to commit the crime would have resulted in a threat to his life. In the present case, KAING Guek Eav failed to demonstrate that he had no choice in committing crimes for which he was accused, that he was personally threatened, or that he attempted to dissociate himself from his criminal conduct.[773] Rather, the Trial

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[770] Trial Judgement, paras 628-631.
[771] Trial Judgement, paras 608-611, 629.
[772] Trial Judgement, para. 608.
[773] *Prosecutor v. Erdemović*, IT-96-22-T*bis*, "Sentencing Judgement", Trial Chamber, 5 March 1998, para. 17 (granting duress as a mitigating factor in a situation where the accused not only claimed that his family members' and his own life was under serious and concrete threat, but also satisfied the Chamber that he had repeatedly shown his willingness to disobey the criminal orders he was given). *See also Prosecutor v. Erdemović*, IT-96-22-A, "Separate and Dissenting Opinion of Judge Cassese", Appeals Chamber, 7 October 1997, para. 15 ("if the superior order is manifestly illegal under

Chamber determined that "he himself has willingly and actively participated"[774] in the commission of the crimes, using his discretion to "implement CPK ideology" by "using all possible means."[775] The mitigation on account of the "coercive climate in DK"[776] is thus of a minimal degree.

365. Second, the potentially mitigating effect of KAING Guek Eav's "subordinate position"[777] must be evaluated in light of the superior orders he received. Given that, as held by the Trial Chamber, KAING Guek Eav knew these orders were unlawful[778] and that they were not "accompanied by threats causing duress,"[779] the Supreme Court Chamber holds that no mitigating effect is to be attached thereto.

366. Third, the Trial Chamber recognised KAING Guek Eav's cooperation with the ECCC as a mitigating factor,[780] holding that it "undoubtedly facilitated the proceedings before the Chamber" and "assisted in the pursuit of national reconciliation."[781] Other international criminal tribunals have also recognised substantial cooperation with the Prosecution as an element warranting mitigation in sentence.[782] In this regard, due consideration was given to the following cooperative conduct by the defendants: clarifying areas of investigative doubt, including crimes previously unknown to the prosecutor;[783] admitting facts;[784] helping organise operations which led to the arrest of other suspects;[785] and agreeing to testify as a witness in other proceedings.[786] As held by an ICTY Trial Chamber:

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international law, the subordinate is under a duty to refuse to obey the order. If, following such a refusal, the order is reiterated under a threat to life or limb, then the defence of duress may be raised").
[774] Trial Judgement, para. 557.
[775] Trial Judgement, para. 395.
[776] Trial Judgement, para. 608.
[777] Trial Judgement, para. 608.
[778] Trial Judgement, para. 552.
[779] *Prosecutor v. Mrđa,* IT-02-59-S, "Sentencing Judgement", Trial Chamber, 31 March 2004, para. 67 ("[t]he fact that he obeyed such orders, as opposed to acting on his own initiative, does not merit mitigation of punishment" without some evidence of duress).
[780] Trial Judgement, para. 609.
[781] Trial Judgement, para. 609.
[782] ICC RPE, Rule 145(2)(a)(ii); ICTY RPE, Rule 101(B)(ii); ICTR RPE, Rule 101(B)(ii); and SCSL RPE, Rule 101(B)(ii); *Galić* Appeal Judgement, para. 434.
[783] *See, e.g. Serugendo* Trial Judgement, paras 61-62.
[784] *See, e.g. Prosecutor v. Musema*, ICTR-96-13-T, "Judgement and Sentence", Trial Chamber, 27 January 2000, ("*Musema* Trial Judgement"), para. 1007.
[785] *See, e.g. Prosecutor v. Serushago*, ICTR-98-39-S, "Sentence", Trial Chamber, 5 February 1999, ("*Serushago* Sentence"), para. 32.
[786] *See, e.g. Serushago* Sentence, para. 33; *Prosecutor v. Todorović*, IT-95-9/1-S, "Sentencing Judgement", Trial Chamber, 31 July 2001, para. 84.

> The earnestness and degree of co-operation with the Prosecutor decides whether there is reason to reduce the sentence on this ground. Therefore, the evaluation of the accused's co-operation depends both on the quantity and quality of the information he provides. Moreover, the Trial Chamber singles out for mention the spontaneity and selflessness of the co-operation which must be lent without asking for something in return.[787]

367. In the present case, the Co-Prosecutors argue that KAING Guek Eav's cooperation was limited, scarcely facilitated the economy of proceedings, and ultimately proved incomplete, selective and opportunistic.[788] The Defence does not set out substantiated arguments in response. The Supreme Court Chamber accepts that the Trial Chamber is vested with broad discretion in its assessment of mitigating factors. Still, the Supreme Court Chamber notes that the well-referenced and detailed trial submissions by the Co-Prosecutors, claiming that only limited weight should be attached to this factor, were not at any point discussed by the Trial Chamber in its Judgement.

368. The Supreme Court Chamber concurs with the Co-Prosecutors that KAING Guek Eav failed to offer a complete picture of his factual knowledge of this case in an effort to minimise his role in the crimes. He carefully avoided responding in full when confronted with allegations related to his personal involvement, seeking to attribute the responsibility for the crimes to others, and uttered statements which are inconsistent with available evidence. In sum, the Supreme Court Chamber, after having reviewed the totality of KAING Guek Eav's conduct during the proceedings before the ECCC, is not satisfied that his cooperation provided substantial information, either in terms of quantity or quality. Therefore the Supreme Court Chamber holds that the weight afforded thereto is limited.

369. Fourth, as for remorse, the Trial Chamber held that despite KAING Guek Eav's public apologies, "the mitigating impact of his remorse is undermined by his failure to offer a full and unequivocal admission of his responsibility," in particular as a result of his belated request for acquittal.[789] The Supreme Court Chamber stresses

[787] *Blaškić* Trial Judgement, para. 774 (citations omitted).
[788] Co-Prosecutors' Final Trial Submission with Annexes 1-5, 11 November 2009, E159/9, paras 423-427.
[789] Trial Judgement, para. 610.

that denying responsibility and requesting an acquittal is a fundamental right of KAING Guek Eav. In this case, however, it should be noted that the request for acquittal was not based on denial of the facts and culpability and, logically and legally, would not have collided with expressing remorse. The Supreme Court Chamber observes that during the Appeal Hearing, KAING Guek Eav spent almost the entire time given to him for his final statements in seeking to minimise his responsibility by placing it upon the "senior leaders". During the nearly thirty minutes of his final statements, he elaborated on the reasons why he believed he was outside of the ECCC's personal jurisdiction, while his reference to remorse and apology was limited to a few sentences in which he "maintain[ed] [his] position to ask for forgiveness" and for the victims and their families to "accept [his] apology and forgiveness." [790] This attitude indicated that he effectively gave up his final opportunity to demonstrate the sincerity of his prior statements on remorse and apology.[791] Considering these, the Supreme Court Chamber finds that remorse as a mitigating factor is of limited weight only.

370. The final mitigating factor taken into account by the Trial Chamber was KAING Guek Eav's propensity for rehabilitation. The Supreme Court Chamber agrees with the finding, supported by jurisprudence of the ICTY Appeals Chamber, that only "limited consideration" should be attributed to this factor in the determination of sentence.[792]

371. On the whole, the Supreme Court Chamber finds that the mitigating impact of the foregoing factors is limited at best. Further, the outstanding aggravating elements and exceptional magnitude of the crimes for which KAING Guek Eav was found responsible, which will be discussed in the following section, neutralise the limited impact of these mitigating factors.

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[790] T. (EN), 30 March 2011, F1/4.1, p. 129 (lines 14-19) (KAING Guek Eav stating, "I still maintain my position of legally responsible for the victims suffered at S-21, and for psychological damage for the victims throughout the country. I still maintain my position to ask for forgiveness for the soul of the victims of 12,733 people who lost their lives at S-21, and for the families of those victims to accept my apology and forgiveness").
[791] *Nikolić* Appeal Judgement, para. 117, citing other ICTY and ICTR cases for the proposition that remorse has been recognised as a mitigating factor only if such remorse is real and sincere; *Prosecutor v. Rugambarara*, ICTR-00-59-T, "Sentencing Judgement", Trial Chamber, 16 November 2007, para. 33.
[792] Trial Judgement, para. 611.

372. This neutralised effect of any mitigating factors in the present case is sufficient to overturn the Trial Chamber's finding, made without reference to any legal authority, that the "significant" mitigating factors "mandate" a finite sentence. The Trial Chamber also failed to discuss, and therefore presumably did not attach any weight to, relevant Cambodian and international law that permits life imprisonment notwithstanding mitigating factors. At the domestic level, Article 95 of the 2009 Criminal Code grants the judge discretion on whether or not to grant the benefit of mitigating factors in the form of a fixed term sentence in cases in which life imprisonment would otherwise be imposed.[793] At the international level, a line of appeal judgements from the *ad hoc* Tribunals confirms that life imprisonment can stand in spite of mitigating factors where the gravity of the crimes so dictates.[794]

373. The Supreme Court Chamber therefore finds that the Trial Chamber attached undue weight to mitigating circumstances and insufficient weight to the gravity of the crimes and aggravating circumstances in this case. Consequently, the Trial Chamber imposed a sentence that does not reflect the gravity of the crimes committed. This failure of the Trial Chamber constitutes an error of law invalidating the sentence in the Trial Judgement pursuant to Internal Rule 104(1)(a) and is an abuse of the Trial Chamber's discretion. As such, the intervention of the Supreme Court Chamber is required to determine an appropriate sentence. The Co-Prosecutors' first ground of appeal is therefore granted.

### 2. The Sentence as Amended by the Supreme Court Chamber

374. In the absence of comparable jurisprudence before Cambodian domestic courts, the Supreme Court Chamber has examined sentences of other international

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[793] 2009 Criminal Code, Art. 95 ("if the penalty incurred for an offence is life imprisonment, the judge granting the benefit of mitigating circumstances *may*" reduce the sentence as indicated) (emphasis added).

[794] *See, e.g. Prosecutor v. Renzaho*, ICTR-97-31-A, "Judgement", Appeals Chamber, 1 April 2011, ("*Renzaho* Appeal Judgement"), para. 612, citing *Prosecutor v. Karera*, ICTR-01-74-A, "Judgement", Appeals Chamber, 2 February 2009, ("*Karera* Appeal Judgement"), para. 390, *Prosecutor v. Niyitegeka*, ICTR-96-14-A, "Judgement", Appeals Chamber, 9 July 2004, para. 267, and *Musema* Appeal Judgement, para. 396; *Seromba* Appeal Judgement, paras 226-239 (imposing a sentence of imprisonment of the remainder of the convicted person's life notwithstanding the presence of mitigating factors); *Galić* Appeal Judgement, paras 453-456 (finding that the Trial Chamber abused its discretion in imposing a sentence of only twenty years, despite the Trial Chamber's undisputed finding concerning the existence of a mitigating factor, on account of the level of gravity of the crimes committed and the convicted person's degree of participation, and ultimately sentencing the convicted person to life imprisonment).

criminal tribunals addressing similar or comparable facts and issues. This Chamber is aware of the need to take into account the circumstances of individual cases and accused persons, and the risk of relying on dissimilar cases. Nevertheless, the Chamber finds it useful to consider sentences in similar or comparable cases as a source of guidance.[795]

375. It is well established in international jurisprudence that the primary factor to be weighed at sentencing is the gravity of the convicted person's crimes.[796] While all crimes falling within the ECCC's jurisdiction are serious violations of Cambodian and international criminal law, a number of factors are relevant to assessing the gravity of a particular offense.[797] Such elements, which revolve around the particular circumstances of the case together with the form and degree of participation of the convicted person, include the number and the vulnerability of victims, the impact of the crimes upon them and their relatives, the discriminatory intent of the convicted person when it is not already an element of the crime, the scale and brutality of the offenses, and the role played by the convicted person.[798] International tribunals have rendered heightened sentences, including life imprisonment, for cases involving particularly grave crimes.[799] The Supreme Court Chamber further observes that the *ad*

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[795] *See, e.g. Čelebići* Appeal Judgement, para. 756 (generally affirming that consistency in punishment is "an important reflection of the notion of equal justice"), and paras 759 and 851 (finding the penalty imposed by the Trial Chamber inadequate in part on account of its disparity with a case involving similar circumstances).

[796] *See, e.g. Nahimana* Appeal Judgement, para. 1060 (finding that "the effective gravity of the offences committed is the deciding factor in the determination of the sentence"); *Prosecutor v. Mucić et al.*, IT-96-21, "Judgement", Trial Chamber, 16 November 1998, para. 1225 ("[b]y far the most important consideration […] is the gravity of the offence"); *Aleksovski* Appeal Judgement, para. 182 ("[c]onsideration of the gravity of the conduct of the accused is normally the starting point for consideration of an appropriate sentence"); *Kambanda* Appeal Judgement, para. 125; *Kupreškić* Appeal Judgement, para. 442; *Čelebići* Appeal Judgement, para. 731.

[797] *See, e.g. Semanza* Trial Judgement and Sentence, para. 555 ("[a]ll of the crimes in the [ICTR] Statute are crimes of an extremely serious nature", thereby making it important to go "beyond the abstract gravity of the crime" to evaluate any relevant circumstance of the case); *Prosecutor v. Karera*, ICTR-01-74-T, "Judgement and Sentence", Trial Chamber, 7 December 2007, para. 574.

[798] *See Milutinović* Trial Judgement, para. 1147; *Lukić and Lukić* Trial Judgement, para. 1050, citing *Čelebići* Appeal Judgement, para. 1260; *Blaškić* Appeal Judgement, para. 683; *Kunarac* Appeal Judgement, paras 352, 357; *Tadić* Appeal Judgement, para. 305; *Prosecutor v. Delić*, IT-04-83-A, "Judgement", Trial Chamber, 15 September 2008, para. 563; *Prosecutor v. Boškoski and Tarčulovski*, IT-04-82-T, "Judgement", Trial Chamber, 10 July 2008, para. 588.

[799] *See, e.g. Galić* Appeal Judgement, para. 455 (issuing a sentence of life imprisonment as the Trial Chamber's 20-year sentence did not reflect the especially grave nature of the convicted person's crimes of organising shelling and sniper attacks that killed hundreds of civilians); *Prosecutor v. Kayishema and Ruzindana,* ICTR-95-1-T, "Sentence", Trial Chamber, 21 May 1999, paras 15-16, 26-27 (issuing four life imprisonment sentences for one of the two convicted persons based on his contribution to four massacres killing thousands of men, women and children in Rwanda, his position of authority, and the particular zeal with which he administered the crimes), affirmed on appeal, *Prosecutor v. Kayishema*

*hoc* Tribunals have issued sentences of life imprisonment mostly in cases in which the convicted person(s) abused a position of leadership by planning or ordering the alleged crimes, [800] as well as exhibited particular cruelty or zeal in their commission.[801] In determining the appropriate sentence, the Supreme Court Chamber will therefore consider the gravity of the crimes, as well as any aggravating factors that are established in the present case, such as the leadership role of KAING Guek Eav and the particular cruel or zealous commission of his crimes.

376. In the present case, the Trial Chamber determined that the crimes of KAING Guek Eav were of a "particularly shocking and heinous character" based on the proven number of people who were killed, at least 12,272 victims, as well as the systematic torture and deplorable conditions of the detention which they suffered.[802] The Co-Prosecutors demonstrated that the instant case is among the gravest in terms of the number of victims killed and the duration of killing when compared to seven other cases, two from the ICTY[803] and five from the ICTR,[804] in which the sentence of

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*and Ruzindana,* ICTR-95-1-A, "Judgement (Reasons)", Appeals Chamber, 1 June 2001, ("*Kayishema and Ruzindana* Appeal Judgement"), para. 371.

[800] *See, e.g. Galić* Appeal Judgement, paras 411-12, 455-456 (increasing the convicted person's sentence from 20 years to life imprisonment to reflect his leadership position as a senior military officer); *Musema* Trial Judgement, paras 1002-1003 (sentencing an influential director of a tea factory who diverted workers to attack Tutsi refugees to life imprisonment); *Prosecutor v. Kambanda*, ICTR-97-23-S, "Judgement", Trial Chamber, 4 September 1998, paras 61-62 (issuing life imprisonment because the convicted person abused his authority as Prime Minister of the Interim Government of Rwanda by inciting genocide); *Prosecutor v. Niyitegeka*, ICTR-96-14-T, "Judgement", Trial Chamber, 16 May 2003, para. 499 (issuing life imprisonment because the convicted person abused his position as Minister of Information by inciting genocide); *Prosecutor v. Ndindabahizi*, ICTR-2001-71-T, "Judgement", Trial Chamber, 15 July 2004, para. 508 (issuing life imprisonment because the convicted person advocated a policy of genocide as Minister of Finance in his native prefecture); *Prosecutor v. Nchamihigo*, ICTR-01-63-T, "Judgement and Sentence", Trial Chamber, 12 November 2008, ("*Nchamihigo* Trial Judgement and Sentence"), paras 391 and 396 (issuing life imprisonment because as "Deputy Prosecutor, [the convicted person] was expected to uphold the rule of law and principles of morality").

[801] *See, e.g. Lukić and Lukić* Trial Judgement, paras 1060-1069 (considering the convicted person's particular cruelty in savagely beating prisoners, burning victims alive and in one instance laughing as he shot a woman twice); *Bagosora* Trial Judgement and Sentence, paras 2265-2267 (considering the convicted person's particular brutality in cutting off limbs and mutilating sexual organs of his victims); *Kayishema and Ruzindana* Appeal Judgement, para. 361 (considering the convicted person's zeal in committing his crimes and the degree of harm caused, especially the irreparable damage of mutilation); *Nchamihigo* Trial Judgement and Sentence, para. 391 (considering the convicted person's particular cruelty in looting a house as its victims burned, as well as his zeal displayed in travelling large distances to numerous locations to intervene in killings); *Muhimana* Trial Judgement and Sentence, para. 612 (considering the particular heinous nature of the convicted person's crimes including one instance of mutilating a pregnant woman).

[802] Trial Judgement, para. 597.

[803] Annex to the Co-Prosecutors' Oral Submissions on Sentencing at the Appeal Hearing for Kaing Guek Eav alias Duch, 31 March 2011, F1/3.1, with attached documents, F1/3/1.1. *Galić* Appeal Judgement, paras 455-456 (in which the ICTY Appeals Chamber sentenced the convicted person to life

life imprisonment was imposed. The Supreme Court Chamber notes additional cases in which crimes of gravity comparable to the present case have resulted in life imprisonment.[805] The high number of deaths for which KAING Guek Eav is responsible, along with the extended period of time over which the crimes were committed (more than three years), undoubtedly place this case among the gravest before international criminal tribunals.

377. As to aggravating factors, KAING Guek Eav held a central leadership role at S-21, which he abused by training, ordering, and supervising staff in the systematic torture and execution of prisoners deemed to be enemies of the DK,[806] and showed "dedication to refining the operations of S-21."[807] The fact that he was not at the top of the chain of command in the DK regime does not justify a lighter sentence. Indeed, there is no rule that dictates reserving the highest penalty for perpetrators at the top of the chain of command.[808] Rather, international jurisprudence reserves the maximum

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imprisonment for the gravity of a campaign of sniping and shelling which occurred over several months and resulted in hundreds of deaths and thousands of wounded civilians); *Lukić and Lukić* Trial Judgement, paras 1063-1069 (sentencing one of the two convicted persons to life imprisonment for the particularly brutal way he committed persecutions on political, racial and religious grounds, murder, inhumane acts and extermination, including the murder of at least 132 Bosnian Muslims).

[804] Annex to the Co-Prosecutors' Oral Submissions. *Akayesu* Appeal Judgement (sentencing the convicted person to life imprisonment for the totality of his criminal conduct, including charges of genocide, crimes against humanity, incitement to commit genocide, torture, rape, and the murder of at least 2,000 Tutsis in the town where he served as bourgmestre); *Karera* Appeal Judgement, paras 393, 398 (sentencing the convicted person to life imprisonment for the crimes of genocide, extermination, and murder as crimes against humanity, including an attack at a church which killed hundreds of Tutsi refugees); *Kayishema and Ruzindana* Appeal Judgement, paras 299, 371-372 (sentencing one of the two convicted persons to life imprisonment for contributing to four massacres that resulted in thousands of deaths); *Bagosora* Trial Judgement and Sentence, paras 41, 2259 (sentencing three of the four convicted persons to life imprisonment for crimes of genocide, crimes against humanity and war crimes, including killings of thousands of Tutsi civilians); *Renzaho* Appeal Judgement, paras 621-622 (sentencing the convicted person to life imprisonment for genocide, murder, including ordering the killing of hundreds of Tutsi refugees, as well as crimes against humanity).

[805] *See, e.g. Gacumbitsi v. Prosecutor*, ICTR-2001-64-A, "Judgement", Appeals Chamber, 7 July 2006, ("*Gacumbitsi* Appeal Judgement"), paras 204, 206 (in sentencing the convicted person to life imprisonment for crimes which included an attack where thousands of people were killed, attaching weight to his "central role in planning, instigating, ordering, committing, and aiding and abetting" the crimes committed); *Prosecutor v. Kajelijeli,* ICTR-98-44A-A, "Judgement", Appeals Chamber, 23 May 2005, ("*Kajelijeli* Appeal Judgement"), para. 324 (sentencing the convicted person to life imprisonment based on the gravity of the crimes, though ultimately reducing the sentence to 45 years as a remedy for violating the convicted person's fundamental rights during his unlawful pre-trial detention).

[806] Trial Judgement, para. 602.

[807] Trial Judgement, para. 607.

[808] *Lukić and Lukić* Trial Judgement, para. 1055 (confirming previous Appeals Chamber rulings which refused to justify a low sentence by reason of the convicted person's low level of command, since "a sentence must always reflect the inherent level of gravity of a crime", which may justify a heightened penalty even where "the accused was not senior in the so-called overall command structure"); Jens David Ohlin, "Proportional Sentences at the ICTY", in *The Legacy of the International Criminal*

available sentence to the "most serious offenders,"[809] identified as those who assumed a remarkable profile during the criminal transaction, most especially by ordering, planning or leading such acts, and/or by accomplishing their received instructions with zeal, enthusiasm, or efficiency in a manner which leaves no doubt as to a convicted person's willingness to actively participate in the commission of crimes.[810] Despite KAING Guek Eav's final plea of acquittal based on the fact that he was not a senior leader of the DK,[811] his sentence must be proportionate to the crimes for which he was responsible, regardless of whether others may have committed more serious offenses.

378. In the Supreme Court Chamber's view, KAING Guek Eav's leadership role and particular enthusiasm in the commission of his crimes are aggravating factors that should be given significant weight in the determination of his sentence in contrast to the limited weight of the mitigating circumstances.

379. The Supreme Court Chamber further notes the many instances at the *ad hoc* Tribunals where an appeals chamber increased a sentence on appeal,[812] including to

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*Tribunal for the Former Yugoslavia*, Bert Swart, Göran Sluiter, Alexander Zahar (eds.), Oxford University Press, 2011, pp. 2-3 (explaining that when a tribunal's sentencing is based on "offense-gravity proportionality," as was seemingly the practice of the ICTR, a defendant receives a sentence proportional to his crime. Thus, grave offenses receive severe punishments, perhaps the tribunal's most severe punishment, regardless of whether other individuals committed even more serious crimes. This sentencing model is opposed to "defendant-relative proportionality," seemingly followed by the ICTY, whereby less culpable defendants receive less severe sentences than more culpable defendants, regardless of the gravity of their offenses).

[809] *Prosecutor v. Ntagerura et al.*, ICTR-99-46-T, "Judgement and Sentence", Trial Chamber, 25 February 2004, ("*Ntagerura* Trial Judgement and Sentence"), para. 815. *See also Semanza* Judgement and Sentence, para. 559 ("the penalty of life imprisonment, the highest penalty available at this Tribunal, should be reserved for the most serious offenders").

[810] *Ntagerura* Trial Judgement and Sentence, para. 815; *Semanza* Judgement and Sentence, paras 557 and 559 (rejecting the Prosecutor's request of life imprisonment primarily on the basis that, bearing the Accused responsibility mostly as indirect perpetrator, he does not fall within the "most serious offenders" category); *Nchamihigo* Trial Judgement and Sentence, para. 388 ("At this Tribunal, a sentence of life imprisonment is generally reserved for those who planned or ordered atrocities and those who participated in the crimes with especial zeal or sadism").

[811] T. (EN), 30 March 2011, F1/4.1, p. 123 (lines 8-10).

[812] *See, e.g. Semanza v. Prosecutor*, ICTR-97-20-A, "Judgement", Appeals Chamber, 20 May 2005, ("*Semanza* Appeal Judgement"), paras 388-39 (increasing the Trial Chamber's sentence from 15 to 25 years, holding that it did not reflect the gravity of the convicted person's crimes of genocide and extermination); *Aleksovski* Appeal Judgement, paras 187, 191 (issuing a seven-year sentence after finding that the Trial Chamber's 2 and a half year sentence was "manifestly inadequate" and giving insufficient weight to the gravity of the convicted person's conduct); *Čelebići* Appeal Judgement, para. 851 (finding that in the case of one of the three convicted persons found guilty, the Trial Chamber failed to give sufficient regard to the gravity of his crimes and remitting the case to the Reconstituted Trial Chamber to increase the sentence).

life imprisonment.[813] While trial chambers enjoy an ample margin of appreciation when it comes to sentencing, an appeals chamber is under a duty to substitute a new penalty where, like in the present case, "the one given by the Trial Chamber simply cannot be reconciled with the principles governing sentencing,"[814] duly considering the gravity of the crimes and particular circumstances of the case.

380. Among a number of recognised purposes of criminal punishment, the Supreme Court Chamber is of the view that retribution and deterrence are particularly relevant to this case in light of the gravity of KAING Guek Eav's crimes.[815] The penalty must be sufficiently harsh to respond to the crimes committed and prevent the recurrence of similar crimes. The crimes committed by KAING Guek Eav were undoubtedly among the worst in recorded human history. They deserve the highest penalty available to provide a fair and adequate response to the outrage these crimes caused in victims, their families and relatives, the Cambodian people, and all human beings. The Co-Prosecutors did not exaggerate when they referred to S-21 as the "factory of death."[816] KAING Guek Eav commanded and operated this factory of death for more than three years. He mercilessly terminated the lives of at least 12,272 individuals, including women and children.

381. The lapse of more than 30 years since the commission of the crimes does not weaken the necessity of a high punishment. The sufferings of victims and their families and relatives are not in the past, but are continuing and will continue

[813] *See, e.g. Galić* Appeal Judgement, paras 455-456 (issuing life imprisonment after finding that the sentence of 20 years issued by the Trial Chamber did not adequately reflect the gravity of the crimes and the convicted person's degree of participation); *Gacumbitsi* Appeal Judgement, para. 206 (issuing a sentence of life imprisonment after determining that the Trial Chamber's sentence of thirty years failed "to give proper weight to the gravity of the crimes committed by the Appellant and to his central role in those crimes").
[814] *Gacumbitsi* Appeal Judgement, para. 205.
[815] *See generally Nahimana* Appeal Judgement, para. 1057 ("in view of the gravity of the crimes in respect of which the Tribunal has jurisdiction, the two main purposes of sentencing are retribution and deterrence"); *Prosecutor v. Rutaganda*, ICTR-96-3-T, "Judgement and Sentence", Trial Chamber, 6 December 1999, para. 456 ("it is clear that the penalties imposed on accused persons found guilty by the Tribunal must be directed, on the one hand, at retribution of the said accused, who must see their crimes punished, and over and above that, on other hand, at deterrence, namely to dissuade for ever, others who may be tempted in the future to perpetrate such atrocities by showing them that the international community shall not tolerate the serious violations of international humanitarian law and human rights"); *Prosecutor v. Gacumbitsi*, ICTR-2001-64-T, "Judgement", Trial Chamber, 17 June 2004, paras 335-336 ("[i]n view of the gravity of the offences committed in Rwanda in 1994, it is of the utmost importance that the international community condemn the said offences in a manner that will prevent a repetition of those crimes either in Rwanda or elsewhere").
[816] Co-Prosecutors' Appeal, para. 210.

throughout their lives. Although the punishment of KAING Guek Eav does not completely cure their suffering, the victims' fair and reasonable expectations for justice deserve to be fulfilled. KAING Guek Eav's crimes were an affront to all of humanity, and in particular to the Cambodian people, inflicting incurable pain. The Cambodian people are still faced with unprecedented challenges in recovering from the tragedies caused by the crimes committed by KAING Guek Eav.

382. The necessity of realizing the deterrence purpose of punishment for crimes against humanity, if ever doubted, was documented daily as this Judgement was being drafted, by reports of foreign governments turning against their constituent peoples, and the increasing caseload of the ICC. This deterrence purpose calls for a statement that the passage of time neither leads to impunity nor undue leniency.

383. For these reasons, the Supreme Court Chamber holds that the sentence of 35 years of imprisonment by the Trial Chamber does not appropriately reflect the gravity of crimes and the individual circumstances of KAING Guek Eav. The Trial Chamber erred in imposing an arbitrary and manifestly inadequate sentence. The Supreme Court Chamber consequently decides to impose a sentence of life imprisonment against KAING Guek Eav.

### 3. Parole

384. The Co-Prosecutors argue that KAING Guek Eav is not entitled to parole for several reasons,[817] and request the Supreme Court Chamber to hold that he will serve his sentence without the possibility of parole.[818] The Defence did not make any submissions on this issue.

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[817] These reasons are: (a) by exceeding the maximum number of years for a fixed sentence as permitted by Cambodian domestic law, the Trial Chamber confirmed the ECCC's *sui generis* sentencing regime and emphasised its ability to make its own sentencing determination without deferring to Cambodian domestic practice; (b) while parole is expressly permitted in other international tribunals with specific provisions in their statutes and rules of procedure and evidence, no ECCC governing document refers to it; (c) as the Accused has been convicted solely for international crimes, only the international sentencing regime should apply; (d) domestic legal provisions concerning parole do not readily apply here given the unique nature of convictions for international crimes; and (e) allowing parole under the Cambodian Code of Criminal Procedure removes the Accused from the jurisdiction of the ECCC which is inconsistent with the principles of international tribunals that the tribunal imposing the initial punishment retains the decision-making power on the issue of sentence reduction. Co-Prosecutors' Appeal, paras 122-129.
[818] Co-Prosecutors' Appeal, para. 122.

385. Article 512 of the 2007 Code of Criminal Procedure provides that any convicted person who is serving one or more imprisonment sentences may be paroled, provided that he has shown good behaviour during imprisonment and appears to be able to reintegrate into society. The possibility of parole thus encourages good behaviour during imprisonment and facilitates the reintegration into society. This role of parole is widely recognised in many legal systems of the world as an important aspect of criminal penalisation. At the international level, commutation or reduction of sentences of imprisonment is available to convicted persons, including those serving life sentences. Article 110(3) of the ICC Statute, for instance, provides for a mandatory review of a life sentence after 25 years have been served.[819]

386. The 2007 Code of Criminal Procedure provides that parole may be granted to a convicted person who has served at least 20 years of a sentence of life imprisonment. The President of the Court of First Instance at the place of detention has the authority to grant parole to a convicted person. The General Prosecutor attached thereto or the Royal Prosecutor of the court that made the decision may appeal this decision to the President of the Court of Appeal.[820]

387. Parole is a distinct procedure that takes place during execution of a sentence of imprisonment. The Supreme Court Chamber finds that the lack of special provisions on parole in the ECCC's statutory documents indicates that the issue should be decided according to procedures in force at the time when parole is to be considered for a particular convicted person, a time at which the ECCC may well have dissolved following the definitive conclusion of the proceedings. Furthermore, contrary to the Co-Prosecutors' submissions,[821] the mere possibility of the future consideration of parole by competent judicial authorities other than the ECCC does not *per se* harm the mandate of this Court, that is, to bring to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes under its jurisdiction.

[819] ICC RPE, Rule 224(3). *See also* ICTY Statute, Art. 28; ICTY RPE, Rules 123-125; ICTR Statute, Art. 27; ICTR RPE, Rules 124-126; SCSL Statute, Art. 23; SCSL RPE, Rules 123-124.
[820] 2007 Code of Criminal Procedure, Arts 513-514, 516.
[821] Co-Prosecutors' Appeal, para. 129.

388. In conclusion, the Supreme Court Chamber holds that it does not have competence to decide on KAING Guek Eav's eligibility for parole. The Co-Prosecutors' request is accordingly denied.

### 4. Detention before the Cambodian Military Court

389. The Trial Chamber found that the combination of a reduction in sentence of 5 years and credit for time spent in detention under the authority of the Cambodian Military Court[822] is appropriate as a remedy for the violation of KAING Guek Eav's rights occasioned by his illegal detention by that Court between 10 May 1999 and 30 July 2007. The Co-Prosecutors neither object to this part of the disposition[823] nor did they appeal the Trial Chamber's decision issued on 15 June 2009.[824] Nevertheless, since the Trial Chamber's sentence has been amended, the Supreme Court Chamber will examine, *ex proprio motu*, whether this remedy should be maintained as a question of law, without interfering with the Trial Chamber's findings of fact.[825]

390. The legal basis for the Trial Chamber's remedy was its conclusion that, according to the case law of the ICTR Appeals Chamber, "an accused may be entitled to seek a remedy for violations of his rights by national authorities" even where such violations are neither attributable to the international tribunal, nor have they met the high threshold required to trigger the abuse of process doctrine.[826] The Trial Chamber further concluded that, should KAING Guek Eav be convicted, he should also be granted a reduction in sentence,[827] whilst, in the case of acquittal, he may seek

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[822] Trial Chamber Decision on Request for Release, 15 June 2009, E39/5, ("Decision on Request for Release"), para. 29 and seventh and eighth dispositive paragraphs (indicating that credit was not afforded pursuant to relevant domestic legislation, which was found inapplicable, but "as a remedy"; reduction of sentence was qualified as an "additional remedy"). The Trial Chamber did not explicitly state the reason warranting credit as a remedy, but the Supreme Court Chamber concludes that it was provided in connection with the alleged violations of rights and within the same context in which the sentence reduction was granted. Trial Judgement, paras 624 (describing the latter remedy as a "further reduction") and 681 (reaffirming, by way of footnote, that credit for the period of detention under the Military Court is afforded according to the Decision on Request for Release).

[823] Co-Prosecutors' Appeal, paras 130 and 131; T. (EN), 29 March 2011, F1/3.2, p. 63 (line 25) to p. 64 (line 9) (the Co-Prosecutors reiterating that a life sentence is the appropriate penalty to be imposed, and a reduction to 45 years' imprisonment being mandated only to redress the unlawful detention suffered by KAING Guek Eav); Co-Prosecutors' Final Trial Submissions with Annexes 1-5, 11 November 2009, E159/9, para. 459.

[824] Decision on Request for Release.

[825] *See Prosecutor v. Erdemović*, IT-96-22-A, "Judgement", Appeals Chamber, 7 October 1997, para. 16 (the Appeals Chamber is not confined to only those "issues raised formally by the parties").

[826] Decision on Request for Release, para. 35.

[827] The remedy of reduction in sentence was granted in addition to that of credit for time spent in custody under the authority of the Military Court.

appropriate remedy before Cambodian domestic courts.[828] However, the Supreme Court Chamber is not satisfied that any law applicable to the ECCC, including international jurisprudence, indicates that violations of KAING Guek Eav's rights should be redressed by the ECCC in the absence of evidence establishing either abuse of process or responsibility of the ECCC for the infringements. As shown below, the Supreme Court Chamber finds that the Trial Chamber misinterpreted the relevant international jurisprudence to mean that violations of KAING Guek Eav's rights should be redressed by the ECCC *even* in the absence of violations attributable to the ECCC and in the absence of abuse of process.

391. The Supreme Court Chamber notes that there are no provisions in the UN-RGC Agreement, the ECCC Law, or the Internal Rules regarding a remedy for violations of an accused's human rights. A remedy by way of sentence reduction is foreign to the law and practice of the Cambodian judicial system. Therefore, the Supreme Court Chamber seeks guidance at the international level.

392. International jurisprudence is clear in affirming that, "before being able to obtain the remedy he seeks, the Accused has to be able to attribute the infringement of his rights to one of the organs of the Tribunal or show that at least some responsibility for that infringement lies with the Tribunal."[829] In other words, international criminal tribunals are under an obligation to redress established breaches where there is evidence of a "concerted action" between these institutions and the external entities under whose authority such violations occurred. In contrast, the common law-rooted doctrine of abuse of process, as interpreted at the international level, requires tribunals to decline jurisdiction as a form of remedy, irrespective of the entity upon which the responsibility for violations may lie. However, as correctly noted by the Trial Chamber, this doctrine "has been narrowly construed and limited to cases where the

[828] Decision on Request for Release, paras 36-37, and fifth and eighth dispositive paragraphs.
[829] *Prosecutor v. Karadžić*, IT-95-5/18-PT, "Decision on the Accused's Motion for Remedy for Violation of Rights in Connection with Arrest", Trial Chamber, 31 August 2009, ("*Karadžić* Decision on Remedy for Violation of Rights Connection with Arrest"), para. 6. *See also Barayagwiza v. Prosecutor*, ICTR-97-19-AR72, "Decision", Appeals Chamber, 3 November 1999, ("*Barayagwiza* Decision"), paras 67, 71, 90, 99; *Kajelijeli* Appeal Judgement, paras 252-253; *Prosecutor v. Rwamakuba*, ICTR-98-44C-A, "Decision on Appeal against Decision on Appropriate Remedy", Appeals Chamber, 13 September 2007, para. 28.

illegal conduct in question is such as to make it repugnant to the rule of law to put the accused on trial."[830]

393. The Supreme Court Chamber will now examine whether the detention of KAING Guek Eav by the Cambodian Military Court was attributable to the ECCC or its organs. The Trial Chamber found that the ECCC is a "separately constituted, independent and internationalised court" which, despite having been "established within the existing Cambodian court structure," qualifies as "an independent entity."[831] It also stated that "there is no evidence of any involvement by ECCC judicial authorities in KAING Guek Eav's Military Court file and in particular in its decisions concerning the detention of the Accused."[832] Similarly, the Pre-Trial Chamber found "no evidence that the Military Court acted on behalf of the ECCC in detaining the Charged Person, or of any concerted action between any organ of the ECCC and the Military Court."[833] The Supreme Court Chamber sees no reason to depart from these uncontested findings of fact.

394. Regarding the abuse of process doctrine, the Trial Chamber has made clear[834] that the instant case provides no evidence tending to show that, during his detention by the Military Court, KAING Guek Eav suffered any "torture or other very serious mistreatment"[835] or that he experienced egregious violations of his rights which would prove detrimental to the ECCC's integrity.[836] The Trial Chamber found that the violation does not amount to a reason for declining jurisdiction.

395. With these two holdings, excluding both attribution of the violations to the ECCC and abuse of process, the Trial Chamber should have rejected KAING Guek Eav's request for remedy. Instead, the Trial Chamber committed an error of law in granting a remedy based on "the case law of the ICTR Appeals Chamber"[837] which, upon deeper analysis, was misinterpreted by the Trial Chamber.

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[830] Decision on Request for Release, para. 33.
[831] Decision on Request for Release, para. 10.
[832] Decision on Request for Release, para. 14.
[833] Decision on Appeal Against Provisional Detention Order of Kaing Guek Eav alias "Duch", 4 December 2007, C5/45, para. 21.
[834] Decision on Request for Release, para. 34. *See also* Decision on Request for Release, para. 16.
[835] *Karadžić* Decision on Remedy for Violation of Rights Connection with Arrest, para. 7.
[836] *See Barayagwiza* Decision, paras 74, 77.
[837] Decision on Request for Release, para. 35.

396. To begin with, the sole legal authority cited by the Trial Chamber, the *Barayagwiza* case, concerns an instance in which abuse of process *was indeed established*. It is therefore impossible to affirm whether the Appeals Chamber in *Barayagwiza* would have granted a remedy in the absence of violations attributable to the Tribunal and in the absence of abuse of process. The fact that Barayagwiza was afforded a remedy even in relation to violations not attributable to the ICTR is therefore immaterial to the present case given that, here, abuse of process has not been established.[838]

397. Furthermore, the totality of cases in which the ICTR Appeals Chamber awarded a remedy reveal that the violations taken into account by that Tribunal were committed after the Prosecutor had requested the arrest or transfer of the accused pursuant to Rules 40 and 40*bis* of the ICTR RPE, thus demonstrating at least some level of involvement by the ICTR. In *Semanza*, a remedy was afforded in respect of violations that fell in their entirety within the Tribunal's responsibility. The ICTR Appeals Chamber only considered the violation of the accused's rights from the time after the Prosecutor's request for provisional detention was made, even though Cameroon authorities were already detaining him.[839] Further, the Appeals Chamber did not consider any violations that occurred during the period between the Prosecutor's decision to drop the case and her subsequent second request for arrest during which Semanza was detained under the sole authority of a Cameroon court.[840] In *Kajelijeli* the accused was awarded a reduction in sentence for the breaches of his rights that occurred after the Prosecutor's request for arrest.[841] Finally, in *Rwamakuba*, the Tribunal granted financial compensation for a violation of the accused's right to legal assistance that occurred while he was held at the ICTR detention facility. By contrast, Rwamakuba's request for review of the conditions of his detention in Namibia was rejected by the ICTR due to a lack of concerted action

[838] *Barayagwiza* Decision, para. 101 (finding that the facts justified the invocation of the abuse of process doctrine).
[839] *Prosecutor v. Semanza*, ICTR-97-20-A, "Decision", Appeals Chamber, 31 May 2000, ("*Semanza* Decision"), paras 4, 5, 79 (setting the commencement day of the violation on the day the Prosecutor issued her first request under Rule 40 of the ICTR RPE, although the accused was already being detained pursuant to an international arrest warrant based on similar allegations). *See also Semanza* Judgement and Sentence, paras 583-584.
[840] *Semanza* Decision, paras 79, 88.
[841] *Kajelijeli* Appeal Judgement, paras 227, 323-324.

between the national authorities and the ICTR during that time.[842] The ICTR Appeals Chamber held that "any challenges in this respect are to be brought before the Namibian jurisdictions."[843]

398. The above ICTR case law establishes that violations of human rights must either constitute an abuse of process or be attributed to the Tribunal in order to grant the accused a remedy, and also that such remedies have always been granted in connection to failures by the Prosecutor or another organ of the Tribunal. As held by the ICTY Trial Chamber:

> [I]t should be noted that, in all the cases relied upon by the Accused in support of his position that no attribution of responsibility to the Tribunal is necessary before a remedy can be given, the major discussions and findings ultimately revolved around the Prosecution's responsibility for violations, rather than the responsibility of the state authorities.[844]

399. For the reasons stated above, the Supreme Court Chamber finds, Judges Klonowiecka-Milart and Jayasinghe dissenting, that this is not a case in which the ECCC should provide a remedy for violations of KAING Guek Eav's rights. As this is a legal issue, the Trial Chamber had no discretion to grant a remedy for alleged violations in the present case, and this error of law directly affects the final sentence to be served by KAING Guek Eav. Therefore, the Supreme Court Chamber finds, Judges Klonowiecka-Milart and Jayasinghe dissenting, that the Trial Chamber committed an error of law invalidating the sentence by affording a reduction in sentence of 5 years and credit for the time served in detention from 10 May 1999 to 30 July 2007 as appropriate remedies for the violations of KAING Guek Eav's rights.

### 5. Credit for Pre-trial Detention

400. The Trial Chamber held that KAING Guek Eav is entitled to credit for the entirety of his time spent in detention, from 10 May 1999 to 30 July 2007 (under the authority of the Cambodian Military Court) and from 31 July 2007 until the Trial

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[842] *Prosecutor v. Rwamakuba*, ICTR-98-44-T, "Decision on the Defence Motion concerning the Illegal Arrest and Illegal Detention of the Accused", Trial Chamber, 12 December 2000, ("*Rwamakuba* Decision on Illegal Arrest and Detention"), paras 27, 30.
[843] *Rwamakuba* Decision on Illegal Arrest and Detention, para. 30.
[844] *Karadžić* Decision on Remedy for Violation of Rights in Connection with Arrest, para. 6.

Judgement becomes final (under the authority of the ECCC).[845] According to the Trial Chamber, while the first period was granted as part of the remedy for illegal detention,[846] the second period was derived as a right from Article 503 of the 2007 Code of Criminal Procedure.[847] Whereas the credit for the second period is not in dispute, the Supreme Court Chamber finds that discussion is required with respect to the credit for the first period.

401. The UN-RGC Agreement, the ECCC Law, and the Internal Rules are silent on the issue of credit for pre-trial detention. Article 503 of the 2007 Code of Criminal Procedure provides that the duration of any provisional detention shall be deducted from the sentence decided by the court or the total duration of the sentences that has been imposed following the consolidation of sentences. Article 51 (Deduction of time spent in pre-trial detention) of the 2009 Criminal Code similarly provides that time spent in pre-trial detention shall be wholly deducted from the term of imprisonment to be served. It is established practice in Cambodia as well as internationally that credit is to be applied by criminal courts in cases resulting in both fixed sentences and sentences of life imprisonment.[848]

402. Since remedy for violations of rights is an issue separate from credit for time served,[849] the Supreme Court Chamber may still credit KAING Guek Eav's detention under the Cambodian Military Court even though it has quashed the remedy afforded by the Trial Chamber.

403. The Supreme Court Chamber concurs with the Trial Chamber in finding that the allegations in the case before the Military Court were "broadly similar"[850] to those giving rise to the proceedings before the ECCC. This is exactly the reason why the Military Court terminated its jurisdiction upon establishment of the ECCC.[851] The *ad*

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[845] Trial Judgement, para. 681.
[846] Decision on Request for Release, para. 29, seventh dispositive paragraph.
[847] Decision on Request for Release, para. 27, sixth dispositive paragraph; Trial Judgement, paras 624, 681.
[848] *See, e.g. Lukić and Lukić* Trial Judgement, para. 1102; *Galić* Appeal Judgement, fifth dispositive paragraph; *Seromba* Appeal Judgement, ninth dispositive paragraph.
[849] *Semanza* Appeal Judgement, para. 328.
[850] Decision on Request for Release, para. 28.
[851] "Order", Investigating Judge of the Military Court, Khmer dated 21 July 2008, English translation filed 25 May 2009, E52/4.66 ("[w]hereas after the establishment of the [ECCC], Crimes Against

*hoc* Tribunals' case-law confirms that in such circumstances, due to reasons of fairness, the entire time spent by the accused in provisional detention under the sole authority of domestic courts is to be deducted from the final sentence imposed by the tribunal.[852] Furthermore, Article 78(2) of the ICC Statute envisages the possibility to "deduct any time *otherwise* spent in detention *in connection* with conduct underlying the crime."[853]

404. In light of Cambodian and international law and practice, the Supreme Court Chamber unanimously finds that KAING Guek Eav is entitled to credit for the entirety of his time spent in detention from 10 May 1999 through to and excluding the date of issuance of this Appeal Judgement. The Supreme Court Chamber decides to apply such credit against KAING Guek Eav's sentence of life imprisonment by declaring that he has served 12 years and 269 days of such sentence, being the amount of time that he spent in pre-trial detention from 10 May 1999 to 2 February 2012, inclusive.

### D. Conclusion

405. On the basis of the foregoing, the Supreme Court Chamber dismisses Ground 2 of the Defence Appeal and grants in part and dismisses in part Ground 1 of the Co-Prosecutors' Appeal.

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Humanity and Grave Breaches of the Geneva Conventions of 12 August 1949, committed during the period from 17 April 1975 to 6 January 1979, are within the jurisdiction of the Extraordinary Chambers, and thus the Military Court no longer has jurisdiction over crimes falling under the jurisdiction of the Extraordinary Chambers").

[852] *See, e.g. Kajelijeli* Appeal Judgement, paras 322, 324 (upholding the decision in the ICTR Trial Chamber Judgement at para. 966); *Semanza* Trial Judgement and Sentence, para. 584.

[853] ICC Statute, Art. 78(2) (emphasis added).

# VI. ALLEGED ERRORS CONCERNING ADMISSIBILITY OF CIVIL PARTY APPLICATIONS (APPEALS FROM CIVIL PARTIES GROUPS 1, 2, AND 3)

## A. Whether the Trial Chamber Erred in Formulating the Notion of Victim

### 1. Submissions

406. Civil Parties Groups 1, 2 and 3 ("Civil Party Appellants") each submits that the Trial Chamber committed an error of law by applying a test for the admission of civil parties that is too strict and not provided for in the Internal Rules. The alleged error of law concerns the Trial Chamber's requirement that civil party applicants, who are not immediate family members of deceased direct victims of the crimes charged, demonstrate both the alleged kinship to a direct victim and circumstances giving rise to a "special bond of affection" with or dependency on the direct victim.[854] Civil Parties Group 1 further submits that the Trial Chamber undermined the fairness of the proceedings because the "special bonds of affection" criterion was not foreseeable and the Trial Chamber failed to provide notice of the test before reaching its Judgement.[855]

407. The Supreme Court Chamber recalls that the Trial Chamber held that civil party applicants must satisfy the Trial Chamber of the existence of wrongdoing attributable to KAING Guek Eav which had a direct causal connection to a demonstrable injury personally suffered by the applicant.[856] The Trial Chamber invoked Article 13 of the 2007 Code of Criminal Procedure and found that the term "direct consequence" employed in this provision emphasises the link between the crime and the injury suffered rather than the intended target of the criminal act.[857] The responsibility of KAING Guek Eav is thus not limited to persons against whom the crimes were committed but may also extend to a larger group of victims.[858] The Trial

[854] CPG1 Appeal, **Ground 2**, paras 40-62; CPG2 Appeal on Admissibility, **Ground 4**, paras 91-109; CPG3 Appeal, **Ground 3**, paras 85-94.
[855] CPG1 Appeal, paras 40-62.
[856] Trial Judgement, paras 639-640.
[857] Trial Judgement, para. 642.
[858] Trial Judgement, para. 642.

Chamber accepted, with limited explanation,[859] that immediate family members fall within the scope of Internal Rule 23(2)(b), whereas "direct harm may be more difficult to substantiate in relation to more attenuated familial relationships."[860] It further considered that harm alleged by extended family members may, in exceptional circumstances, amount to a direct consequence of the crime where the applicant can establish kinship to the direct victim as well as special bonds of affection with or dependence on the direct victim.[861]

408. Under these grounds of appeal, the primary question before the Supreme Court Chamber is who may be admitted as a civil party before the ECCC. What follows to be considered is whether the Trial Chamber's unqualified statement that "immediate family members of a victim fall within the scope of Internal Rule 23(2)(b)"[862] is valid as a holding of law or a finding of fact. Subsequently, based on the answers obtained, the Supreme Court Chamber will examine whether the Trial Chamber erred in requiring the demonstration of special bonds of affection or dependency in order to admit applications from non-immediate family of the deceased direct victims.

### 2. The Notion of the Civil Party at the ECCC

409. At the outset of the analysis, the Supreme Court Chamber reiterates that according to the UN-RGC Agreement, Article 12(1), and the ECCC Law, Article 33 new, Cambodian law remains the controlling procedural law for proceedings before the ECCC, save where that law is inadequate according to the criteria specified in these provisions.[863] Civil party admissibility is addressed in Internal Rule 23(2) (Rev. 3), which reflects Article 13 of the 2007 Code of Criminal Procedure by providing as follows:

> In order for [a] Civil Party action to be admissible, the injury must be:

[859] Trial Judgement, paras 642-643, fns 1075-1076. The Trial Chamber makes reference to the understanding of "victim" in other jurisdictions and in the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 60/147, UN GAOR, 60th Sess., U.N. Doc. A/RES/60/147 (21 March 2006) ("UN Basic Principles on Reparations"), without clarifying whether the Trial Chamber considers these sources to be an expression of a binding international standard, persuasive authority as to interpretation, or an evidentiary standard.
[860] Trial Judgement, para. 643.
[861] Trial Judgement, para. 643.
[862] Trial Judgement, para. 643.
[863] UN-RGC Agreement, Art. 12(1); ECCC Law, Art. 33 new.

a) Physical, material or psychological; and
b) The direct consequence of the offence, personal and have actually come into being.

410. In considering whether the definition of the civil party is adequately covered in Cambodian law, the Supreme Court recalls that Internal Rule 23(2) was retained as a restatement of Article 13 of the 2007 Code of Criminal Procedure, which, in turn, closely resembles Article 2 of the Code of Criminal Procedure of France.[864] Critical to the definition of the civil party in these legal instruments is not a formal designation of a specific class of persons, but the substantive criterion of an actual injury resulting as a direct consequence of the crime.

411. An approach to civil party admissibility based on this substantive criterion is consistent with the principle that victim participation in criminal proceedings is inextricably linked with the civil action. The Supreme Court Chamber notes that domestic legal systems which recognise victim participatory rights independent of a civil action may define the circle of authorised persons in a formal, more narrow sense by granting civil party status only to persons whose rights have been violated or endangered by the acts charged and to enumerated categories of immediate family in case of the death of the direct victim.[865] The former are only required to demonstrate the violation or endangerment of their rights while the latter must demonstrate the fact that they fall under one of the allowed categories of successors. This more restrictive and formal approach to the admission of victims as parties in criminal cases has justification in the principles of public action, equality of arms and economy of proceedings, which all function to limit access in support of the prosecution and time

[864] Trial Judgement, fn. 1075.
[865] *See, e.g.* § 395 of the Code of Criminal Procedure of Germany (regulating the rights of victims to act as "private accessory prosecutor" ("Nebenklage"); the right is limited to victims who were killed through an unlawful act (or their children, parents, siblings or spouses) and the exercise of the right is independent of civil action); Articles 49-58 of the Code of Criminal Procedure (1997) of Poland (providing that the victim may act as a subsidiary prosecutor, and in the event the victim is deceased, his or her rights can be exercised by the next of kin, precisely defined); in New South Wales, and similarly in other Australian states, victims may submit a "victim impact statement" after a guilty verdict but prior to sentencing. § 28(1) of the Crimes (Sentencing Procedure) Act 1999 of New South Wales; in the case of death of the primary victim (direct victim), a family victim (family member) may submit a victim impact statement. § 28(3); a family victim "means a person who was, at the time the offence was committed, a member of the primary victim's immediate family, and includes such a person whether or not the person has suffered personal harm as a result of the offence. § 26; immediate family includes: "(a) the victim's spouse, or (b) the victim's de facto partner, or (b1) a person to whom the victim is engaged to be married, or (c) a parent, grandparent, guardian or step-parent of the victim, or (d) a child, grandchild or step-child of the victim or some other child for whom the victim is the guardian, or (e) a brother, sister, half-brother, half-sister, step-brother or step-sister of the victim." § 26.

spent on establishing an applicant's eligibility. As concerns a civil action, however, the status of a party attaches solely to the fact of deriving a civil claim from the criminal act charged, without any formal limitations on the person putting forth the claim. Instead of establishing formal eligibility, the emphasis is on assessing the proof in support of the claim.

412. The Supreme Court Chamber recalls that notwithstanding the mosaic of the civil party regime in the ECCC Internal Rules and numerous revisions to that regime, the definition of a civil party as envisaged in the original version of Internal Rule 23(2) (12 June 2007) has remained essentially unchanged, thus confirming its lasting validity before the ECCC.[866]

413. The Supreme Court Chamber notes that the criteria for defining victims in Cambodian criminal procedure and before the ECCC are consistent with international criminal proceedings that permit victim participation.[867] To the extent the UN Basic

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[866] The admissibility criteria and standard of proof were clarified in the amendments in Revision 5 of the Internal Rules. *See also* Internal Rule 23*bis*(1) (Rev. 8) ("In order for [a] Civil Party action to be admissible, the Civil Party applicant shall: a) be clearly identified; and b) demonstrate as a direct consequence of at least one of the crimes alleged against the Charged Person, that he or she has in fact suffered physical, material or psychological injury upon which a claim of collective and moral reparation might be based"). This clarification does not entail a change in the substance of the definition of a civil party.

[867] *See, e.g.* Rule 85(a) of the ICC RPE (defining victims as "natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court"); *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-1432, "Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008", Appeals Chamber, 11 July 2008, para. 38 (in which four of the five judges held that "the notion of victim necessarily implies the existence of personal harm but does not necessarily imply the existence of direct harm"). The ICC's conception of the term "victim" may slightly differ from that set forth in Internal Rule 23(2) and Article 13 of the 2007 Code of Criminal Procedure, which require the victim's injury to be a "direct consequence of the offence." The latter criterion was seemingly endorsed by Judge G.M. Pikis in the aforementioned "Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008", "Partly Dissenting opinion of Judge G.M. Pikis", pp. 37-38, para. 3 ("There must be a direct nexus between the crime and the harm, in the sense of cause and effect. Psychological harm may, no doubt, be suffered without prior physical harm, but the crime itself must be the cause generating the harm, as may be the case with the destruction, violation or humiliation of persons near and dear to the victims"). It is unclear whether the majority of the ICC Appeals Chamber disagreed that the "the crime itself must be the cause generating the harm." In any event, at the ECCC, the harm suffered by direct and indirect victims alike must be both "direct", in the sense of cause and effect, and personal. At the STL, a victim is defined as "[a] *natural* person who has suffered physical, material or mental harm as a *direct* result of an attack within the Tribunal's jurisdiction" (emphasis added). A "victim participating in the proceedings" is defined as a "[v]ictim of an attack within the Tribunal's jurisdiction who has been granted leave by the Pre-Trial Judge to present his views and concerns at one or more stages of the proceedings after an indictment has been confirmed." Rule 2(A), STL Rules of Procedure and Evidence (amended 10 November 2010). It

Principles on Reparations may be representative of international standards, the Supreme Court Chamber considers that the definition of victim provided therein is relevant for the *sensu largo* objective of that document. That objective is to address a State's obligation to provide for remedy and reparation to victims, rather than the specific forms of victim participation in criminal proceedings. Furthermore, the UN Basic Principles on Reparations explicitly leave the scope of indirect victimhood to be determined by national law.[868] An earlier UN document that is more directly relevant to criminal proceedings is the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.[869] This Declaration also contains qualifying language concerning indirect victims,[870] demonstrating that the decision as to the scope of indirect victims ultimately belongs to national legislation.

414. It cannot therefore be held that Internal Rule 23(2) and Article 13 of the 2007 Code of Criminal Procedure contravene international standards. Consequently, these provisions remain controlling for determining the scope of the term civil party at the

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therefore seems that legal persons and those who may have suffered indirect harm are ineligible for the status of "victim" before the STL.
Another difference between the ECCC and ICC relates to the issue of succession. ICC case law has rejected victim claims based on succession, only allowing claims based on a victim's own right. *See, e.g. Situation in the Democratic Republic of the Congo*, ICC-01/04-423-Corr-tENG, "Corrigendum to the 'Decision on the Applications for Participation Filed in Connection with the Investigation in the Democratic Republic of the Congo by a/0004/06 to a/0009/06, a/0016/06 to a/0063/06, a/0071/06 to a/0080/06 and a/0105/06 to a/0110/06, a/0188/06, a/0128/06 to a/0162/06, a/0199/06, a/0203/06, a/0209/06, a/0214/06, a/0220/06 to a/0222/06, a/0224/06, a/0227/06 to a/0230/06, a/0234/06 to a/0236/06, a/0240/06, a/0225/06, a/0226/06, a/0231/06 to a/0233/06, a/0237/06 to a/0239/06 and a/0241/06 to a/0250/06'", Pre-Trial Chamber (Single Judge), 31 January 2008, paras 23-25; *Situation in Darfur, Sudan*, ICC-02/05-111-Corr, "Corrigendum to Decision on the Applications for Participation in the Proceedings of Applicants a/0011/06 to a/0015/06, a/0021/07, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/07", Pre-Trial Chamber (Single Judge), 14 December 2007, para. 35. In contrast, the ECCC's legal framework explicitly allows victims' successors to file claims on their behalf. 2007 Code of Criminal Procedure, Art. 16 ("In case of death of the victim, a civil action can be started or continued by his successor").

[868] "*For purposes of the present document*, victims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights […]. *Where appropriate, and in accordance with domestic law*, the term 'victim' also includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization." Para. 8 (emphasis added).

[869] G.A. Res. 40/34, UN GAOR, 40th Sess., U.N. Doc. A/RES/40/34 (29 November 1985) ("UN Declaration of Basic Principles of Justice for Victims").

[870] "'Victims' means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States […] The term 'victim' also includes, *where appropriate*, the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization." UN Declaration of Basic Principles of Justice for Victims, paras 1-2 (emphasis added).

ECCC, and there has been no demonstrated basis for re-defining it in reference to international standards. Accordingly, the notion of the civil party must be interpreted in accordance with Cambodian procedure, and, in the event that such procedure does not provide an answer to a relevant issue, "guidance may be sought in procedural rules established at the international level."[871]

415. In accordance with the substantive definition of the civil party as discussed above, the Supreme Court Chamber holds that injury resulting from the crime charged is the only defining, and at the same time limiting, criterion for the admissibility of the civil party application before the ECCC. The word "injury" denotes hurt, damage or harm, which results through loss or detriment.[872] Internal Rule 23(2) provides that the injury suffered must be "physical, material or psychological," and must "have actually come into being."[873] Physical injury denotes biological damage, anatomical or functional. It may be described as a wound, mutilation, disfiguration, disease, loss or dysfunction of organs, or death. Material injury refers to a material object's loss of value, such as complete or partial destruction of personal property, or loss of income. Finally, as amply noted by the Trial Chamber, injury "may also be psychological and include mental disorders or psychiatric trauma, such as post-traumatic stress disorder."[874]

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[871] ECCC Law, Art. 33 new.
[872] The Supreme Court Chamber notes that in the ECCC and in international jurisprudence, "injury" is used interchangeably with "harm." In their Admissibility Orders in Case 002 at the ECCC, issued in August 2010, the Co-Investigating Judges used the terms "harm" and "injury" interchangeably. *See, e.g.* Order on the Admissibility of Civil Party Applicants from Current Residents of Kep Province, 26 August 2010, D392; Orders D393-D399, D401, D403-D404, D406, D408-D411, D414-D419, D423-D424, D426 (collectively, the "CIJ Admissibility Orders in Case 002"). The ECCC Pre-Trial Chamber also used these terms similarly in Case 002. *See, e.g.* Decision on Appeals Against Orders of the Co-Investigating Judges on the Admissibility of Civil Party Applications, 24 June 2011, D404/2/4; Decision on Appeals Against Orders of the Co-Investigating Judges on the Admissibility of Civil Party Applications, 24 June 2011, D411/3/6 (collectively, "Decisions on Appeals against the CIJ Admissibility Orders in Case 002"). At the ICC, the terms "injury" and "harm" are used in both the RPE and the ICC Statute. ICC RPE, Rules 85, 94, 97, 145(c), 219; ICC Statute, Arts 6-8, 75. In *Prosecutor v. Lubanga*, the ICC's Appeals Chamber, referring to the Black's Law Dictionary and the Oxford English Dictionary, explained: "The word 'harm' in its ordinary meaning denotes hurt, injury and damage. It carries the same meaning in legal texts, denoting injury, loss or damage and is the meaning of 'harm' in rule 85(a) of the Rules." "Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008", para. 31. For ease of reference and because the Supreme Court Chamber detects no difference in the respective meanings of "harm" and "injury," it will not modify the choice of language in the Trial Judgement.
[873] Internal Rule 23(2) (Rev. 3). *See also* 2007 Code of Criminal Procedure, Art. 13 ("An injury can be damage to property or physical or psychological damage").
[874] Trial Judgement, para. 641, fn. 1073.

416. Injury is contingent, or more likely to come into being, where there is a violation of a right, however a violation of a right does not in itself always presuppose or produce injury. Pursuant to the criterion of injury, the term "civil party" will usually encompass what is commonly designated by the word "victim", that is, a person whose rights were the object of the criminal attack in the act charged, in other words, "against whom the crimes were committed." However, for legal standing as a civil party, it is necessary that such person sustained an injury.[875] For clarity, the Supreme Court Chamber will use the term "direct victim" to refer to the category of persons whose rights were violated or endangered by the crime charged; this term is not coterminous with the category of persons who suffered injury as a "direct consequence" of the crime.[876] In the case before us the direct victims were the no fewer than 12,273 detainees at S-21 who were subjected to imprisonment, torture, and, in most cases,[877] murder. Very few direct victims are alive today.

417. The next question before the Supreme Court is whether the characteristics of "injury" outlined above cover injury suffered by persons other than direct victims. In accordance with the substantive definition of the civil party, such an *indirect victim* would need no less to have suffered injury as a direct consequence of the crimes committed against the direct victim(s). Indirect victims encompass persons who actually suffered psychological injury, for example, as a result of the injury, whether temporary or permanent, of their loved ones. The psychological injury results from

[875] In order to illustrate the centrality of injury to the concept of a civil party, let us use an example of burglary committed against family NN who went on holidays. The burglars were caught soon after the deed and all stolen items were recovered. The owners learned about the burglary only upon their return from holidays. While NN are direct victims of the crime of burglary they have not suffered an injury and their standing as civil parties is improbable. Likewise, hypothetically, a person arbitrarily arrested by the Khmer Rouge would be a victim of arbitrary arrest, but if he or she then promptly joined the oppressive regime (e.g. at first interrogation), thereby avoiding injury, it would be difficult to demonstrate his or her standing as a civil party. *See also* International Committee on Reparation for Victims of Armed Conflict, Conference Report The Hague (2010), "Draft Declaration of International Law Principles on Reparation for Victims of Armed Conflict (Substantive Issues)", pp. 9-10 ("[T]he recognition of a 'substantial impairment of fundamental rights' as harm risks conflating the question of whether a violation of law has occurred with the question of whether harm has been caused […] Harm can be suffered not only by the individual whose rights have been violated but also by third persons") <http://www.ila-hq.org/en/committees/index.cfm/cid/1018>.
[876] The Trial Chamber and the Co-Investigating Judges refer to direct victims as immediate victims. *See, e.g.* Trial Judgement, paras 643-644, 648-650, 667; Order on the Admissibility of Civil Party Applicants from Current Residents of Ratanakiri Province, 27 August 2010, D394.
[877] Trial Judgement, para. 340, fn. 619.

uncertainty and fear about the direct victim's fate, knowledge of their suffering,[878] or the loss of the sense of safety and moral integrity.[879] In grave or prolonged cases, psychological injury may lead to physical injury by causing various ailments. Psychological and physical injury may be suffered by the vulnerable, such as infants, children, and the old and sick, whose caregivers were taken away from them. Material injury may have been inflicted upon those for whom the direct victim was providing at the time of the victimisation, or would have, in all probability, provided for in the future, such as in the relationship between parents and children. Material injury may be occasioned by, or be a material consequence of, damage to the patrimony of the family.[880] Eventually, material injury may have its source in a contractual or statute-based claim toward the direct victim which the crime prevented from being satisfied. The meaning of "injury" in Article 13 of the 2007 Code of Criminal Procedure in the context of indirect victims is thus congruent with many plausible scenarios involving a wide range of persons. Its actuality, however, needs to be established in each particular case.

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[878] At trial, the expert CHHIM Sotheara detailed the consequences for the mental and physical condition of family members of direct victims of S-21 and the nature of the traumatisation resulting from knowledge of a relative's death there, including, amongst other things, identification with the suffering of the victim, guilt, helplessness, and psychiatric conditions such as post-traumatic stress disorder. Trial Judgement, fn. 1073.

[879] Indirect victims of grave human rights violations such as death or torture may suffer from "post-trauma stress" syndrome or "tragic seclusion." Longer term consequences entail a sense of guilt, helplessness and transference of blame, leading to the breakdown of family ties and disturbances rendering the victims unable to establish emotional relations with others. *See Paniagua-Morales et al. v. Guatemala ("Case of the white van")*, IACtHR, Judgment (Reparations and Costs), 25 May 2001, para. 66 (containing an exemplary description of moral damages). In *Caracazo v. Venezuela,* the IACtHR confirmed that moral damages may include "damage caused to the life project of the victims whose right to humane treatment was breached, insofar as the wounds suffered became obstacles that prevented them from attaining their vocation […]." *Caracazo v. Venezuela,* IACtHR, Judgment (Reparations and Costs), 29 August 2002, para. 97(b). Assessing the scope of moral prejudice resulting from the death of a child, the Supreme Court of Canada stated that the court should consider the following factors, "*inter alia*: the circumstances of the death, the ages of the deceased and the parent, the nature and quality of the relationship between the deceased and the parent, the parent's personality and ability to manage the emotional consequences of the death, and the effect of the death on the parent's life in light, *inter alia*, of the presence of other children or the possibility of having others." *Augustus v. Gosset,* [1996] 3 S.C.R. 268, para. 50. *See also Çakici v. Turkey*, ECtHR, Grand Chamber Judgment, App. No. 23657/94, 8 July 1999, para. 98 (discussing the gravity of moral damage: "Relevant elements will include the proximity of the family tie – in that context, a certain weight will attach to the parent-child bond –, the particular circumstances of the relationship, the extent to which the family member witnessed the events in question, the involvement of the family member in the attempts to obtain information about the disappeared person and the way in which the authorities responded to those enquiries").

[880] Victims before the IACtHR may claim compensation for pecuniary damage, which includes patrimonial damage to the household, lost earnings, and consequential damage, such as funeral and medical expenses. *Caracazo v. Venezuela,* Judgement (Reparations and Costs), paras 80-88.

418. On the basis of the foregoing, the Supreme Court Chamber finds that the requirement of injury as a direct consequence of the offence in Internal Rule 23(2)(a)-(b) does not restrict the admissibility of civil parties to direct victims but can also include indirect victims who personally suffered injury as a direct result of the crime committed against the direct victim. Absent any limiting provision, the category of indirect victims is not restricted to any specific class of persons such as family members.[881] It may encompass common law spouses, distant relatives, friends, *de facto* adopters and adoptees, or other beneficiaries, provided that the injury on their part can be demonstrated. On the other hand, persons who did not suffer injury will not be considered indirect victims even if they were immediate family members of the direct victim. Moreover, the exercise of the rights of indirect victims is autonomous of the rights of the direct victims. This means that indirect victims may be granted civil party status even where the direct victim is alive and does not pursue the civil party action him or herself.

419. On this occasion, it must be stressed that under the 2007 Code of Criminal Procedure there are two avenues by which a family member of a direct victim may participate in criminal proceedings: under Article 13, as an indirect victim who has suffered personal injury as a result of the injury to his or her family member (in other words, *iure proprio*); or as a successor to a direct victim by bringing or supporting a claim on behalf of a deceased victim (in other words, *iure hereditatis*) under Article 16, which provides that "in case of death of the victim, a civil action may be started or continued by his successors."

420. The Supreme Court Chamber notes that in one of its earlier decisions the Trial Chamber found that the exercise of a civil action before criminal courts is an exceptional right that must be "interpreted strictly within the limits defined by the law."[882] Apparently referring to Article 16 of the 2007 Code of Criminal Procedure,[883]

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[881] *See* International Committee on Reparation for Victims of Armed Conflict, International Law Association, Conference Report The Hague (2010), "Draft Declaration of International Law Principles on Reparation for Victims of Armed Conflict (Substantive Issues)", p. 10 ("The Committee holds the view that it is the suffering of harm which qualifies these third persons as victims. It sees no compelling reason to a priori restrict this group of third persons to members of the "immediate family", "dependants" or "persons who have suffered harm in intervening to assist victims in distress or to prevent victimization" as done in the Basic Principles").
[882] Decision on Motion Regarding Deceased Civil Party, 13 March 2009, E2/5/3, ("Decision on Motion Regarding Deceased Civil Party"), para. 8.

the Trial Chamber held that "in order to obtain moral reparation, the successors of a dead victim who intend to act on behalf of this party must demonstrate that he or she has filed a civil party application."[884] In the absence of proof of a civil party application having been previously filed before the death of the direct victim, the Trial Chamber stated that "successors can act only for themselves to seek reparation for personal damage arising from the death of the victim, and the death must be linked directly to an offence with which the accused has been charged."[885]

421. Although the Trial Chamber's decision on the admissibility of successors of deceased Civil Party applicants has not been appealed, the Supreme Court Chamber considers it necessary for the sake of clarity to point out that the Trial Chamber's decision to limit the scope of eligible successors to circumstances where the direct victim had personally filed a civil party application before his or her death has no basis in applicable law.[886]

### 3. Re-Defining Civil Parties or Creating Presumptions

422. The Supreme Court Chamber further finds that within the legal framework based in Article 13 of the 2007 Code of Criminal Procedure and Internal Rule 23(2), there is no substantive distinction between direct and indirect victims. In practical terms, the determination of a civil party application is principally an evidentiary matter focusing on the existence of direct injury resulting from the crimes charged. As demonstrated above, the Trial Chamber's statement that immediate family members fall within the scope of Internal Rule 23(2)(a)-(b) is, therefore, too categorical when compared with the applicable legal framework. The sparse reasoning provided by the Trial Chamber in reaching this conclusion seems to conflate the definitional question of injury central to the statutory notion of civil party with the evidentiary question of establishing direct injury. While the Trial Chamber may employ discretion in deciding issues of fact, it has no discretion to re-define statutory terms. The ambiguity in the Trial Judgement thus begs the question of whether the Trial Chamber considered the

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[883] The Trial Chamber referred to the "last provision", and the last provision cited was Article 16. It is therefore presumed that the Trial Chamber intended to refer to Article 16 of the 2007 Code of Criminal Procedure. Decision on Motion Regarding Deceased Civil Party, para. 11.
[884] Decision on Motion Regarding Deceased Civil Party, para. 11.
[885] Decision on Motion Regarding Deceased Civil Party, para. 12.
[886] As to the possibility that the Trial Chamber "innovated" under Article 33 new of the ECCC Law, the following section of this Appeal Judgement applies by reference.

current definition of civil party in the ECCC context to be unsuitable and opted for a legislative "innovation" under Article 33 new of the ECCC Law, or whether the Chamber's intent was to articulate a presumption of fact. Considering that the matter is disputed not only in the present case but also seems to be of continued relevance to ECCC jurisprudence,[887] the Supreme Court Chamber will discuss the implications of each possibility.

423. Pursuant to ECCC practice to date, the forms of "innovation" authorised under Article 33 new of the ECCC Law are decided by way of adopting Internal Rules, which involves a consultative process and endorsement by a majority of the ECCC

[887] In a seemingly legislative decision on the inadmissibility of victim applications in Case 002, the Co-Investigating Judges created two new types of presumptions—"determinant" and "relative"—without explaining the legal effect of the distinction between the two or justifying their authority to create them:

> a. There is a presumption of psychological harm for the members of the direct family of the immediate Victim. In applying the criteria set out in the present order, the notion of direct family encompasses not only parents and children, but also spouses and siblings of the direct Victim. The presumption will be considered as determinant in the following situations:
>
> > i. When the immediate Victim is deceased or has disappeared as a direct consequence of the facts under investigation.
> > ii. When the immediate Victim has been forcibly moved and separated from the direct family as a direct consequence of facts under investigation. Such separation results in suffering for the direct family members which meets the personal psychological harm threshold.
>
> b. When the immediate Victim has been forcibly married, such circumstances inevitably result to a suffering which meets the personal psychological harm threshold for his or her parents, spouse, and child(ren).
> c. The Co-Investigating Judges agree with the Trial Chamber finding that "*direct harm may be more difficult to substantiate in relation to more attenuated familial relationships*" and consider that only a relative presumption exists for extended family members (grand-parents, aunts and uncles, nieces and nephews, cousins, in-laws and other indirect kin). In such cases, the Co-Investigating Judges will assess on a case-by-case basis, whether there are sufficient elements to presume bonds of affection or dependency between the applicant and the immediate Victim. The presumption will be considered as determinant when the immediate Victim is deceased or has disappeared as a direct consequence of facts under investigation.

CIJ Admissibility Orders in Case 002, September 2007, common para. 14 (D392-D399, D401, D403-D404, D406, D408). The Supreme Court Chamber assumes that the Co-Investigating Judges meant to introduce irrebuttable and rebuttable presumptions. The first category, in the Supreme Court Chamber's opinion, would necessarily require a legislative decision under Article 33 new of the ECCC Law. The Pre-Trial Chamber, in its Decisions on Appeals against the CIJ Admissibility Orders in Case 002, struck the "determinative" presumption: "The Pre-Trial Chamber further observes that the Co-Investigating Judges define 'personal psychological harm' in restrictive terms. The Pre-Trial Chamber considers that where finding that a familial relationship was required, the Co-Investigating Judges applied a limitation without proper basis or consideration. The presumptions in relation to psychological harm are used to the exclusion of other considerations and conclude with the unsupported statement in paragraph 14 d of the orders." Decisions on Appeals against the CIJ Admissibility Orders in Case 002, common para. 48.

Judges.[888] While Article 33 new or the Internal Rules do not preclude *ad hoc* innovation by any Office or Chamber where necessary, the lack of prior notice and of binding effect on the ECCC as a whole practically limits the application of such innovations to Chamber-specific procedural technicalities. An individual Chamber's innovations regarding established legal concepts, albeit not excluded by Article 33 new, would render those concepts variable and undermine legal certainty of ECCC processes. In practice, they are to be avoided.[889]

424. With respect to the merits of the hypothetical "innovation" by the Trial Chamber, the Supreme Court Chamber agrees that a question might be posed *de lege ferenda* whether a regime that so broadly embraces victims, yet is so heavily dependent on proving an injury, is compatible with criminal proceedings concerning core international crimes and mass victimisation. However, as discussed above, the notion of a civil party as articulated in the 2007 Code of Criminal Procedure and Internal Rules has an unequivocal meaning and remains a key feature of a certain model chosen by the ECCC. Intervening with respect to this definition would call for reconsideration of the coherence of the model as a whole. As such, it would be expected that a decision to redefine the notion of civil party would expressly resort to Article 33 new of the ECCC Law, specifically discuss the criteria justifying the redefinition, and use sharply-contoured terms as opposed to imprecise ones such as "immediate family." This the Trial Chamber did not do. Moreover, the judgement phase must, by any standard, be considered an inappropriate moment for legislative changes to be introduced. For these reasons, the Supreme Court Chamber considers that the Trial Chamber did not purport to innovate as to the notion of the civil party. The more likely explanation of paragraph 643 of the Trial Judgement is that it denotes a presumption.

### 4. Legal or Discretionary Presumptions

425. The Supreme Court Chamber will now address the question of whether the Trial Chamber's unqualified statement that immediate family members of direct victims fall within the scope of Internal Rule 23(2)(a)-(b) is legally valid as a presumption. The Supreme Court notes that a presumption does not remove the

[888] Internal Rule 2.
[889] Trial Judgement, para. 662 (regarding forms of reparations).

requisite elements of the definition (the existence of direct, personal injury) but, under certain conditions, may relieve the burden of proving it.

426. As a starting point, the Supreme Court Chamber recalls the distinction in civil law between presumptions established by law (*praesumptio iuris,* legal or mandatory presumption) and presumptions formed by the court itself (*praesumptio iudicis,* discretionary presumption). The former presumptions are deduced from some legal precept or authority expressed in law, and the latter operate where the law is silent on the subject and a conclusion is being formed according to the way that circumstances and indications would affect a prudent judge. In both cases the term "presumption" signifies a reasonable conjecture concerning something doubtful that is drawn from arguments and appearances, which by the force of circumstances can be accepted as proven. The law establishes legal presumptions in order to protect certain commonly acknowledged, legitimate and durable interests, such as legal certainty, prevention of abuse of power, and discouraging vigilantism. Legal presumptions in Cambodian law include, for example, the presumption of innocence, presumptions included in the civil law,[890] or presumptions attaching to court judgements, legal titles and other official documents under the law.[891] Discretionary presumptions are formed on an *ad hoc* basis for the purpose of efficiency of proceedings. However, they are not meant to give one party an undue advantage or serve the mere convenience of the court. Discretionary presumptions are authorised under the Code of Civil Procedure of Cambodia.[892]

427. Any discretionary presumption formed by a court must not contradict presumptions established by law. A legal presumption is binding on all, whereas a discretionary presumption is applicable only before the court that created it, subject to challenge and appellate review as a finding of fact. A legal presumption may or may not be rebuttable; a discretionary presumption is always rebuttable. A legal presumption is itself considered to be equivalent to proof and places the burden of rebuttal on the adversary. Accordingly, a court may base a determination upon a legal

[890] *See, e.g.* Law on Marriage and Family 1989, Arts 9 (presumption of paternity of the current husband), 82-83 (presumption of paternity); Civil Code of Cambodia 2007, Arts 988 (presumption of paternity), 234(4) (presumption of lawful possession).
[891] *See e.g.* Code of Civil Procedure 2006, Arts 155(2), 155(4)-(5).
[892] *See e.g.* Code of Civil Procedure 2006, Arts 96(1), 123(1)-(2).

presumption even where the court had doubt as to the presumption's congruence with the facts of the case. Conversely, the court cannot, without falling into a major contradiction, do so with respect to the presumption that it has formed itself. In order to allow the determination of a civil matter, a discretionary presumption needs corroboration from elements extraneous to itself, such as supporting evidence, indirect evidence, or an implied admission. A discretionary presumption therefore does not detract from the necessity of proof. Hence, the utility of discretionary presumptions manifests mainly in *prima facie* substantiation, such as where the determination is not final (as, for example, in the initial decision on civil party admissibility) or falls in the area of wide discretion where no adverse legal interest is likely to be affected (as, for example, in granting extension of time limits). Whereas, in order to allow the determination of the merits of a civil dispute, a presumption needs corroboration from elements extraneous to itself, such as, for example, supporting evidence, indirect evidence, or implied admission.

428. Returning to the question of a civil party action in criminal proceedings, the Supreme Court notes that the Co-Prosecutors must prove beyond a reasonable doubt the event that primarily caused the claimed injury, which is the factual foundation of the criminal charge.[893] Presuming that any elements already exist with respect to that charge would go against the presumption of innocence. On the other hand, any element of the civil action that goes beyond the elements of the crime charged needs to be demonstrated by the civil party to the level of proof required for the civil case. The Supreme Court Chamber notes that in the prosecution of core international crimes such as those under the jurisdiction of the ECCC, the exact number of victims or their identities do not constitute elements of a crime and need not necessarily be included in the charges. It follows that often the particulars of the direct victims will not be proven by the prosecution and will need to be demonstrated by the civil parties. Likewise, the injury caused by the crime to indirect victims will usually remain outside the scope of the criminal charges and thus will be subject to proof by the civil party on a preponderance of the evidence, unless the law allows a lower threshold. [894]

[893] Internal Rule 87(1).
[894] Code of Civil Procedure 2006, Arts 92, 124(1).

429. Considering that the 2007 Code of Criminal Procedure and the Internal Rules do not alter the burden of proof with regard to any class of victims and, unlike the Code of Civil Procedure, do not specifically authorise the creation and application of presumptions by the court, the question arises as to whether there are conditions under which judicial organs of the ECCC might be authorised to formulate presumptions.

430. With regard to legal presumptions, that is, reversing the burden of proof, a caveat needs to be put forth concerning their limited effect on ECCC proceedings. Legal presumptions established by individual Offices or Chambers of the ECCC would be inherently weak, as explained above. While the reversal of the burden of proof would be binding on the parties in the current phase of the case, the lack of binding effect on the ECCC as a whole largely removes the distinction between the Chamber-made *praesumptio iuris* and a discretionary presumption *iudicis*.[895] Concerning the merits, the Supreme Court Chamber considers that in the context of the ECCC, legal presumptions could be formulated under the same conditions that determine leave to depart from the statutorily prescribed procedure, which would be an "innovation" pursuant to Article 33 new of the ECCC Law. Likewise, in addition to identifying inadequacies in Cambodian procedural law, the newly introduced legal presumption would need to refer to international law or practice relevant to the ECCC context by demonstrating similarity of legal ramifications and factual circumstances as well as the same public policy concerns substantiating the reversal of the burden of proof.

431. The Supreme Court Chamber notes that ECCC jurisprudence[896] relies heavily on the case law of the Inter-American Court of Human Rights ("IACtHR") and the European Court of Human Rights ("ECtHR"), the regional human rights courts established under the American Convention on Human Rights[897] ("ACHR") and the ECHR, respectively. The Supreme Court observes that claims before these courts may be factually relevant for the ECCC analysis because they often result from a pattern of

[895] This is evidenced by the "determinative" and "relative" presumptions used in the CIJ Admissibility Orders in Case 002, which were rejected by the Pre-Trial Chamber in its Decisions on Appeals against the CIJ Admissibility Orders in Case 002, common paragraph 48.
[896] *See e.g.* CIJ Admissibility Orders in Case 002, fns 11-13, 15; Trial Judgement, fn. 1076; CPG2 Appeal on Admissibility, para. 56; Decisions on Appeals against the CIJ Admissibility Orders in Case 002, fns 77, 111, 129.
[897] Opened for signature 22 November 1969, 1144 UNTS 143 (entered into force 18 July 1978).

human rights violations. However, because the focus of the regional human rights courts is *state* responsibility for breach of conventional obligations, rather than individual criminal responsibility, the IACtHR and ECtHR necessarily operate under a different legal framework and are animated by different policies than the ECCC.

432. Thus, applications and petitions under the ECHR and ACHR must derive from the alleged breach by a State Party of rights protected under the respective conventions.[898] Based exclusively in international law, the regional human rights courts develop their procedures largely through their own jurisprudence[899] and, in defining beneficiaries of remedies, they exercise much wider discretion than would be allowed under the legal framework of the ECCC.[900] The resulting jurisprudence under

[898] ECHR, Art. 34 (an applicant must claim "to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto"); ACHR, Art. 44 ("Any person or group of persons, or any nongovernmental entity legally recognized in one or more member states of the Organization, may lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a State Party"); Art. 63(1) ("If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated").

[899] The ECtHR has stressed that the notion of "victim" is interpreted autonomously and irrespective of domestic rules such as those concerning interest in or capacity to take action. *See, e.g. Gorraiz Lizarraga and Others v. Spain*, ECtHR, Chamber Judgment, App. No. 62543/00, 27 April 2004, para. 35. It has further held that "the conditions governing individual applications under [then] Article 25 [now Article 34] of the Convention are not necessarily the same as national criteria relating to locus standi. National rules in this respect may serve purposes different from those contemplated by Article 25 and, whilst those purposes may sometimes be analogous, they need not always be so." *Norris v. Ireland,* ECtHR, Plenary Judgment, App. No. 10581/83, 26 October 1988, para. 31. Likewise, the IACtHR stressed that "[t]he obligation contained in Article 63(1) of the Convention is governed by international law in all of its aspects, such as, for example, its scope, characteristics, beneficiaries, etc." *Aloeboetoe et al. v. Suriname*, IACtHR, Judgment (Reparations and Costs), 10 September 1993, para. 44.

[900] Before the ECtHR, the interpretation of the term "victim" is liable to evolve in the light of conditions in contemporary society and it must be applied without excessive formalism. *Gorraiz Lizarraga and Others v. Spain*, Chamber Judgment, para. 38; *Monnat v. Switzerland*, ECtHR, Chamber Judgment, App. No. 73604/01, 21 September 2006, paras 30-33; *Stukus and Others v. Poland*, ECtHR, Chamber Judgment, App. No. 12534/03, 1 April 2008, para. 35; *Zietal v. Poland*, ECtHR, Chamber Judgment, App. No. 64972/01, 12 May 2009, paras 54-59. The Court has acknowledged that "human rights cases before it generally also have a moral dimension […] all the more if the leading issue raised by the case transcends the person and the interests of the applicant and his heirs in that it may affect other persons." *Micallef v. Malta*, ECtHR, Grand Chamber Judgment, App. No. 17056/06, 15 October 2009, para. 45. The IACtHR has likewise explained its competence to determine both the class of successors and the victims being compensated in their own rights. *See, e.g. Juan Humberto Sánchez v. Honduras*, IACtHR, Judgment (Interpretation of the Judgment of Preliminary Objections, Merits and Reparations), 26 November 2003, paras 57, 59-66; *Myrna Mack Chang v. Guatemala*, IACtHR, Judgment (Merits, Reparations and Costs), "Reasoned Concurring Opinion of Judge Sergio García-Ramírez", 25 November 2003, para. 57 ("[I]n one area of 'case law development,' there is a category of persons who do not appear under the heading of direct victims and are just beginning to be classified as indirect victims, but who are owed reparation, because they have been prejudiced by the facts submitted to the Court's consideration. In brief, all these subjects are encompassed in the concept of 'Beneficiaries' […] that the Court generally uses, which encompasses direct victims, indirect victims

the two Conventions employs rather broad criteria for admissibility of persons other than direct victims. Applying the standard of a "sufficiently direct link between the applicant and the harm which they consider they have sustained on account of the alleged violation,"[901] the ECtHR has accepted, virtually on an *ad hoc* basis, applications from relatives of deceased persons where it was justified by the nature of the violation alleged and considerations of the effective implementation of the Convention.[902] Under the ACHR, indirect victims may petition under the concept of succession after the direct victim[903] or under the doctrine of the breach of indirect

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and other persons who are located on the narrow and elusive dividing line between the latter and third parties").

[901] *Gorraiz Lizarraga and Others v. Spain*, Chamber Judgment, para. 35. *See also Fairfield and others v. the United Kingdom*, ECtHR, Chamber Decision, App. No. 24790/04, 8 March 2005, pp. 4-5.

[902] The ECtHR confirmed that "individuals who are the next-of-kin of persons who have died in circumstances giving rise to issues under *Article 2* of the Convention may apply as applicants in their own right," but held that "this is a particular situation." *Fairfield and others v. the United Kingdom*, p. 5 (emphasis added). *See also Case of Biç and Others v. Turkey,* ECtHR, Chamber Judgment, App. No. 55955/00, 2 February 2006, para. 22 (denying relatives' applications lodged in respect of Articles 5 and 6 of the Convention). *But see Grădinar v. Moldova*, ECtHR, Chamber Judgment, App. No. 7170/02, 8 April 2008, para. 91 (accepting relatives' applications lodged with respect to alleged violations of Article 3, and stating, "The Court has consistently rejected as inadmissible *ratione personae* applications lodged by the relatives of deceased persons in respect of alleged violations of rights *other than those protected by Articles 2 and 3 of the Convention*") (emphasis added). However, in a seminal judgement in *Kurt v. Turkey*, the Court's finding of a breach of Article 3 of the Convention was qualified by the fact that the case concerned the mother of a victim of a serious human rights violation who was herself the victim of the authorities' complacency in the face of her anguish and distress. *Kurt v. Turkey*, ECtHR, Chamber Judgment, App. No. 24276/94, 25 May 1998, paras 130-134. *See also Varnava and Others v. Turkey*, ECtHR, Grand Chamber Judgment, App. Nos 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, 18 September 2009, paras 200-202. In relation to Article 5 (right to liberty), the ECtHR accepted the victim application of a husband whose wife was involuntarily committed to a psychiatric hospital after the doctors convinced him that her forced hospitalization was necessary. *Houtman and Meeus v. Belgium,* ECtHR, Chamber Judgment, App. No. 22945/07, 17 March 2009, paras 27-31. In relation to Article 6 (right to fair trial) the ECtHR accepted applicants who sought to defend a deceased spouse's reputation, however the Court noted that the applicants were heirs of the deceased. *Grădinar v. Moldova*, ECtHR, Chamber Judgment, App. No. 7170/02, 8 April 2008, paras 92-95. Other cases concerning Article 6 of the ECHR include: *Brudnicka and Others v. Poland*, ECtHR, Chamber Judgment, App. No. 54723/00, 3 March 2005, paras 32-34; *Marie-Louise Loyen and Bruneel v. France*, ECtHR, Chamber Judgment, App. No. 55929/00, 5 July 2005, para. 29. The Court also allowed an application by a widow of a defendant who was the victim of a breach of his right to be presumed innocent. *Nölkenbockhoff v. Germany*, ECtHR, Plenary Judgment, App. No. 10300/83, 25 August 1987, para. 33. However, the Court dismissed a claim from the relatives of a successful applicant for non-pecuniary damage for the anguish and humiliation they suffered as a result of the applicant's imprisonment, having found that they did not possess the status of victim within the meaning of Article 34 of the Convention. *Stoimenov v. The Former Yugoslav Republic of Macedonia*, ECtHR, Chamber Judgment, App. No. 17995/02, 5 April 2007, paras 50, 53. Under Article 10 (freedom of expression) the Court recognised the standing of an applicant's widow, qualified by the fact that the victim filed the application himself and it was only continued by the widow. *Dalban v. Romania*, ECtHR, Grand Chamber Judgment, App. No. 28114/95, 28 September 1999, paras 38-39. The Court asserted its competence to decide whether it is appropriate to continue its examination for the purpose of protecting human rights and in consideration of general interest involved. *Karner v. Austria*, ECtHR, Chamber Judgment, App. No. 40016/98, 24 July 2003, paras 25-28; *Marie-Louise Loyen and Bruneel v. France*, Chamber Judgment, para. 29.

[903] *See, e.g. Aloeboetoe et al. v. Suriname*, Judgment (Reparations and Costs), para. 54 ("The damages suffered by the victims up to the time of their death entitle them to compensation. That right to

victims' own right to moral integrity, at times in conjunction with the right to access court and to a fair trial.[904]

433. Compared with a civil party action at the ECCC, causality relevant to the proceedings under the regional human rights instruments is rights-focused as opposed to injury-focused. At times, it leads to a narrowing of the scope of victims, [905] at times

compensation is transmitted to their heirs by succession"); *Garrido and Baigorria v. Argentina,* IACtHR, Judgment (Reparations and Costs), 27 August 1998, para. 50; *Case of the white van,* Judgment (Reparations and Costs), para. 84; *Juan Humberto Sánchez* v. *Honduras*, Judgment (Interpretation of the Judgment of Preliminary Objections, Merits and Reparations), paras 59-66.

[904] In *Myrna Mack Chang v. Guatemala*, the Court followed the ECtHR in *Kurt v. Turkey*, finding a violation of the right to moral integrity of the next of kin of the direct victim upon establishing that the authorities had harassed and threatened them. *Myrna Mack Chang v. Guatemala*, Judgment (Merits, Reparations and Costs), paras 232, 234. In *La Cantuta v. Perú*, the IACtHR held that "in cases involving forced disappearance of people, it can be understood that the violation of the right to mental and moral integrity of the victim's next of kin is, precisely, a direct consequence of that event, which causes them severe suffering and is made worse by the continued refusal of state authorities to supply information on the victim's whereabouts or to conduct an effective investigation to elucidate the facts." *La Cantuta v. Perú*, IACtHR, Judgment (Merits, Reparations and Costs), 29 November 2006, para. 123. In other cases, the Court also stressed violation of the right to moral integrity, irrespective of the conduct of the authorities in the dealings with the next of kin. *See, e.g. Blake v. Guatemala*, IACtHR, Judgment (Merits), 24 January 1998, paras 114-116; *Bámaca Velásquez v. Guatemala*, IACtHR, Judgment (Merits), 25 November 2000, para. 160. Concerning Articles 8(1) and 25 of the ACHR, the IACtHR stated, "Article 8(1) of the Convention must be given a broad interpretation based on both the letter and the spirit of this provision […] Thus interpreted, the aforementioned Article 8(1) of the Convention also includes the rights of the victim's relatives to judicial guarantees […]." *Blake v. Guatemala*, Judgment (Merits), paras 96-97.

[905] In *Case of the white van*, the IACtHR stressed the irrelevance of individual liability: "Unlike domestic criminal law, it is not necessary to determine the perpetrators' culpability or intentionality in order to establish that the rights enshrined in the Convention have been violated, nor is it essential to identify individually the agents to whom the acts of violation are attributed. The sole requirement is to demonstrate that the State authorities supported or tolerated infringement of the rights recognized in the Convention." *Case of the white van*, Judgment (Merits), 8 March 1998, para. 91. A focus on state liability renders the notion of victim narrower before the ECtHR. *See, e.g. Çakici v. Turkey*, para. 98 ("The *Kurt* case does not [...] establish any general principle that a family member of a 'disappeared person' is thereby a victim of treatment contrary to Article 3. Whether a family member is such a victim will depend on the existence of special factors which gives the suffering of the applicant a dimension and character distinct from the emotional distress which may be regarded as inevitably caused to relatives of a victim of a serious human rights violation. [...]. The [...] essence of such a violation does not so much lie in the fact of the 'disappearance' of the family member but rather concerns the authorities' reactions and attitudes to the situation when it is brought to their attention. It is especially in respect of the latter that a relative may claim directly to be a victim of the authorities' conduct"); *Micallef v. Malta*, Grand Chamber Judgment, "Partly Dissenting Opinion of Judges Björgvinsson and Malinverni", para. 4(b) ("[…] where the direct victim has died *before* the application was lodged with the Court, the latter will only very exceptionally recognize the members of the victim's family as having victim status") (emphasis added); *Lipencov v. Moldova*, ECtHR, Chamber Judgment, App. No. 27763/05, 25 January 2011, para. 27 (holding that where the applicant's status of direct victim under Article 3 is beyond question, it is not required to examine another complaint under Article 3 from the applicant's mother "who had been deeply worried" and experienced "anxiety and distress" concerning her son's welfare during the time he was detained in view of his age and his disability).

to a broadening.[906] Moreover, the mandates of regional human rights mechanisms extend beyond the courtrooms of Strasbourg and San José. As noted by the ECtHR:

> [t]he Court has repeatedly stated that its judgments in fact serve not only to decide those cases brought before the Court but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties […]. Although the primary purpose of the Convention system is to provide individual relief, its mission is also to determine issues on public-policy grounds in the common interest, thereby raising the general standards of protection of human rights and extending human rights jurisprudence throughout the community of Convention States.[907]

434. As a result of this wider understanding of their mission, proceedings before regional human rights courts allow for a larger margin of discretion in deciding the admissibility of victims and claims for reparations than is warranted under the fair trial principle in criminal proceedings. This relaxation of requirements implicates the standard of proof,[908] the scope of beneficiaries[909] and the burden of proof.[910]

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[906] In order to qualify as a victim within the meaning of Article 34 of the ECHR it is not required that an applicant have suffered a specific detriment. The Court has accepted that in the context of Article 3, a potential future violation may be sufficient to satisfy the victim requirement. *Soering v. United Kingdom*, ECtHR, Plenary Judgment, App. No. 14038/88, 7 July 1989, para. 90.

[907] *Karner v. Austria*, para. 26, citing *Ireland v. United Kingdom*, Plenary Judgment, App. No. 5310/71, 18 January 1978, para. 154; *Guzzardi v. Italy*, Plenary Judgment, App. No. 7367/76, 6 November 1980, para. 86. The difference of mandates and its impact on exercising jurisdiction was noted by the Trial Chamber in its discussion of reparations. Trial Judgement, paras 662-663.

[908] *See, e.g. Case of the white van,* Judgment (Reparations and Costs), para. 51 ("The Court has indicated previously that the proceedings before it are not subject to the same formalities as domestic proceedings […]. International jurisprudence has upheld the power of the courts to evaluate the evidence within the limits of sound judicial discretion; and has always avoided making a rigid determination of the amount of evidence required to support a judgment"); *Juan Humberto Sánchez* v. *Honduras*, Judgment (Interpretation of the Judgment of Preliminary Objections, Merits and Reparations), para. 42 ("In this respect, the guiding principle is that justice 'cannot be sacrificed for mere formalities' and, therefore, international human rights courts have greater flexibility and latitude when assessing evidence").

[909] *See, e.g. Garrido and Baigorria v. Argentina,* Judgment (Reparations and Costs), paras 63-64 (granting reparation to siblings of victims despite finding that "they offered no proof of an affective relationship such that the disappearance of their brother would have caused them grievous suffering. Some live more than 1,000 kilometers from where [the victim had lived] and there is no evidence to show that they visited each other frequently or that they took much interest in the life that their brother was leading when they might have"); *Juan Humberto Sánchez* v. *Honduras*, Judgment (Interpretation of the Judgment of Preliminary Objections, Merits and Reparations), paras 58-59 (recognising the right to reparation [either through succession or in their own right] on the part of two consecutive concubines of the deceased); *Caracazo v. Venezuela,* Judgment (Reparations and Costs), para. 91 (granting specific percentages of the compensation by succession to the children, spouse or companion, parents, or those who had had an affective relationship of a similar nature, either as stepfather, aunts, uncles or grandparents. Should none of these exist, the Court ruled that compensation be delivered in equal percentages to the parents and siblings of the victim). The ECtHR approaches the notion of a victim generally more restrictively. *See, e.g. Velikova v. Bulgaria*, ECtHR, Chamber Decision, App. No. 41488/98, 18 May 1999, p. 12 ("The Convention organs have always and unconditionally

435. For these reasons, legal precepts of regional human rights mechanisms do not necessarily provide guidance for civil actions in criminal cases. The different interests involved call for caution in the distribution of the burden of proof. In any event, before importing a presumption from another jurisdiction to the ECCC context, it is judicious to consider whether the model functions as the *law* (legal presumption) or as a discretionary presumption.

436. The Supreme Court Chamber notes at this point that the ECCC's authority to use discretionary presumptions derives from the principle of free evaluation of evidence. Such presumptions can thus be applied, noting the limitations stated above. While inherent in legal presumptions, two issues fall to be specifically considered in introducing discretionary presumptions by the court: reasonableness and foreseeability.

437. The basis of discretionary presumptions is in the probable, "natural" conclusions drawn, in accordance with the indications of logic, science and common human experience, from ordinary happenings of common life and the consideration of the motives that usually sway individuals in certain circumstances. It follows that in order to avoid being arbitrary, the presumption must reflect the rule rather than the exception. Otherwise, the strength of discretionary presumptions will vary depending on the circumstances out of which they arise. Their content is always a matter of probability grounded in facts and not legal standards. In this respect, presumptions formed by courts and tribunals at the international level may thus be of relevance for the ECCC insofar as they are convincingly drawn from similar circumstances or demonstrate factual relations universally held as true.

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considered in their case-law that a parent, sibling or nephew of a person whose death is alleged to engage the responsibility of the respondent Government could claim to be the victim of an alleged violation of Article 2 of the Convention even where closer relatives, such as the deceased person's children, have not submitted applications. In all these cases the question whether the applicant was the legal heir of the deceased person was without relevance", citing *Yaşa v. Turkey*, ECtHR, Chamber Judgment, App. No. 22495/93, 2 September 1998, para. 66). Why the nephew in *Yaşa* was to be "unconditionally" considered a victim was not explained under either the concept of succession or the nephew's own right. *Yaşa v. Turkey*, paras 61-66.

[910] *Juan Humberto Sánchez* v. *Honduras*, Judgment (Interpretation of the Judgment of Preliminary Objections, Merits and Reparations), para. 47 ("[...] in proceedings to determine human rights violations, the State's defense cannot be based on the impossibility of the petitioner to allege evidence when such evidence cannot be obtained without the State's cooperation, so that the parties and, in particular the State, must provide the Court with all the necessary probative elements"). Obviously, in criminal proceedings the court may not put the defence under the obligation to supply the probative elements nor can it purport to effectuate the same by creating presumptions.

438. The related issue of fairness necessarily requires that, in order for discretionary presumptions to be open to challenge or rebutted, the parties must be adequately put on notice. Notice may not be required where a presumption reflects probability that is strongly supported by pressing conjecture. Otherwise, articulating presumptions at the phase of the judgement does not provide adequate notice and potentially violates the rights of the parties negatively affected by it.

439. A review of the jurisprudence under the ACHR demonstrates that presumptions applied by the Inter-American Court are, for the most part, discretionary.[911] That is, they are tailored for particular cases while the conjectures reflect factual relations generally accepted as true. Thus the Court found that no evidence is required to accept that direct victims suffered moral damages "for it is characteristic of human nature that anybody subjected to the aggression and abuse [such as unlawful detention, cruel and inhumane treatment, disappearance and death] will experience moral suffering."[912] Likewise, the Court has consistently held that "it can be presumed that the parents have suffered morally as a result of the cruel death of their offspring, for it is essentially human for all persons to feel pain at the torment of their child."[913] In certain cases, a presumption of moral damage was extended to the children of the direct victims,[914] but less consistently to the siblings.[915] Broader

[911] In an early case, the IACtHR held: "With respect to the [successors] it is assumed that the death of the victim has caused them actual and moral damages and the burden of proof is on the other party to show that such damages do not exist." *Aloeboetoe et al. v. Suriname*, Judgment (Reparations and Costs), para. 54. The Court then proceeded to interpret the notion of successors with reference to the general rules accepted by the community of nations, indicating that the Court saw the definition of successors as an established category of international law while the harm on their part was presumed as a matter of fact. *Aloeboetoe et al. v. Suriname*, Judgment (Reparations and Costs), paras 54, 62, 71, 76. *See also Castillo-Páez v. Peru*, IACtHR, Judgment (Reparations and Costs), 27 November 1998, paras 86-90. At the ECCC, the right of successors to pursue civil action and the succession as such are determined by Cambodian law.

[912] *Aloeboetoe et al. v. Suriname*, Judgment (Reparations and Costs), para. 52. *Cf. Case of the white van,* Judgment (Reparations and Costs), para. 106; *Castillo-Páez v. Peru*, Judgment (Reparations and Costs), para. 86.

[913] *Aloeboetoe et al. v. Suriname*, Judgment (Reparations and Costs), para. 76; *Castillo-Páez v. Peru*, Judgment (Reparations and Costs), para. 88; *Case of the white van*, Judgement (Reparations and Costs), para. 108; *Loayza-Tamayo v. Peru*, IACtHR, Judgment (Reparations and Costs), 27 November 1998, para. 142; *Garrido and Baigorria v. Argentina,* Judgment (Reparations and Costs), para. 62.

[914] *Loayza-Tamayo v. Peru,* Judgment (Reparations and Costs), para. 140; *Case of the white van,* Judgment (Reparations and Costs), para. 108.

[915] In *Loayza-Tamayo v. Peru* and in *Case of the Street Children*, the IACtHR held that "it may be presumed that the death of a person results in non-pecuniary damage to his siblings." *Villagrán Morales et al. v. Guatemala ("Case of the Street Children")*, IACtHR, Judgment (Reparations and Costs), 26 May 2001, para. 68; *Loayza-Tamayo v. Peru,* Judgment (Reparations and Costs), para. 143. In *Case of the white van* the Court found it "necessary to take into account the degree of relationship and affection that existed between [the victim and her siblings]." *Case of the white van*, Judgment

holdings introduced presumptions of moral suffering by the closest members of the family, particularly those who had close affective relationships with the victim who suffered death or disappearance.[916]

440. Fairly recently, in summing up its jurisprudence, the Inter-American Court[917] held that a violation of the right to mental and moral integrity of the direct next of kin of victims of certain human rights violations may be declared by applying a presumption *iuris tantum* (a legal rebuttable presumption) with regard to mothers and fathers, daughters and sons, husbands and wives, and permanent companions, provided it responds to the specific circumstances of the case, such as in the cases of various massacres, [918] forced disappearance of persons, [919] and extrajudicial executions.[920] With regard to such direct next of kin, it is for the State to disprove their claim.

441. In all other cases, the Inter-American Court must analyse whether the evidence on record shows a violation of the right to humane treatment of the alleged indirect victim, regardless of whether or not s/he is a next of kin of a direct victim in the case. As regards those persons in respect of whom the Court does not presume that the right to humane treatment has been violated because they are not direct next of kin, the Court must assess, for example, whether there is a particularly close relationship between them and the direct victim(s). The Court may also assess whether the alleged

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(Reparations and Costs), para. 109. Similarly, in *Garrido and Baigorria v. Argentina*, the Court found that the siblings could not establish that there was an "affective relationship" with the direct victims. *Garrido and Baigorria v. Argentina,* Judgment (Reparations and Costs), paras 63-64. The Court, however, did not deny the siblings reparations, but merely reduced the reparation awarded to a symbolic amount, as if to recognise the residual emotional bonds between the siblings. Similarly, in terms of pecuniary damage, the Court found a general damage to the patrimony of the family group resulting from a death of a sibling. *Case of the white van*, Judgment (Reparations and Costs), para. 99.

[916] *Case of the white van,* Judgment (Reparations and Costs), para. 106; *Juan Humberto Sánchez v. Honduras*, IACtHR, Judgment (Preliminary Objections, Merits, Reparations and Costs), 7 June 2003, para. 156.

[917] *Valle-Jaramillo et al. v. Colombia*, IACtHR, Judgment (Merits, Reparations, and Costs), 27 November 2008, para. 119; *Kawas-Fernández v. Honduras*, IACtHR, Judgment (Merits, Reparations and Costs), 3 April 2009, paras 128-129.

[918] *Case of the Mapiripán Massacre v. Colombia*, IACtHR, Judgment (Merits, Reparations, and Costs), 15 September 2005, para. 146; *Case of the Ituango Massacres v. Colombia*, IACtHR, Judgment (Preliminary Objections, Merits, Reparations and Costs), 1 July 2006, para. 262.

[919] *Blake v. Guatemala*, Judgment (Merits), para. 114; *Heliodoro Portugal v. Panama*, IACtHR, Judgment (Preliminary Objections, Merits, Reparations and Costs), 12 August 2008, paras 174-175; *Goiburú et al. v. Paraguay*, IACtHR, Judgment (Merits, Reparations and Costs), September 22, 2006, paras 96-97.

[920] *La Cantuta v. Perú,* Judgment (Merits, Reparations and Costs), para. 218.

indirect victims have been actively involved in seeking justice in the specific case,[921] or whether they have suffered as a result of the facts of the case or of subsequent acts or omissions on the part of the State authorities in relation to the incidents.[922]

442. The Supreme Court notes that in most cases where presumptions regarding the existence of injury were applied, the Inter-American Court additionally relied on other factors supporting the presumption, such as: statements from the victims taken either directly or in the form of briefs;[923] the State's acknowledgement of responsibility,[924] even if later withdrawn;[925] the State's presumed acceptance of facts (lack of dispute);[926] the Court's prior cases;[927] sworn affidavits and private expert reports;[928] victims' declarations signed in the presence of a public notary;[929] and a variety of documentary evidence.

443. Even in cases where the *presumption iuris* was declared, but where the State opposed any ruling in relation to the alleged violation, the Court proceeded to examine the evidence presented by the representatives.[930] In considering whether there was a close personal relationship, the Court examined the evidence provided and asked questions such as: Was there regular contact? Was care provided? Was there emotional suffering? Was there financial support?[931] The Court has required that "at

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[921] *Bámaca Velásquez v. Guatemala*, Judgment (Merits), para. 163; *Heliodoro Portugal v. Panama*, Judgment (Preliminary Objections, Merits, Reparations and Costs), para. 163; *Valle-Jaramillo et al. v. Colombia*, Judgment (Merits, Reparations, and Costs), para. 119.
[922] *Blake v. Guatemala*, Judgment (Merits), para. 114; *Heliodoro Portugal v. Panama*, Judgment (Preliminary Objections, Merits, Reparations and Costs), para. 163; *Valle-Jaramillo et al. v. Colombia*, Judgment (Merits, Reparations, and Costs), para. 119.
[923] *Kawas-Fernández v. Honduras*, Judgment (Merits, Reparations and Costs), paras 131-138; *Valle-Jaramillo, et al. v. Colombia*, Judgment (Merits, Reparations, and Costs), para. 121; *Caracazo v. Venezuela,* Judgment (Reparations and Costs), para. 63.
[924] *Aloeboetoe et al. v. Suriname*, Judgment (Reparations and Costs), para. 52; *Valle-Jaramillo, et al. v. Colombia*, Judgment (Merits, Reparations, and Costs), para. 115.
[925] *Caracazo v. Venezuela,* Judgment (Reparations and Costs), para. 52 ("in view of the *estoppel* principle, […], acknowledgment of the facts set forth in the application and recognition of responsibility regarding those facts, made by the State in the instant case, must be given full import").
[926] *Valle-Jaramillo, et al. v. Colombia*, Judgment (Merits, Reparations, and Costs), para. 115; *Caracazo v. Venezuela,* Judgment (Reparations and Costs), para. 54.
[927] *Castillo-Páez v. Peru*, Judgment (Reparations and Costs), para. 86; *Case of the white van,* Judgment (Reparations and Costs), para. 108.
[928] *Castillo-Páez v. Peru*, Judgment (Reparations and Costs), para. 33; *Valle-Jaramillo et al. v. Colombia*, Judgment (Merits, Reparations, and Costs), para. 124.
[929] *Castillo-Páez v. Peru*, Judgment (Reparations and Costs), para. 81.
[930] *Kawas-Fernández v. Honduras*, Judgment (Merits, Reparations and Costs), paras 130-139.
[931] *Kawas-Fernández v. Honduras*, Judgment (Merits, Reparations and Costs), paras 130-139.

least testimonial evidence be provided."[932] This jurisprudence demonstrates that, despite the nominally "legal" character, the presumption of damage was *de facto* applied as a discretionary one, such that it took effect only to the extent that the opposing party did not object.

444. In conclusion, the jurisprudence under the ACHR serves to demonstrate that while there is a standard practice of applying presumptions regarding the scope of the notion of victim, the concrete inferences are not treated as law but as factual statements drawn in consideration of the circumstances of the case.[933] These presumptions may be of assistance for the ECCC inasmuch as they attest to the universality of certain probabilities in given circumstances. The ECCC, however, exercises its own discretion in formulating presumptions in the factual context of the cases before it.

### 5. Evaluation of the Presumption Applied by the Trial Chamber

445. Given the lack of explicit pronouncement of a legal innovation pursuant to Article 33 new of the ECCC Law, and the lack of an explanation of the legal basis and reasons for it, the Supreme Court Chamber interprets paragraph 643 of the Trial Judgement as an expression of a discretionary presumption and will proceed to evaluate it as such.

446. The dispute here concerns indirect victims who are not "immediate family" members who question the requirement of proving "special bonds of affection or dependence" with the direct victim for the admissibility of their civil party applications.

447. The Supreme Court Chamber finds that the criterion of special bonds of affection or dependence connecting the applicant with the direct victim captures the essence of inter-personal relations, the destruction of which is conducive to an injury on the part of indirect victims. This criterion applies to all persons who claim to be

[932] *Kawas-Fernández v. Honduras*, Judgment (Merits, Reparations and Costs), paras 130-139.
[933] As stressed by the IACtHR in relation to reparations for moral damage: "The Court considers that jurisprudence can serve as a guide to establish principles in this matter, although it cannot be invoked as an absolute criterion, since the particularities of each case must be examined." *Case of the white van*, Judgment (Reparations and Costs), para. 104.

indirect victims, whether family or not, because without prior bonds tying the claimants emotionally, physically or economically to the direct victim, no injury would have resulted to them from the commission of the crime. While the term as such may have been introduced for the first time in the Trial Judgement,[934] the criterion or "test" which it denotes is inherent to the notion of injury in Article 13 of the 2007 Code of Criminal Procedure as applicable to indirect victims.[935] Therefore the use of this requirement was legally correct and foreseeable, just as the requirement to demonstrate injury must have been foreseeable for all civil party applicants. Accordingly, the appeals of the Civil Party Appellants fail insofar as they allege an error of law and lack of foreseeability regarding the requirement of "special bonds of affection or dependence."

448. Alternatively, the question might be posed as a matter of fact, in other words, whether certain applicants may be *presumed* to have had special bonds of affection or dependence with the direct victims. The Supreme Court Chamber notes that bonds of affection and dependence are dynamics that usually exist among close family members. Therefore, the forced disappearance, imprisonment, torture and eventual murder of a family member will likely bring about suffering, anguish and other kinds of injury, such as financial damage, to this victim's close family members. This conclusion is substantiated by the evidence collected in this case, common sense, as well as evidence-based findings under the ACHR and at the ICC.[936] Accordingly, it is

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[934] *But see* Committee on Compensation for Victims of War, International Law Association, Conference Report Rio 2008, "Draft Declaration of International Law Principles on Compensation for Victims of War (Substantive Issues)", p. 7 ("As a general rule, only persons directly affected will be considered as victims. This does not preclude that in the future persons linked by *special bonds*, such as strong emotional or family ties to the person directly harmed, might be considered as victims") (emphasis added)
<http://www.ila-hq.org/en/committees/index.cfm/cid/1018>.

[935] *See also Lubanga*, ICC-01/04-01/06-1813, "Redacted version of 'Decision on 'indirect victims'"', Trial Chamber I, 8 April 2009, para. 50 ("the Appeals Chamber [of the ICC] has determined that close personal relationships, such as those between parents and children, are a precondition of participation by indirect victims", citing *Lubanga*, "Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008", para. 32).

[936] *See, e.g. Situation in Darfur, Sudan, In the Case of the Prosecutor v. Bahar Idriss Abu Garda*, ICC-02/05-02/09-255, Decision on Applications a/0655/09, a/0656/09, a/0736/09 to a/0747/09, and a/0750/09 to a/0755/09 for Participation in the Proceedings at the Pre-Trial Stage of the Case, Pre-Trial Chamber I (Single Judge), 19 March 2010, paras 28, 30 (regarding "aunts, uncles, cousins, a nephew, a niece, a son of the mother's cousin and a close friend of the [deceased] peacekeeper", "[t]he Single Judge considers that for the purposes of recognition as victims in the proceedings before the Court, applications from members of the immediate family of a deceased victim will usually require less information and/or evidence regarding the nature of the relationship with the deceased victim for such applicants to be recognised as victims, as these members of the family are usually the most affected by

not incorrect or unreasonable to relieve the class of immediate family from discharging the burden of proof of injury after having defined it precisely and put the parties on notice.

449. Concerning the scope of the presumption of injury, it would be reasonable to define it by taking into account the nature of the injury claimed in the context of Cambodian familial relationships. In this respect, an expert retained by the Trial Chamber testified that Cambodian families generally live close together and co-depend on one another so that strong bonds are usually formed. Families encompass not just couples and their offspring but also "other family members, such as ageing parents," or "siblings and their families" or "grandparents, cousins, uncles and aunts."[937] In Cambodian culture, there is a tradition of showing homage and respect to older family members. In most circumstances the older generation acts as a role model in the lives of the younger generation, thus generating a very special and close bond.[938] The Trial Chamber accepted this broad notion of *de facto* immediate family members, but nonetheless later found that "only in exceptional circumstances" will non-immediate family members be considered to have had "special bonds of affection or dependence" with the direct victim.[939] Whereas this conclusion defines the scope of presumption more narrowly than could be justified by the accepted expert testimony, it does not infringe on the rights of the Civil Party Appellants because the formulation of such a presumption lies in the area of the court's discretion and not the parties' right to benefit from it.

450. Similarly, the Civil Party Appellants' rights were not affected by the lack of prior notice, given that they continually had the burden of proving injury through evidence. This part of the appeal of the Civil Party Appellants on the rejection of their applications is accordingly dismissed. Consequently, the Supreme Court Chamber

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the death of their family member. As such emotional harm is less apparent in the case of persons from a more distant family or from outside of the family circle, more information and/or evidence would be required to substantiate the claim that the relationship of the applicant and the deceased person was of such a nature that the death of that person caused emotional harm to the applicant and/or resulted in a loss of economic support").

[937] Trial Judgement, fn. 1077.

[938] T. (EN), 25 August 2009, E1/68.1, p. 48 (lines 9-22).

[939] Trial Judgement, para. 643.

will consider in a later subsection whether the Trial Chamber erred in fact in its determination of the merits of the individual civil party applications.

## B. Whether the Trial Chamber Erred in Conducting a Two-Tier Review of the Admissibility of Civil Party Applications

### 1. Submissions

451. Civil Parties Groups 1, 2, and 3 submit under several grounds of appeal that the Trial Chamber erred in law by applying a two-step process to decide civil party status in Case 001; the first step was the initial assessment that occurred prior to, during, or shortly after the Initial Hearing, depending on the applicant, and the second step occurred in the Trial Judgement. The Civil Party Appellants allege that this two-tier process is not provided for in the Internal Rules or Cambodian law. Specifically, they contend that the Trial Chamber incorrectly relied on Internal Rule 100(1) (Rev. 3) to justify its re-assessment of civil party applications in the Judgement. In their view, Internal Rule 100(1) relates only to decisions on claims for reparations and not to decisions on applications for civil party status. Thus, by deciding on civil party status at the judgement stage, the Trial Chamber acted outside of its temporal jurisdiction[940] because, pursuant to Internal Rule 23(4), the Trial Chamber must determine the admissibility of civil party applications at the commencement of the trial proceedings. Furthermore, pursuant to Internal Rule 83(1), the Trial Chamber shall consider any civil party application at the initial hearing.[941]

452. Referring to Internal Rule 23(4), the Civil Party Appellants argue that "[o]nce [a civil party] application has been put before the [Trial] Chamber, and has not been declared inadmissible, the [applicant] is considered to have 'joined' the criminal proceedings as a Civil Party,"[942] carrying with it the effect provided in Internal Rule 23(6).[943] The Civil Party Appellants point out that they exercised their participatory

[940] CPG1 Appeal, para. 26.
[941] CPG1 Appeal, paras 18-39 ("Ground 1: The Trial Chamber erroneously relied on Internal Rule 100(1) in reassessing the Civil Party status of CPG-1 victims, thereby causing prejudice"); CPG2 Appeal on Admissibility, paras 21-49 ("First Ground of Appeal: [...] based on an error on a question of law/Internal Rules invalidating the judgment by violating Internal Rules 21(1), 21(1)(a), 21(1)(c), 23(4), 83(1) and 100"); CPG3 Appeal, paras 38-40 ("Ground 1: Error On A Question Of Law Relating To Admissibility Of Civil Party Applicants [...]").
[942] CPG1 Appeal, para. 28.
[943] Internal Rule 23(6) (Rev. 3) ("Being joined as a Civil Party shall have the following effects: a) When joined as a Civil Party, the Victim becomes a party to the criminal proceedings. The Civil Party

rights and obligations in the trial proceedings, and stripping them of their status at a later stage resulted in "effectively traumatizing the [appellants] once again," especially because this was done "without adequate warning."[944] The revocation of their status, after many publically recalled traumatic details of the past, has caused "significant anguish, confusion, and additional grief."[945] Further, the erroneous approach favoured by the Trial Chamber disregarded any concern for the investment of time and resources.[946] The Civil Party Appellants nonetheless do not submit that the Trial Chamber may never revoke civil party status once granted. Rather, they argue that once recognized by the Chamber as Civil Parties, this status should remain unless specific and identifiable evidence is presented that casts doubt on the status.[947]

453. Civil Party Appellants further note that the law applicable before the ICC does not provide for a two-step determination process of victim status.[948] Through the Civil Party Co-Lawyers, the Civil Party Appellants further complain that the Trial Chamber violated the fundamental principles of legal certainty and transparency provided for in Internal Rule 21.[949] The application of a two-step process resulted in different groups of victim applicants being granted different rights.[950] They point out that some of the civil party applications were even subjected to three reviews of admissibility.[951]

454. Finally, Civil Party Appellants express concern because the Internal Rules do not allow them to appeal both the Trial Chamber's rejection of their applications for civil party status and its decision on reparations. The result is that the Supreme Court Chamber will issue the final decision on civil party status after the deadline to appeal the Trial Chamber's decision on reparations. A Civil Party Appellant who may successfully challenge the rejection of civil party status would thereby be permanently deprived of the opportunity to appeal the decision on reparations. Therefore, it was

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can no longer be questioned as a simple witness in the same case and, subject to Rule 62 relating to Rogatory Letters, may only be interviewed under the same conditions as a Charged Person or Accused; b) The Chambers shall not hand down judgment on a Civil Party action that is in contradiction with their judgment on public prosecution of the same case; and c) The Co-Investigating Judges and the Chambers may afford to Civil Parties the protection measures set out in Rule 29").

[944] CPG1 Appeal, paras 34-38.
[945] CPG1 Appeal, para. 56.
[946] CPG1 Appeal, para. 53.
[947] CPG1 Appeal, para. 31.
[948] CPG2 Appeal on Admissibility, paras 21-28; CPG3 Appeal, para. 38.
[949] CPG2 Appeal on Admissibility, paras 45-49; CPG3 Appeal, para. 38.
[950] CPG2 Appeal on Admissibility, paras 29-34.
[951] CPG2 Appeal on Admissibility, para. 33.

against the interests of justice for the Trial Chamber to reassess civil party status in its Judgement.[952]

### 2. Procedural Background

455. As detailed below, of the twenty-two Civil Party Appellants,[953] some applied for civil party status and started participating in the proceedings during the judicial investigation phase and remained as civil parties at the Initial Hearing. Some applied to the Trial Chamber, received interim recognition letters from Trial Chamber Greffiers, and their status was confirmed at the Initial Hearing. Others applied to the Trial Chamber and were admitted at the Initial Hearing. Still others applied to the Trial Chamber and were admitted during the trial proceedings by separate decisions of the Trial Chamber. Most of these applications were subsequently challenged by the Defence during the trial. Ultimately, the applications of all twenty-two Civil Party Appellants were rejected by the Trial Chamber in its Judgement.

### 3. Civil Party Admissibility before the Co-Investigating Judges

456. Civil Party Appellants D25/11 (KHUON Sarin) and D25/15 (SUON Sieng) were joined as Civil Parties during the judicial investigation stage. Each of these Appellants received a letter from the Greffiers of the Co-Investigating Judges informing them of the following:

> 1. Your Civil Party Application Form has been received by the OCIJ Greffiers and, upon instruction from the Co-Investigating Judges, placed on the Case File. Accordingly, subject to any later decision of the Co-Investigating Judges (see paragraph 2), you are now considered to be a Civil Party in the judicial investigation relating to that case.
>
> 2. It should be recalled that the Co-Investigating Judges may, at any time during the judicial investigation, make a formal decision with respect to the admissibility of your application, and **reject** it if they consider that you are not a victim or that the criteria set out in the Internal Rules and the Practice Direction on victim participation are not fulfilled.

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[952] CPG2 Appeal on Admissibility, paras 35-44.
[953] Nine Civil Party applicants from CPG1 (E2/61, Ly HOR *alias* EAR Hor; E2/88, Joshua ROTHSCHILD; E2/86, Jeffrey JAMES; E2/62, HIM Mom; D25/15, SUON Sieng; E2/74, NGET Uy; E2/75, THIEV Neap; E2/69, LIM Yun; E2/73, NORNG Sarath); five Civil Party applicants from CPG2 (E2/32, NAM Mon; E2/35, CHHAY Kan alias LIENG Kân; E2/83, HONG Savath; E2/22, CHHOEM Sitha; E2/64, NHEB Kimsrea); eight Civil Party applicants from CPG3 (E2/34, SO Saung; D25/11, KHUON Sarin; E2/82, MÂN Sothea; E2/70, CHAN Yoeung; E2/71, SOEM Pov; E2/63, PANN Pech; E2/33, PHAOK Khan; E2/23, LAY Chăn).

> 3. You should also be aware that, through your participation as a Civil Party, you and your lawyer may have access to confidential information in the case file.[954]

457. On 12 August 2008, in their Closing Order for Case 001, the Co-Investigating Judges noted that:

> [d]uring the investigation, eight individuals joined the case file as Civil Parties pursuant to Rule 23 including former prisoners of S21 and immediate family members of former detainees executed at S21. Another 20 Civil Parties joined between the end of the judicial investigation and the closing order.[955]

458. On 17 February 2009, at the Initial Hearing, the Trial Chamber stated that Civil Party Appellants D25/11 and D25/15 "remain as civil parties in the case against the accused person."[956] The applications of Civil Party Appellants D25/11 and D25/15 were subsequently found inadmissible in the Judgement.[957]

### 4. Civil Party Admissibility before the Trial Chamber

459. At the end of January 2009, the Trial Chamber Greffiers issued letters of interim recognition to the following Civil Party Appellants: E2/22 (CHHOEM Sitha)[958]; E2/35 (LIENG Kân)[959]; E2/32 (NAM Mon)[960]; E2/23 (LAY Chăn)[961]; E2/33 (PHAOK Khân)[962]; and E2/34 (SO Saung).[963] Subsequently, on 11 February 2009, the Trial Chamber Greffiers issued interim recognition letters to the following Civil Party Appellants: E2/61 (LY Hor *alias* EAR Hor)[964]; E2/62 (HIM Mom)[965]; E2/64 (NHEB

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[954] Status of your Civil Party Application, 11 August 2008, D25/11/4 and D25/15/3. *See also* Closing Order, para. 6. The Greffiers of the Co-Investigating Judges issued interim recognition letters to all twenty-eight civil party applicants who applied during the investigation stage of the proceedings. Unlike the rest of these letters, the first of these letters had an additional paragraph before paragraph 2 that read: "your application is currently being assessed and you will be informed in due course." This paragraph was omitted in the rest of the interim recognition letters issued by the Co-Investigating Judges.
[955] Closing Order, para. 6.
[956] T. (EN), 17 February 2009, E1/3.1, p. 34 (lines 16-17). *See also* Trial Judgement, para. 637.
[957] Trial Judgement, para. 648.
[958] Interim Recognition as Civil Party, 29 January 2009, E2/22/3.
[959] Interim Recognition as Civil Party, 29 January 2009, E2/35/3.
[960] Interim Recognition as Civil Party, 29 January 2009, E2/32/3.
[961] Interim Recognition as Civil Party, 30 January 2009, E2/23/3.
[962] Interim Recognition as Civil Party, 29 January 2009, E2/33/4.
[963] Interim Recognition as Civil Party. 29 January 2009, E2/34/4.
[964] Interim Recognition as Civil Party, 11 February 2009, E2/61/3.
[965] Interim Recognition as Civil Party, 11 February 2009, E2/62/3.

Kimsrea)[966]; and E2/63 (PANN Pech).[967] All of these letters were of identical content and read as follows:

> 2. You are now recognized, as an interim measure, as a Civil Party in the proceedings until the Initial Hearing in this Case, when your application will be considered in accordance with Internal Rule 83 [...].
>
> 4. The Trial Chamber may make a formal decision with respect to the admissibility of your application, and reject it if it considers that the legal criteria identifying the victim status as set out in the Internal Rules and in the Practice Direction on Victim Participation are not fulfilled.
>
> 5. You should also be aware that, through your participation as a Civil Party, you, your lawyers and/or other persons who may assist you may have access to confidential information contained in the Case File.
>
> 6. Following this letter, your lawyers will be notified of the list of witnesses and experts that the Co-Prosecutors intend to have summoned at trial, as well as of any other materials relevant thereto. Pursuant to the provisions of Internal Rule 80(2), any Civil Party who wishes to summon any witnesses or experts who are not on the list filed by the Co-Prosecutors shall submit an additional list within 15 days from the notification of the Co-Prosecutors list.

460. At the Initial Hearing on 17 February 2009, the Trial Chamber "confirm[ed] the status of those that have already received interim recognition as Civil Parties [...]."[968] Judge Lavergne stated that:

> [h]aving heard the different comments of the parties, the Chamber makes the following determination: Prior to issuing interim recognition, the Chamber has carefully received each of the relevant civil party applications and it has applied a prima facie standard of proof. This is not an examination on substance or on merit. Regarding the existence of criteria for the evaluation of a civil party application, at this juncture the Chamber confirms the status of those that have already received interim recognition as civil parties in the case against the accused [...].[969]

461. During the Initial Hearing, the Trial Chamber "admitted as civil parties" each of the "latest" applicants, which included Civil Party Appellants E2/73 (NORNG Sarath), E2/86 (Jeffrey JAMES), E2/88 (Joshua ROTHSCHILD), E2/75 (THIEV Neap alias KHIEV Neap), E2/83 (HONG Savath), E2/70 (CHAN Yoeung), E2/71 (SOEM Pov), and E2/82 (MÂN Sothea). At the time, Judge Lavergne stated:

[966] Interim Recognition as Civil Party, 11 February 2009, E2/64/3.
[967] Interim Recognition as Civil Party, 11 February 2009, E2/63/3.
[968] T. (EN), 17 February 2009, E1/3.1, p. 46 (lines 17-18).
[969] T. (EN), 17 February 2009, E1/3.1, p. 46 (lines 10-19).

> Having carefully reviewed each one of the latest applications, and having applied a prima facie standard of proof for the existence of criteria for the evaluation of the civil party application, and having heard the comments from the other parties, the Chamber declares that apart for applicants E2/69, 74, 87, all other remaining civil party applicants who do not have interim recognitions are admitted as civil parties in the case against the accused.
>
> The Chamber will later on review the applications of applicants E2/69, 74, 87 in light of the documents that have been promised to us this morning and we shall issue a determination with respect to these applicants in due course and definitely prior to the substantive hearing.[970]

462. On 26 February 2009[971] and 4 March 2009,[972] the Trial Chamber issued decisions admitting Civil Party Appellants E2/74 (NGET Uy) and E2/69 (LIM Yun) respectively as Civil Parties in the case against KAING Guek Eav.

463. On 25 August 2009, during the substantive trial hearing, the Defence challenged[973] a number of civil party applications, including those of the following fourteen Civil Party Appellants: E2/22 (CHHOEM Sitha), D25/15 (SUON Sieng), E2/35 (LIENG Kân), E2/62 (HIM Mom), E2/64 (NHEB Kimsrea), E2/63 (PANN Pech), E2/69 (LIM Yun), E2/70 (CHAN Yoeung), E2/71 (SOEM Pov), E2/73 (NORNG Sarath alias Por), E2/74 (NGET Uy), E2/75 (THIEV Neap alias KHIEV Neap), E2/82 (MÂN Sothea), and E2/83 (HONG Savath). On 27 August 2009, the Trial Chamber directed those civil party applicants who had been challenged by the Defence to submit additional evidence. The direction issued by the President of the Trial Chamber read in relevant part:

> 1. Civil parties whose applications have been challenged shall submit additional evidential materials to the Chamber to show the relevancy between the civil parties and the victims in the case file 001. 2. If possible, civil parties shall submit those evidential materials to the Trial Chamber, by the latest, Thursday the 3rd September 2009 at 4:30 p.m.[974]

[970] T. (EN), 17 February 2009, E1/3.1, p. 50 (lines 6-18).
[971] Decision of the Trial Chamber Concerning Proof of Identity for Civil Party Applicants, 26 February 2009, E2/94.
[972] Decision on the Civil Party Status of Applicants E2/36, E2/51 and E2/69, 4 March 2009, E2/94/2.
[973] T. (EN), 25 August 2009, E1/68.1, p. 66 (line 15) to p. 73 (line 18).
[974] T. (EN), 27 August 2009, E1/70.1, p. 2 (lines 18-24).

464. The Defence did not challenge the admissibility of applications from eight[975] of the Civil Party Appellants, and those Appellants were therefore not invited to submit further evidence by the Trial Chamber. In the Trial Judgement, however, they found themselves among the twenty-four civil party applicants that the Trial Chamber decided lacked evidence to support their claim that they suffered harm as a direct consequence of the crimes for which KAING Guek Eav is responsible.

465. In the Trial Judgement, the Trial Chamber summarised its two-step determination of applications for civil party status as follows:

> Initial decisions on the admissibility of Civil Party applications ascertained that the criteria for participation as a Civil Party were satisfied. In common with the practice before comparable international tribunals, the Chamber undertook a *prima facie* assessment of the credibility of the information provided by the applicants. This process is distinct from the Chamber's determination of the merits of all applications in the verdict, on the basis of all evidence submitted in the course of proceedings.[976]
>
> [...]
>
> Once declared admissible in the early stages of the proceedings, Civil Parties must satisfy the Chamber of the existence of wrongdoing attributable to the Accused which has a direct causal connection to a demonstrable injury personally suffered by the Civil Party.[977]

## 5. Applicable Law

### *a. Civil Party Admissibility in the 2007 Code of Criminal Procedure*

466. In considering these grounds of appeal, the Supreme Court Chamber begins with an examination of the relevant provisions of the 2007 Code of Criminal Procedure of Cambodia. The Chamber will then determine whether the Internal Rules deviate from this regime and, if so, to what extent.

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[975] CPG1 (E2/61, E2/86, E2/88); CPG2 (E2/32); CPG3 (E2/23, E2/33, E2/34, D25/11). The Defence did not contest the entire admissibility of the application from Civil Party Appellant, E2/32 (NAM Mon), but only her claim to have been a staff at S-21 and her request to submit a written statement to the Trial Chamber. T. (EN), 27 August 2009, E1/70.1, pp. 39-41; Trial Judgement, para. 638, fns 1067-1068.
[976] Trial Judgement, para. 636 (emphasis added).
[977] Trial Judgement, para. 639.

467. According to the 2007 Code of Criminal Procedure, at the pre-trial stage, a victim may become a civil party by filing a request with the investigating judge in an on-going proceeding[978] or by filing a criminal complaint accompanied by a request to become a civil party.[979] Notwithstanding the silence of the 2007 Code of Criminal Procedure, some minimum initial scrutiny of civil party applications is indispensable in order to register a victim's claim as a judiciable event. The investigating judge must initially examine whether the application refers to an identifiable criminal case pending before them, is to be treated as a criminal complaint, or is to be forwarded to the civil court as an autonomous civil law suit. Other than this, however, the 2007 Code of Criminal Procedure does not provide for an investigating judge to scrutinise a civil party application as to whether or not it meets the criteria under Article 13 regarding the presence of injury related to the crime charged. No provision in the 2007 Code of Criminal Procedure foresees that the investigating judge could make an order granting "interim recognition" of a victim as a civil party. In the practice of the regular Cambodian courts, their Greffiers do not issue letters acknowledging the interim recognition of civil party applicants as civil parties.

468. The 2007 Code of Criminal Procedure foresees the issuance of an order declaring the civil party application inadmissible only where the applicant fails to pay the requisite financial deposit.[980] It is otherwise implicit that the applicant acquires the status of a civil party and exercises rights envisaged in the 2007 Code of Criminal Procedure. Moreover, once a victim files a criminal complaint with a request to become a civil party, and the resulting decision of the investigating judge and/or prosecutor is to investigate, [981] this victim has, from that time forward, the responsibility to pay an order for a civil fine or compensation if the investigation that was started on the sole ground of his or her complaint is found to be "abusive or dilatory" at some later stage.[982] This scenario is not foreseen under the ECCC regime due to the restricted participation rights of civil parties who can only support the prosecution[983] but cannot initiate criminal investigations.[984]

[978] 2007 Code of Criminal Procedure, Art. 137.
[979] 2007 Code of Criminal Procedure, Art. 138.
[980] 2007 Code of Criminal Procedure, Art. 140.
[981] 2007 Code of Criminal Procedure, Art. 139, paras 2, 5.
[982] 2007 Code of Criminal Procedure, Art. 142.
[983] Internal Rules 23(1)(a), 55(5)(a), 59, 83, 91(1), 94(1)(a) (Rev.3).

469. Pursuant to the 2007 Code of Criminal Procedure, a victim may also apply to join the proceedings as a civil party before the trial court, even if he or she failed to apply during the judicial investigation phase.[985] A victim may also file an application during the trial hearing.[986] A victim who submitted a civil party application during the investigation does not need to resubmit the application before the trial court. Finally, pursuant to Article 355 of the 2007 Code of Criminal Procedure, "[i]n the criminal judgment, the court shall also decide upon civil remedies. The court shall determine the admissibility of the civil party application and also decide on the claims of the civil party against the accused and civil defendants."[987]

470. In summary, throughout the criminal proceedings, the 2007 Code of Criminal Procedure widely embraces civil party applicants and presupposes that a civil party's participation in the proceedings is at his or her own risk. Once initially accepted, the civil party claim is to be examined on the merits at the same time as the determination on criminal responsibility of an accused. All relevant issues, including the existence of an injury in the sense of Article 13, the causal link to the crime charged, the civil responsibility of the accused, and eventually the civil remedies, are decided in the judgement. It follows that, while the 2007 Code of Criminal Procedure does not foresee a two-tier review of the civil party claim, it nonetheless clearly envisages that comprehensive evaluation of the civil party claim, including standing, is to be done at the judgement phase.

### *b. Civil Party Admissibility under the ECCC Framework*

471. Compared with the 2007 Code of Criminal Procedure, the ECCC Internal Rules provide for judicial scrutiny over the threshold admissibility of civil party applications. Pursuant to Internal Rule 23(3) (Rev. 3), "[a]t any time during the judicial investigation, a Victim who wishes to be joined as a Civil Party before the Co-Investigating Judges shall submit such application in writing." The Internal Rules allow the Co-Investigating Judges to decide "by reasoned order that the Civil Party

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[984] Internal Rule 23(1) (Rev. 3) ("The purpose of Civil Party action before the ECCC is to: a) Participate in criminal proceedings [...] by *supporting* the prosecution") (emphasis added). There is no provision in the Internal Rules similar to the provisions of Articles 138-139, first and fifth paragraphs, in the 2007 Code of Criminal Procedure.
[985] 2007 Code of Criminal Procedure, Art. 291, para 3.
[986] 2007 Code of Criminal Procedure, Art. 311, para 1.
[987] 2007 Code of Criminal Procedure, Art. 355.

application is inadmissible. Such order shall be open to appeal" to the Pre-Trial Chamber.[988] Under this framework, once a victim has filed an application to become a civil party, unless the Co-Investigating Judges issue a reasoned decision declaring the application inadmissible, the victim participates in the criminal proceedings and continues the civil action. According to Internal Rule 23(4), "[a] Victim who has filed a Civil Party application during the investigation shall not be required to renew the application before the Chambers."

472. Neither the granting of "interim recognition" nor a decision that the application is admissible is explicitly foreseen by the Internal Rules (Rev. 3). The legal effect of either act or their combined effect invites diverse interpretation.[989] As demonstrated by the Greffier's letters reproduced above, the Co-Investigating Judges interpreted the Rules as not obligating them to issue a "formal" decision finding an application admissible or inadmissible; moreover, they did not consider themselves bound by "the interim recognition" letters.

473. At the trial stage, a victim may file a civil party application with the Trial Chamber at least ten days before the initial hearing.[990] At the initial hearing, "the [Trial] Chamber shall consider any applications submitted by Victims to be joined as civil parties, as provided in Rule 23(4)."[991] The Trial Chamber "may, by written reasoned decision, declare the Civil Party application inadmissible", either because the application was not timely filed or is without merit.[992] This power is consistent

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[988] Internal Rule 23(3) (Rev. 3). *See also* Internal Rule 74(4)(b) (Rev.3).
[989] *See, e.g.* Case 002, Decision on Appeals Against Co-Investigating Judges' Combined Order D250/3/3 Dated 13 January 2010 and Order 250/3/2 Dated 13 January 2010 on Admissibility of Civil Party Applications, Pre-Trial Chamber, 12 May 2010, D250/3/2/1/5, "Opinion of Judges Ney Thol, Catherine Marchi-Uhel and Huot Vuthy In Respect of the Declared Inadmissibility of Admitted Civil Parties", para. 11 (stating that while "provisional status may not meet the requirement of certainty foreseen by Internal Rule 21(1), but it is clearly more favourable to the victims than a conservative decision to deny them any right to participate in the proceedings"); *contra* "Opinion of Judges Prak Kimsan and Rowan Downing in Respect of the Declared Inadmissibility of Admitted Civil Parties", paras 8-12 (holding that the two-tier process violates the fundamental requirements for procedural fairness and legal certainty. They considered that the interim recognition letters by the Greffiers represent formal decisions by the Co-Investigating Judges and opined that the Co-Investigating Judges cannot, under the applicable law, issue a subsequent decision on admissibility of civil party applicants as the Internal Rules do not provide for the issuance of two decisions on the same civil party application, and that doing so would result in the Co-Investigating Judges acting *ultra vires* and in the violation of the civil party applicants' rights to "fairness of proceedings").
[990] Internal Rule 23(4).
[991] Internal Rule 83(1).
[992] Internal Rule 23(4).

with the principles of safeguarding the interests of parties, including victims and accused persons,[993] and to respect economy of proceedings.[994] However, the exercise of this power, again, is left to the Chamber's discretion. As there is no deadline for such a decision, the Trial Chamber may declare a civil party application inadmissible at any time during the trial phase of a case. Absent such a decision, the applicant is permitted to participate in the trial as a civil party.

474. Given that neither the granting of "interim recognition" nor an affirmative decision on admissibility by the Trial Chamber is provided for in the Internal Rules, the effect of either action or the combination of both may be subject to interpretation. However, Internal Rule 100(1), mirroring Article 355 of the 2007 Code of Criminal Procedure, provides that "[t]he Chamber shall make a decision on any Civil Party claims in the judgment. It shall rule on the admissibility and the substance of such claims against the Accused."[995]

475. Where there is a negative decision on admissibility by the Trial Chamber, "[e]xcept where the Trial Chamber has rejected an application which has been filed outside the time limit specified in this sub-rule," Internal Rule 23(4) provides that "a decision of the Trial Chamber may be appealed to the Supreme Court Chamber." Internal Rule 104(4)(e) (Rev. 3) further clarifies that the appealable "decision" referred to in Internal Rule 23(4) is a decision of the Trial Chamber "declaring the application of a civil party inadmissible." The Internal Rules are silent as to whether a decision by the Supreme Court Chamber rejecting the Trial Chamber's finding of inadmissibility would have a binding effect only as to the certain "initial threshold" of admissibility or whether it would be finally determinative for the admissibility issue such that it would preclude the Trial Chamber's further cognisance of the question under Internal Rule 100(1).[996]

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[993] Internal Rule 21(1).
[994] Internal Rule 21(4).
[995] Internal Rule 100(1).
[996] This last issue is not relevant for the appeal and due to the change in the Internal Rules will not arise in the future jurisprudence. The Supreme Court Chamber considers, however, that its decisions on immediate appeals are final and binding as to the law, and are final and binding as to the state of facts adjudicated. Accordingly, the Supreme Court's positive decision on an immediate appeal on civil party admissibility would have been final concerning the state of evidence available at the time of adjudication, without prejudice to new findings based on new evidence adduced by the Trial Chamber.

### c. *The Practice of International Criminal Tribunals*

476. In reaction to the Trial Chamber's assertion that it undertook a *prima facie* assessment of the credibility of the information provided by the applicants in accordance with the practice before comparable international tribunals, one of the arguments raised by the Civil Party Appellants is that such a two-step procedure has no support in the practice of the ICC.[997] In response to this contention, the Supreme Court Chamber shall consider whether rules established before international criminal tribunals are of relevance here and, if so, to what extent.

477. Apart from the ECCC, the ICC and the STL are the only other criminal courts of international character that allow participation by victims. Of these two, only the ICC has jurisdiction to grant reparations to victims. In this section, the Supreme Court Chamber will consider victim status at the ICC in detail, while only mentioning the legal framework of the STL in light of the fact that the practice before that tribunal is still in its earliest stages of development.

478. In describing the ICC's regime surrounding victim status in criminal proceedings, an important distinction with the ECCC must be noted. At the ECCC, the acceptance of the civil party application automatically entails the full range of participation rights available to civil parties under the 2007 Code of Criminal Procedure and the Internal Rules in the pre-trial, trial, and appeal phases of a case. By contrast, at the ICC, victims do not have the status of a party to the proceedings but have a *sui generis* standing. As provided in Article 68(3) of the ICC Statute:

> Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.[998]

479. Thus, the granting of victim status at the ICC does not automatically confer all the rights of participation. Rather, the right of audience and other participatory

[997] CPG2 Appeal on Admissibility, paras 21-28; CPG3 Appeal, para. 38.
[998] ICC Statute, Art. 68(3).

rights[999] are selectively accorded by the Court upon the demonstration of specific interest.[1000]

480. Regarding the general process to apply to participate as a victim, the ICC Rules of Procedure and Evidence clarify that "[i]n order to present their views and concerns, [the] victims shall make written application to the Registrar."[1001] The Registrar transmits the application to the relevant Chamber, who then may reject the application where the applicant is not a victim or fails to meet conditions under Article 68(3) of the Statute. "A victim whose application has been rejected may file a new application later in the proceedings."[1002] In accepting the application, the relevant Chamber shall also "specify the proceedings and manner in which participation is considered appropriate."[1003] Notably, "[a] Chamber may *modify* [its] previous ruling."[1004] The Supreme Court Chamber notes that the latter discretionary power is similar to the actions that may be taken by the ECCC Co-Investigating Judges or the Trial Chamber in relation to civil party applications, as described above.

481. In practice, the ICC has adopted a favourable approach to victim participation beyond the investigation stage,[1005] by holding that persons who have been granted

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[999] *See, e.g. Prosecutor v. Lubanga*, "Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008", para. 3 (identifying the authorisation to lead evidence and to challenge admissibility of evidence).
[1000] *Prosecutor v. Katanga and Chui*, ICC-01/04-01/07-2288, "Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 22 January 2010 Entitled 'Decision on the Modalities of Victim Participation at Trial'", Appeals Chamber, 16 July 2010, para. 39; *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-1119, "Decision on victims' participation", Trial Chamber I, 18 January 2008, para. 96 (holding that "[f]ollowing an initial determination by the Trial Chamber that a victim shall be allowed to participate in the proceedings [i.e., victim status], thereafter in order to participate at any specific stage in the proceedings, e.g. during the examination of a particular witness or the discussion of a particular legal issue or type of evidence, a victim will be required to show, in a discrete written application, the reasons why his or her interests are affected by the evidence or issue then arising in the case and the nature and extent of the participation they seek. A general interest in the outcome of the case or in the issues or evidence the Chamber will be considering at that stage is likely to be insufficient"); "Separate and Dissenting Opinion of Judge René Blattmann", paras 21-22, 31); *Prosecutor v. Lubanga*, "Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008", para. 99.
[1001] ICC RPE, Rule 89(1).
[1002] ICC RPE, Rule 89(2).
[1003] ICC RPE, Rule 89(1).
[1004] ICC RPE, Rule 91(1) (emphasis added).
[1005] *Situation in the Democratic Republic of Congo*, ICC-01/04-556, "Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 7 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 24 December 2007", Appeals Chamber, 19 December 2008, paras 2, 43-44, 57, 59 (confirming that victims are no longer afforded a general right to participate in the proceedings at the investigation stage of a situation), followed in *Situation in the Democratic Republic of the*

victim status by the Pre-Trial Chamber are automatically authorised to participate in the proceedings at the trial stage, without the need for their applications to be registered and re-assessed by the Trial Chamber.[1006] This holding, however, only introduces a presumption of a continuing legal interest of victim participation upon moving to the trial stage, rather than asserting the binding force of the pre-trial determination of victim status in further proceedings. Similarly, the ICC Appeals Chamber ruled that in considering an interlocutory appeal from participating victims, it would "not enquire into victim status but will proceed to the next stage of its enquiry, namely, the question of whether their personal interests are affected by the interlocutory appeal."[1007] Furthermore, the Trial Chamber has not allowed victim participation in situations where victims had previously been authorised to participate in the proceedings at the pre-trial stage on the basis of a charge that was not eventually confirmed by the Pre-Trial Chamber,[1008] or where there were new facts indicating that the granting of the victim status was unfounded.[1009]

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*Congo*, ICC-01/04-593, "Decision on victims' participation in proceedings relating to the situation in the Democratic Republic of the Congo", Pre-Trial Chamber I, 11 April 2011, paras 15-17.

[1006] *Prosecutor v. Katanga and Chui*, ICC-01/04-01/07-933-tENG, "Decision on the treatment of applications for participation", Trial Chamber II, 26 February 2009, para. 10; *Prosecutor v. Bemba*, ICC-01/05-01/08-699, "Decision defining the status of 54 victims who participated at the pre-trial stage, and inviting the parties' observations on applications for participation by 86 applicants", Trial Chamber III, 22 February 2010, paras 17-22; *Prosecutor v. Banda and Jerbo*, ICC-02/05-03/09-231, "Decision on the Registry Report on six applications to participate in the proceedings", Trial Chamber IV, 17 October 2011, paras 15-17. However, Trial Chamber I appears to have reassessed applications for victim status from four persons who were granted that status by the Pre-Trial Chamber. These four victims had been participating in the trial proceedings and were granted the right to participate in interlocutory appeals in the case by the Appeals Chamber. Lubanga, ICC-01/04-01/06-1119, "Decision on victims participation", Trial Chamber I, 18 January 2008, para. 112; Lubanga, ICC-01/04-01/06-1556, "Decision on the applications by victims to participate in the proceedings", Trial Chamber I, 15 December 2008, paras 54-59.

[1007] *Lubanga*, ICC-01/04-01/06-1335, "Decision, *in limine*, on Victim Participation in the appeals of the Prosecutor and the Defence against Trial Chamber I's Decision entitled 'Decision on Victims' Participation'", Appeals Chamber, 16 May 2008, para. 37. *See also Bemba*, ICC-01/05-01/08-1597, "Decision on the Participation of Victims in the Appeal against the 'Decision on Applications for Provisional Release' of Trial Chamber III", Appeals Chamber, 14 July 2011, para. 8.

[1008] *Katanga and Chui*, "Decision on the treatment of applications for participation", para. 11; *Bemba*, "Decision defining the status of 54 victims who participated at the pre-trial stage, and inviting the parties' observations on applications for participation by 86 applicants", para. 19 (the Chamber agreeing that participation is not to be continued if the harm allegedly suffered was not, *prima facie*, the result of at least one crime confirmed by the Pre-Trial Chamber).

[1009] *Katanga and Chui*, "Decision on the treatment of applications for participation", para. 12 ("This could be the case, for example, for a victim wrongly authorised to participate in the proceedings on the basis of supporting documentation which subsequently turned out to be invalid. In that event, it would then be for the Registry or the parties immediately to inform the Chamber, so that it could rule on the matter").

482. Another avenue for victim participation before the ICC is available in the event that the ICC convicts an accused. According to Article 75(1) of the ICC Statute:

> The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision [i.e., its judgment] the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting.

483. Concerning the pursuit of reparations at the ICC, a person who had victim status for purposes of trial participation is not automatically eligible for reparations. As pointed out by the ICC, "[p]articipation of a victim at the trial [...] is not a prerequisite for claiming reparations," whereas "reparations under the scheme of the Statute can only be claimed against a convicted person ([A]rticle 77(2))."[1010] Given the requirement of a nexus between the claim for reparations and an actual conviction, it is thus possible that an ICC Trial Chamber will reassess victim status in its decision for purposes of deciding reparations.

484. In conclusion, under Article 68(3) of the ICC Statute, the ICC Chambers exercise wide discretion in deciding victim participation at different stages of the proceedings. In accordance with the Statute, prior decisions granting victim status are not binding on the issuing Chamber; as such, they can be modified. The legal framework for victim participation (*sensu largo*, in other words, including reparation claims) does not expressly foresee a re-assessment of victim standing, but it certainly does not preclude it. As demonstrated above, the jurisprudence identifies circumstances that give rise to the revocation of victim status; it may result from the entry of new evidence, a change in the scope of the charges, or additional criteria that must be met in order to allow victims to participate at different stages of the proceedings.[1011]

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[1010] *Lubanga*, "Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008", "Partly dissenting opinion of Judge G.M. Pikis", para. 18. *See also Prosecutor v. Katanga and Chui*, ICC-01/04-01/07-1491-Red-tENG, "Grounds for the Decision on the 345 Applications for Participation in the Proceedings Submitted by Victims", Trial Chamber II, 23 September 2009, para. 55.

[1011] Although issued after the pronouncement of this Appeal Judgement, *see Lubanga*, ICC-01/04-01/06-2842, Judgment pursuant to Article 74 of the Statute, Trial Chamber I, 14 March 2012, paras 484, 502, 1362-1363; Separate and Dissenting Opinion of Judge Odio Benito, paras 22-35.

485. Similar to the ICC regime, the STL regime grants the Tribunal discretion in deciding on victim participation, based on similar criteria looked at by the ICC. According to the STL Rules of Procedure and Evidence,[1012] once an application by a victim to participate in the proceedings[1013] is reviewed for completeness from a formal point of view by the STL's Victims' Participation Unit,[1014] it is transmitted to the Pre-Trial Judge who, only after an indictment is confirmed, shall review and decide on the victim applications for participation in the proceedings.[1015] The next step is that "[a]ny person identified in a final judgment as a victim, or otherwise considering himself or herself victim [...] of crimes by the accused convicted by the Tribunal"[1016] may file suit in a national court for compensation.[1017] Unlike the ICC and the ECCC, the STL does not have the competence to decide on compensation claims. In order, however, to enable such claims to be brought through a domestic system, the Tribunal is required to identify the victims in the judgement. It is thus implicit that the "identification in the judgment" is the final determination of victim status, where the Chamber may depart from prior findings on the matter according to the outcome at trial.

486. Given fundamental differences in victim standing before comparable international criminal tribunals and before the ECCC, the Supreme Court Chamber finds these tribunals' practices of limited guidance for the purpose of deciding civil party admissibility here. The Supreme Court Chamber finds, in any event, that this law and practice do not support the Civil Party Appellants' contention regarding the "illegality" of a two-step review process, nor does it lend support to the multiple reviews held in Case 001.

### 6. SCC's Determination

487. In addressing the Civil Party Appellants' submissions about the unlawfulness and unforeseeability of the Trial Chamber's two-tier review process of the civil party

[1012] STL, Rules of Procedure and Evidence, adopted on 20 March 2009, amended on 10 November 2010 and corrected on 29 November 2010 ("STL RPE").
[1013] STL RPE, Rule 2 ("Victim participating in the proceedings: Victim of an attack within the Tribunal's jurisdiction who has been granted leave by the Pre-Trial Judge to present his views and concerns at one or more stages of the proceedings after an indictment has been confirmed").
[1014] STL RPE, Rule 51(B)(iii).
[1015] STL RPE, Rule 86.
[1016] STL RPE, Rule 86(G). *See also* STL Statute, S/RES/1757 (2007), ("STL Statute"), Art. 25.
[1017] STL RPE, Rule 86(G); STL Statute, Art. 25(4).

applications in this case, the Supreme Court Chamber puts forth the following premises.

488. First, the starting point is that, unlike at the ICC and STL, victims before the ECCC have the status of a party.[1018] Once admitted in the proceedings, a civil party acquires a number of procedural rights and may:

(i) be afforded protective measures;[1019]
(ii) be represented by lawyers;[1020]
(iii) be questioned in the presence of their lawyer;[1021]
(iv) request investigative actions;[1022]
(v) lodge appeals;[1023]
(vi) participate as a party in appeals generally;[1024]
(vii) support the prosecution;[1025]
(viii) make a claim for moral and collective reparations;[1026]
(ix) participate in trial proceedings;[1027]
(x) call witnesses;[1028]
(xi) access the case file;[1029]
(xii) respond to preliminary objections;[1030]
(xiii) question the accused;[1031]
(xiv) exercise the right of audience;[1032]
(xv) make written submissions;[1033] and
(xvi) make closing statements.[1034]

489. Given the role played by a civil party in support of both the civil claim and the prosecution, which includes the ability to lead evidence and to exercise the right of audience in trial or appeal decisions, and the effect such support may have upon the issue of equality of arms, any procedural action admitting an individual as a civil party to a criminal case before the ECCC is of practical significance. That

[1018] Internal Rule 23 (Rev. 3); Internal Rules Glossary (Rev. 3) ("Party" refers to the Co-Prosecutors, the Charged Person/Accused and Civil Parties").
[1019] Internal Rules 23(6)(c), 29(1).
[1020] Internal Rules 23(7), 83(1).
[1021] Internal Rule 23(6)(a).
[1022] Internal Rule 55(10).
[1023] Internal Rule 74(4).
[1024] Internal Rule 74(4).
[1025] Internal Rule 23(1)(a).
[1026] Internal Rule 23(1)(b).
[1027] Internal Rule 23(1)(a).
[1028] Internal Rule 80(2).
[1029] Internal Rule 86.
[1030] Internal Rule 89(2).
[1031] Internal Rule 90(2).
[1032] Internal Rules 88(1), 91(1).
[1033] Internal Rule 92.
[1034] Internal Rule 94(1)(a).

significance is even greater where there are a large number of civil parties. Consequently, from several angles, including the right to representation, [1035] fairness, [1036] legal certainty, [1037] and economy of proceedings, [1038] there is a legal interest in having the full "cast" in the proceedings established as much as possible before the commencement of trial.

490. The Supreme Court Chamber recalls that under Revision 3 of the Internal Rules, Internal Rule 83(1) obliged the Trial Chamber only to "consider" civil party applications at the initial hearing in accordance with Internal Rule 23(4), which merely states that the Trial Chamber may declare by written reasoned decision at any time in the trial phase that a civil party application is inadmissible. The Supreme Court observes that these provisions, in so far as they could be read as granting the Co-Investigating Judges and the Trial Chamber an unfettered license to choose whether or not to examine the admissibility of the civil party claim, are not consistent with the concept of victims as a party in criminal proceedings. In this context, they appear to be a rather unfortunate copy of the ICC's vast discretionary powers. The Supreme Court agrees that with a large number of civil party claims, there is need for scrutiny by the Trial Chamber for purposes of eliminating impermissible or unsupported claims, as opposed to following the 2007 Code of Criminal Procedure scheme of accepting civil plaintiffs at their risk. In such a situation, however, in accordance with legal certainty and economy of the proceedings, civil party applications should have been examined, as a rule, at the earliest opportunity and before the commencement of the trial hearing, so that unsuccessful applicants would have the opportunity to appeal or supplement their unsupported applications.

491. On this occasion, the Supreme Court agrees with the minority opinion of Judges PRAK Kimsan and Rowan DOWNING of the Pre-Trial Chamber in Case 002 that the "interim recognition letters" are court decisions admitting civil parties with all accruing procedural rights and obligations. [1039] After issuing these decisions, the

[1035] Internal Rule 23(7)-(8).
[1036] Internal Rule 21(1)(a).
[1037] Internal Rule 21(1).
[1038] Internal Rule 21(4).
[1039] Decision on Appeals Against Co-Investigating Judges' Combined Orders D250/3/3 and 250/3/2 on Admissibility of Civil Party Applications, "Opinion of Judges Prak Kimsan and Rowan Downing in Respect of the Declared Inadmissibility of Admitted Civil Parties", para. 1.

relevant judges should be considered *functus officio*,[1040] unless the law foresees review of the decision. Subsequent decisions on the same matter by the same body should be dependent on a change of circumstances in the case, new evidence, or the elevation of the requisite level of proof attaching to the case moving to the next phase of proceedings. The Supreme Court is mindful, however, that these conclusions do not explicitly result from the legal framework of the Internal Rules at the time, and therefore there is no basis to invalidate the orders subsequent to "interim recognition."

492. The Supreme Court Chamber notes that subsequent revisions of the Internal Rules have removed some of the shortcomings in the provisions governing the decision on the admissibility of civil party claims.[1041] However, the Chamber also observes that even under the framework of Revision 3, there was the possibility of conducting a meaningful and unambiguous review before reaching the judgement phase. Instead, the issuance of "interim recognition letters", declarations of civil parties having "joined the case file" and confirmations of "interim recognition letters," coupled with the fact that neither the Internal Rules nor the "interim recognition letters" reveal whether the applications were examined, and, if so, according to what level of proof, may have caused confusion as to the legal standing of the civil party applicants.[1042] The Supreme Court Chamber notes, in particular, that interim recognition letters issued by the Trial Chamber's Greffiers implied that the interim recognition would last only until the Initial Hearing, where there would be a

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[1040] Decision on Appeals Against Co-Investigating Judges' Combined Orders D250/3/3 and 250/3/2 on Admissibility of Civil Party Applications, "Opinion of Judges Prak Kimsan and Rowan Downing in Respect of the Declared Inadmissibility of Admitted Civil Parties", para. 9 ("Once the decision is made under Internal Rule 23 the Co-Investigating Judges are *functus officio*, that is, they have exhausted their power in this regard. The Co-Investigating Judges are not authorised to make a second decision or to revisit and reconsider the decision. The reservation contained in the second paragraph of the Letter was *ultra vires*, that is, beyond the power of the Co-Investigating Judges").

[1041] Internal Rules (Rev. 5), as revised on 9 February 2010 (repealing Internal Rule 83 and introducing Internal Rules 23*bis*(3) and 77*bis*, the latter of which relates only to appeals before the PTC and not to those before the Supreme Court Chamber and provides: "The decision of the Pre-Trial Chamber shall be final." Internal Rule 110(5), which was preserved from Revision 4, permits civil parties to appeal to the Supreme Court Chamber only in relation to their "civil interests").

[1042] *See* CPG2 Appeal on Admissibility, para. 47 (referring to the rejection within the Judgment as a "second rejection decision"); Von Silke Studzinsky, "Victim's Participation before the Extraordinary Chambers in the Courts of Cambodia", *Zeitschrift für Internationale Strafrechtsdogmatik*, October 2011, p. 887 <http://www.zis-online.com/dat/artikel/2011_10_627.pdf> (positing that "[d]ue to the public pressure to start the hearing as soon as possible, the Trial Chamber failed to take a decision on the admissibility of the civil party applications at the beginning. Instead, it either granted them 'interim status' or started to refer to them as 'civil parties', even though the decision on their admissibility had not yet been made").

determination of the application,[1043] and that a formal decision would follow if the legal criteria for victim status were not fulfilled.[1044] Against this background, the Trial Chamber's undertaking at the Initial Hearing to explain the *status quo* of the victims may not have been sufficient. The Supreme Court notes that the Trial Chamber's announcement about the non-finality of its review[1045] is not quite clear, at least in relation to civil parties "recognized" prior to the Initial Hearing; it may be understood as relating to the interim recognition at the investigations stage, and not to the confirmation by the Trial Chamber.[1046]

493. In conclusion, while it cannot be said that the Trial Chamber acted outside the Internal Rules, the Supreme Court Chamber finds that the legal framework for deciding the admissibility of civil parties was patently obscure. This was exacerbated by multiple pronouncements at the juncture between investigation and trial as to civil party status that largely lacked a basis in actual scrutiny of the merits of civil party applications.

494. The Civil Party Appellants challenge the lawfulness of the Trial Chamber's second assessment of civil party status in the Judgement, and contend that the Trial Chamber erroneously relied on Internal Rule 100(1) (Rev. 3) as the legal basis for such re-assessment.[1047] The Civil Party Appellants argue that the term "claims" employed in Internal Rule 100(1) does not include the question of civil party status. Civil Parties Group 2[1048] correctly points to differences between the English and the

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[1043] *See, e.g.* Interim Recognition Letter, 29 January 2009, E2/22/3 ("Interim Recognition Letter E2/22/3") ("2. You are now recognized, as an interim measure, as a Civil Party until the Initial Hearing in this Case, when your application will be considered in accordance with Internal Rule 83").
[1044] *See, e.g.* Interim Recognition Letter E2/22/3 ("4. The Trial Chamber may make a formal decision with respect to the admissibility of your application, and reject it if it considers that the legal criteria identifying the victim status as set out in the Internal Rules and in the Practice Direction on Victim Participation are not fulfilled").
[1045] T. (EN), 17 February 2009, E1/3.1, p. 46 (lines 11-25) ("Prior to issuing interim recognition, the Chamber has carefully received each of the relevant civil party applications and it has applied a prima facie standard of proof. This is not an examination on substance or on merit").
[1046] *See, e.g.* Interim Recognition Letter E2/22/3 ("2. You are now recognized, as an interim measure, as a Civil Party until the Initial Hearing in this Case, when your application will be considered in accordance with Internal Rule 83").
[1047] Trial Judgement, para. 636, fn. 1064 (citing "'Co-Lawyers for Civil Parties (Group 2) - Final Submission, E159/6, 12 [*sic*] November 2009, paras 6-8 ("requesting the [Trial] Chamber to instead treat all Civil Parties accorded interim recognition as recognized Civil Parties")'" to recognize that at least some civil parties' lawyers understood that at the time (filing date of 10 November 2009), the merits of civil party applications had not yet been finally decided by the Trial Chamber).
[1048] CPG2 Appeal on Admissibility, para. 37.

French versions of the Internal Rules (Rev. 3). Indeed the French version of Internal Rule 100(1) (Rev. 3) "links the admissibility requirement to the Civil Party application [for status]" which is not as explicit in English and Khmer. However, for the reasons that follow, the Supreme Court Chamber finds that the Trial Chamber's reading of Internal Rule 100(1) is correct and that any difference between the English, Khmer, and French versions is immaterial to this conclusion.

495. Internal Rule 100(1) reflects Article 355 of the 2007 Code of Criminal Procedure, which is clear in its terms: "[i]n the criminal judgment, the court [of first instance] shall also decide upon civil remedies. The court shall determine the admissibility of the civil party application and also decide on the claims of the civil party against the accused and civil defendants."[1049] It is also clear from the 2007 Code of Criminal Procedure that "civil party application" refers to a victim's application to act as civil party.[1050] The understanding of the term "admissibility" is elucidated in Article 138 of the 2007 Code of Criminal Procedure and Internal Rule 23(2). Under these provisions, facts that determine an applicant's standing as a victim are explicitly included among the elements that need to be demonstrated for the civil party application to be admissible. The Supreme Court Chamber therefore finds that the Trial Chamber had a lawful basis in Cambodian criminal procedure to determine in its Judgement the merits of victims' applications for civil party status.

496. The Supreme Court Chamber further finds that the Trial Chamber did in fact provide advance notice and opportunity to the Civil Party Appellants. Principally, the Supreme Court holds that the clarity of Article 355 of the 2007 Code of Criminal Procedure and Internal Rule 100(1) suffices for notice. All lawyers for the Civil Party Appellants, both international and especially Cambodian, ought to have been familiar with Cambodian criminal procedure, which clearly obliges a court of first instance to finally decide on civil party admissibility in its judgement. Even if there were conceivable doubts as to the extent of determinations undertaken by the ECCC organs at earlier stages of the case, the legal framework is clear as to the Trial Chamber's competence to comprehensively assess the admissibility of civil party applications in the judgement.

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[1049] 2007 Code of Criminal Procedure, Art. 355.
[1050] 2007 Code of Criminal Procedure, Arts 137-138, 311.

497. Moreover, notwithstanding the multiplicity of pronouncements regarding civil party status at the juncture between investigations and trial, the Trial Chamber did, however, signal the lack of finality of its *prima facie* assessment at the Initial Hearing. The Supreme Court Chamber notes that Judge Lavergne stated:

> I think it is perfectly clear to all the parties that we are not going to go to the merits of the applications, we are just trying to look at the apparent existence of harm. It is perfectly clear that during the substantive proceedings we shall examine each of the applications to be perfectly certain that the alleged harm did in fact occur.[1051]

498. The Supreme Court Chamber considers that this representation by the Trial Chamber, even if it could not be considered to be "perfectly clear" as to what the Chamber had examined at that point, did make "perfectly clear" that the Trial Chamber did not consider its examination of the applications to be final. In addition, had this statement not been clear to the Civil Party Appellants, it certainly provided an opportunity for seeking further clarification from the Trial Chamber.

499. With respect to the opportunity to make submissions on 27 August 2009, three months prior to the end of trial, the Trial Chamber directed the lawyers for the Civil Party Appellants that "[t]he final written submission, if any, of the Civil Parties shall indicate the legal and factual basis for Civil Parties' applications to participate as a Civil Party."[1052] This direction appears to have prompted Civil Parties Group 2 in their Final Submission to request the Trial Chamber "to declare immediately all 'Interim' Civil Parties admissible as a result of the implicit assumption of admissibility."[1053] Noticeably absent from this Final Submission is the "the legal and factual basis for Civil Parties' applications to participate as a Civil Party" as directed by the Trial Chamber. The Supreme Court Chamber finds that it was legally and factually incorrect for Civil Parties Group 2 to characterise the Trial Chamber's direction as "a recommendation rather than binding or mandatory."[1054] Not only did

[1051] T. (EN), 17 February 2009, E1/3.1, p. 42 (lines 5-10).
[1052] Direction on Proceedings relevant to Reparations and on the Filing of Final Written Submissions, 27 August 2009, E159, ("27 August 2009 Directions"), para. 5. *See also* 27 August 2009 Directions, para. 1 (stipulating the deadline of 18 September 2009 for the Civil Parties Groups to file written submissions).
[1053] Co-Lawyers for Civil Parties (Group 2) - Final Submission, 10 November 2009, E159/6 ("CPG2 Final Submission"), para. 21(1). *See also* CPG2 Final Submission, paras 6-8, as referenced in Trial Judgement, para. 636, fn. 1064.
[1054] CPG2 Final Submission, para. 3.

the Trial Chamber expressly order that "any" final written submission by a civil party "shall indicate the legal and factual basis for Civil Parties' applications to participate as a Civil Party," but the title of this document, "Direction", is indicative of its mandatory nature. The Supreme Court Chamber observes that Civil Parties Group 2 decided not to take advantage of this opportunity provided by the Trial Chamber and, instead, pursued the argument, irrelevant in the circumstances, that the victims had already finally become civil parties.

500. Accordingly, the Supreme Court Chamber holds that the Trial Chamber did not commit an error of law by conducting an evaluation of whether victimhood had been sufficiently demonstrated in the Trial Judgement. The Supreme Court Chamber further finds that whatever ambiguity could have been occasioned by the ECCC as to the Civil Party Appellants' standing at the outset of the trial, it did not entail a prejudice for the Civil Party Appellants' access to the trial proceedings.

501. Notwithstanding a lack of legal error on the part of the Trial Chamber, the Supreme Court Chamber nonetheless notes that there appears to have been a fundamental misunderstanding between the Trial Chamber and the Civil Party Appellants as to the merits and legal effect of the initial review of their applications. The Supreme Court Chamber also recognises that the process for the admissibility of civil party applicants and the revocation of their status in the Trial Judgement may have caused anguish and frustration at the futility of their practical and emotional investment in the proceedings.[1055] Having regard to the novel character of the civil party framework before the ECCC and the conceivable lack of clarity as to its specific arrangements as discussed above, the Supreme Court Chamber acknowledges the possibility that some among the Civil Party Appellants may have been confused as to whether submission of evidence was still expected of them. Therefore, in order to

[1055] *See generally* Phuong Pham *et al.*, "Victim Participation and the Trial of Duch at the Extraordinary Chambers in the Courts of Cambodia", *Journal of Human Rights Practice*, Vol. 3:3 (2011), p. 284:

> Among those who ultimately had their status denied, anger, helplessness, shame, and feelings of worthlessness prevailed. While the rejection was possibly made worse by its timing at the end of the trial, the responses highlight the need to engage with victims so that denial of civil party status is not perceived as chagrining. This means not only informing civil party applicants of the rejection but explaining how and why it happened so they could link it to the legal process.

*See also* Eric Stover *et al.*, "Confronting *Duch*: Civil Party participation in Case 001 at the Extraordinary Chambers in the Courts of Cambodia", *International Review of the Red Cross*, Vol. 93:882 (June 2011), pp. 38-44.

remedy any possibly missed opportunity, the Supreme Court Chamber decided to grant the Civil Party Appellants' motions to submit additional evidence, irrespective of whether such evidence would have been available during the first instance proceedings.

### C. Whether the Trial Chamber Applied the Correct Standard of Proof in Deciding Admissibility of Civil Party Applications in the Trial Judgement

#### 1. Submissions

502. Civil Parties Groups 1, 2, and 3 submit that the Trial Chamber erred in law by applying the wrong standard of proof in reassessing civil party applications in the Judgement.[1056] Civil Parties Groups 1 and 2 claim that the standard of proof applied by the Trial Chamber was unreasonably high,[1057] and note that the Internal Rules do not provide for a standard of proof for the admissibility of civil party applications.[1058] All Civil Parties Groups note that the Trial Chamber, when first determining admissibility prior to commencement of trial, applied a *prima facie* standard of proof, yet at the judgement stage the Trial Chamber applied a new, unspecified standard of proof.[1059] Civil Parties Group 1 claims that this standard was adopted without prior notice and thereby caused them prejudice.[1060]

503. Civil Parties Group 2 submits that the amendments to the Internal Rules made after Revision 3 could be used for guidance as to the correct standard of proof. In particular, they refer to Revision 5 of the Internal Rules adopted on 9 February 2010, five months before the issuance of the Trial Judgement. Internal Rule 23*bis*(1) of Revision 5 stated: "when considering the admissibility of the Civil Party application, the Co-Investigating Judges shall be satisfied that facts alleged in support of the application are more likely than not to be true." The Civil Party Appellants submit that this standard is a preponderance of evidence, which is a relatively low standard.[1061] Based on references to the practice of international criminal and human rights courts,[1062] they however conclude that the ECCC should apply the *prima facie*

[1056] CPG2 Appeal on Admissibility, para. 50; CPG1 Appeal, paras 6, 63, 68.
[1057] CPG1 Appeal, paras 63-75; CPG2 Appeal on Admissibility, paras 55-70.
[1058] CPG2 Appeal on Admissibility, para. 51; CPG1 Appeal, para. 65.
[1059] CPG2 Appeal on Admissibility, paras 91-109; CPG1 Appeal, para. 68.
[1060] CPG1 Appeal, paras 68, 76.
[1061] CPG2 Appeal on Admissibility, para. 53.
[1062] CPG2 Appeal on Admissibility, paras 55-69.

standard applied by the ICC at the pre-trial and trial stages.[1063] Such a standard would entail deciding admissibility mainly by evaluating an applicant's statements on the merits of intrinsic coherence.

504. Civil Parties Group 3 further argues that Internal Rule 23(5) allows for "freedom of proof."[1064] This freedom must be interpreted in light of the historical context of detention at S-21 and S-24 and the fact that records from there are either incomplete or have been lost or kept in poor conditions. The Civil Party Appellants add that, in relation to crimes against humanity and genocide, the rules of evidence must be assessed in light of the effects that these crimes had on the victims.[1065] They observe that the ICC has also accepted indirect evidence when the burden of proof is rendered impossible by objective obstacles.[1066]

505. While admitting that "the [Trial] Chamber is correct in asserting that the Civil Parties need to provide some form of evidence in corroboration of their identity,"[1067] Civil Parties Group 1 argues that in its examination of proof of identity, the Trial Chamber did not show flexibility, unlike the ICC. For instance, "the [Trial Chamber] was more willing to accept a statement by the Accused regarding the validity of [civil party] applications rather than to take into account the documents and statements by the [Civil Party Appellants]."[1068] Referring to *Prosecutor v. Omar Hassan Achmad Al-Bashir* decision,[1069] Civil Parties Group 1 submits that the ICC recognised that "while applications are to be based on documentary evidence, the conditions of war and upheaval may hinder the submission of evidence in furtherance of their identification."[1070]

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[1063] CPG2 Appeal on Admissibility, para. 70.
[1064] CPG3 Appeal, para. 45.
[1065] CPG3 Appeal, paras 41-84.
[1066] CPG3 Appeal, paras 56-57, fn. 6 (referring to *Situation in Uganda*, ICC-02/04-101, "Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06", Pre-Trial Chamber (Single Judge), 10 August 2007, para. 15).
[1067] CPG1 Appeal, para. 72.
[1068] CPG1 Appeal, para. 73.
[1069] CPG1 Appeal, fn. 78.
[1070] CPG1 Appeal, para. 72.

### 2. Trial Judgement

506. In the opening of the first sub-section, "Procedural History," in the section of the Judgement titled "Civil Party Reparations," the Trial Chamber stated the following:

> In common with the practice before comparable international tribunals, the Chamber undertook a *prima facie* assessment of the credibility of the information provided by the applicants. This process is distinct from the Chamber's determination of the merits of all applications in the verdict, on the basis of all evidence submitted in the course of proceedings.[1071]

507. The only occurrence of the term "standard of proof" in the section "Civil Party Reparations" is in a footnote, which provides that "these admissibility criteria and standard of proof were *clarified* in the amendments [to the Internal Rules] adopted at the 7th Plenary Session."[1072] In the same footnote the Trial Chamber then reproduced Internal Rule 23*bis*(1) (Rev. 5) in full:

> In order for a Civil Party action to be admissible, the Civil Party applicant shall:
>
> a) be clearly identified; and
> b) demonstrate as a direct consequence of at least one of the crimes alleged against the Charged Person, that he or she has in fact suffered physical, material or psychological injury upon which a claim of collective and moral reparation might be based.
>
> When considering the admissibility of the Civil Party application, the Co-Investigating Judges shall be satisfied that facts alleged in support of the application are more likely than not to be true.

508. It is clear that the Trial Chamber required civil party applicants to have "substantiated" their applications. In this regard it attached primary importance to the issue of credibility of the applicant's statements, yet it stated that it was "unable to determine a Civil Party application based on uncorroborated Civil Party statements alone."[1073] Thus, in relation to some Civil Party Appellants, the Trial Chamber found that they did not provide "objective proof" and that the "description of detention conditions" was found to be "at odds with the bulk of evidence before the Chamber

[1071] Trial Judgement, para. 636.
[1072] Trial Judgement, fn. 1072 (emphasis added).
[1073] Trial Judgement, fn. 1079.

regarding the established practices at S-21."[1074] The Trial Chamber also found that "inconsistencies between the information contained in [the] application, in-court statements and subsequent submissions" led it, notwithstanding the "impact of trauma and the passage of time," to an inability to conclude that the Civil Party Appellant was detained at S-21.[1075] In other cases the Trial Chamber rejected civil party applications after finding that no document or attestation was provided to substantiate the nature of an alleged kinship with the immediate victim.[1076]

509. It is however not clear whether the Trial Chamber purported to apply the standard of proof articulated in Revision 5 of the Internal Rules ("more likely than not to be true") to its "determination of the merits," in contrast to its "*prima facie* assessment." It is therefore also not clear to the Supreme Court Chamber which standard of proof the Trial Chamber used when it referred five times to the "required standard" in rejecting civil party applications.[1077] Civil Parties Group 1 is therefore correct that the Trial Chamber's standard of proof is "unspecified."[1078] At a minimum, it transpires that the Trial Chamber considered the "more likely than not to be true" standard to be a useful guide in determining civil party admissibility in the Judgement.

### 3. Applicable Law

510. The Internal Rules provide guidance as to the criteria that a civil party application must satisfy in order to be admissible,[1079] but not the standard of proof according to which such criteria are to be assessed in a trial judgement. As previously noted in this Appeal Judgement, in accordance with the regular civil party regime, factual elements of the civil party action that are not encompassed by the criminal charges, and thus not proven by the prosecution beyond a reasonable doubt, must be

[1074] Trial Judgement, para. 647, p. 223 (relating to the findings on civil party applicant E2/23) and pp. 224-225 (findings in relation to applicants E2/33 and E2/61).
[1075] Trial Judgement, para. 647, p. 223 (findings in relation to civil party applicant E2/32).
[1076] *See, e.g.* Trial Judgement, para. 648, p. 226 (findings in relation to civil party applicant E2/62 and others under the same category).
[1077] Trial Judgement, pp. 223, 225, 229.
[1078] CPG1 Appeal, para. 68.
[1079] Internal Rule 23(5) (Rev. 3) (requiring that all civil party applications "must contain sufficient information to allow verification of their compliance with these IRs. In particular, the application must provide details of the status as a Victim, specify the alleged crime and attach any evidence of the injury suffered, or tending to show the guilt of the alleged perpetrator").

proven by the civil party pursuant to the standard of a preponderance of evidence.[1080] A question arises whether preponderance of evidence constitutes an appropriate standard in the circumstances of the civil party actions pursued before the ECCC. Another question is whether the level of proof required by the ECCC for the determination of the initial civil party admissibility remains unchanged at the judgement phase when the admissibility of civil party applications is finally decided.

511. As the Trial Chamber appears to have done, the Civil Party Appellants[1081] accept that the standard of proof provided for in Revision 5 of the Internal Rules ("more likely than not to be true") is a legitimate guide in determining civil party admissibility under Revision 3 of the Internal Rules. Yet this standard in Revision 5 purports to apply to the "Co-Investigating Judges," and thus to only the pre-trial stage of a case. The question arises, then, whether it is appropriate to apply at the reparations stage of a case a standard of proof that is applied during the pre-trial stage. In answering this question, it must first be noted that following the removal of the availability to pursue individual claims at the trial phase,[1082] Revision 5 removed from the Trial Chamber the competence to decide on civil party admissibility.[1083] Under Revision 5, as under the current Revision 8, the power to decide civil party admissibility is vested in the Co-Investigating Judges, subject to appeal to the Pre-Trial Chamber. Similarly, under Revision 3 of the Internal Rules, the power to decide on civil party admissibility was vested in the Trial Chamber, subject to appeal to the Supreme Court Chamber.[1084] The Trial Chamber under Revision 3 and the Co-Investigating Judges under Revision 5 (as well as Revision 8) therefore share the same responsibility to decide on civil party admissibility, subject to appeal to the respective appellate chambers. It is this commonality between Revisions 3 and 5 of the Internal Rules that allows the Supreme Court to consider the relevance of the

[1080] See above paragraph 428.
[1081] *See, e.g.* CPG2 Appeal on Admissibility, paras 5, 13, 53.
[1082] Internal Rule 23(5) (Rev. 5).
[1083] For example, the term "Civil Party" is defined in the Glossary to Revision 5 as "a victim whose application to become a Civil Party has been declared admissible by the Co-Investigating Judges *or the Pre-Trial Chamber* in accordance with these IRs," whereas the Glossary to Revision 4 defines the term as "a victim whose application to become a Civil Party has been accepted by the Co-Investigating Judges *or the Trial Chamber* in accordance with these IRs" (emphasis added).
[1084] Provided the application had not already been rejected as inadmissible by the Co-Investigating Judges and/or by the Pre-Trial Chamber on appeal. Internal Rules 23(3), 74(4)(b) (Rev. 3).

standard of proof articulated in the latter version of the Internal Rules when applying the former.

512. Nevertheless, in practice, significant differences may occur between the pre-trial and reparations stages of a case, including the quantity and quality of evidence affecting a civil party's standing and reparation claims, resulting from evidence adduced by the civil party and from the findings as to the criminal responsibility of the accused person. Therefore the Supreme Court must adapt a standard appropriate to the reparations stage of proceedings. In seeking answers to the questions formulated above, the Supreme Court has decided to explore whether guidance might be found "in procedural rules established at the international level."[1085]

### *a. Procedural Rules Established at the International Level*

#### *i. The ICC and STL*

513. Where a person applies to an ICC Trial Chamber either before the commencement of or during the trial for victim status in a case, the Trial Chamber must satisfy itself as to the admissibility of the application[1086] on a *prima facie* standard of proof.[1087] At the trial stage, in addition to the criteria applicable in the pre-

[1085] UN-RGC Agreement, Art. 12(1); ECCC Law, Art. 33 new.
[1086] *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-1017, "Decision on 772 applications by victims to participate in the proceedings", Trial Chamber, 18 November 2010, para. 38 (establishing the requirement to show: "(i) that the applicant is a natural or a legal person; (ii) that the applicant suffered harm; (iii) that the events described by the applicant constitute a crime within the jurisdiction of the Court and with which the accused is charged; and (iv) that there is a link between the harm suffered and the crimes charged in the case at hand"). This test is similar to the test applied by ICC Pre-Trial Chambers during the pre-trial phase of a case. *See, e.g. Situation in the Central African Republic in the Case of the Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-320, "Fourth Decision on Victims' Participation", Pre-Trial Chamber (Single Judge), 12 December 2008, para. 30; *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Katanga and Chui*, ICC-01/04-01/07-357, "Decision on the Applications for Participation in the Proceedings of Applicants a/0327/07 to a/0337/07 and a/0001/08", Pre-Trial Chamber (Single Judge), 2 April 2008, p. 8; *Situation in Darfur, Sudan in the Case of the Prosecutor v. Bahar Idriss Abu Garda*, ICC-02/05-02/09-255, "Decision on Applications a/0655/09, a/0656/09, a/0736/09 to a/0747/09, and a/0750/09 to a/0755/09 for Participation in the Proceedings at the Pre-Trial Stage of the Case", Pre-Trial Chamber (Single Judge), 19 March 2010, para. 8; *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Callixte Mbarushimana*, ICC-01/04-01/10-351, Pre-Trial Chamber (Single Judge), 11 August 2011, para. 19; *Situation in the Republic of Kenya in the Case of the Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, ICC-01/09-01/11-17, "First Decision on Victims' Participation in the Case", Pre-Trial Chamber (Single Judge), 30 March 2011, para. 6.
[1087] Before commencement of trial, *see, e.g. Lubanga*, "Decision on victims' participation", para. 99; *Prosecutor v. Katanga and Chui*, Grounds for the Decision on the 345 Applications for Participation in the Proceedings Submitted by Victims, para. 57 ("The Chamber has further taken the view that applicants are required to establish that these four criteria have been met *prima facie*, without any need for it to conduct an in depth assessment of the credibility of their statements"). During the trial, *see, e.g.*

trial phase, the court must examine whether the harm allegedly suffered was *prima facie* the result of the commission of at least one crime within the charges confirmed by the Pre-Trial Chamber.[1088] Means of evidence are broadly admissible[1089] and there is no obligation to use any particular form of evidence, save for documentary proof of identity and proxy.[1090] In the event an ICC Trial Chamber convicts an accused, a request for reparations under Article 75 of the ICC Statute shall contain, *inter alia*, "*to the extent possible*, the identity of the person or persons the victim believes to be responsible for the injury, loss or harm."[1091] Similarly, a request for reparations shall provide "*to the extent possible* any relevant supporting documentation, including names and addresses of witnesses."[1092]

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*Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-2659-Corr-Red, "Redacted version of the Corrigendum of Decision on the applications by 15 victims to participate in the proceedings", Trial Chamber, 8 February 2011, paras 28, 30 ("[T]he obligation on an applicant is limited to providing the Chamber with sufficient material to establish, *prima facie*, his or her identity and the link between the alleged harm and the charges against the accused. […] [T]hese 15 applicants simply ask to participate in the proceedings and they are not, at present, requesting a more active role in the trial, nor are they trial witnesses"); *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-2764-Red, "Redacted version of the Decision on the applications by 7 victims to participate in the proceedings", Trial Chamber, 25 July 2011, para. 23; *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-1862, "Decision on 270 applications by victims to participate in the proceedings", Trial Chamber, 25 October 2011, paras 27, 30.

[1088] *Lubanga*, "Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008", paras 61-66; *Katanga and Chui*, Decision on the treatment of applications for participation, para. 13; *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-699, "Decision defining the status of 54 victims who participated at the pre-trial stage, and inviting the parties' observations on applications for participation by 86 applicants", Trial Chamber, 22 February 2010, para. 19.

[1089] *Situation in Uganda*, "Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06", para. 15 ("it is to be reasonably expected that victims will not necessarily or always be in a position to fully substantiate their claim. It is also accepted as a general principle of law that 'indirect proof' (i.e., inferences of fact and circumstantial evidence) is admissible if it can be shown that the party bearing the burden of proof is hampered by objective obstacles from gathering direct proof of a relevant element supporting his or her claim; the more so when such indirect evidence appears to be based 'on a series of facts linked together and leading logically to a single conclusion'. Similarly to the method followed by Pre-Trial Chamber I, the Single Judge will therefore assess each statement by applicant victims first and foremost on the merits of its intrinsic coherence, as well as on the basis of information otherwise available to the Chamber").

[1090] *See Bemba*, "Decision on 772 applications by victims to participate in the proceedings", para. 39 (a completed application for participating status during trial must contain the following information: (i) the identity of the [victim] applicant; (ii) the date of the crime(s); (iii) the location of the crime(s); (iv) a description of the harm suffered as a result of the commission of any crime within the jurisdiction of the Court; (v) proof of identity [of the victim applicant]; (vi) if the application is made by a person acting with the consent of the victim, the express consent of that victim; (vii) if the application is made by a person acting on behalf of a victim, in the case of a victim who is a child, proof of kinship or legal guardianship; or, in the case of a victim who is disabled, proof of legal guardianship; (viii) a signature or thumb-print of the Applicant on the document at the very least on the last page of the application).

[1091] ICC RPE, Rule 94(1)(c) (emphasis added).

[1092] ICC RPE, Rule 94(1)(g) (emphasis added). *See also* ICC RPE, Rule 97(2):

> At the request of victims or their legal representatives, or at the request of the convicted person, or on its own motion, the Court may appoint appropriate experts

514. It thus seems possible that an ICC Trial Chamber will reassess victim status in or after its final decision for the purposes of deciding reparations.[1093] It also appears that at the reparations stage of a case, the proof required of the victim applicant is still flexible; in particular, there is no formal requirement of producing documentary evidence. Means of evidence, on the other hand, which are available under the law to determine reparations, are broad, indicating the Court's competence to require the factual findings to the standard of a preponderance of evidence.

515. Since at present, however, there has not been a judgement in a case from an ICC Trial Chamber, it is too early to conclude whether or not the ICC reassesses victim status in or after a final decision, and, if so, which standard of proof the ICC applies to such reassessment.[1094] Similarly, while the Pre-Trial Judge of the STL must determine "whether the applicant has provided prima facie evidence that he is a victim as defined in [the Rules of Procedure and Evidence],"[1095] it is too early in the life of the STL to conclude whether or not it reassesses victim participation status in or after a judgement, and, if so, which standard of proof the STL applies to such reassessment.[1096]

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to assist it in determining the scope, extent of any damage, loss and injury to, or in respect of victims and to suggest various options concerning the appropriate types and modalities of reparations.

[1093] *See* ICC Statute, Art. 75(1):

The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision [i.e., its judgment] the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting.

[1094] Views have been expressed against re-assessment at the junction of pre-trial and trial phases and at interlocutory appeal. *See, e.g. Lubanga Dyilo*, ICC-01/04-01/06-824, "Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled 'Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo'", "Dissenting Opinion of Judge Sang-Hyun Song Regarding the Participation of Victims", Appeals Chamber, 13 February 2007, paras 5-8 (arguing that, once victims are able to establish their personal interests in a given case, these interests are affected in all proceedings arising from that case); *Lubanga*, "Decision, *in limine*, on Victim Participation in the appeals of the Prosecutor and the Defence against Trial Chamber I's Decision entitled 'Decision on Victims' Participation'", "Separate Opinion of Judge Georghios M. Pikis", para. 3 (noting that it is judicially settled that persons whose status as victims has been acknowledged by the first instance court need not establish that status anew in proceedings before the Appeals Chamber).

[1095] STL RPE, 86(B)(i).

[1096] *See generally* Jérôme de Hemptinne, "Challenges Raised by Victims' Participation in the Proceedings of the Special Tribunal for Lebanon", *Journal of International Criminal Justice*, Vol. 8 (2010), p. 171 (commenting that the *prima facie* standard applied by the STL "is in line with the jurisprudence of the United Nations Compensation Commission (UNCC), according to which the UNCC 'chose a novel approach to the question of evidence, requiring 'simple documentation' or a

*ii. Regional Human Rights Bodies*

516. Case law from regional human rights bodies created under the ACHR and the ECHR may be considered, but as previously discussed in this Judgement, both the Inter-American Court and European Court of Human Rights claim autonomous approaches to evidence that are not bound by national rules and depend on the nature of the violation and the issues in dispute between the parties.[1097] Accordingly, differences with the ECCC may concern both the subject of proof, which is focused on the violation of rights conducive to injured party status,[1098] and the standard of proof, which is affected by the fact that the Contracting States have a duty to co-operate with the Convention institutions in arriving at the truth.[1099]

517. In practice, the IACtHR has applied a case-by-case approach to the standard of proof for victim status of the petitioner, considering that the nature of the crimes can have a direct effect on the victims' ability to collect such proof at a later stage. The IACtHR has found that, provided they have been individualized in the application,[1100] direct victims and their next of kin who have not been identified in the proceedings before it can nonetheless be injured parties (also called beneficiaries of reparations). In order to receive the compensation for non-pecuniary damages, the next of kin of direct victims who are identified[1101] after notification of the judgement on reparations

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'reasonable minimum' from a claimant by way of proof. This did not change the evidentiary standard of 'balance of probabilities' but rather assisted a claimant in getting the standard'.").

[1097] *See, e.g. Nachova and Others v. Bulgaria,* ECtHR, Grand Chamber Judgment, App. Nos. 43577/98 and 43579/98, 6 July 2005, para. 147 (reiterating that "[I]n the proceedings before the Court, there are no procedural barriers to the admissibility of evidence or pre-determined formulae for its assessment. It adopts the conclusions that are, in its view, supported by the free evaluation of all evidence, including such inferences as may flow from the facts and the parties' submissions"); *Case of the white van*, Judgment (Reparations and Costs), para. 51.

[1098] *Contreras et al. v. El Salvador*, IACtHR, Judgment (Merits, Reparations and Costs), 31 August 2011, para. 181; *Vera Vera v. Ecuador*, IACtHR, Judgment (Preliminary Objections, Merits, Reparations and Costs), 19 May 2011, para. 109; *Abrill Alosilla et al. v. Peru*, IACtHR, Judgment (Merits, Reparations and Costs), 4 March 2011, paras 89-90; *Cabrera Garcia and Montiel Flores v. Mexico*, IACtHR, Judgment (Preliminary Objection, Merits, Reparations and Legal Costs), 26 November 2010, paras 211-212; *Usón Ramírez v. Venezuela*, IACtHR, Judgment (Preliminary Objections, Merits, Reparations, and Costs), 20 November 2009, paras 206-208; *Acevedo Buendía et al. v. Peru ("Discharged and Retired Employees of the Comptroller")*, IACtHR, Judgment (Preliminary Objection, Merits, Reparations and Costs), 1 July 2009, paras 111-114.

[1099] ECHR, Art. 38(1)(a) (former Art. 28(1)(a)); *Ireland v. United Kingdom*, Plenary Judgment, paras 148, 161; ACHR, Art. 48(1)(d).

[1100] *Moiwana Community v. Suriname*, IACtHR, Judgment (Preliminary Objections, Merits, Reparations and Costs), 15 June 2005, paras 177-78.

[1101] *Mapiripan Massacre v. Colombia*, IACtHR, Judgment (Merits, Reparations and Costs), 15 September 2005, para. 247 ("While the approximately 49 victims acknowledged by the State as well as their next of kin, will be beneficiaries of other forms of reparation and/or the

must, within a certain period of time, prove their relationship with the direct victim(s) by means of "genetic filiation" or official state-issued documents, such as marriage or birth certifications or "a baptismal certificate, death certificate or identity card, or by acknowledgment of this relationship in the domestic proceedings."[1102] Where official documentation is not available, other means of proving identity were accepted, including two attesting witnesses[1103] or a statement before a competent state official by a recognized leader of the relevant community, as well as the declarations of two additional persons, "all of which clearly attest to the individual's identity."[1104]

518. Under the ECHR, given the requirement to exhaust domestic remedies prior to submitting an application to the European Court of Human Rights (reflecting the principle of subsidiarity),[1105] in the vast majority of cases the significant facts are no longer in dispute.[1106] The Court applies a distinct approach to the burden of proof regarding issues of admissibility and fact.[1107] In *Ireland v. UK*, the Court refused to accept that the burden of proof should be borne by either of the States Parties and indicated that it would examine all material before it, whether originating from the Commission, the parties or other sources, and, if necessary, obtain material *ex proprio motu*.[1108] In cases subsequent to *Ireland v. UK*, the ECtHR's jurisprudence shows that it is for the applicant to present a *prima facie* case that there has been an interference with a protected right.[1109] Mere assertion was found insufficient where an issue of material fact is disputed by the government,[1110] unless due to the circumstances of the

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compensation set for nonpecuniary damages, for lack of information the Court abstains from ordering compensation for pecuniary damages in favor of those victims and their next of kin who have not been individually identified in this proceeding. However, the Court states that setting of reparations in this international instance neither obstructs nor precludes the possibility of the next of kin of unidentified victims filing the appropriate complaints before the national authorities, as they come to be identified, including the means ordered in this Judgment [...]").

[1102] *Case of Ituango Massacres v. Colombia*, Judgment (Preliminary Objections, Merits, Reparations and Costs), para. 356.

[1103] *See, e.g. Mapiripan Massacre v. Colombia*, Judgment (Merits, Reparations and Costs), paras 252, 257(b), 289, 309, 311(iii).

[1104] *Moiwana Community v. Suriname*, para. 178.

[1105] ECHR, Art. 35(1).

[1106] Philip Leach *et al.*, "Human Rights Fact-Finding. The European Court of Human Rights at a Crossroads", *Netherlands Quarterly of Human Rights*, Vol. 28:1 (2010), p. 41.

[1107] David Harris *et al.*, *Law of The European Convention on Human Rights*, Oxford University Press, 2nd ed., 2009, pp. 849-851.

[1108] *Ireland v. United Kingdom*, Plenary Judgment, para. 160.

[1109] *Artico v. Italy*, ECtHR, Chamber Judgment, App. No. 6694/74, 13 May 1980, para. 30.

[1110] *Goddi v. Italy*, ECtHR, Chamber Judgment, App. No. 8966/80, 9 April 1984, para. 29.

breach the Court releases the applicant of the burden of proof.[1111] At the merits stage, the "level of persuasion necessary for reaching a particular conclusion [...] [is] linked to specific circumstances of the case, the nature of allegations made and Convention right at stake."[1112] In cases under Articles 2 and 3 of the ECHR, the Court established that facts must be proven beyond reasonable doubt.[1113] There are no procedural barriers to the admissibility of evidence.[1114] Traditionally, the Court heard testimonial evidence only exceptionally,[1115] relying rather on a plethora of documentary evidence.

519. It is evident from the above that international criminal and human rights law provide limited guidance to the ECCC on which standard of proof to apply to determine civil party admissibility at the reparations stage of a case. At a minimum, however, the ultimate finding on eligibility of the civil party applicant for reparation is established at a level higher than *prima facie*.

*iii. Reparation Claims Programs*

520. The Supreme Court considers that it might be instructive to canvass the standards of proof applied in past reparation claims programs. Similar to civil party applicants at the ECCC, it is often challenging for claimants before these reparation claims programs to prove their eligibility for reparation due to a lack of evidence that is "very much linked with the circumstances leading to the losses and violations that were sustained and that are to be redressed through the [reparation] programme."[1116]

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[1111] *Ribitsch v. Austria*, ECtHR, Chamber Judgment, App. No. 18896/91, 4 December 1995, para. 34; *Ireland v. United Kingdom*, Plenary Judgment, para. 161 (concerning allegations of torture and inhuman treatment when in custody); and *Çiçek v. Turkey*, ECtHR, Chamber Judgment, App. No. 25704/94, 27 February 2001, para. 147 (concerning forced disappearance).
[1112] *Nachova and Others v. Bulgaria,* Grand Chamber Judgment, para. 147. *See also* David Harris *et al.*, *Law of The European Convention on Human Rights*, 2nd ed., p. 849.
[1113] *Ireland v. United Kingdom*, Plenary Judgment, para. 161 (holding that the proof beyond reasonable doubt "may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact"); *Aydin v. Turkey*, ECtHR, Grand Chamber Judgment, App. No. 23178/94, 25 September 1997, paras 72-73; *Mentes et al. v. Turkey*, ECtHR, Grand Chamber Judgment, App. No. 23186/94, 28 November 1997, para. 66; *Anguelova v. Bulgaria*, ECtHR, Chamber Judgment, App. No. 38361/97, 13 June 2002, para. 111.
[1114] *Nachova and Others v Bulgaria,* Grand Chamber Judgment, para. 147.
[1115] David Harris *et al.*, *Law of The European Convention on Human Rights*, 2nd ed., pp. 846-848; Philip Leach *et al.*, "Human Rights Fact-Finding. The European Court of Human Rights at a Crossroads", pp. 42, 77 (observing a peak in ECHR fact-finding missions from 1990 but significant decrease in their number since the changes to the Strasbourg system in 1998).
[1116] Heike Niebergall, "Overcoming Evidentiary Weaknesses in Reparation Claims Programmes", in Carla Ferstman *et al.* (eds.), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity*, Brill, 2009, p. 150. *See also Situation in Uganda*, "Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06",

According to Niebergall, a "majority" of recent reparation claims programs "have developed and applied relaxed standards of proof, in order to facilitate the claimants' task of proving their claims."[1117] The standards of proof applied by these mass claims procedures were expressed in the following terms: plausibility; credibility; demonstrates satisfactorily; simple documentation; reasonable minimum; and balance of probability.[1118]

521. The Claims Resolution Tribunals for Dormant Accounts in Zurich, Switzerland (CRT I and CRT II), which had the plausibility standard prescribed in their constituent documents, determine plausibility pursuant to three criteria: 1) production of all documents and information that can be reasonably expected to be produced in view of the particular circumstances; 2) there is no reasonable basis to conclude that fraud or forgery affects the claim; and 3) there is no reasonable basis to conclude other persons may have a better or an identical claim.[1119] Under these criteria the type of information that was accepted as proof of personal circumstances was broadened to assist claimants. Instead of official documents, private documents were accepted, including photographs, letters, and postcards. Even newspaper clippings were regarded as sufficient to show the existence of a family member if they matched or at least did not contradict the bank records.[1120] The International Commission on Holocaust Era Insurance Claims (ICHEIC) ruled that a claim had to be plausible "in the light of all the special circumstances involved, including, but not limited to the destruction caused by World War II, the Holocaust, and the lengthy period of time that has passed."[1121] The claimants could submit private documents such as statements from third parties or letters. However, where the claimant was "not able to submit any documentary evidence in support of the claim, [his] assertion must have the necessary degree of particularity and authenticity to make it credible in the

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para. 15 ("it is to be reasonably expected that victims will not necessarily or always be in a position to fully substantiate their claim").

[1117] Niebergall, "Overcoming Evidentiary Weaknesses in Reparation Claims Programmes", p. 155. In footnote 35, Niebergall provides examples of two reparation claims programs that did not include in their rules "a relaxation of evidentiary standards."

[1118] Niebergall, "Overcoming Evidentiary Weaknesses in Reparation Claims Programmes", pp. 156-159.

[1119] First Claims Resolution Tribunal for Dormant Accounts in Zurich, Switzerland Rules of Procedure, Art. 22 <www.crt-ii.org/_crt-i/frame.html>.

[1120] Niebergall, "Overcoming Evidentiary Weaknesses in Reparation Claims Programmes", p. 157.

[1121] ICHEIC Relaxed Standards of Proof Guide, Rule A(1) <www.icheic.org/docs-documents.html>.

circumstances of th[e] case." [1122] The German Forced Labour Compensation Programme provided that "eligibility shall be demonstrated by submission of documents." Nevertheless, "if no relevant evidence is available, the claimant's eligibility can be made credible in some other way."[1123] Depending on the value of the remedy sought, the United Nations Compensation Commission (UNCC) required from a claimant by way of proof: ''simple documentation''; a ''reasonable minimum that is appropriate under the particular circumstances'';[1124] or "documentary or other appropriate evidence sufficient to demonstrate the circumstances and the amount of the claimed loss."[1125] In respect to this last category, the Panel however held that many claimants could not be expected to document all aspects of a claim and went on to establish a "test of 'balance of probability'" to be applied having regard to the circumstances existing at the time of the invasion and loss.[1126]

### 4. Discussion

522. To provide context for the ensuing discussion, the Supreme Court recalls that the Trial Chamber examined the admissibility of civil party applications in the Judgement after it had determined the criminal responsibility of KAING Guek Eav and within the context of deciding on claims for reparations.[1127] The Trial Chamber was therefore correct to require civil parties at the reparations stage to "satisfy the Chamber of the existence of wrongdoing *attributable to the Accused* which has a direct causal connection to a demonstrable injury personally suffered by the Civil Party."[1128] The present issue on appeal is to determine the correct standard of proof to apply at the reparations stage to determine civil party admissibility, and then to determine whether the Trial Chamber applied such a standard to the applications of the Civil Party Appellants.

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[1122] ICHEIC Appeals Panel, Redacted Decision No 20, para. 19 <www.icheic.org/docs-appealspanel.htm>.
[1123] The Law on the Creation of a Foundation "Remembrance, Responsibility and Future" of 2 August 2000, Art. 11(2) <www.stiftung-evz.de/eng/>.
[1124] UNCC Governing Council, Decision 10, approving the Provisional Rules for Claims Procedure, U.N. Doc. S/AC.26/1992/10 (26 June 1992), ("UNCC Rules"), Art. 35(2)(a)-(c) <www.uncc.ch/decision.htm>.
[1125] UNCC Rules, Art. 35(3).
[1126] UNCC Report and Recommendation Made by the Panel of Commissioners Concerning Part One of the First Installment of Individual Claims for Damages above US$100, 000 (Category "D" Claims), U.N. Doc. S/AC.26/1998/1 (3 February 1998), para. 72 <www.uncc.ch/reports.htm>.
[1127] Trial Judgement, paras 567-568, 639-675.
[1128] Trial Judgement, para. 639 (emphasis added).

523. The *prima facie* standard of proof applied by the Trial Chamber prior to the commencement of trial is not under appeal, and, in any event, it is widely accepted at the international level as the standard used at the initial assessment of victim status.[1129] Regarding the standard for the reparations stage, the Supreme Court Chamber agrees with the Trial Chamber that Revision 5 of the Internal Rules "clarified"[1130] the applicable standard of proof. The nature of this clarification is that the Plenary of the ECCC explicitly recognised in Revision 5 what was implicitly the standard under Revision 3 and during Case 001. The Supreme Court Chamber further agrees with Civil Parties Group 2[1131] that the term "more likely than not" has been used to describe the standards of proof known as "preponderance of evidence"[1132] and "balance of probabilities."[1133] As such, this standard of proof is consistent with the decisive standard of proof in a civil case.

524. Furthermore, the Supreme Court notes that the reparation programmes, notwithstanding the variety of expressions used to describe evidentiary requirements,

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[1129] *See, e.g.* the above summaries of the ICC, STL, and ECtHR.
[1130] Trial Judgement, fn. 1072.
[1131] CPG2 Appeal on Admissibility, para. 53.
[1132] In the context of national civil proceedings, *see, e.g. Tolland Enterprises v. Scan-Code, Inc.*, 1995 Conn. Super. LEXIS 2882, 6 (Superior Ct. Conn.) (October 11, 1995) ("In the usual civil case, a party satisfies its burden of proof if the evidence presented establishes the issue in favor of that party by a 'fair preponderance of the evidence' . . . 'Fair preponderance' means the better or weightier evidence; a party is not required to prove a fact to an absolute certainty but merely to prove that a fact is *more likely than not to be true* [...] Such preponderance is not judged by the number of witnesses but rather the quality of the evidence presented") (emphasis added; citations omitted), reversed in part on appeal on other grounds, 239 Conn. 326 (Supreme Ct. Conn.) (November 26, 1996). In the context of national criminal proceedings, *see, e.g. People v. Wilhoite*, 228 Ill. App. 3d 12, 20 (Ill. App. Ct.) (December 27, 1991) ("A preponderance of the evidence means defendant must prove it is '*more likely than not* that he was insane when he committed the offenses charged.' . . . *See also*, P. Robinson, 1 *Criminal Law Defenses*, sec. 5(c) at 51-52 (1984) ('Proof by a preponderance of the evidence requires the burdened party to convince the jury that the claim he asserts is *more likely than not to be true*. Where a defendant must prove a defense by a preponderance of the evidence, the fact finder must deny the defense where it believes only that it is as likely as not that the defendant qualifies for the defense')") (emphasis added), appeal denied, 144 Ill. 2d 642, 591 N.E.2d 30, 169 Ill. Dec. 150 (1992) (LEXIS).
[1133] In the context of international criminal proceedings, *see, e.g. Prosecutor v. Nikola Šainović & Dragoljub Ojdanić*, IT-99-37-AR65, "Decision on Provisional Release", "Separate Opinion of Judge Shahabuddeen", Appeals Chamber, 30 October 2002, para. 37:

> In the present case, the issue was whether the accused, who were charged with serious violations of international humanitarian law before a tribunal without enforcement powers, would appear to stand trial. To determine that issue on a balance of the probabilities test would mean that all the accused had to do to satisfy the Trial Chamber that they would appear for trial was to show that it was *more likely than not* that they would do so - that is, to use the language of Posner, Chief Judge, that the odds were 51 to 49 that they would appear. For, as Lord Diplock remarked in *Fernandez*, on that test it must be shown that the event in question is "more likely ... than ... not - which is all that 'balance of probabilities' means" (emphasis added).

still have not divorced from the notion of balance of probabilities. For example, the standard of "credibility" applied in the Forced Labour Compensation Programme was satisfied if "in light of the available information it seemed more probable than not that the underlying facts were true."[1134] The expression "more probable than not that the underlying facts were true" and "balance of probabilities" are identical in meaning to "more likely than not to be true" under Revision 5 of the ECCC Internal Rules. Finally, the "simple documentation" and "reasonable minimum" evidentiary standards used by UNCC were "a novel approach to the question of evidence", which however, "did not change the evidentiary standard of 'balance of probabilities', but rather assisted a claimant in getting to that standard."[1135]

525. The Supreme Court further observes that in practice, the reparation programmes had regard to the factual background out of which the claims arose and the entailed paucity of official and formal documents and responded by easing the burden on the claimants. It was done less by lowering the requisite degree of probability and more by widely accepting other means of evidence. To this end, reparation programmes abandoned the requirement that certain material facts, such as kinship, ownership, and contractual relationship, be proven through official or officially attested documents, and accepted in their absence an array of private documents directly or indirectly supporting the claim. With such an approach, credence that may be given to an applicant's statement is of primary importance. The Supreme Court Chamber notes that the two reparation claims programs where the "plausibility" standard of proof was prescribed in their constituent legal documents[1136] have followed the same practice.

526. Turning to the Trial Chamber's approach to the question of sufficiency of proof, the Supreme Court notes that it had accepted a wide range of means of proof. In order to establish the existence of direct victims, the Trial Chamber accepted official records from S-21 and S-24, including registers, detainee lists, photographs,

[1134] Niebergall, "Overcoming Evidentiary Weaknesses in Reparation Claims Programmes", p. 158.
[1135] Rajesh Singh, "Raising the Stakes: Evidentiary Issues in Individual Claims Before the United Nations Compensation Commission", in The International Bureau of the Permanent Court of Arbitration (ed.), *Redressing Injustices Through Mass Claims Processes: Innovative Responses to Unique Challenges*, Oxford University Press, 2006, p. 62.
[1136] Niebergall, "Overcoming Evidentiary Weaknesses in Reparation Claims Programmes", pp. 156-158 (referring to the standard of plausibility that was prescribed in the CRT I and II Rules).

recorded confessions, and biographies in the preliminary part where they recorded the detainee's identity and could not reasonably be presumed to have been obtained under torture.[1137] In order to establish kinship, the Trial Chamber accepted birth certificates and identity cards,[1138] attestations from commune chiefs,[1139] election cards and voter registration forms,[1140] and photographs accompanied by statements from third parties.[1141] The completeness and coherence of the applicants' statements were evaluated in connection with the documents. The presence of injury on the part of indirect victims was presumed in relation to the immediate family.[1142]

527. On the basis of the aforesaid the Supreme Court Chamber infers that the Trial Chamber applied the "more likely than not to be true" standard of proof to civil party admissibility at the reparations stage. It further observes that the Trial Chamber, presumably in recognition of objective difficulties in providing official documents, showed flexibility and broadly accepted any documentary evidence capable of supporting the claim directly or indirectly.

528. Considering the Civil Party Appellants' argument that the Trial Chamber should have decided civil party admissibility on the basis of a statement of the applicant alone, the Supreme Court Chamber finds that such claim is not supported by practice at the international level. Considering whether the ECCC should introduce such a standard in order to balance the interests in the proceedings, the Supreme Court Chamber notes that reparation claims programs, and, to a certain extent, regional human rights mechanisms, possess a number of characteristics, not present at the ECCC, that allow a claimant to meet the standard of proof without much of an active role:

> -"[t]he secretariats of most claims processes have themselves actively participated in the gathering of evidence."[1143] A similar role is played by the Inter-American Commission on Human Rights and was played by the former European Commission of Human Rights;

[1137] Trial Judgement, fns 1079, 1122, 1125-1127, 1129-1132.
[1138] Trial Judgement, fns 1125, 1127, 1130.
[1139] Trial Judgement, fns 1126, 1130-1132.
[1140] Decision on the Civil Party Status of Applicants E2/36, E2/51 and E2/69.
[1141] Trial Judgement, fns 1126-1127.
[1142] Trial Judgement, para. 643.
[1143] Niebergall, "Overcoming Evidentiary Weaknesses in Reparation Claims Programmes", p. 153.

-in at least one reparation claims program, "[t]he majority of claimants […] had no legal representation."[1144] Likewise, legal representation is not required by regional human rights mechanisms;[1145]

-these programs and mechanisms eased the burden of proof on the claimant in part "by stipulating an obligation for other parties directly or indirectly involved in the claims resolution process to cooperate in the gathering of evidence."[1146]

529. In contrast to these characteristics, in Case 001 at the ECCC:

-aside from the statutory discretion to, on its own initiative, "summon or hear any person as a witness or admit any new evidence which it deems conducive to ascertaining the truth,"[1147] and consistent with the Fundamental Principles in Internal Rule 21, there was no duty or discretion for the Trial Chamber to actively participate in the gathering of evidence to help substantiate civil party applications;

-consistent with the adversarial character of the proceedings, there was no obligation on KAING Guek Eav or third parties to cooperate or otherwise assist in the gathering of evidence in support of the civil party applications;

-all civil party applicants were represented by both national and foreign lawyers. Foreign lawyers were required to have "at least 10 (ten) years working experience in criminal proceedings, as a lawyer, judge or prosecutor, or in some other capacity" and "established competence in criminal law and procedure at the international or national level,"[1148] while national lawyers were required to have "established competence in criminal law and procedure at the national or international level."[1149]

530. Yet the situation of victims in Case 001 at the ECCC is not totally dissimilar to these reparation claims programs. It has to be kept in mind that the Civil Party Appellants did not bear the burden of proving the criminal conduct of KAING Guek Eav. As to the remaining elements material for the civil party application, under Revision 3 of the Internal Rules the ECCC had a "Victims Unit," the mandate of which included assisting victims in submitting civil party applications and facilitating the participation of victims.[1150] This suggests that the obligation of the Victims Unit to

[1144] Niebergall, "Overcoming Evidentiary Weaknesses in Reparation Claims Programmes", p. 153, fn. 29 (referring to the First Claims Resolution Tribunal for Dormant Accounts in Zurich, Switzerland).
[1145] *See, e.g.* ECHR Rules of Court (1 April 2011), Rule 36.
[1146] Niebergall, "Overcoming Evidentiary Weaknesses in Reparation Claims Programmes", p. 151.
[1147] Internal Rule 87(4).
[1148] Internal Rule 11(4)(c)(iii)-(iv).
[1149] Internal Rule 11(4)(d)(ii).
[1150] Internal Rule 12(2)(d), (g). *See also* Practice Direction on Victim Participation, 02/2007/Rev.1 (27 October 2008), para. 3.4 ("The Victims Unit shall assist applicants in processing applications […]").

conduct a "formal verification"[1151] of civil party applications before forwarding them to the Greffier of the Trial Chamber involved more than verifying, for example, that all relevant boxes were completed. Part C of the Victim Information Form stated, "For information on the connection between this harm and the crimes being investigated by the ECCC that needs to be shown, *please contact the Victims Unit.*"[1152] Such instruction to civil party applicants (and their lawyers) presupposes, at a minimum, that the Victims Unit itself could provide "information on the connection [...]", and/or that it could refer civil party applicants (and their lawyers) to relevant sources of "information on the connection [...]." In any event, it is clear from the Internal Rules and Practice Direction on Victim Participation that the assistance available from the Victims Unit of the ECCC to civil party applicants was intended to be similar in nature to the assistance provided to victim claimants by the secretariats in some of the above reparation claims programs.

531. For these reasons, the Supreme Court holds that the standard of proof applied by the Trial Chamber, namely, "more likely than not to be true" or "preponderance of evidence," was in accordance with the law. This standard is common to civil claims across the world. Moreover, there is no basis to claim a relaxation of this standard either in practice at the international level or in concerns for the proper balancing of interests.

532. The Supreme Court will now address the Civil Party Appellants' submissions that the Trial Chamber failed to properly notify them of the standard of proof that would be applied at the reparations stage to determine civil party admissibility.

533. After the Trial Chamber assessed civil party applications on a *prima facie* standard of proof prior to commencement of trial, Civil Parties Group 1 alleges that:

> The Trial Chamber, without providing the Civil Parties with prior notice, subsequently adopted vastly higher standards not rooted in law, and proceeded to re-assess the Civil Party applications anew in the Judgement of first instance. After having weighed the applications against this novel, unspecified, standard of review and having increased their demand for proof

[1151] Internal Rule 23(4).
[1152] Practice Direction on Victim Participation, Appendix A Victim Information Form, p. 3 (emphasis added).

> of identity, the Chamber came to the conclusion that 20 Civil Parties, of which nine pertain to the present appeal, did not meet the "required standard."[1153]

534. The Supreme Court recalls that Judge Lavergne explicitly stated at the Initial Hearing that the initial, *prima facie* assessment of civil party applications was distinct from the determination of the merits of such applications.[1154] This ought to have provided notice to competent counsel that a more rigorous standard of proof would be applied to finally determine civil party admissibility. Nonetheless, as already noted by this Chamber on the occasion of discussing the lawfulness of the Trial Chamber's two-tier review, there was a degree of confusion caused by the multiple communications regarding civil party status. Moreover, the Supreme Court agrees with Civil Parties Group 1 that the Trial Chamber failed to clearly inform the Civil Party Appellants prior to the Judgement of the particular standard of proof it would apply at the reparations stage. It was not enough for the Trial Chamber to state in a footnote of the Judgement that Revision 5 of the Internal Rules "clarified" the applicable standard of proof. The Supreme Court Chamber also accepts that the lack of clarity from the Trial Chamber after the Initial Hearing on precisely which standard of proof it would apply at the reparations stage caused confusion and frustration to Civil Party Appellants upon reviewing the Judgement.[1155] Nevertheless, the Supreme Court Chamber also finds that any prejudice suffered by the Civil Party Appellants has been cured by the opportunity they have had on appeal to submit additional evidence to satisfy the Supreme Court Chamber that they qualify as civil parties under the Internal Rules. It is to these applications of the Civil Party Appellants that the Supreme Court Chamber now turns.

### D. Admissibility of Applications of Civil Party Appellants

535. The Trial Chamber dismissed the applications of 22 of the Civil Party Appellants,[1156] having found that they failed to establish harm suffered as a direct

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[1153] CPG1 Appeal, para. 68.
[1154] T. (EN), 17 February 2009, E1/3.1, p. 42 (lines 5-12), p. 46 (lines 10-22).
[1155] *See generally* Phuong Pham *et al.*, *Victim Participation and the Trial of Duch at the Extraordinary Chambers in the Courts of Cambodia*, pp. 264-287; Eric Stover *et al.*, "Confronting *Duch*: Civil Party participation in Case 001 at the Extraordinary Chambers in the Courts of Cambodia", pp. 38-44.
[1156] There are 41 Civil Party Appellants in total: 9 are appealing on civil party status only; 19 on reparations only (D25/6, CHUM Sirath, is also appealing on the omission of the names of his sister in law and her child in the Trial Judgement); and 13 on both civil party status and reparations. Civil party

consequence of the crimes for which KAING Guek Eav was convicted. Such findings were based on one or more of the following three reasons:

1. The Trial Chamber was not satisfied to the required standard that the civil party applicants were victims of crimes committed by KAING Guek Eav at S-21 or S-24;[1157]
2. Civil party applicants claiming to be victims due to the loss of a close relative at S-21 and S-24 were unable to establish to the required standard the existence of the immediate victims;[1158]
3. Civil party applicants claiming to be victims due to the loss of a close relative at S-21 and S-24 did not provide proof of kinship or special bonds of affection or dependency in relation to immediate victims of S-21 or S-24.[1159]

536. The Supreme Court has evaluated the below civil party applications according to the standard of appellate review applicable to this Chamber. On factual matters, for example, the task of the Supreme Court is to determine whether the Trial Chamber's application of the "more likely than not" standard of proof was unreasonable. In its evaluation the Supreme Court has considered whether the statements of the Appellants contain the necessary degree of particularity and authenticity to make it credible in the circumstances of the case. Given the lack of individual financial interest on the part of the victims in pursuing their civil actions, the Supreme Court was inclined to lend high credibility to their statements, provided they were consistent and complete. It nevertheless deferred to the Trial Chamber's evaluation of credibility where there had been a direct hearing of the party. The Supreme Court Chamber moreover evaluated the Civil Party Appellants' statements in connection with official and private (unofficial) documents[1160] contained in the file as well as those submitted by the parties at the Appeal Hearing.

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applicant E2/37 (KLAN Fit) did not appeal the rejection of his application in the Trial Judgement, p. 228.
[1157] Trial Judgement, para. 647.
[1158] Trial Judgement, para. 648.
[1159] Trial Judgement, para. 649.
[1160] Code of Civil Procedure 2006, Art. 155.

## 1. Civil Parties Group 1 (E2/61, E2/62, E2/69, E2/73, E2/74, E2/75, E2/86, E2/88, D25/15)

*Application of Civil Party Appellant E2/61, LY Hor alias EAR Hor*

537. The Civil Party Appellant claims to have been detained and tortured at S-21 and later transferred to S-24 from where he escaped. As a result of these events he claims to have suffered permanent damage to his left hand and one of his ankles.[1161]

538. The Trial Chamber rejected the application of this Appellant for the following reasons:

> LY Hor (E2/61) avers that he was detained first at the S-21 complex and later transferred to S-24, from where he escaped. While the existence of a detainee named EAR Hor at S-21 may be accepted on the basis of the documents and explanations provided, there is doubt as to whether this detainee was the Civil Party.[1162] Further, there is no indication in the S-21 archives of the detainee having been transferred from S-21 to S-24 and no explanation was given for this alleged transfer, which was contrary to the norm.[1163] The Chamber accordingly also finds LY Hor's Civil Party application not to have been established to the required standard.[1164]

539. Due to questions about the truthfulness of his claim, the Co-Lawyers filed a *Request to establish the status of Ly Hor as a survivor of S-21 and authenticity of documents as a matter of record* on 7 August 2009. Annexed to the Request was a declaration from KE Sopannaka, Head of Tuol Sleng Genocide Museum, certifying that he had located the original copies of the documents submitted in support of the Appellant's application. The Co-Lawyers submit that the Trial Chamber failed to deliberate and rule on this additional evidence.[1165]

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[1161] Report of Civil Party Application, 28 January 2009, E2/61/1.
[1162] Trial Judgement, para. 647, fn. 1091 ("The Chamber is uncertain that LY Hor was also known by the name EAR Hor during the DK period. *cf* 'Civil Party Group 1 - Request to Establish the Status of LY Hor as a Survivor of S-21 and Authenticity of Documents as a Matter of Record', 28 July 2009, E137").
[1163] Trial Judgement, para. 648, fn. 1092 ("Although a handwritten notation on the biography of detainee EAR Hor indicates that he was 'released on 8 March 76' (Biography of EAR Hor, E2/61.2, ERN 00361722), KAING Guek Eav and numerous witnesses, including several former S-21 staff members, all testified that apart from very few exceptions not involving ordinary prisoners, all S-21 detainees were executed *(see e.g.,* T. (EN), 27 July 2009 (SUOS Thy), E1/54.1, pp. 102-103)").
[1164] Trial Judgement, para. 647, pp. 224-225.
[1165] CPG1 Appeal, para. 61.

540. It was not necessary for the Trial Chamber to have been certain that "LY Hor was also known by the name EAR Hor during the DK period."[1166] What matters is whether the Appellant, presently using the name LY Hor, is the same person that was detained at S-21 under the name of EAR Hor. At the Appeal Hearing, the Civil Party Appellant submitted additional evidence showing that the names of his parents match the parents' names of EAR Hor,[1167] and submitted his thumbprint that matches the thumbprint of EAR Hor taken at S-21.[1168] The Supreme Court Chamber is therefore satisfied that the Appellant was a detainee at S-21, and decides to reverse the Trial Chamber's decision and to admit this Civil Party's application.

*Application of Civil Party Appellant E2/62, HIM Mom*

541. The Civil Party Appellant claims that four Khmer Rouge militiamen arrested her two brothers in Takeo Province in 1977, and that she was also arrested in 1978 but later escaped. The Appellant claims that she saw photos of her two brothers at the Tuol Sleng Museum. As a result of these events, the Civil Party Appellant claims to have suffered from a psychological injury.[1169]

542. The Trial Chamber rejected the application of this Appellant for the following reasons:

> Civil Party E2/62 claims that her brother[1170] was allegedly detained and executed at S-21. In support of her claim, she provided a photograph from the Tuol Sleng Museum archives. However, the photograph is unidentified and therefore does not establish whom the photograph depicts. Further, and as the Civil Party has acknowledged, no document exists to substantiate the nature of her alleged kinship to the victim[.][1171]

[1166] Trial Judgement, fn. 1091.
[1167] Confirmation Letter of Lieutenant Om Sophai, 26 March 2011, F2/6.1.
[1168] Group One - Civil Parties' Co-Lawyers' Request to File Additional Evidence in Support of their Appeal Against the Judgement, 11 March 2011, F2/3, para. 7; attachment F2/3.2.3, ERN 00651493 (current thumbprint); annex E2/61.2, ERN 00279930 (thumbprint taken at S-21).
[1169] Report on Civil Party Application, 28 January 2009, E2/62/1.
[1170] The Appellant in fact claimed that two of her brothers were detained at S-21. Annex 1: Claiming Letter, 28 January 2009, E2/62.1, ERN 00279966-00279968; Annex 2: Additional Information, 28 January 2009, E2/62.2, ERN 00279969. However, the Appellant submitted to the Trial Chamber a photograph of only one of her brothers. T. (EN), 23 November 2009, E1/78.1, p. 20; Photograph at S-21, E165/1/1.2; Annex 4: Photograph at S-21, E2/62.4.
[1171] Trial Judgement, para. 648.

543. The Civil Party Appellant submitted two additional witness statements, one from the Appellant's sister who identifies the person in the photograph as the Appellant's brother,[1172] and one from a village chief who confirms the identity of the person in the photograph.[1173]

544. The Supreme Court Chamber observes that written statements do not qualify as witness testimony, however the Chamber may accept them as unofficial documents. The authenticity of these documents was not challenged. Such documents sufficiently corroborate the statement of the injured party. Therefore the Supreme Court Chamber is satisfied that there is basis to reverse the Trial Chamber's decision and to admit this Civil Party's application.

*Application of Civil Party Appellant E2/69, LIM Yun*

545. The Civil Party Appellant claims that while she was imprisoned, tortured and interrogated at a location outside S-21,[1174] the prison chief of security told her that her brother was imprisoned at S-21.

546. The Trial Chamber rejected the application of this Appellant for the following reasons:

> LIM Yon (E2/69), in addition to reporting the arrest and execution of several relatives during the DK period, claims that one of her brothers was allegedly imprisoned at S-21. However, no evidence was provided to corroborate this claim[.][1175]

547. The Civil Party Appellant has not provided the Supreme Court Chamber with any additional evidence. The name of the Appellant's brother is not found in the list of detainees at S-21. Not calling into question the subjective veracity on the part of this Appellant, the Supreme Court Chamber notes that the party's statement is based

[1172] Confirmation Letter of Saing Neng, 8 March 2011, F2/3.2.1.
[1173] Confirmation Letter of Kong Ngoeun, 11 March 2011, F2/3.2.2. *See also* Certificate of Deputy Chief of Archives Office, Tuol Sleng, 1 September 2009, E165/1/1.3.
[1174] Claiming Letter of LIM Yun, 10 August 2009, E2/69.1 ("My family was imprisoned at Baray Sandaek pagoda, in Kampong Thma village, Ballangk commune for 10 days").
[1175] Trial Judgement, para. 648.

on hearsay from a source whose credibility is highly dubious.[1176] The Supreme Court Chamber finds no basis to reverse the Trial Chamber's decision that this Appellant did not demonstrate victim status with respect to the crimes attributed to KAING Guek Eav.

*Application of Civil Party Appellant E2/73, NORNG Sarath alias Por*

548. The Civil Party Appellant claims that his cousin and uncle were detained and executed at Tuol Sleng, and claims that as a result of these events he suffers from a psychological injury.

549. The Trial Chamber rejected the application of this Appellant for the following reasons:

> NORNG Sarath *alias* Por (E2/73) claims that his cousin NORNG Saruoth and his uncle NORNG Soang were detained and executed at S-21. However, the applicant provided neither documentary proof in support of this alleged detention nor any attestation establishing the alleged kinship [...].[1177]

550. The Civil Party Appellant has provided the Supreme Court Chamber with two additional written statements.[1178] The first written statement, from the Appellant's aunt, attests to the kinship between the Appellant and the Appellant's uncle, but the statement does not mention that the uncle was detained at S-21. The aunt states that she was told by the Appellant's colleague that the uncle was arrested, but the aunt then states, "I did not know who arrested him [the uncle] and his family and I did not know where they were taken to."[1179] Similarly, the second written statement, from the Appellant's cousin, states:

> When Norng Sang [Appellant's uncle] and Norng Saruoth [Appellant's cousin] were taken away, I did not know where they were taken to.

[1176] Victim Information Form (Confidential), 5 February 2009, E2/69, Annex 1, E2/69.1, ERN 00364915 ("While I was being tortured, the chief of security told me that my brother named Mayith, aged 35, was imprisoned at Tuol Sleng prison: 'Why did you say you did not know. Your brother was a traitor. He was arrested and detained at Tuol Sleng prison because he was responsible for the Tonle Sap River, whereas you bitch were arrested for secretly giving food to the enemy.'").
[1177] Trial Judgement, para. 648.
[1178] Written Statement of Norng Nith, 25 March 2011, F2/5.2.1; Written Statement of Sar Saren, 25 March 2011, F2/5.2.2.
[1179] Written Statement of Norng Nith.

> Nonetheless, due to the fact that they held high ranking position during the Khmer Rouge period, I think they were perhaps taken to Tuol Sleng.[1180]

551. While the Supreme Court Chamber has no reason to doubt the sincerity of the persons who issued these statements, specifically the Appellant's cousin who drafted this second statement, it is clear that the Appellant's cousin has no personal knowledge of whether or not NORNG Sang or NORNG Saruoth were detained at S-21. Furthermore, the names of the alleged victims, Norng Sang and Norng Saruoth, are not found in the list of detainees at S-21. The Supreme Court Chamber therefore finds no basis to reverse the Trial Chamber's decision that this Civil Party Appellant did not demonstrate victim status with respect to the crimes attributed to KAING Guek Eav.

*Application of Civil Party Appellant E2/74, NGET Uy*

552. The Civil Party Appellant claims that her husband, PRAK Pat, was imprisoned, tortured and executed at S-21.

553. The Trial Chamber rejected the application of this Appellant for the following reasons:

> NGET Uy (E2/74) alleges that her husband PRAK Pat, a former Khmer Rouge military cadre, was imprisoned, tortured and executed at S-21. In support of her claim, she referred to the testimony of a nephew of her husband, who allegedly worked at S-21.[1181] However, the precise identity of this potential witness was not disclosed. Further, no attestation or document corroborates either this claim or the alleged marital bond[.][1182]

554. The Civil Party Appellant has not offered any additional evidence before the Supreme Court Chamber. The name of the Appellant's alleged husband is not found in the list of detainees at S-21. The Supreme Court Chamber therefore finds no reason to reverse the Trial Chamber's decision that this Appellant did not demonstrate victim status in this case.

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[1180] Written Statement of Sar Saren.
[1181] Claiming letter of NGET Uy, 10 August 2009, E2/74.1.
[1182] Trial Judgement, para. 648.

*Application of Civil Party Appellant E2/75, THIEV Neap alias KHIEV Neap*

555. The Civil Party Appellant claims that her husband was imprisoned and executed at S-21.

556. The Trial Chamber rejected the application of this Appellant for the following reasons:

> THIEV Neab *alias* KHIEV Neab (E2/75), claims that her husband Heng CHOEUN *alias* CHOEUN, was arrested in late 1978 while he was a civil servant at Office 870 and taken to Prey Sâr (S-24). She claims to have witnessed his arrest and alleges that a soldier named Reth informed her of her husband's death at S-24. However, the exact identity of this witness is unknown, and no attestation or document corroborates her claims. Further, no proof of this kinship is provided[.][1183]

557. The Civil Party Appellant has not provided the Supreme Court Chamber with any additional evidence. Hearsay from a source not clearly identified[1184] does not suffice to confirm the allegations. The Supreme Court Chamber therefore finds no ground to reverse the Trial Chamber's decision that this Civil Party Appellant did not demonstrate victim status in this case.

*Applications of Civil Party Appellants E2/86 and E2/88, Jeffrey JAMES and Joshua ROTHSCHILD*

558. These two Civil Party Appellants claim to suffer psychological harm as a result of the imprisonment, torture and execution of their uncle, James W. CLARK. Appellant ROTHSCHILD claims that he and his family have not had any closure because his uncle's body was allegedly burned.[1185]

559. The Trial Chamber rejected the application of these Appellants for the following reasons:

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[1183] Trial Judgement, para. 648.
[1184] Victim Information Form, Khmer filed 5 February 2009, English translation filed 3 June 2009, E2/75, Annex 1, Information Related to the Alleged Crimes, E2/75.1, ERN 00365580 ("In 1981, when I went to look for rice in Siem Reap province I met Ret, a former Khmer Rouge soldier who used to work with my husband and was later transferred out of the military by Angkar. Ret told me that my husband had died because *Angkar* had sent him to Prey Sar prison since he had betrayed *Angkar*").
[1185] Claiming letter of Joshua Rothschild, 5 February 2009, E2/88.2.

> Jeffrey JAMES (E2/86) and Joshua ROTHSCHILD (E2/88) allege that their uncle James W. CLARK was detained and executed at S-21. The detention of James W. CLARK at S-21 is undisputed. However, the applicants' kinship to the victim was not established to the required standard. Although describing their distress at discovering his fate, the applicants, aged 5 and 8 years respectively when James W. CLARK was arrested, have also not substantiated any special bond of affection or dependency in relation to the victim.[1186]

560. The Co-Lawyers submit that the Trial Chamber required an unreasonable standard of proof to substantiate 'special bonds of affection' with extended family members. The Co-Lawyers submit that the Trial Chamber erroneously applied CHHIM Sotheara's expert testimony, in which he explains the historical tendency of Cambodian families to live together, to all civil party applicants regardless of their nationality or cultural background. The Co-Lawyers submit that, together with their mother, the two Appellants are the only living relatives of their uncle. Further, on Appellant JAMES' application he states that he and his uncle "were very close." The Co-Lawyers submit that the Trial Chamber failed to take into account the specific circumstances of these Appellants.

561. The Trial Chamber found that "the applicants' kinship to the victim was not established to the required standard."[1187] In a footnote, the Trial Chamber stated that the Appellants had not established that their mother, Sherry Alice CLARK, is the sister of James W. CLARK.[1188] The Supreme Court Chamber finds that the standard of proof applied by the Trial Chamber was too strict on the issue of kinship with respect to these particular Civil Party Appellants. Of course, in retrospect it would have been ideal if the Appellants had supplied birth certificates attesting to the fact that their mother and James W. CLARK had been from the same parent(s), or, at minimum, they had supplied the passport of or an affidavit from their mother confirming the same. However, given that Appellant JAMES specifically offered such documents should the court so require,[1189] and the Appellants' mother and the direct victim share a family name, it is difficult to explain why these Appellants would go to the trouble of applying to be civil parties at the ECCC if their uncle was not the direct

[1186] Trial Judgement, para. 649.
[1187] Trial Judgement, para. 649.
[1188] Trial Judgement, fn. 1121.
[1189] Written Statement of Jeffrey James, 23 January 2009, E2/86.2, p. 2.

victim. The Supreme Court Chamber notes moreover that James W. CLARK's biography from S-21 contains a statement that he had a sister.[1190] Altogether, this Chamber is satisfied as to the existence of kinship between the Appellants and the direct victim.

562. As held above, the Trial Chamber was correct to articulate the requirement of special bonds of affection or dependence between a direct victim and the claimed indirect victim. This Chamber has further held that close family members may be presumed to have had such bonds. As to what constitutes a close family is context-dependent. In the Cambodian context large families live together and form ties connecting immediate and non-immediate family members. By Western standards, grown-up family members do not usually co-habit with their parents or siblings; families are atomized, smaller and economically autonomous. Lack of co-habitation, however, does not preclude bonds of affection, especially within small families, where exclusivity of these bonds may render them strong. The Supreme Court Chamber notes that according to the direct victim's biography, his family was small and after his parents' divorce he lived together with his mother and sister. Against this background, Appellant JAMES' statement about "the frequent visits made by their uncle to [the Appellants'] family home when they were growing up"[1191] is plausible.

563. As indicated by the Trial Chamber, the two Appellants were ages 5 and 8 when their uncle was captured by the Khmer Rouge. While the Supreme Court Chamber does not have much information as to their family model, it still has no reason to doubt the sincerity of Appellant JAMES' statement that he and Appellant ROTHSCHILD were "very close" with their uncle and "looked up to him."[1192] Accordingly, it is credible that Jeffrey JAMES, at age 10, and Joshua ROTHSCHILD, at age 8, suffered a trauma in the face of a magazine story featuring the fate of their uncle.[1193] Accordingly the Supreme Court Chamber is satisfied that there is sufficient basis to reverse the Trial Chamber's decision and to confirm victim status of these two Civil Party Appellants.

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[1190] Declaration of James William Clark, 23 May 1978, E2/86.5, p. 1.
[1191] CPG1 Appeal, para. 78. *See also* Written Statement of Jeffrey James, p. 1.
[1192] *See also* T. (EN), 30 March 2011, F1/4.1, p. 71 (lines 7-12) (Mr. KHAN).
[1193] Written Statement of Jeffrey James, p. 1 ("Life Magazine (March, 1980) by Steve Robinson"); Victim Information Form of Joshua Rothschild, 5 February 2009, E2/88, p. 3 (alleging mental trauma and anguish).

*Application of Civil Party Appellant D25/15, SUON Sieng*

564. The Civil Party Appellant claims that three of his younger brothers and one of his cousins were imprisoned and executed at S-21.

565. The Trial Chamber rejected the application of this Appellant for the following reasons:

> SUON Seang (D25/15) was allegedly told by friends that three of his younger brothers had been detained at S-21. However, no proof of their detention was provided. He further claims that one of his cousins PEIN Um *alias* Rith, was also detained and executed at S-21.[1194] While the detention of an individual named PEIN Um at S-21 has been established, the Civil Party provided no proof of kinship to him[.][1195]

566. The Civil Party Appellant has not provided the Supreme Court Chamber with any additional evidence. The Supreme Court Chamber finds no grounds to reverse the Trial Chamber's decision that this Appellant did not demonstrate victim status in this case.

### 2. Civil Parties Group 2 (E2/32, E2/35, E2/83, E2/22, E2/64)

*Application of Civil Party Appellant E2/22, CHHOEM Sitha*

567. The Civil Party Appellant claims that his nephew was imprisoned and executed at S-21, and as a result the Appellant suffers from physical and mental injuries.

568. The Trial Chamber rejected the application of this Appellant for the following reasons:

> CHHOEM Sitha (E2/22) described the arrest, mistreatment and execution of soldiers from Division 310, of which he was a member. Although many soldiers from this Division were detained at S-21, none of these immediate victims were identified save for an individual named KAUV Phalla. A certificate from his village chief and commune chief states that CHHOEM

[1194] T. (EN), 26 August 2009, E1/69.1, p. 26 (line 15) to p. 27 (line 24).
[1195] Trial Judgement, para. 649.

> Sitha was allegedly the uncle of a KAUV Phalla. However, a special bond of affection has not been proved[.][1196]

569. The Appellant has provided a written statement as additional evidence on appeal. The statement, written by the Appellant's sister and the mother of the Appellant's nephew, states:

> I would like to confirm that my son KOV Phalla and younger brother CHHIM Sitha grew up together in the same village-Kampong Kor, Kampong Kor Subdistrict, Preaek Prasab District of Kratie Province. Both of them were of the same age; and after discussions, they decided to become soldiers in Unit 310. Both of them had very close relationship.[1197]

570. The Supreme Court Chamber has no reason to doubt that the Appellant "grew up" and was "very close" with his nephew. Here the Supreme Court also recalls that the notion of family in the context of Cambodia is large enough to encompass the relationship between an uncle and his nephew.[1198] Thus, the Supreme Court Chamber reverses the Trial Chamber's decision and confirms the Civil Party status of this Appellant.

*Application of Civil Party Appellant E2/32, NAM Mon*

571. The Civil Party Appellant claims that she, her mother, KHEN To, her father, YEAT Yân, and her brothers, YÂN Roeun, YÂN Thoeun, YÂN Yon, YÂN Sok Hêng, and YÂN Run were imprisoned at S-21 in late 1977. The Civil Party Appellant claims that her brothers were forced to kill their parents, and then later her brothers were also killed. She further claims that she and her surviving brother, YÂN Run, were sent to Prey Chhor Prison to be executed but were saved by the arrival of the Vietnamese troops.

572. The Trial Chamber rejected the application of this Appellant for the following reasons:

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[1196] Trial Judgement, para. 648.
[1197] Written Statement of CHHIM Phum, 7 August 2010, F11.2.
[1198] Trial Judgement, fn. 1077.

> NAM Mon (E2/32) stated that she was initially a member of the S-21 medical staff, and was later detained there following the arrest of some of her brothers, who were S-21 guards. From there, she was allegedly transferred to S-24 and then to another detention centre. There are, however, inconsistencies between the information contained in her Civil Party application and her in-court statements and subsequent submissions.[1199] She was unable to provide any particulars concerning either S-21 or S-24 and the evidence produced by her purporting to show kinship to persons photographed and executed at S-21 do not clearly establish that these persons are her relatives. Even allowing for the impact of trauma and the passage of time, the Chamber is unable to conclude that NAM Mon (E2/32) was detained either at the S-21 complex or at S-24. Although the Chamber acknowledges her tremendous suffering, NAM Mon's Civil Party application is also rejected.[1200]

573. The Co-Lawyers submit that the Civil Party Appellant's omissions at trial were understandable, based on the fact that she did not dare to disclose that she and her brothers worked at S-21 for fear of reprisals. Further, the Co-Lawyers submit that it is also understandable that the Civil Party Appellant initially omitted the fact that she had been raped due to her trauma and the shame that she felt.[1201]

574. On appeal, the Civil Party Appellant has submitted a written statement by YIM Saron *alias* Heng, commune chief,[1202] who attests that the Appellant's father is depicted in a photograph of a detainee at S-21.[1203] The commune chief also attests that the Appellant was a medic at S-21, stating:

> As to Mon, I know of her background to some extent. She joined the revolution when she was still little, and lived in Phnom Penh city with her uncle Oeun, chief of Division 310. This person was also killed at S-21 (Tuol Sleng). Later on, Mon became a medic at S-21. And I do not know what happened afterwards. That is my brief remark.[1204]

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[1199] Trial Judgement, para. 647. The Trial Chamber found deficiencies with her application that she has not corrected on appeal. For example, the applicant's year of birth as indicated on her Cambodian identification card and application form (1968) differs from her testimony (1960). T. (EN), 13 July 2009, E1/47.1, p. 2 (lines 6-25) and p. 3 (lines 1-12); Victim Information Form of NAM Mon, Khmer filed 20 January 2009, English translation filed 19 May 2009, E2/32; T. (EN), 9 July 2009, E1/46.1, p. 55 (line 19) and p. 66 (line 22). The applicant attempted to explain this difference regarding her year of birth, but the Trial Chamber was apparently not persuaded by such explanation. T. (EN), 13 July 2009, E1/47.1, p. 2 (lines 6-25) and p. 3 (lines 1-12); Trial Judgement, fn. 1083.
[1200] Trial Judgement, para. 647.
[1201] CPG2 Appeal on Admissibility, para. 85.
[1202] CPG2 Appeal on Admissibility, para. 86.
[1203] Written Statement of YIM Saron alias Heng and Photograph of Ta Prak, 9 August 2010, F11.3.
[1204] Written Statement of YIM Saron alias Heng and Photograph of Ta Prak. The English translation of F11.3 incorrectly describes the Civil Party Appellant as a male.

575. The Supreme Court Chamber finds that these attestations from the commune chief satisfy it that the Appellant's father was a direct victim. Accordingly, the Supreme Court Chamber decides to overturn the Trial Chamber's decision and confirm victim status of this Appellant as an indirect victim due to the loss of her father in S-21.

576. The other allegations however remain unsubstantiated. The Supreme Court notes that explanations furnished by counsel as to the inconsistencies in the Appellant's court statements cannot substitute for evidence on which the court could rely. Whatever rationale may underlie the Appellant's insincerity with the trial court, it does not alleviate the fact that she did give inconsistent statements about facts material for her application as well as about seemingly neutral facts, such as her date of birth. Moreover, the Appellant could not provide particulars of S-21 where she allegedly had worked before being victimized. In conclusion, the Supreme Court Chamber finds no reason to intervene in the Trial Chamber's assessment as to this Civil Party Appellant's credibility, and therefore upholds the Trial Chamber's finding that the Appellant has not proven to have been detained at S-21 or S-24.

*Application of Civil Party Appellant E2/35, CHHAY Kan alias LIENG Kân*

577. The Civil Party Appellant claims that she lost four relatives under the Khmer Rouge regime, including her nephew who was detained and executed at S-21. As a result, the Civil Party Appellant claims that she suffers from a psychological injury.

578. The Trial Chamber rejected the application of this Appellant for the following reasons:

> CHHAY Kan (E2/35) *alias* LEANG Kan, alleges that one of her nephews, NHEM Chheuy, was detained at S-21, having seen his photograph when visiting the Tuol Sleng Museum. While it is established that, as a child, LEANG Kan lived with this nephew, who was an orphan, it has not been established that the photograph of the detainee provided in support of her application is in fact that of NHEM Chheuy[.][1205]

[1205] Trial Judgement, para. 648.

579. The Co-Lawyers submit that the Civil Party Appellant's statement in which she identifies a photograph of her nephew at S-21 is conclusive and intrinsically coherent and meets the preponderance standard.[1206] The Civil Party Appellant has submitted an additional written statement from the Appellant's older sister who confirms that the person in the photograph[1207] is the Appellant's nephew, named Mr. NHEM Chheuy.[1208]

580. The Supreme Court Chamber is satisfied with the Appellant's statement as corroborated by documents submitted before the Trial Chamber and this Chamber. Thus, there is basis to reverse the Trial Chamber's decision and to confirm victim status of this Civil Party Appellant.

*Application of Civil Party Appellant E2/64, NHEB Kimsrea*

581. The Civil Party Appellant claims that seven members, namely her aunt, uncle and five cousins were detained and executed at S-21. The Civil Party Appellant claims that she suffers from pain and dissatisfaction.[1209]

582. The Trial Chamber rejected the application of this Appellant for the following reasons:

> NHEB Kimsrea (E2/64) claims that her uncle CHEAB Baro *alias* Pen, the latter's wife KHUT Phorn and five of her cousins were detained and executed at S-21. There is evidence to show that an individual named CHEAB Parou *alias* Pen, was detained at S-21. However, the applicant, who was born in 1978, acknowledges that she could not have known her uncle, her aunt and her cousins. Accordingly, special bonds of affection have not been established between the applicant and these relatives.[1210]

583. The Co-Lawyers' submit that the Civil Party Appellant should be admitted as a civil party because she has suffered harm as a result of the death of the direct victim. The suffering of her parents has accompanied her whole life. On appeal the Civil Party Appellant has submitted an additional confirmation letter from her father which

[1206] CPG2 Appeal on Admissibility, para. 75.
[1207] Photograph of LIENG Kân, 20 January 2009, E2/35.2.
[1208] Written Statement of CHHAY Koeun, 8 August 2010, F11.4.
[1209] Claiming Letter of NHEB Kimsrea, 19 August 2009, E2/64.1, p. 1.
[1210] Trial Judgement, para. 649.

describes the relationship between his family and the deceased's family. The Civil Party Appellant claims that she is the only family member capable to represent her family.

584. The Supreme Court Chamber finds that the Civil Party Appellant could not have had special bonds of affection with the direct victims because she was born after their deaths.[1211] The additional written statement submitted by the Co-Lawyers is therefore not relevant to whether special bonds of affection existed between the Appellant and her relatives who were direct victims.[1212] The Co-Lawyers appear to argue that the Appellant should be granted civil party status on the basis that she is a "second-generation"[1213] indirect victim, meaning the Appellant suffers harm as a result of the harm suffered by her father, who is the brother of one of the direct victims.[1214] Given the explicit requirement that harm suffered by the victim result as a direct consequence of the crimes,[1215] the Supreme Court Chamber holds that the pain and dissatisfaction alleged by the Appellant do not fall within the purview of ECCC reparations. Accordingly, it finds no ground to reverse the Trial Chamber's decision that this Civil Party Appellant did not demonstrate victim status in this case.

*Application of Civil Party Appellant E2/83 HONG Savath*

585. The Civil Party Appellant claims that her uncle was taken away for re-education in 1975 and claims to have never seen him again. In 2008 the Appellant discovered his photograph at S-21.

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[1211] T. (EN), 30 March 2011, F1/4.1, p. 35 (lines 9-11), p. 41 (lines 9-25), p. 42 (lines 1-3).
[1212] Written Statement of CHIEB Nhim, August 2010, F11.5. The applicant's father states, "I would like to confirm that my younger brother CHIEB Baru with his family shared the same house with my family. We had had close relationship until his family went to Phnom Penh, and since then we have never seen each other again."
[1213] CPG2 Appeal on Admissibility, para. 105; T. (EN), 30 March 2011, F1/4.1, p. 41 (9-25) and p. 42 (lines 1-3).
[1214] CPG2 Appeal on Admissibility, para. 105 ("Ms. NHEB Kimsrea lives with her elderly father, who is the brother of the deceased victim. An additional ["witness statement", F11.5] describes how her father and his family lived together with the deceased and his family. The Civil Party Applicant is the only person who is capable of representing the family before the ECCC. She is on a daily basis confronted with the suffering of her father, which causes harm directly to her"). *See also* T. (EN), 30 March 2011, F1/4.1, p. 41 (lines 19-23).
[1215] Internal Rule 23(2)(b).

586. The Trial Chamber rejected the application of this Appellant for the following reasons:

> HONG Savath (E2/83) alleges that her uncle LOEK Sreng was detained and executed at S-21. She claims to have recognised him in a photograph she saw in 2008 during a visit to the Tuol Sleng Museum. However, neither this photograph nor any documentary evidence was provided as proof of her uncle's detention at S-21. The Civil Party, who was 11 years of age when her uncle disappeared, has also not provided evidence of any special bonds of affection or dependency in relation to her uncle.[1216]

587. The Co-Lawyer's submit that the Trial Chamber rejected the Civil Party Appellant's application on the bases that Ms. HONG Savath did not submit anything beyond her statement. The Co-Lawyers submit that the Trial Chamber made an error of fact when it overlooked the photograph taken at S-21 of LOEK Sreng, the Civil Party Appellant's deceased uncle.[1217]

588. The Supreme Court Chamber notes that a photograph of a man was submitted with the Appellant's original application. [1218] The Appellant claims that this photograph is of her uncle who was a direct victim at S-21. On appeal, the Co-Lawyers have submitted an additional written statement from the deceased uncle's brother, named You HONG.[1219] You HONG states that he took a photograph of his brother's (i.e., the Appellant's uncle's) picture at S-21 and later gave it to the Appellant who included it with her civil party application. The Supreme Court Chamber notes that You HONG does not confirm that he viewed the photograph submitted by the Appellant. Nevertheless, the Supreme Court Chamber finds that the statements from the Appellant and You HONG suffice to establish kinship between the Appellant and the direct victim.

589. Regarding special bonds of affection, the additional statement of You HONG provides:

> I would like to claim that prior to the Khmer Rouge regime (during the Lon Nol regime), the three families-the family of LOEK Sreng, the family of

[1216] Trial Judgement, para. 648.
[1217] CPG2 Appeal on Admissibility, paras 87-89.
[1218] Photograph of LOEK Sreng, 12 February 2009, E2/83.3.
[1219] Written Statement of You HONG, 28 July 2010, F11.6.

> HONG Savath, and mine consisting of myself and my wife lived very closely together as one family and shared a house.[1220]

590. The fact that the Appellant was 11 years old when her uncle disappeared does not necessarily reduce the likelihood that she had special bonds of affection with him at the time. You HONG has confirmed that the Appellant's and her uncle's families "lived very closely together as one family and shared a house." There is no reason for the Supreme Court Chamber to doubt that an 11 year old child is capable of forming a special bond of affection with an uncle who she lives closely with and who had no children of his own. You HONG's statement is enough information to establish that a special bond of affection existed between the Appellant and the direct victim as of the latter's death. The Supreme Court Chamber therefore reverses the Trial Chamber's decision and confirms victim status of this Appellant.

### 3. Civil Parties Group 3 (E2/23, E2/33, E2/34, E2/63, E2/70, E2/71, E2/82, D25/11)

*Application of Civil Party Appellant E2/23, LAY Chăn*

591. The Civil Party Appellant claims that he was interrogated and tortured while imprisoned at S-21. The Appellant claims that as a result of the crimes committed against him he suffers from physical, psychological and material injury.

592. The Trial Chamber rejected the application of this Appellant for the following reasons:

> Although the Chamber does not doubt that LAY Chan (E2/23) suffered severe harm as a result of detention, interrogation and torture during the DK period, no evidence was provided to show that this occurred at S-21. No objective proof from official registers, photographs or confessions corroborates his claim to have been detained there, and his description of detention conditions is at odds with the bulk of the evidence before the Chamber regarding established practices at S-21.[1221] The Chamber is

[1220] Written Statement of You HONG, p. 2.
[1221] Trial Judgement, fn. 1081 ("T., 07 July 2009 (LAY Chan), pp. 8, 11-2, 17-19 (stating that he was unable to recall being officially registered or photographed or having to provide a biography, providing a description of his cell that does not correspond to others provided of the cells at S-21 and claiming, contrary to established policies, to have been released from S-21 without explanation. During a site visit to S-21, he was also unable to recognize any part of S-21 as the place where he was incarcerated)").

> accordingly not satisfied to the required standard that LAY Chan (E2/32) was detained either at S-21 or S-24. Absent sufficient proof of a causal link between the events described and the crimes for which KAING Guek Eav was convicted, his Civil Party application is rejected. [1222]

593. The Appellant has submitted an additional photograph to the Supreme Court Chamber,[1223] presumably to challenge the Trial Chamber's finding that the Appellant "provid[ed] a description of his cell that does not correspond to others provided of the cells at S-21."[1224] It is not clear to the Supreme Court Chamber whether the Co-Lawyers claim that the photograph is of the Appellant's actual cell[1225] or is an example of the kind of cell in which the Appellant was detained.[1226] In any event, even if this additional photograph proves that the Appellant's description of his cell is credible, the Co-Lawyers have not adduced any argument or additional evidence on appeal addressing the other deficiencies with his application as found by the Trial Chamber. The Supreme Court Chamber therefore finds no reason to intervene in the Trial Chamber's assessment of the credibility of this Appellant. Accordingly, the Supreme Court upholds the Trial Chamber's decision that this Appellant did not demonstrate victim status in this case.

*Application of Civil Party Appellant E2/33, PHAOK Khân*

594. The Civil Party Appellant claims that in 1977 and 1978, his wife, TUY Leap, and his cousin, TIN Neth, were imprisoned, tortured and executed at Tuol Sleng. Further, the Civil Party Appellant claims to also have been imprisoned and tortured at Tuol Sleng, however he escaped before he was to be executed. The Appellant claims that as a result of the crimes committed by KAING Guek Eav he suffers from psychological injury.

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[1222] Trial Judgement, para. 647.
[1223] Request to Submit Additional Evidence in Support of Appeal Brief by the Co-Lawyers for Civil Parties Group 3, Khmer filed 4 March 2011, English translation filed 16 March 2011, F2/1, para. 16; Photograph of LAY Chăn's Cell, 4 March 2011, F2/1.7; T. (EN), 30 March 2011, F1/4.1, p. 75 (lines 8-12); CPG3 Appeal, para. 83, fn. 12 ("Photograph attached to the appeal").
[1224] Trial Judgement, fn. 1081.
[1225] The following words are written at the top of the photograph, "Photograph taken at S-21; location of Mr LAY Chăn's cell."
[1226] Request to Submit Additional Evidence in Support of Appeal Brief by the Co-Lawyers for Civil Parties Group 3, para. 16. ("[the] photograph taken at S-21 shows that, as reported by LAY Chăn, there were indeed many cells below a staircase as described and reported several times by him"); T. (EN), 30 March 2011, F1/4.1, p. 75 (lines 10-12) (MOCH Sovannary) ("[the photograph] prov[es] that there is a cell under the stair, and that photo was taken from the Tuol Sleng museum").

595. The Trial Chamber rejected the application of this Appellant for the following reasons:

> PHAOK Khan (E2/33) recounted being tortured and interrogated at a prison in the vicinity of Phnom Penh during the DK period. While it is plausible that the Civil Party may have been detained and tortured by Khmer Rouge soldiers, there is no objective evidence that this occurred at the S-21 complex. The description provided of his place of detention does not match that of S-21 and, contrary to standard S-21 procedures, the Civil Party was neither photographed nor compelled to provide a biography. In addition, the Civil Party's account of his escape from the place of execution and the geographical indicia provided are inconsistent with Choeung Ek, where he claims to have been left for dead. PHAOK Khan further alleged that his wife and a cousin were also killed at S-21. However, no evidence was furnished to show that his wife was detained there. While it is undisputed that an individual named CHOEUNG Phoam was detained and executed at S-21, the applicant himself admitted that he could not provide proof of his relationship to him. His Civil Party application is therefore also rejected.[1227]

596. The Co-Lawyers argue against dismissing the Appellant's statement and submit that the fact that KAING Guek Eav did not contest the application militates in favour of reversing the Trial Chamber's decision.[1228] They further submit that photographs offered as evidence on appeal demonstrate the merits of the Appellant's application.[1229] The Co-Lawyers also argue that the Appellant should be granted civil party status in Case 001 because he was admitted by the Co-Investigating Judges in Case 002.[1230]

597. The Supreme Court Chamber rejects the Co-Lawyers' first submission considering that in the face of deficiencies of the Appellant's statements it would be unfair to KAING Guek Eav to use his silence to make an adverse finding against him. The Supreme Court reiterates that it does not exclude that a civil party applicant's statement alone may suffice as substantiation of an allegation, especially where it is the most obvious or only available evidence. Such finding, however, requires that the statement be credible by virtue of inherent consistency, exhaustiveness and plausibility in the overall context. Minor inconsistencies or contradictions could be explained on account of fallibility of human perception and memory, especially with the passage of time. Still, it is necessary that the party recount events in acceptable

[1227] Trial Judgement, para. 647.
[1228] CPG3 Appeal, para. 74.
[1229] CPG3 Appeal, paras 74-76.
[1230] CPG3 Appeal, para. 75.

detail. These conditions are not present in this case, where the Appellant's statement is deficient regarding material facts put forth in support of the application. Accordingly, the Supreme Court Chamber finds no grounds to intervene with the Trial Chamber's assessment of evidence in this case.

598. The Supreme Court has no cognizance over the Appellant's submissions in Case 002 and would examine specific evidence contained in that file only if so directed by the Appellant. The Appellant was also invited to submit any additional evidence directly before this Chamber. In any event, the fact that the Appellant has been admitted in Case 002 by the Co-Investigating Judges pursuant to the *prima facie* standard of proof[1231] is not conclusive for the admissibility of his application at the conclusion of Case 001. In this case the Supreme Court Chamber concludes that the Civil Party Appellant did not demonstrate direct victim status.

599. Further, on appeal the Civil Party Appellant has filed additional photographs that he claims are photos of his wife, uncle, and his uncle's wife.[1232] It was only after visiting S-21 that he was able to identify the photographs of his wife, his uncle, and the latter's wife. While these photographs do not have names attached, the Supreme Court Chamber finds that the Appellant's attestation of the identities of the persons in the photographs is sufficient; the Supreme Court Chamber has no reason to doubt such attestation. The Supreme Court Chamber therefore reverses the Trial Chamber's decision and confirms the Appellant's indirect victim status in this case.

[1231] *See, e.g.* Case No. 002/19-09-2007-ECCC-OCIJ, Order on the Admissibility of Civil Party Applicants from Current Residents of Kampong Thom Province, 14 September 2010, D418, paras 10, 24.
[1232] Request to Submit Additional Evidence in Support of Appeal Brief by the Co-Lawyers for Civil Parties Group 3, para. 11 ("Mr PHAOK Khan (E2/33) also reported that members of his family died at S-21. It was only after visiting S-21 that he was able to identify the photographs of his wife, his uncle, and the latter's wife") (citations to photos omitted). The six additional photographs are: F2/1.1- F2/1.2 (wife); F2/1.3- F2/1.4 (uncle); and F2/1.5- F2/1.6 (uncle's wife).

*Application of Civil Party Appellant E2/34, SO Saung*

600. The Civil Party Appellant claims that her brother-in-law was imprisoned and executed at S-21, and that the disappearance of her brother-in-law has caused the Appellant tremendous distress.[1233]

601. The Trial Chamber rejected the application of this Appellant for the following reasons:

> SO Saung (E2/34) alleges that her brother-in-law MEAS Sun *alias* TENG Sun was detained and executed at S-21. In support of her claim, she provided a photograph from the archives of the Tuol Sleng Museum. However, the photograph provides no attestation of identity and on its own does not establish that the person in the photograph is actually MEAS Sun. Further, no proof was provided of any dependency or special bonds of affection between the Civil Party and her brother-in-law.[1234]

602. The Co-Lawyers submit that the Civil Party Appellant had showed proof of kinship with MEAS Sun. The Trial Chamber omitted to take into account the provided photographs of the direct victim. The Trial Chamber's error is revealed in the Co-Investigating Judges' order on admissibility in Case 002 in which the Civil Party Appellant was held to have suffered psychological harm that is directly linked to the crimes committed at S-21.[1235]

603. The Supreme Court Chamber finds that the Appellant's attestation of the identity of the person in the photograph is sufficient; the Supreme Court Chamber has no reason to doubt that the person in the photograph is the Appellant's brother-in-law. However, the Co-Lawyers have not submitted any evidence to establish special bonds of affection or dependence in relation to the Appellant's deceased brother-in-law. A mere kinship of this kind does not lead to a presumption of closeness or dependence and, in the absence of documentary or other material evidence, would require detailed testimonial evidence that was not offered. The fact that the Appellant has been

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[1233] Victim Information Form of SO Saung, Khmer filed 20 January 2009, English translation filed 6 August 2009, E2/34, p. 3.
[1234] Trial Judgement, para. 648, fn. 1094 ("Although kinship by marriage was established by attestation (Lettre de confirmation, 14 August 2009, E2/34/5.2), such kinship alone is insufficient (Section 4.2.2.)").
[1235] CPG3 Appeal, paras 92-94.

admitted in Case 002 by the Co-Investigating Judges pursuant to the *prima facie* standard of proof is not conclusive for the admissibility of his application at the conclusion of Case 001. The Supreme Court Chamber therefore finds no grounds to reverse the Trial Chamber's decision that this Appellant did not demonstrate victim status in this case.

*Application of Civil Party Appellant E2/63, PANN Pech*

604. The Civil Party Appellant claims that in 1978 she received a photograph of her younger brother-in-law that was taken at S-21 and it depicted her brother-in-law shackled and mutilated. The Civil Party Appellant claims that she is traumatised and in shock.

605. The Trial Chamber rejected the application of this Appellant for the following reasons:

> PANN Pech (E2/63) claims that her brother-in-law PLAING Hauy was allegedly detained and executed at S-21 but provides no evidence in support of this claim.[1236]

606. On appeal, the Co-Lawyers have not provided any additional evidence to support the Appellant's application. The Co-Lawyers argue that, given "the consistent nature of the victim's statements, the facts reported [by] him are clearly truthful."[1237] The Co-Lawyers also argue:

> The Court ought to take into consideration the difficulties encountered by the victim in producing proof of his brother's[1238] detention at S-21, and of the fact that a large number of the records relating to S-21 have either disappeared or were destroyed.[1239]

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[1236] Trial Judgement, para. 648. *See also* Trial Judgement, fn. 1101 ("Further, alleged kinship by marriage alone is an insufficient basis for a Civil Party application (Section 4.2.2.)").
[1237] CPG3 Appeal, para. 71.
[1238] While the original French of document F9, para. 72 is also "son frère," it is clear from the Victims Unit's Report on Civil Party Application, 28 January 2009, E2/63/1 and other documents (*e.g.* Written Statement of KY Sean Thai, 15 May 2008, E2/63.1) that the alleged direct victim is the applicant's brother-in-law.
[1239] CPG3 Appeal, para. 72.

607. The Supreme Court Chamber finds that, even assuming that the identity of and kinship with the direct victim have been proven, the Appellant bases her claim that the direct victim had been imprisoned, tortured and, in all probability, murdered in S-21, not on her own direct knowledge but on a photograph of an unknown provenance and presently not available. While the Supreme Court Chamber has no reason to doubt the subjective veracity of the Appellant's belief in the facts alleged, it cannot, however, accept it as evidence. Therefore, it has to concur with the Trial Chamber in that it has not been substantiated that the brother-in-law was a prisoner of S-21. Besides, the Appellant has not offered any facts to support the existence of special bonds of affection or dependence in relation to her brother-in-law. As previously noted, such kinship does not allow the presumption of special closeness or dependence. The Supreme Court Chamber therefore finds no grounds to reverse the Trial Chamber's decision that this Appellant did not demonstrate victim status in this case.

*Application of Civil Party Appellant E2/70, CHAN Yoeung*

608. The Civil Party Appellant claims that her uncle, SOK Bun, who was the former village chief, was arrested and imprisoned at the Rovieng College Prison, and then later transferred to and imprisoned at S-21 with six others. After liberation the Civil Party Appellant was informed by NUNG Sokhon, SOK Bun's wife, that her uncle was executed at S-21.

609. The Trial Chamber rejected the application of this Appellant for the following reasons:

> E2/70 claims that her uncle SOK Bun was detained and executed at S-21. While an attestation of this kinship was provided, the applicant admits that no substantiation of her uncle's alleged detention at S-21 was provided.[1240]

610. In their written appeal brief, the Co-Lawyers submit the following:

> SOK Bun, her[1241] uncle, was indeed the mayor of Romeas Hek, Rovieng district, Preah Vihear province; this proves that some village chiefs and

[1240] Trial Judgement, para. 648.

> mayors were arrested in this commune and district in early 1978 and taken to Ro Vieng school before being transferred to S-21 in Phnom Penh. At trial, Duch recognized that such internal purges did occur.[1242]

611. At the Appeal Hearing, the Co-Lawyers stated, "There is no evidence showing her uncle's photo at Tuol Sleng, however the information that is provided by her is credible, and I urge Your Honours to examine it."[1243]

612. The Supreme Court Chamber cannot infer that the Appellant's uncle was detained at S-21 on the basis of what happened to "some village chiefs and mayors." The alleged general admission of internal purges by KAING Guek Eav[1244] and the Appellant's own conviction do not suffice for proof of the required facts even if such conviction is sincere. The Supreme Court Chamber therefore finds no reason to reverse the Trial Chamber's decision that this Appellant does not qualify for civil party status under the Internal Rules.

*Application of Civil Party Appellant E2/71, SOEM Pov*

613. The Civil Party Appellant claims that her brother-in-law was imprisoned, tortured and executed at Tuol Sleng in 1976, and that as a result of the crimes committed by KAING Guek Eav she suffers from economic hardship.

614. The Trial Chamber rejected the application of this Appellant for the following reasons:

> SOEM Pov (E2/71) alleges that her brother-in-law NGUY Sreng was detained and executed at S-21. In support of these claims, she provided a biography from the archives of S-21. Although the detention of NGUY Sreng at S-21 is thus established, kinship by marriage alone is an insufficient foundation absent proof of any special bonds of affection or dependency (Section 4.2.2).[1245]

615. The Appellant has not submitted any evidence that proves special bonds of affection or dependence in relation to the direct victim. In particular she did not

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[1241] The English translation of the CPG3 Appeal, para. 67, incorrectly states "his uncle."
[1242] CPG3 Appeal, paras 67-68.
[1243] T. (EN), 30 March 2011, F1/4.1, p. 77 (lines 23-25).
[1244] CPG3 Appeal, para. 68 ("At trial, Duch recognized that such internal purges did occur").
[1245] Trial Judgement, para. 649.

demonstrate that the loss of her brother-in-law would have caused economic damage to her. Such damage cannot be presumed on the basis of a mere kinship by marriage and would require demonstration of concrete facts concerning the effect of the direct victim's death on the Appellant's patrimony. Absent such facts, the Supreme Court Chamber finds no grounds to reverse the Trial Chamber's decision that this Appellant did not demonstrate victim status in this case.

*Application of Civil Party Appellant E2/82, MÂN Sothea*

616. The Civil Party Appellant claims that his mother, a former diplomat, was imprisoned and executed at S-21. The Appellant experiences fear and sadness as a result of the crimes committed against his mother.

617. The Trial Chamber rejected the application of this Civil Party Appellant for the following reasons:

> MORN Sothea (E2/82) claims that his mother, a former diplomat, and many other family members disappeared during the evacuation of Phnom-Penh in April 1975. Although his statement appears credible, it is unsupported by proof of any demonstrable link to the crimes for which KAING Guek Eav has been convicted.[1246]

618. The Co-Lawyers submit that the Trial Chamber committed an error of fact by omitting to take account of the photographs of the direct victims taken at S-21 that had been submitted before it.[1247] On appeal, the Appellant has submitted two items of additional evidence. The Appellant's aunt authored a written statement attesting to the kinship between the Appellant and his mother, SEM Soklin, who is the direct victim, and stating that in November 2009 at S-21 she discovered a photograph of SEM Soklin.[1248] This photograph is the second item of additional evidence.[1249]

619. The Supreme Court Chamber finds that this additional evidence is sufficient to prove the link between the Appellant and the crimes for which KAING Guek Eav has

[1246] Trial Judgement, para. 648.
[1247] CPG3 Appeal, para. 95.
[1248] Written Statement of SAING Thai, 13 August 2010, F2/6.2.
[1249] Photograph of SEM Soklin, 1 April 2011, F2/6.3.

been found responsible. The Supreme Court Chamber therefore reverses the Trial Chamber's decision and grants victim status to this Appellant.

*Application of Civil Party Appellant D25/11, KHUON Sarin*

620. The Civil Party Appellant claims that his uncle, KHIEV Sokkour, who worked at the Japanese Embassy under Lon Nol's regime, was imprisoned at S-21 and executed in 1976.

621. The Trial Chamber rejected the application of this Appellant for the following reasons:

> KHUON Sarin (D25/11), whose claim is based on the arrest and execution of KHIEV Sakhor, a staff member of the Cambodian embassy in Japan. While KHIEV Sakour's detention at S-21 has been proven, there is no document showing the exact nature of his alleged kinship to the Civil Party or proof of any special bonds of affection. Although KAING Guek Eav did not dispute this Civil Party application, the Chamber nevertheless cannot uphold it[.][1250]

622. The Co-Lawyers' submit that the Civil Party Appellant is the direct victim's nephew and that his uncle raised him and treated him as his own son.[1251] The Co-Lawyers' assertion on appeal is insufficient to solve the problems with the application that were identified by the Trial Chamber. While the Supreme Court Chamber would not necessarily require documentary evidence, it would still expect, at minimum, testimonial evidence in order to establish the alleged relationship between the Appellant and the victim. The Supreme Court Chamber therefore finds no ground to reverse the Trial Chamber's decision that this Appellant did not demonstrate victim status in this case.

[1250] Trial Judgement, para. 649.
[1251] CPG3 Appeal, para. 91 (the original French, ERN 00613343, incorrectly states that the applicant is the uncle of the direct victim; the applicant in fact claims that the direct victim is his uncle. Victim Information Form, Khmer filed 20 May 2008, English translation filed 18 November 2008, D25/11).

623. The Co-Lawyers for Civil Parties Group 3 make submissions in relation to the rejection of the civil party application of E2/38 (HIET Teycheou) in the Trial Judgement.[1252] The Supreme Court Chamber, however, has not considered the merits of these submissions due to procedural defects in the appeal, including that there was no power of attorney from the applicant attached to the Notice of Appeal,[1253] and neither the name nor pseudonym of the applicant was included in the list of appellants in the Notice of Appeal.[1254] Thus, the Supreme Court Chamber rejects the submissions in relation to E2/38 (HIET Teycheou) on the basis of Internal Rule 111(2).

### 4. Appeal Regarding Civil Party CHUM Sirath

624. Civil Parties Group 2 has appealed to the Supreme Court Chamber on behalf of Civil Party Mr. CHUM Sirath against the Trial Chamber's omission of the name of his sister-in-law, Ms. KEM Sovannary, and her child (name unknown) in the list of admitted Civil Parties in the Trial Judgement.[1255]

625. On 30 July 2010 the Co-Lawyers requested the Trial Chamber to correct the Judgement and to include a reference to Ms. KEM Sovannary and her child on page 230 of the Judgement (English version) and the corresponding pages in the Khmer and French versions.[1256] The Trial Chamber failed to decide upon this request.

626. The Co-Lawyers submit that "[t]he omission of the name of Mr. CHUM Sirath 's sister-in-law is based on an error of fact which has occasioned a miscarriage of justice and an error of law/Internal Rules by violating IR 21 (1) (a) and (c) invalidating the Judgment."[1257] The Co-Lawyers submit that omitting Ms. KEM Sovannary and her child's name from the list of admitted Civil Parties, while including non-immediate family members of other Civil Parties, amounts to unequal treatment that violates Internal Rule 21(1)(a) and (c).

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[1252] CPG3 Appeal, paras 77-80; Trial Judgement, p. 226.
[1253] *Cf.* document E188/4.1 from Appellant D25/11.
[1254] CPG3 Notice of Appeal, paras 1-7.
[1255] CPG2 Appeal on CHUM Sirath, paras 1-2.
[1256] Request for Correction from Co-lawyers for Civil Parties, 2 August 2010, E188/1.
[1257] CPG2 Appeal on CHUM Sirath, paras 11-14.

627. The Supreme Court Chamber recalls that the Trial Chamber held in the Judgement:

> [S]ome [of the] Civil Party applications are accepted on the basis of victims who were immediate family members, other victims who were instead extended family members are listed merely for information purposes. It is only where applications were based exclusively on alleged links to extended family members that the Chamber has considered whether sufficient evidence was provided to show the existence of special bonds of affection or dependency.[1258]

628. Mr. CHUM Sirath's Civil Party status was granted by the Trial Chamber on the establishment of his immediate family members' arrest and detention at S-21. The Trial Chamber therefore did not find it necessary to establish that kinship and a 'special bond of affection' existed between Mr. CHUM Sirath and his sister-in-law and her child.

629. An appeal against a clerical error that does not relate to a determination of law or an established fact falls outside the scope of the appeal before this Chamber[1259] and is therefore rejected as inadmissible. Nevertheless, as the Supreme Court Chamber accepts that the omission of Ms. KEM Sovannary and her child from the list of victims in the Judgement amounts to a clerical error, the Supreme Court Chamber thus corrects the clerical error itself to include the names of Ms KEM Sovannary and her child in the Trial Judgement.

[1258] Trial Judgement, fn. 1123.
[1259] Internal Rule 104.

# VII. ALLEGED ERRORS CONCERNING CLAIMS FOR REPARATION (APPEALS FROM CIVIL PARTIES GROUPS 2 AND 3)

## A. Orders Sought by the Civil Party Appellants

630. Civil Parties Group 1 ("CPG1") has not lodged an appeal against the Trial Chamber's findings on reparations because it is satisfied that the admission of a civil party application is adequate reparation in and of itself.[1260] In the event, however, that the grounds of appeal on reparation put forward by the other Civil Party Appellants are granted, CPG1 requests that the benefits deriving from any reparations that are awarded by the Supreme Court be extended also to the Civil Parties in CPG1 whose applications were admitted by the Trial Chamber or the Supreme Court Chamber on appeal.[1261]

631. Civil Parties Group 2 ("CPG2") articulates extensive submissions on reparations. In its Notice of Appeal as well as in its Appeal on Reparations, it requests that the Supreme Court Chamber overturn the Trial Chamber's rejection of its nine reparation requests and consequently grant these claims in their entirety.[1262]

632. The main focus of the appeal of Civil Parties Group 3 ("CPG3") lies in the admissibility of the rejected Civil Party Appellants. It nonetheless also requests the Supreme Court Chamber to grant the Appellants' original claims for reparations filed before the Trial Chamber and refused in the Trial Judgement.[1263]

## B. Civil Party Appellants' General Submissions

633. The Supreme Court Chamber will first examine the Civil Party Appellants' general submissions concerning the following three issues:

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[1260] CPG1 Notice of Intent, paras 4-5.
[1261] T. (EN), 30 March 2011, F1/4.1, p. 8 (lines 3-9).
[1262] Notice of Appeal of Co-Lawyers for Civil Parties (Group 2) on the Reparation Order, 6 September 2010, E188/14, para. 9; CPG2 Appeal on Reparations, paras 8, 130.
[1263] Notice of Appeal by the Co-Lawyers for Civil Party Group 3, Khmer filed 20 August 2010, English translation filed 6 September 2010, E188/4, paras 26-27; CPG3 Appeal, paras 107-108.

a) whether the ECCC is empowered to grant reparation measures that require the assistance of the RGC to be implemented;
b) whether KAING Guek Eav's current state of indigence precludes the ECCC from issuing reparation orders the execution of which requires him to have financial means; and
c) whether the Trial Chamber committed an error of law by grouping the reparation requests and disposing of them without explicitly explaining which request is addressed under each group.

634. The Supreme Court Chamber will then move on to address in turn each of the Civil Party Appellants' specific claims for reparation that have been reiterated before the Chamber on appeal.

### 1. Submissions

635. As a general observation, CPG2 notes that, independent of changes of government over a period of time, States are entrusted with a responsibility to grant reparations.[1264] Since the Kingdom of Cambodia is a State Party to the ICCPR and to the Convention Against Torture, both of which oblige it to guarantee effective remedies for victims of violations of the respective treaties, the Cambodian State has a legal obligation to satisfy the internationally recognised right to reparations.[1265] While admitting that the scope of the ECCC's jurisdiction does not include the power to order reparations that would create obligations on the part of the RGC, CPG2 submits that the ECCC is not prevented from ordering reparations that require the RGC's assistance in the form of "non-pecuniary and administrative support rather than a financial contribution,"[1266] given that such assistance underlies "a general duty of States to take care of the needs of their population."[1267] Civil Parties Group 3 also argues, albeit without further expansion, that the ECCC can go beyond its mandate with regard to awarding reparation in light of "the provisions of the ECCC Law on property acquired unlawfully or by criminal conduct."[1268]

[1264] CPG2 Appeal on Reparations, para. 21.
[1265] CPG2 Appeal on Reparations, paras 22-23.
[1266] CPG2 Appeal on Reparations, para. 25.
[1267] CPG2 Appeal on Reparations, para. 25.
[1268] CPG2 Appeal on Reparations, para. 98.

636. Civil Parties Group 2 further submits that the indigence of KAING Guek Eav should not prevent the ECCC from issuing reparation orders.[1269] Although reparations are to be "awarded against, and be borne by convicted persons,"[1270] CPG2 argues that they should be issued irrespective of KAING Guek Eav's financial situation and should not be refused merely on the ground of uncertain financing.[1271] Civil Parties Group 2 notes in this respect that even if KAING Guek Eav does not appear to currently possess any assets, a thorough financial investigation might in fact uncover assets or he might receive income at a future date from media publications or other sources.[1272]

637. As a common ground of appeal related to all of its unsuccessful reparation requests, CPG2 submits that the Trial Chamber committed an error of law by abstracting and grouping the Civil Parties' requests without explicitly indicating which request was examined under which paragraph, thereby violating the right to a reasoned decision as developed internationally, guaranteed under Internal Rule 21, and already confirmed by the Pre-Trial Chamber of the ECCC.[1273] Civil Parties Group 2 avers that the Trial Chamber's inadequate and insufficient reasoning not only infringed the fundamental right of the Civil Party Appellants to a reasoned decision, it also precludes a fair and comprehensive appellate review by the Supreme Court Chamber.[1274]

## 2. Discussion

### *a. Civil Party Reparations in the ECCC Legal Framework*

638. As the Civil Party Appellants often relied on a variety of international legal authorities in their submissions, it is appropriate to first outline the legal framework applicable to reparations before the ECCC in order to assess the extent to which these authorities are relevant.

[1269] T. (EN), 30 March 2011, F1/4.1, p. 47 (lines 14-15).
[1270] Internal Rule 23(11).
[1271] CPG2 Appeal on Reparations, para. 26.
[1272] T. (EN), 30 March 2011, F1/4.1, p. 47 (lines 16-21).
[1273] CPG2 Appeal on Reparations, paras 29-44.
[1274] CPG2 Appeal on Reparations, paras 30-35, 39.

639. As correctly noted in the Trial Judgement,[1275] civil party participation before the ECCC includes both the right for victims to participate as parties in the criminal trial of an accused, and to pursue a related civil action for collective and moral reparations.[1276] While the 2007 Code of Criminal Procedure and the Internal Rules comprehensively regulate the right to participation, when it comes to reparations the Internal Rules are a rather terse legal framework. In this matter the fundamental provisions are Internal Rule 23(11) and (12) which read:

> (11) Subject to Article 39 of the ECCC Law, the Chambers may award only collective and moral reparations to Civil Parties. These shall be awarded against, and be borne by convicted persons.
> (12) Such awards may take the following forms:
> (a) An order to publish the judgment in any appropriate news or other media at the convicted person's expense;
> (b) An order to fund any non-profit activity or service that is intended for the benefit of Victims; or
> (c) Other appropriate and comparable forms of reparation.

640. After the final judgement is delivered, "the enforcement of reparations shall be made at the initiative of a Civil Party."[1277]

641. Expanding the panorama, the Supreme Court Chamber observes that the notion of reparations before the ECCC combines elements of private and public law and draws from two sources: Cambodian criminal procedure for civil party claims[1278] and international human rights law on reparations, which recently has been implemented in international criminal proceedings.[1279] However, the relevance of Cambodian law and of principles derived from international instruments or jurisprudence is limited because the Internal Rules delineate a specific reparation regime that has been tailored to the ECCC's *sui generis* mechanism and mandate.

642. Cambodian law recognises the right of victims to seek a remedy for the harm suffered. Article 2 of the 2007 Code of Criminal Procedure, in delineating the general goals of criminal and civil actions, states that the latter aims to "seek compensation for injuries to victims of an offense and with this purpose to allow victims to receive

[1275] Trial Judgement, para. 660.
[1276] Internal Rule 23(1).
[1277] Internal Rule 113(1).
[1278] 2007 Code of Criminal Procedure, Arts 13-26.
[1279] *See, e.g.* ICC Statute, Art. 75; STL Statute, Art. 25.

reparation corresponding with the injuries they suffered."[1280] A civil action for compensation in domestic criminal proceedings, similar to cases before the ECCC, is limited to injury that is "a direct consequence of an offense," constitutes personal damage, and "actually occurred and exist[s] at the present time."[1281]

643. There are several differences between reparations at the ECCC and compensation under Cambodian national law. Domestically, the scope of civil action is significantly wider. Civil parties may claim compensation for injury against a broader group of liable persons, including, but not limited to, perpetrators.[1282] Under the ECCC regime the civil action may be directed only against the accused.[1283] Domestic courts are competent to order a wider range of classic civil law remedies, such as damages proportional to the injury suffered, return of lost property and restoration of damaged or destroyed property to its original state.[1284] In comparison, the Internal Rules confine reparations to moral and collective awards, yet this category allows measures not available under the 2007 Code of Criminal Procedure.[1285] As such, civil actions at the ECCC are not restricted by the statute of limitations provided for in the Civil Code of Cambodia.[1286] Finally, a resulting difference between the two regimes concerns the possibility to bring the civil action before civil courts, envisaged under domestic law[1287] yet not available for civil parties before the ECCC.

644. Therefore, while the reparations regime envisaged by the Internal Rules derives from analogous forms of redress found in the 2007 Code of Criminal Procedure, the Trial Chamber correctly held that the regulations regarding civil parties before the ECCC must be distinguished from and cannot readily be drawn by way of

[1280] 2007 Code of Criminal Procedure, Art. 2(3).
[1281] 2007 Code of Criminal Procedure, Art. 13.
[1282] 2007 Code of Criminal Procedure, Art. 21 (stating that a civil action can be made against all persons who are liable to compensate for injury resulting from the offence: perpetrators, accessories, accomplices and any other individuals who are liable to compensation). As a result, at the domestic level, compensation can also be ordered to be borne by civil defendants other than the accused. 2007 Code of Criminal Procedure, Arts 291(4) (defining civil defendants as "those who shall be legally liable to compensate for damages caused to the victim"), 355 (stating that the claims of the civil party can be decided against the accused and civil defendants).
[1283] Internal Rule 23(11).
[1284] 2007 Code of Criminal Procedure, Art. 14.
[1285] Internal Rule 23(1)(b), (11).
[1286] 2007 Code of Criminal Procedure, Art. 26.
[1287] 2007 Code of Criminal Procedure, Art. 22.

analogy to those in domestic law.[1288] This observation is particularly valid regarding the civil compensation regime, from which the Internal Rules significantly depart. As noted by the Trial Chamber, "[s]uch departures from national law were considered necessary in view of the large number of Civil Parties expected before the ECCC and the inevitable difficulties of quantifying the full extent of losses suffered by an indeterminate class of victims."[1289] Moreover, as necessitated by the need to fulfil its mandate of adjudicating international crimes the prosecution of which has been unviable for many years, reparations before the ECCC are intended to be essentially symbolic rather than compensatory,[1290] with eligibility decided on an equitable basis rather than according to civil compensation formulae.

645. As concerns international law, the articulation of the right to reparation dates back to the Permanent Court of International Justice's Judgment in the *Chorzow Factory* case, stating that:

> [I]t is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation.[1291]

The Permanent Court went on to clarify that "reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed."[1292]

646. This milestone Judgment established an international principle that any violation must be remedied *in full*, if possible through *restitutio in integrum*, that is, restoration of the prior lawful status. In a more recent advisory opinion, the International Court of Justice held that this principle applies also between States and individuals.[1293]

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[1288] Trial Judgement, para. 661.
[1289] Trial Judgement, fn. 1144.
[1290] Trial Judgement, fn. 1144.
[1291] *Case Concerning Factory at Chorzow (Germany v. Poland)*, Judgment (Claim for Indemnity) (The Merits), Permanent Court of International Justice, 13 September 1928, PCIJ Series A, No 17, para. 73.
[1292] *Chorzow Factory*, Judgment (Claim for Indemnity) (The Merits), para. 125.
[1293] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, International Court of Justice, 9 July 2004, ICJ Reports (2004), paras 152-153 (holding that Israel is under an obligation to make reparation for the damage caused to all natural or legal persons by returning the property that had been seized or, if materially impossible, by compensating the person in question for the damage suffered).

647. This principle, developed within the context of state responsibility, has been progressively extended to human rights law.[1294] Article 8 of the Universal Declaration of Human Rights affirms that an individual enjoys the right to an effective remedy by the competent national tribunals for conduct infringing his or her fundamental rights. Likewise, many human rights treaties include specific provisions confirming the right to an effective remedy for individuals whose rights under the treaty have been infringed. Article 2(3) of the ICCPR requires States Parties to ensure that an effective remedy is afforded to any person whose rights have been violated.[1295] Similarly, the right to remedy is confirmed in the Convention on the Elimination of All Forms of Racial Discrimination,[1296] the Convention Against Torture,[1297] the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography,[1298] and the regional human rights conventions, ECHR[1299] and ACHR.[1300]

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[1294] *See* Dinah Shelton, *Remedies in International Human Rights Law*, 2nd ed., Oxford University Press, 2006, pp. 113 *et seq*.

[1295] ICCPR, Art. 2(3) (providing that State Parties shall: ensure that "any person whose rights or freedoms as herein recognized are violated shall have an effective remedy"; "develop the possibilities of judicial remedy"; and "ensure that the competent authorities shall enforce such remedies when granted"). *See also* ICCPR, Art. 9(5) (mandating that "Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation"); Human Rights Committee, General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (26 May 2004), para. 15 ("Article 2, paragraph 3 [of the ICCPR], requires that in addition to effective protection of Covenant rights States Parties must ensure that individuals also have accessible and effective remedies to vindicate those rights").

[1296] Convention on the Elimination of All Forms of Racial Discrimination, Art. 6 (obliging State Parties to "assure to everyone within their jurisdiction effective protection and remedies, […] as well as the right to seek from [competent national] tribunals just and adequate reparation or satisfaction").

[1297] Convention Against Torture, Art. 14(1) (enshrining the enforceable right of the victims to "fair and adequate compensation including the means for as full rehabilitation as possible").

[1298] Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, opened for signature 25 May 2000, 2171 UNTS 227 (entered into force 18 January 2002), ("Protocol on the sale of children, child prostitution and child pornography"), Art. 9(4) (providing for victims to "have access to adequate procedures to seek, without discrimination, compensation for damages from those legally responsible").

[1299] ECHR, Arts 13 ("Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority […]") and 41 (empowering the European Court of Human Rights, under certain circumstance, to "afford just satisfaction to the injured party").

[1300] ACHR, Art. 63(1) (vesting the Inter-American Court with the power to find "that there has been a violation of a right or freedom protected by th[e] [ACHR]" and to rule, where appropriate, that "the breach of such right or freedom be remedied and that fair compensation be paid to the injured party"). *See also* African Charter on Human and Peoples' Rights, adopted 27 June 1981, OAU Doc. CAB/LEG/67/3/Rev.5, reprinted in *International Legal Materials*, Vol. 21 (1982), p. 58 (entered into force 21 October 1986), Art. 21(2); Arab Charter on Human Rights, adopted 23 May 2004, reprinted in *Boston University International Law Journal*, Vol. 24 (Fall 2006), p. 147 (entered into force 15 March 2008), Art. 23.

648. The right to remedy has also been recognised in the field of international criminal law. For example, the ICTR held that the right to an effective remedy undoubtedly forms part of international customary law[1301] and that "any violation, even if it entails a relative degree of prejudice, requires a proportionate remedy."[1302]

649. It is also of note that there are non-binding documents expressing international standards on reparations. The UN Basic Principles on Reparations affirm that States shall "ensure that their domestic law" makes available adequate, effective, prompt and appropriate remedies, including reparation, for violations of norms of international human rights law and international humanitarian law.[1303] It also stipulates:

> States should endeavour to establish national programmes for reparation and other assistance to victims in the event that the parties liable for the harm suffered are unable or unwilling to meet their obligations.[1304]

650. Similarly, the UN Declaration of Basic Principles of Justice for Victims states:

> Victims should be treated with compassion and respect for their dignity. They are entitled to access to the mechanisms of justice and to prompt redress, as provided for by national legislation, for the harm that they have suffered.[1305]

651. Specifically referring to victims of abuse of power, the UN Declaration of Basic Principles of Justice for Victims stipulates:

> States should consider [...] providing remedies to victims of such abuses. In particular, such remedies should include restitution and/or compensation, and necessary material, medical, psychological and social assistance and support.[1306]

652. The case law of regional human rights bodies on victims' remedies may serve as persuasive authority with regard to the content of the right to reparation for harm

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[1301] *Prosecutor v. Rwamakuba*, ICTR-98-44C-T, "Decision on Appropriate Remedy", Trial Chamber, 31 January 2007, para. 40.
[1302] *Semanza* Decision, para. 125.
[1303] UN Basic Principles on Reparations, Art. I(2)(c).
[1304] UN Basic Principles on Reparations, Art. IX(16).
[1305] UN Declaration of Basic Principles of Justice for Victims, para. 4.
[1306] UN Declaration of Basic Principles of Justice for Victims, para. 19. *See also* Declaration of International Law Principles on Reparation for Victims of Armed Conflict (Substantive Issues), appended to Resolution No. 2/2010, 74th Conference of the International Law Association, The Hague, The Netherlands, 15-20 August 2010 <http://www.ila-hq.org/en/committees/index.cfm/cid/1018>.

suffered by individuals, including victims of mass crimes. Nevertheless, as already clarified by this Chamber, the jurisdiction of these bodies is focused on the breach of the duty on the part of the respondent State to uphold human rights. Accordingly, proceedings before regional human rights bodies differ, in terms of policy, technical legal framework, and rules of interpretation from criminal trials.[1307] Likewise, forms of reparations owed by states differ from reparations that can be awarded against convicted persons. For these reasons, the Supreme Court Chamber will consider with caution the Civil Party Appellants' references to jurisprudence of international non-criminal courts, and will establish on a case-by-case basis the potential of such jurisprudence to be persuasive guidance in the present case. Similar concerns attach to following procedures used by administrative bodies, such as reparation claims programs, created for the purpose of deciding reparations.

653. The Kingdom of Cambodia is a State Party to several of the international instruments that enshrine the right of victims to an effective remedy.[1308] International human rights standards are recognised in Cambodian law through Article 31(1) of the Constitution, which states:

> The Kingdom of Cambodia shall recognize and respect human rights as stipulated in the United Nations Charter, the Universal Declaration of Human Rights, the covenants and conventions related to human rights, women's and children's rights.

654. Relating the above considerations to the ECCC's mandate, the Supreme Court Chamber notes that on the legal plane, the ECCC, its hybrid nature notwithstanding, acts as an emanation of the State of Cambodia and is duty-bound to respect international standards of justice and generally recognised human rights precepts. Still, its mandate is limited to "bringing to trial senior leaders of Democratic

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[1307] *See Velasquez-Rodriguez v. Honduras*, IACtHR, Judgment (Merits), 29 July 1988, para. 134 ("[t]he international protection of human rights should not be confused with criminal justice. States do not appear before the Court as defendants in a criminal action. The objective of international human rights law is not to punish those individuals who are guilty of violations, but rather to protect the victims and to provide for the reparation of damages resulting from the acts of the States responsible").

[1308] The Kingdom of Cambodia acceded without reservation to the Convention Against Torture on 15 October 1992 and to the ICCPR on 26 May 1992. It ratified without reservation the Protocol on the sale of children, child prostitution and child pornography on 30 May 2002, the ICC Statute on 11 April 2002, and the Convention on the Elimination of All Forms of Racial Discrimination on 28 November 1983.

Kampuchea and those who were most responsible for the crimes [...]."[1309] As a criminal tribunal, albeit of an internationalised character, the ECCC is not vested with the authority to assess Cambodia's compliance with these international obligations.

655. On the policy level, it should be emphasised that ECCC criminal proceedings ought to be considered as a contribution to the process of national reconciliation, possibly a starting point for the reparation scheme, and not the ultimate remedy for nation-wide consequences of the tragedies during the DK. As such, the ECCC cannot be overloaded with utopian expectations that would ultimately exceed the attainable goals of transitional justice.[1310] Therefore, while the ECCC did assume the competence to grant "collective and moral" reparations, this competence must be interpreted in view of a narrow mandate and purpose.

656. The first consequence of this understanding of the ECCC mandate is expressed in the Internal Rules by providing that the reparations "shall be awarded against, and be borne by convicted persons."[1311] It follows that the civil action in ECCC proceedings may be brought only against the accused, and the victim does not have standing to advance a claim at the ECCC against any other civil defendant.[1312] Notwithstanding the question of whether a civil action would be available before regular Cambodian courts,[1313] this limitation precludes the use of the legal framework of the 2007 Code of Criminal Procedure to sue the State before the ECCC. Secondly,

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[1309] UN-RGC Agreement, Art. 1; ECCC Law, Art. 1.
[1310] *See generally* Harvey M. Weinstein, "Editorial Note: The Myth of Closure, the Illusion of Reconciliation: Final Thoughts on Five Years as Co-Editor-in-Chief", *International Journal of Transitional Justice*, Vol. 5(1) (2011), pp. 1-10 (expressing scepticism towards the capacity of trials, truth commissions and memorials to achieve, especially in the short term, goals such as reconciliation and closure in the affected communities, suggesting that the international community should temper its objectives to avoid "inflated expectations and ultimate disappointment on the part of those who suffered"). *See also* Susana SáCouto, "Victim Participation at the International Criminal Court and the Extraordinary Chambers in the Courts of Cambodia: a Feminist Project?", American University Washington College of Law, Research Paper No. 2011-30, pp. 54-56 (arguing that it is at best inappropriate to unduly raise expectations that are unlikely to be met) <http://ssrn.com/abstract=1934320>.
[1311] Internal Rule 23(11).
[1312] This feature has not been changed by subsequent revisions of the Internal Rules. Internal Rule 23*quinquies*(3) (Rev. 8).
[1313] Whereas a civil defendant other than the accused becomes responsible in connection with the determination of the criminal responsibility of the accused (2007 Code of Criminal Procedure, Arts 291, 355), the State obligation to provide reparations is independent of the finding of criminal responsibility of an individual. Absent positive regulation of reparations in the domestic law that would tie up state obligation to pay reparations with the finding of criminal responsibility of its former agent, the use of provisions in the 2007 Code of Criminal Procedure regarding civil defendants is likely a moot question.

unlike the framework applicable before the ICC,[1314] the ECCC legal framework does not provide for a mechanism to invite representations from the State. Obviously, it would run counter to basic principles of procedural fairness to issue binding orders against the Cambodian State, or, to the same effect, any individual or legal entity, which has neither been a party to the proceedings nor been afforded the opportunity to submit observations.

657. It must be noted here that the legal frameworks of the ICC and STL, both of which address the harm suffered by the victims,[1315] differ from the ECCC in that they foresee procedural mechanisms apposite to prevent the delay of the criminal case due to a potentially burdensome and time-intensive process related to reparations. The Trust Fund for Victims created within the ICC system can be tasked with the identification of victims eligible for reparations and to financially administer or implement the awards.[1316] Moreover, reparation proceedings can be instituted at a later phase, subsequent to the conviction.[1317] The STL Statute, which foresees identification of the victims during the criminal proceedings, leaves compensation to victims to be addressed by national courts or other competent bodies.[1318] Such diversion of the reparation claim is not available under the ECCC legal framework, whereupon ECCC jurisdiction had to be limited by narrowing the content of the admissible claim.

658. In consequence, ECCC reparations are limited to "collective and moral" awards as stipulated in Internal Rule 23(1)(b), (11).[1319] While the term "moral reparations" may be unprecedented in international or domestic legal frameworks,[1320]

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[1314] ICC Statute, Art. 75(3); ICC RPE, Rules 94(2), 95(1) (envisaging that the ICC may invite representations from or on behalf of interested States that are also notified of reparation requests).
[1315] The ICC may, upon request or on its own motion, determine the damage suffered by victims, make a reparation order against the convicted person or order that the award for reparations be made through the Trust Fund. ICC Statute, Art. 75(1)-(2). The STL "may identify victims who have suffered harm as a result of the commission of crimes by an accused convicted by the Tribunal." STL Statute, Art. 25(1).
[1316] Regulations of the Trust Fund for Victims, Annex to Resolution ICC-ASP/4/Res.3, 3 December 2005, Regulations 43-45, 54, 58, 60-61, 69-70.
[1317] ICC Statute, Art. 76(3); ICC RPE, Rule 143.
[1318] STL Statute, Art. 25(3).
[1319] *See generally* CPG2 Appeal on Reparations, paras 27-28, 92-110; CPG3 Appeal, para. 97 (raising in general terms the issue of the meaning of "collective and moral").
[1320] *See* CPG2 Appeal on Reparations, para. 95.

the concept of moral damage is not.[1321] The Internal Rules do however supply some guidance to interpret the term by setting out examples of measures that would qualify as moral and collective reparations. Internal Rule 23(12) mentions the publication of the judgement, financing a non-profit activity or service beneficial to victims, and "other appropriate and comparable forms of reparation." In this context, the term "moral" denotes the aim of repairing moral damages rather than material ones. While the requisite "collective" character of the measures confirms the unavailability of individual financial awards, neither the moral nor collective character requirements preclude *tout court* measures that require financing in order to be implemented. As long as the award is available for victims as a collective, moral reparations also may entail individual benefit for the members of the collective.[1322]

659. The term "collective" is straightforward and established in the jurisprudence on reparations.[1323] In the ECCC context it excludes individual awards, whether or not of a financial nature. It also seems to favour those measures that benefit as many victims as possible. The present case is concerned with mass crimes, which, by their very nature, directly and indirectly affected, albeit to varying degrees, a large number of victims. Granting measures which are capable of being enjoyed by a restricted group of victims only, however much they might be deserved, would entail excluding other individuals such as those: who were not aware of the proceedings or of the opportunity to participate as civil parties;[1324] were not in a financial, physical, psychological or logistic position to join the proceedings; did not possess sufficient evidence to meet the required threshold of admissibility of their application; or did not wish to be engaged for other reasons. As observed by CPG3, the present case numbers fewer than one hundred civil parties, while the crimes involved more than 12,000

[1321] *See, e.g. Castillo-Páez v. Perú*, Judgment (Reparations and Costs), para. 53 (holding that "[a]s the name implies, reparations are intended to wipe out the effects of the violation. Their quality and amount will depend upon the damage caused at both the material and moral levels").
[1322] The Center for Justice & Accountability, Access Justice Asia and The International Human Rights Law Clinic, "Victims' Right to Remedy: Awarding Meaningful Reparations at the ECCC", p. 7 (arguing that "[c]ollective reparations may, as a corollary of attempting to remedy a shared or collective harm, directly benefit members of that community in their individual capacity") <www.accessjusticeasia.org/victims-right-to-remedy>.
[1323] *See, e.g. Case of the street children*, Judgment (Reparations and Costs), para. 84. *See also* ICC RPE, Rule 98(3) (envisioning collective awards).
[1324] According to a country-wide survey undertaken by the Human Rights Center of Berkeley University, 39 percent of interviewees had no knowledge at all of the ECCC. Phuong Pham *et al.*, "So We Will Never Forget: A Population-Based Survey on Attitudes about Social Reconstruction and the Extraordinary Chambers in the Courts of Cambodia", Human Rights Center, University of California, Berkeley, January 2009, p. 36 <http://www.law.berkeley.edu/>.

victims.[1325] Moreover, an unspecified number of victims could not, and will likely never fully, be identified. In the present circumstances, the Supreme Court Chamber is of the view that the most inclusive measures of reparation should be privileged.

660. Finally, considering that collective harm merits collective redress, the Supreme Court Chamber takes note of the reconciliatory function of reparations. As recommended in the report of the Guatemalan Historical Clarification Commission:

> [C]ollective reparatory measures for survivors of collective human rights violations and acts of violence, and their relatives, should be carried out within a framework of territorially based projects to promote reconciliation, so that in addition to addressing reparation, their other actions and benefits also favour the entire population without distinction between victims and perpetrators.[1326]

661. Acknowledging the limitations of the above outlined framework of the ECCC, this Chamber is of the view that although collective and moral reparations may not reinstate the victims of human rights abuses either physically or economically, other general purposes of reparations are fulfilled before the ECCC to the extent the reparation responds to "the psychological, moral, and symbolic elements of the violation."[1327] This is achieved through the "verification of the facts and full and public disclosure of the truth"[1328] as fostered by the findings of the Co-Investigating Judges and three Chambers, through the access and participation of victims to proceedings,[1329] and through victims' identification and individual recognition in the

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[1325] T. (EN), 30 March 2011, F1/4.1, p. 96 (lines 14-23) (arguing that part of the victims did not apply as civil parties out of fear, despite no actual threat is now in place).
[1326] Guatemalan Historical Clarification Commission, "Guatemala: Memory of Silence", s. III(10) <http://shr.aaas.org/guatemala/ceh/report/english/recs3.html>. *See also* Friedrich Rosenfeld, "Collective Reparation for Victims of Armed Conflict", *International Review of the Red Cross*, Vol. 92:879 (2010), p. 745 (pointing out that collective reparations are able to reach every victim who has suffered harm during an armed conflict, thus avoiding "the negative side-effect of individual reparation that single victims might not receive any reparation at all").
[1327] Alice Riener, "Reparations and the Issue of Culture, Gender, Indigenous Populations and Freedom of Expression: 'Children & Reparations'", in "Conference: Reparations in the Inter-American System: A Comparative Approach", *American University Law Review*, Vol. 56:6 (2007), p. 1442.
[1328] UN Basic Principles on Reparations, Art. IX(22)(b).
[1329] *See* UN Basic Principles on Reparations, Art. VIII; Susana SáCouto, "Victim Participation at the International Criminal Court and the Extraordinary Chambers in the Courts of Cambodia: a Feminist Project?", p. 39 (indicating that victims participating as civil parties in Case 001 trial considered their involvement and, in particular, the opportunity to be present, to tell their story, to question Duch and to learn about details of their loved ones, as a most valuable reparation).

final judgement[1330] that represent a public acknowledgement of their suffering.[1331] Furthermore, the Supreme Court Chamber considers that its acknowledgement of a proposed award as an appropriate reparation measure has a potential of being *per se* a form of satisfaction and redress, possibly capable of attracting attention, efforts, and resources toward its actual realisation.

### *b. Whether the ECCC can Issue Reparation Orders the Enforcement of which may Require Governmental Administrative Assistance*

662. A number of the Civil Party Appellants' claims for reparation entail, either explicitly or by necessary implication, an active involvement of the Cambodian authorities in order for the measures to be realised. The question before the Supreme Court Chamber is whether this entailment bars the issuance of this kind of reparation.

663. The Supreme Court Chamber holds that it has no jurisdiction over matters that are not statutorily conferred upon it. As such, the Supreme Court Chamber reiterates that the ECCC's mandate does not authorize its jurisdiction over the State of Cambodia or the RGC in order to compel either to administer a reparations scheme. Likewise, the ECCC can neither engage the RGC as a civil defendant in the proceedings before it nor can it exercise jurisdiction such as to encroach upon statutory competence of the executive. As noted by the ECtHR, "a remedy which is not enforceable or binding or which is dependent on the discretion of the executive falls outside the concept of effectiveness […]."[1332]

664. It follows that any reparation claim is predestined for rejection that *necessarily* requires the intervention of the RGC to the extent that, in effect, such request predominantly seeks a measure falling within governmental prerogatives. This is the

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[1330] *See* UN Basic Principles on Reparations, Art. IX(22)(c); Phuong Pham *et al.*, "So We Will Never Forget: A Population-Based Survey on Attitudes about Social Reconstruction and the Extraordinary Chambers in the Courts of Cambodia", pp. 264-287 (showing that in a survey, 75 civil party applicants in Case 001 cited positive outcomes of the trial, such as its contribution to establishing a historical truth, including the opportunity for them to tell their story, and they were also expecting the trial to afford justice and recognition to victims).

[1331] Bridget Mayeux, Justin Mirabal, "Collective and Moral Reparations in the Inter-American Court of Human Rights", Human Rights Clinic, The University of Texas School of Law, November 2009, p. 4 ("[c]ollective and moral reparations begin to restore the victims' dignity by publicly sharing their stories. Acknowledgment of their pain elevates the victims back to the status of human beings with rights that demand respect. The nameless souls who vanished as a result of state-sponsored forced disappearances regain their identities") <www.utexas.edu/law>.

[1332] *B and L v. United Kingdom*, ECtHR, Chamber Decision, App. No. 36536/02, 29 June 2004, p. 9.

case, for instance, with respect to requests for State apology, organisation of health care, institution of national commemoration days, and naming of public buildings after the victims.

665. On the other hand, there is no doubt that domestic courts are bound to give effect to the ECCC reparation orders against convicted persons, similar to any other reparation order issued by domestic courts.[1333]

### c. *Whether KAING Guek Eav's Indigence Affects the ECCC's Power to Award Reparations to be Borne by Him*

666. KAING Guek Eav's presumed[1334] state of indigence would not bar the ECCC from granting compensation in response to a civil claim filed under the 2007 Code of Criminal Procedure. The civil action under the 2007 Code of Criminal Procedure presupposes that even where the civil defendant is indigent, he may receive income in the future or third parties may pay in his/her stead. The Civil Code of Cambodia explicitly foresees, for example, that "an obligation may be performed *by a third party* as well as by the obligor,"[1335] and regulates subrogation in the performance of obligations.[1336] The obligation may also devolve upon the accused's heirs following their acceptance of the succession.[1337] Hence an obligor's state of indigence does not exclude the possibility that his/her obligations are nevertheless ultimately performed through the intervention of third parties.

667. With that said, considering the *sui generis* and dual private/public character of the ECCC reparations regime, this Chamber holds that an award that, in all probability, can never be enforced, i.e., is *de facto* fictitious, would belie the objective

[1333] Internal Rule 113(1); 2007 Code of Criminal Procedure, Art. 496.
[1334] Final Defence Written Submissions, 11 November 2009, E159/8, para. 50 (pointing out that KAING Guek Eav was found indigent at the time of his transfer to the ECCC); Declaration of Means of the Suspect, E175/1.1 (signed by KAING Guek Eav on 16 October 2009, declaring that he receives no income nor owns any assets or expects to receive income in future). The Supreme Court notes that, since the arrest of KAING Guek Eav in 1999, no assets on his part have been detected or even alleged.
[1335] Civil Code of Cambodia 2007, Art. 434(1) (Performing person) (emphasis added). Paragraphs (2) and (3) of the same Article provide that performance by a third party is excluded if (a) the purpose of the obligation cannot be achieved by the performance of a third party or (b) the obligor and the obligee so agree.
[1336] Civil Code of Cambodia 2007, Arts 459 *et seq.*
[1337] Civil Code of Cambodia 2007, Book Eight ("Succession").

of *effective* reparation and would be confusing and frustrating for the victims.[1338] Unlike in the civil action, where seeking a title of execution against an indigent defendant is based on a choice and private interest of the plaintiff, in proceedings that have elements of reparations, the effectiveness requirement mandates that there be a tangible availability of funds. Accordingly, reparation claims programmes envisage reparations payable by the State, by companies or by specific funds.[1339] At the ICC, while its Statute envisages granting reparations against the convicted person irrespective of such person's indigence, the enforcement is secured through the operation of the Trust Fund.[1340] At the STL, the indigence of the convicted person is irrelevant given that the Tribunal concerns itself only with the identification of the victims who suffered harm as a result of the crimes for the potential use in proceedings before national courts or other competent bodies.[1341]

668. Considering that in the ECCC context there is no externally subsidised funding mechanism that could give effect to orders issued against an indigent convicted person, this Chamber concurs with the Trial Chamber's implicit finding[1342] that it is of primary importance to limit the remedy afforded to such awards that can realistically be implemented, in consideration of the actual financial standing of the convicted person. In purely abstract terms it is imaginable that KAING Guek Eav may enrich himself in the future or even that a third party will come forward to provide means necessary to fund the reparations, opting to do so on behalf of KAING Guek Eav rather than in its own name. Such possibilities are nevertheless so remote that they can practically be excluded, and, as such, cannot constitute a basis for ordering reparations. An award that is modest but tailored to what is in practical terms attainable is appropriate in the ECCC reparations framework.[1343] The Supreme Court

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[1338] *See* Phuong Pham *et al.*, "Victim Participation and the Trial of Duch at the Extraordinary Chambers in the Courts of Cambodia", pp. 264-287 (stating that, according to a survey, civil parties tend to have a more negative opinion than the overall population who lived under the Khmer Rouge on the impact of Case 001 trial on the rule of law, forgiveness and reconciliation).
[1339] *See, e.g.* Heike Niebergall, "Overcoming Evidentiary Weaknesses in Reparation Claims Programmes", pp. 145-166 (referring *inter alia* to the First Claims Resolution Tribunal for Dormant Accounts in Zurich, Switzerland, the United Nations Compensation Commission, the German Forced Labour Compensation Programme, and the International Commission on Holocaust Era Insurance Claims).
[1340] ICC Statute, Art. 79.
[1341] STL Statute, Art. 25(1), (3); STL RPE, Rule 86(G).
[1342] Trial Judgement, paras 664, 666.
[1343] The Supreme Court Chamber notes in this respect that even though the Internal Rules have been recently amended so as to expand the reparation measures available to the ECCC, they still confirm the

Chamber also stresses that the limited reparations available from the ECCC do not affect the right of the victims to seek and obtain reparations capable of fully addressing their harm in any such proceedings that could be made available for this purpose in the future. [1344]

### *d. Whether the Trial Chamber Erred by Grouping the Requests for Reparation without Explicitly Indicating which Reasons Applied to the Rejection of Each Request*

669. The Trial Chamber decided on the numerous requests for reparation from the Civil Parties by subsuming them under eight separate general categories, which were then disposed of without specific reference to each claim, except for some mentioned by way of example. By doing so, the Trial Chamber undoubtedly saved precious resources, but precluded the Appellants from clearly appreciating the reasons for the rejection of certain requests. The question before the Supreme Court Chamber is whether this course of action by the Trial Chamber infringed the Civil Party Appellants' rights, notably the right to a reasoned decision.

670. Civil Parties Group 2 in its submissions points to the international level to substantiate the right to a reasoned decision attaching to decisions on reparation requests. The Supreme Court Chamber considers however that it is not necessary to resort to rules at the international level, since the right concerned can be inferred from Cambodian procedural law. The Appellants' right to a reasoned decision underlies, to begin with, Article 139(4) of the 2007 Code of Criminal Procedure, according to which, where the investigating judge is seized of a civil party application, s/he shall issue an order with the "statement of reasons" in case s/he decides not to investigate, and this order shall be notified to the civil party applicant. The fact that this order is

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same rationale that takes into consideration the availability of funds. Pursuant to Internal Rule 23*quinquies* (Rev. 8), monetary payments to civil parties are excluded and reparations shall be requested in a single submission seeking a limited number of measures. The proposed projects are to be financed either by the convicted person or by external donors.

[1344] *Cf.* Redress, "International Criminal Tribunal for Rwanda" <http://www.redress.org/international-criminal-tribunals/international-criminal-tribunal-for-rwanda> (observing that in Rwanda, despite the defendants' state of indigence, victims have claimed and have been awarded vast amounts of money as damages in the proceedings against the convicted persons). In this regard, the Supreme Court Chamber notes however that a number of elements suggest that reliance on Rwanda's situation is inapposite in the present case. In Rwanda damages were awarded by domestic courts pursuant to a domestic law specifically passed for this purpose, whereas the ECCC context lacks a provision foreseeing that ECCC's reparation decisions be transmitted to national courts or other competent bodies. Moreover, the fact that there has been no enforcement of these judicial decisions confirms their ineffectiveness.

subject to appeal[1345] confirms one functional aspect of judicial reasoning: to render meaningful the right to appellate review. Equally relevant is Article 355 of the 2007 Code of Criminal Procedure, which, by stipulating that the decision on civil remedies forms part of the judgement, necessarily implies that the court must provide adequate reasoning in order to "respond to the written arguments submitted by *any party*."[1346] This enables the civil party to file an appeal regarding the civil matter of the case,[1347] and eventually to lodge a request for cassation[1348] that can be founded, *inter alia*, on the "lack of reasons."[1349]

671. The Supreme Court Chamber concludes that civil parties enjoy the right to a reasoned decision on their reparation claims. It has now to be determined whether the Trial Chamber's synthetic reasoning violates this right. To begin with, apart from any requirements that might be imposed by the law, it is for judicial organs to decide the manner in which their reasoning is to be articulated. From this perspective, the method of creating general categories of requests and subsequently addressing them in a synthetic form is not *per se* erroneous. The Supreme Court Chamber holds, however, that the Trial Chamber's course of action did infringe the right to a reasoned decision in that it does not allow the Civil Party Appellants to unambiguously identify the reasoning pertinent to certain reparation requests.[1350] The Supreme Court Chamber therefore recognises the violation of the Appellants' right to a reasoned decision and, by way of redress, proceeds to provide its own reasoning in regard of the claims that have been reiterated on appeal.

### *e. Civil Party Appellants' Specific Requests for Reparations*

#### *i. Compilation and Dissemination of Apologetic Statements Including Civil Parties' Comments Thereon*

672. The Civil Parties requested the compilation and publication of all statements of apology of KAING Guek Eav made during the trial, together with the Civil Parties'

[1345] 2007 Code of Criminal Procedure, Art. 268.
[1346] 2007 Code of Criminal Procedure, Art. 357 (emphasis added).
[1347] 2007 Code of Criminal Procedure, Art. 375.
[1348] 2007 Code of Criminal Procedure, Art. 418.
[1349] 2007 Code of Criminal Procedure, Art. 419.
[1350] CPG2 Appeal on Reparations, paras 85-87 (correctly affirming that the request for paid visits for Civil Parties to memorial sites was not decided by the Trial Chamber), 58, 127 (correctly noting that the Trial Chamber did not address the requests that KAING Guek Eav be ordered to write two letters to the RGC).

comments on these statements.[1351] The Trial Chamber granted the request to compile and publish the statements of apology but rejected the inclusion of the Civil Parties' comments, reasoning that such comments were distinct from the statements of apology and their content had not been specified.[1352]

673. Civil Parties Group 2 argues that the Trial Chamber erred in refusing to include these comments based on their lack of specificity, as "[KAING Guek Eav's] statements cannot be said to be any more 'specific' than the Civil Parties' statements."[1353] Civil Parties Group 2 further submits that it is logical and obvious that the Civil Parties' comments are "distinct" from the apologies made by Duch, so this holding is not a valid reason for their rejection.[1354] It concludes by maintaining that the Trial Chamber failed to give a reasoned decision in rejecting this request, thereby violating Internal Rule 21(1)(a) and (c).[1355]

674. The Supreme Court Chamber notes, however, CPG2's contention that as a consequence of the shift of the Defence strategy that resulted in KAING Guek Eav's late request for acquittal, "[the request for apologies] is no longer meaningful and even less so without the statements of Civil Parties on these apologies during trial."[1356] At the Appeal Hearing, CPG2 maintained this position[1357] and CPG3 concurred that KAING Guek Eav's apologies cannot be considered as a meaningful reparation measure insofar as the victims perceive them as disingenuous.[1358]

675. Although the compilation and publication of all statements of apology made by Duch is not, strictly speaking, an order against KAING Guek Eav, the Trial Chamber granted it on the ground of "the widespread recognition of similar measures as reparations."[1359] As envisaged also by the UN Basic Principles on Reparations,[1360]

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[1351] Trial Judgement, paras 652, 657.
[1352] Trial Judgement, para. 668.
[1353] T. (EN), 30 March 2011, F1/4.1, p. 49 (lines 13-21). *See also* CPG2 Appeal on Reparations, paras 50-51.
[1354] CPG2 Appeal on Reparations, para. 49.
[1355] CPG2 Appeal on Reparations, paras 52-53.
[1356] CPG2 Appeal on Reparations, para. 46.
[1357] T. (EN), 30 March 2011, F1/4.1, p. 45 (lines 11-16).
[1358] T. (EN), 30 March 2011, F1/4.1, p. 79 (line 25) to p. 80 (lines 1-6). *See also* T. (EN), 30 March 2011, F1/4.1, p. 84 (line 17) to p. 85 (line 19) (emphasising that they were equally unsatisfied with KAING Guek Eav's apologetic behaviour at the Appeal Hearing).
[1359] Trial Judgement, fn. 1153.

reparations encompass satisfaction measures such as public apologies, including acknowledgement of the facts and acceptance of responsibility. It is worth noting that, under the ACHR framework, apologies are primarily concerned with a *respondent State* apologising for a grave violation of a victim's rights under the Convention and are intended "as a measure of satisfaction for the victims and a guarantee of non-repetition of the grave human rights violations that were committed."[1361]

676. Apology as a form of reparation does not foresee the participation of victims via their comments on the apologies. Rather, what is commonly applied is that the form of apology is court-controlled so as to ensure its dignity.[1362] In the present case, the statements of apology, even if not compiled by KAING Guek Eav, do indeed originate from his resolve and reflect authentic facts of the proceedings. This, in the opinion of the Supreme Court Chamber, is an added value compared with an apology that would be drafted and imposed by the court, and also removes problems with the implementation, discussed below. In contrast, an apology that includes criticism by some of the addressees, or which includes content that would diminish the convicted person, would readily devalue itself and not serve the purpose of just satisfaction.

677. In response to CPG2 and CPG3 who express doubts as to the sincerity of KAING Guek Eav's apologies, the Supreme Court Chamber agrees that it is indeed desirable that all addressees perceive an apology as a sincere expression of remorse. Sincerity, however, cannot be enforced and supplying the apology with comments does not render it more sincere. This Chamber believes that notwithstanding the fact that not all victims accept the sincerity of the apology, its value is still retained by

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[1360] UN Basic Principles on Reparations, Art. IX(22)(e).
[1361] *Ituango Massacres v. Colombia*, Judgment (Preliminary Objections, Merits, Reparations and Costs), para. 406.
[1362] A review of the jurisprudence of the Inter-American Court of Human Rights relating to reparations confirms that while the IACtHR has developed a liberal, creative and tailored approach to victims' reparations, including utilising public acceptance of responsibility and apologies, this approach has not extended to including the comments of victims on public apologies. *See, e.g. Plan de Sánchez Massacre v. Guatemala*, IACtHR, Judgment (Reparations and Costs), 19 November 2004, para. 100 (issuing a detailed order that the respondent State carry out public apologies addressed to communities affected by the crimes and duly publicise it in the media); *Ituango Massacres v. Colombia*, Judgment (Preliminary Objections, Merits, Reparations and Costs), para. 406 (ordering the respondent State to publicly acknowledge, in the presence of senior authorities, its international responsibility for the massacres, and apologise to the next of kin of the victims); *Zambrano-Vélez et al. v. Ecuador*, IACtHR, Judgment (Merits, Reparations and Costs), 4 July 2007, para. 150 (ordering the respondent State to carry out a public act of acknowledgement of its responsibility for the violations in the presence of the victims' family members with the high State authorities participating).

virtue of publication and memorialisation of the harm and the apology. Apology transcends the time and the scene of the courtroom and in this sense contributes to just satisfaction in the long term and beyond the immediate audience,[1363] leaving the victims the choice of how to receive it. Accordingly the Supreme Court Chamber sees no error in the Trial Chamber's decision not to include comments by some of the Civil Parties. It notes moreover that the Trial Chamber's determination on this point has never precluded Civil Parties from furnishing comments on KAING Guek Eav's apologies independent of the framework of the final judgement.

*ii. Letter Requesting an Apology from the Government*

678. The Civil Parties requested a reparation order compelling KAING Guek Eav to write an open letter to the RGC requesting a serious, genuine and truthful apology from the State.[1364] The Trial Chamber rejected this claim, reasoning that the request falls outside the jurisdiction of the ECCC, and any decision to issue such an apology would be the exclusive prerogative of the RGC.[1365] Civil Parties Group 2 submits that the Trial Chamber committed an error of fact in misinterpreting the content of the request, evident in its inclusion in the Judgement under the heading "Requests for measures by the Royal Government of Cambodia."[1366] Civil Parties Group 2 argues that the clear meaning of the request was simply to order KAING Guek Eav to write a letter, not order any measures by the RGC.[1367] In the alternative, CPG2 submits that the Trial Chamber violated Internal Rule 100(1) by not rendering an explicit decision on the request.[1368]

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[1363] The Supreme Court Chamber notes that the IACtHR did deal with cases in which State apologies were considered of a partial nature only and nevertheless held they represent a "positive contribution" and "a valuable contribution" to the evolution of the proceedings and the implementation of human rights. *Molina-Theissen vs. Guatemala*, IACtHR, Judgment (Merits), 4 May 2004, para. 46; *Ticona Estrada et al. v. Bolivia*, IACtHR, Judgment (Merits, Reparations and Costs), 27 November 2008, para. 26. In any event, whereas the partiality of apologies sometimes led the IACtHR to order further reparation measures to be taken by the respondent State, they have never involved victims' comments on such apologies.
[1364] Trial Judgement, para. 656.
[1365] Trial Judgement, para. 671.
[1366] CPG2 Appeal on Reparations, para. 56 (referring to Trial Judgement, heading 4.4.3.5 related to para. 671).
[1367] CPG2 Appeal on Reparations, para. 57; T. (EN), 30 March 2011, F1/4.1, p. 50 (lines 14-18).
[1368] CPG2 Appeal on Reparations, paras 55, 60.

679. Having examined the record the Supreme Court Chamber notes that CPG2's request to the Trial Chamber was in fact focused on a "State Apology"[1369] aimed at obtaining "sincere, genuine and truthful" public apologies from the Royal Kingdom of Cambodia as successor state of the State of Democratic Kampuchea for the crimes committed by the latter. An open letter from KAING Guek Eav to the RGC would be a "contribut[ion] to this process" of reconciliation, according to CPG2.[1370] The Supreme Court Chamber concurs with the Trial Chamber that this request reveals an intention that the reparation be, in fact, performed by the State.[1371] Alternatively, accepting the interpretation presented on appeal, the objective of the request was to use KAING Guek Eav as a medium to convey a message. In this latter scenario, the request still has the RGC as the target so that the performance by KAING Guek Eav is devoid of relevance.[1372] While government apology or acknowledgment of responsibility is an internationally practiced form of reparation,[1373] it cannot be ordered within the ECCC legal framework. As such, the Trial Chamber did not commit an error by dismissing this request.

680. Additionally, the Supreme Court Chamber finds that orders of this kind are not enforceable against KAING Guek Eav, since a principle of law has developed that it is not possible to coerce an individual to perform *in specie* any obligation of *facere* of a personal nature.[1374] Assuming for the sake of argument that the Court made such an

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[1369] CPG2 Final Submission, paras 9-14.
[1370] CPG2 Final Submission, para. 14.
[1371] CPG2 Final Submission, para. 13 (stating that "[f]or the foregoing reasons [dealing with State apology], the Civil Parties believe it is time *for the Cambodian government* […] to apologize sincerely, genuinely and truthfully for the heinous crimes committed during the DK period") (emphasis added). *See also* Civil Parties' Co-Lawyers' Joint Submission on Reparations, 17 September 2009, E159/3, ("Civil Parties Joint Submissions"), fn. 6 (stating that "Civil Party Group 2 further submits that the Court has authority to request an official acknowledgement and apology *from the Cambodian Government*") (emphasis added).
[1372] This concern is further strengthened given the Appellants' declared lack of confidence in the sincerity of KAING Guek Eav.
[1373] *See, e.g. Ituango Massacres v. Colombia*, Judgment (Preliminary Objections, Merits, Reparations and Costs), para. 406.
[1374] The law regarding obligations of *facere* (i.e., obligations *to do*) has been well established in both common law and civil law jurisdictions, particularly in the context of remedies for breach of contract. *See generally* G. H. Treitel, "Remedies for Breach of Contract", *International Encyclopedia of Comparative Law*, Vol. 7 (1976), p. 13; Randy Barnett, "Contract Remedies and Inalienable Rights", *Social Philosophy & Policy*, Vol. 4:1 (1986), pp. 179-202. The Supreme Court Chamber observes that under French, German and Swiss contract law, for example, the appropriate remedy awarded for a breach of an obligation of *facere* of a personal nature is to order compensatory damages to a disappointed promise, whereas an order of any other form of compulsion to effect performance *in specie* (i.e., *specific* performance) would amount to an interference with an individual's liberty. Charles Szladits, "The Concept of Specific Performance in Civil Law", *The American Journal of Comparative*

order, the fulfilment of the obligation would rely on KAING Guek Eav's own volition. As discussed above, in light of the indigence of KAING Guek Eav, imposing a pecuniary sanction for non-compliance with the order would not guarantee the fulfilment of the obligation. Similarly, detention as a penalty for non-compliance with the reparation order, while available under the 2007 Code of Criminal Procedure,[1375] would not likely be effective against KAING Guek Eav given that he has been sentenced to life imprisonment. Thus, granting a measure the execution of which cannot be implemented would undermine the authoritativeness of judicial decisions, not to mention frustrate the victims.

*iii. Installation of Memorials at Tuol Sleng and Choeung Ek and Transformation of Prey Sâr into a Memorial Site*

681. The Civil Parties requested a number of reparations generally aimed at preserving and enhancing public memory of past events.[1376] These include the construction of memorials in the courtyard of Tuol Sleng (S-21) and on both sides of the stupa at Choeung Ek, as well as the transformation of Prey Sâr (S-24) into a memorial site. The Trial Chamber rejected the Civil Parties' requests for pagodas and other memorials on the ground that they lacked sufficient specificity in relation to their exact number, nature, location and estimated costs. The Trial Chamber emphasised that "no information has been provided [...] regarding the identity of the owners of all proposed sites, whether they consent to the construction of each proposed memorial, or whether additional administrative authorisations such as building permits would be necessary to give effect to each measure."[1377] The Trial Chamber concluded it was not in a position to issue an enforceable order against

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*Law*, Vol. 4:2 (1955), pp. 216, 226, 230, fn. 31. *See also* Louis J. Romero, "Specific performance of contracts in comparative law: some preliminary observations", *Les Cahiers de Droit*, Vol. 27 (1986), pp. 805-806; Alan Schwartz, "The Case for Specific Performance", *Yale Law Journal*, Vol. 89:2 (1979), p. 297; Lando H., Rose C., "On the enforcement of specific performance in Civil Law countries", *International Review of Law and Economics*, Vol. 24 (2004), pp. 473-487 (noting that specific performance is a rare, if not already abandoned, remedy in Denmark, Germany and France, due to its unnecessarily coercive character, its disproportionality and its administrative cost). Common law jurisdictions also recognise analogous reasons for excluding specific performance in obligations of a personal nature. *See, e.g. Lumley v. Wagner, English Reports*, Vol. 42 (1852), pp. 687 *et seq.* (admitting, relying also on other precedents, that specific performance of an obligation to sing in a certain theatre cannot be ordered); Alan Schwartz, "The Case for Specific Performance", p. 297 (regarding specific performance of personal services).

[1375] 2007 Code of Criminal Procedure, Arts 523, 533 (providing for imprisonment in lieu of payment where a convicted person has not paid "compensation and any damage[s] to a civil party").

[1376] Trial Judgement, paras 652, 654, 656-657.

[1377] Trial Judgement, para. 672.

KAING Guek Eav to pay "a fixed or determinable amount" to fund the proposed constructions.[1378]

682. Civil Parties Group 2 contends that the Internal Rules do not contain a legal basis for imposing such a high standard of specificity and, in any case, their requests were detailed and sufficiently specific.[1379] Civil Parties Group 2 therefore asserts that the Trial Chamber committed an error of fact by overlooking the detailed particulars in the Civil Parties' submissions related to the requests for memorials.[1380] Secondly, by requiring more details than had already been submitted, the Trial Chamber imposed an excessively rigorous threshold, thereby rendering any reparation request impossible and violating the victims' rights as guaranteed under Internal Rule 21(a) and (c).[1381] While accepting that the ECCC mechanism is claimant-driven, CPG2 maintains that the Civil Parties cannot be expected to provide technical details such as the identity of the owners of the site, their consent to the construction, or administrative authorisations.[1382] Rather, the ECCC should adopt a more flexible and feasible approach, notably in respect of satisfaction measures, such as those proposed, given the difficulty for Civil Parties to provide all details of a project in the absence of adequate resources and expertise. The Civil Party Appellants contend that the Supreme Court Chamber should have recourse to equitable principles and, drawing from international human rights law, accept a lower threshold of specificity that the Court would then supplement by utilising its power to act *ex proprio motu*.[1383] Finally, CPG2 submitted that the Trial Chamber failed to inform the Civil Parties in advance of the level of specificity that was required.[1384]

683. The Supreme Court Chamber concurs with the Trial Chamber in sympathising with the present requests, and holds that they squarely fall within the meaning of 'collective and moral reparations' as envisaged by Internal Rule 23(1)(b). The 'moral' requirement is satisfied by the fact that memorials restore the dignity of victims,

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[1378] Trial Judgement, para. 672.
[1379] CPG2 Appeal on Reparations, para. 66.
[1380] CPG2 Appeal on Reparations, paras 66, 83-84. *See also* CPG3 Appeal, para. 99.
[1381] CPG2 Appeal on Reparations, paras 67 and 80.
[1382] CPG2 Appeal on Reparations, paras 71, 81-82. *See also* CPG3 Appeal, paras 99-100 (concurring that the requests for memorials were sufficiently specific for the Trial Chamber to make an award and that it is not for the Civil Parties to estimate the cost).
[1383] CPG2 Appeal on Reparations, paras 71-79.
[1384] CPG2 Appeal on Reparations, para. 67.

represent a public acknowledgement of the crimes committed and harm suffered by victims, and, as lasting and prominent symbols, assist in healing the wounds of victims as a collective by diffusing their effects far beyond the individuals who were admitted as Civil Parties. Additionally, memorials contribute to national reconciliation by strengthening public knowledge of past crimes, promoting a culture of peace among the current and future generations, and contributing to a global message of concord to all potential visitors.[1385]

684. As held earlier in this Appeal Judgement, there are two main obstacles in granting the Civil Parties' claims for reparation. One is the indigence of KAING Guek Eav, which renders impossible the enforcement of orders against him and thus precludes an 'effective remedy.' The other obstacle is a jurisdictional limitation barring the imposition of obligations on the RGC or other third parties and thus precluding awards that by their nature would require such obligations. Both of these obstacles prevent granting the present reparation requests.

685. As a related issue, the Supreme Court Chamber refers here to the Civil Party Appellants' submission that in rejecting their claims due to lack of specificity, the Trial Chamber set an excessively demanding standard compared to the practices of international human rights bodies. The Supreme Court Chamber holds that a lack of specificity is not a fatal flaw in a reparation request, provided the request demonstrates that the award sought would be otherwise appropriate and enforceable

[1385] *See, e.g. Plan de Sánchez Massacre v. Guatemala*, Judgment (Reparations and Costs), para. 104 (ordering the respondent State to finance the "maintenance and improvements to the infrastructure of the chapel in which the victims **pay** homage to those who were executed in the Plan de Sánchez massacre", in order to enhance public awareness and keep alive the memory of those who died as a guarantee of non-repetition of similar crimes); *La Cantuta v. Perú*, Judgment (Merits, Reparations and Costs), para. 236 (stating that for a memorial to be an appropriate measure of reparation, it must include a sign with the name of each of the 10 individuals who were executed or forcefully disappeared, provided that their relatives so desire); *Goiburú et al. v. Paraguay*, Judgment (Merits, Reparations and Costs), para. 177 (ordering the respondent State to erect a monument bearing a plaque with the names of the victims and a description of the context in which the crimes occurred). Memorials have been embodied by the IACtHR under the category of "other forms of reparation", which embrace, *inter alia*, measures of satisfaction that are public in their scope or repercussions and aim at "remembrance of the victims, acknowledgment of their dignity, consolation to their next of kin, or transmission of a message of official reproval of the human rights violations involved, as well as avoiding repetition of [similar] violations." *Gómez-Paquiyauri Brothers v. Perú*, IACtHR, Judgment (Merits, Reparations and Costs), 8 July 2004, para. 223. *See also* Bridget Mayeux, Justin Mirabal, "Collective and Moral Reparations in the Inter-American Court of Human Rights", p. 33 (noting that "[m]emorials and monuments serve as an important acknowledgment of the harm that befell the people. Not only is honoring the victims of violations of utmost importance, but also rehabilitation for survivors").

against KAING Guek Eav. Although specifics of an award should be set out in parties' proposals, they may be additionally requested from the parties or obtained by the Court through the use of its own powers.[1386] However, the need to adjudicate the criminal case within a reasonable time does not allow the ECCC Chambers to simply adopt the paradigm of the ACHR on reparations, according to which the Inter-American Court assumes the "ultimate task of designing a just and equitable remedy for the injured party"[1387] and "creates the reparations it deems appropriate and is even not bound by the victims' requests."[1388] The Trial Chamber may decide to give priority to the determination of the question of criminal responsibility and adjourn the decision on civil parties' claims to a new hearing.[1389] That said, the ECCC's mandate and the legal framework that retains the features of the civil action require that the evidentiary proceedings on reparations remain claimant-driven.

686. The Civil Party Appellants argue that, under international human rights law, the ECCC is "obliged to facilitate and assist victims in obtaining redress" and that it should be done through relaxing the procedural burden on the victims.[1390] The Supreme Court Chamber notes that many instruments of international human rights law relevant to reparations deal with the general State obligation to provide victims with access to justice.[1391] The ECCC and UNAKRT fulfil this obligation in many ways by, among others: organising and funding professional legal representation for the victims;[1392] conducting information, outreach and support activities through the Victims Support Section ('VSS');[1393] and cooperating with NGOs,[1394] all of which are available to provide information, advice, and assistance to victims regarding, among other things, procedural obligations. The role of the adjudicating criminal court in assisting one party to the proceedings must, however, be limited and does not

[1386] Internal Rule 87(4); Code of Civil Procedure 2006, Art. 124(2) (regarding the court's power to take evidence on its own initiative).
[1387] CPG2 Appeal on Reparations, para. 72.
[1388] CPG2 Appeal on Reparations, para. 73.
[1389] Internal Rule 100.
[1390] CPG2 Appeal on Reparations, para. 72 (citations omitted).
[1391] *See, e.g.* UN Basic Principles on Reparations, Art. VIII(12)(c), (13).
[1392] Internal Rule 12 (Rev. 3); Internal Rules 12, 12 *bis*, 12 *ter* (Rev. 8).
[1393] Internal Rule 12(2)(c)-(h) (Rev. 3); Internal Rule 12 *bis*(1)(h)(Rev. 8) (specifying also that outreach activities related to victims and civil parties should be undertaken, where appropriate, in consultation with the Public Affairs Section).
[1394] Internal Rule 12 *bis*(2), (3).

translate into the court's "ultimate task of designing a just and equitable remedy for the injured party."

687. In conclusion, a reparation request must provide a reasonable level of detail, depending on the nature of the request. For the Court to be in a position to issue reparation awards, it must have available enough specifications that would enable it to grant the proposal through an enforceable disposition.

688. The Supreme Court Chamber further notes that the degree of specificity for reparation requests and the prerogatives of government are issues where the ECCC legal framework does not allow the court to copy from regional human rights mechanisms, such as the IACtHR, that apply a significantly lower standard of specificity by "passing some burden onto the State to execute the order"[1395] or "giv[ing] the State discretion in how they are executed."[1396] As already held, the ECCC does not have jurisdiction over the State or its executive branch and lacks monitoring powers. The ECCC therefore cannot take advantage of the interactive collaboration with the State's executive apparatus, which is a key component in the less-specific and in-progress reparations awarded under the ACHR. In contrast, ECCC orders are to be executed within the court system, i.e., by the bailiff (*huissier de justice*).[1397] Thus, irrespective of whether specificity was achieved by virtue of the parties' own motion or through the Court's powers, reparation awards must be self-executing. This means that an order of an award must be specific enough to permit enforcement without requiring subsequent administrative decision and administrative discretion for its implementation. Issuing orders directly or indirectly obligating the executive to implement projects and programmes, no matter how meritorious, would not only exceed the ECCC's jurisdiction, but, given the want of enforcement mechanisms, would belie the notion of an effective remedy. Accordingly, the ECCC may only endorse the present reparation requests insofar as to confirm that the form of reparation is appropriate.

[1395] CPG2 Appeal on Reparations, para. 74.
[1396] CPG2 Appeal on Reparations, para. 75.
[1397] Code of Civil Procedure 2006, Art. 336 (Execution organs).

689. Specificity of a request, however, is an issue secondary to the question of interference with the rights of third parties and the prerogatives of the government. It is not necessary to have technical specifications of a request on file in order to find that the erecting of a monument, unless it were to be on land owned by KAING Guek Eav, necessarily implies encroaching on the sphere of (public or private) ownership and administration of land and, presumably, the administrative sphere of building permits. As such, the request cannot be granted as an enforceable order unless the issues of ownership and any administrative permit(s) required under the law are resolved prior to the advancing of the request before the criminal court. In this regard, the Supreme Court observes that the Trial Chamber stated, "no information has been provided [...] regarding the identity of the owners of all proposed sites, whether they consent to the construction of each proposed memorial, or whether additional administrative authorisations such as building permits would be necessary to give effect to each measure."[1398] This statement *de facto* confirms that all forms of redress sought under the heading of "memorials" necessarily interfere with third party rights and the prerogatives of the executive. This interference, and not a generic lack of specificity, is the basis for the rejection of these requests.

690. Among the proposals advanced for memorials, the S-21 Victims' Memorial presented by CPG3 on behalf of the Association of Victims of Democratic Kampuchea, "Ksem Ksan,"[1399] which includes most victims in Case 001,[1400] stands out because of the specificity provided. The proposed memorial is sketched in its core descriptive elements, including its desired location within the S-21 compound, its impact on UNESCO-recognised sites, and technical specifications on construction,

[1398] Trial Judgement, para. 672.
[1399] T. (EN), 30 March 2011, F1/4.1, p. 79 (line 16) to p. 82 (line 10). *See also* Annex 1: Proposal by the KSEM KSAN Victims Association for the Construction of an S-21 Victims Memorial at the Tuol Sleng Museum, 25 March 2011, F25.1 ("Proposal by Ksem Ksan"). This Association is currently composed of 486 victims, has been validly registered with the Ministry of Interior of the Kingdom of Cambodia, and has been included in the list of associations recognised by the Victims Support Section of the ECCC.
[1400] The Supreme Court Chamber particularly appreciates that the proposal for this memorial was conceived and finalised by an association representing most victims in the present case. *See* Brandon Hamber, "Narrowing the Micro and Macro: A Psychological Perspective on Reparations in Societies in Transition", *The Handbook of Reparations,* Oxford, 2006, p. 576 ("communities should have a say in the process of how community reparations are conceptualized and delivered. In so doing it recognizes the individual and collective impact of the extreme trauma of political repression and violence, as well as the importance of the process, and in that regard points to some ways forward").

management, maintenance and cost, which is estimated at $100,000 USD.[1401] This 13-metre-wide construction is intended to be located in the yard surrounded by buildings A, B and E inside the S-21 complex. All its features, including the plaques bearing the victims' names, would be installed as outlined in the project submitted by the Ksem Ksan Association. It should not disturb the UNESCO-recognised site of Tuol Sleng and, if necessary, will be adjusted so as to comply with UNESCO's directions.

691. The Supreme Court Chamber, considering its high level of specificity and its notable endorsement by all civil party applicants in Case 001, recognises, without pre-judging any outstanding technical specifications, the S-21 Victims' Memorial as an appropriate form of reparation envisaged by Internal Rule 23(1)(b). As confirmed by CPG3, such official and solemn acknowledgement by the ECCC of the adequacy of the present reparation request constitutes in and of itself a form of reparation irrespective of its future implementation.[1402]

692. The Supreme Court Chamber finally notes that, given KAING Guek Eav's indigence, this request cannot be granted. The Chamber nonetheless notes that the Ksem Ksan Association has indeed adumbrated a fund-raising initiative, which may attract the interest of potential donors.[1403] Bearing in mind that the construction of a memorial within the S-21 compound is a complex process that needs the constructive participation and coordination of several entities and administrative bodies, the Supreme Court Chamber invites and encourages competent national and international entities to facilitate the performance of any and all measures required to give it effect.

*iv. Paid Visits for Civil Parties to Memorial Sites*

693. The Civil Parties requested reparations in the form of paid visits to the memorial sites three times a year, each time for four days.[1404] The Trial Chamber did not expressly address this request, however. Civil Parties Group 2 accordingly submits that the Trial Chamber violated Internal Rule 100(1), which requires the Trial

[1401] T. (EN), 30 March 2011, F1/4.1, p. 81 (line 21) to p. 82 (line 10); Proposal by Ksem Ksan.
[1402] CPG3 Supplemental Submissions, p. 3, last paragraph.
[1403] Proposal by Ksem Ksan, p. 11.
[1404] Trial Judgement, para. 656.

Chamber to render a decision on every civil party claim, and therefore committed an error of fact which led to a miscarriage of justice.[1405]

694. The Supreme Court Chamber observes that the implementation of this request would entail financial investment and significant administrative and logistic arrangements. As the ECCC is unable to issue an enforceable order against KAING Guek Eav, the lack of specificity is without bearing on the rejection of this request. This Chamber notes, nonetheless, that the request does not contain even basic technical data, such as the number of individuals who are willing to be involved, as well as the extent of their involvement, for how many years these periodic visits will continue, the visitors' place of residence in Cambodia, and other specifications that would allow the Supreme Court to assess the reasonableness of this request and quantify the related costs. For this reason the Supreme Court Chamber is prevented from endorsing this claim even as a non-binding recommendation as an appropriate form of reparation.

*v. Provision of Medical Treatment and Psychological Services for Civil Parties*

695. The Civil Parties requested free access to medical care, including physical and psychological therapy, covering also transportation to and from appropriate medical facilities.[1406] The Trial Chamber rejected these claims on the grounds that: (a) since these requests for medical care are not symbolic but aimed at a large and indeterminate number of individuals, they may purport to impose obligations upon national authorities, thus exceeding the ECCC's sphere of competence; (b) no link was established between the measures requested and the crimes of which KAING Guek Eav was convicted; and, (c) these requests did not meet the specificity requirement, given the absence of essential elements such as the number and identity of intended beneficiaries and the nature and cost of the measures sought.[1407] The Trial Chamber concluded, "the requests in their current form cannot provide the basis of enforceable orders against KAING Guek Eav."[1408]

[1405] CPG2 Appeal on Reparations, paras 86-87.
[1406] Trial Judgement, paras 652, 654, 656-657.
[1407] Trial Judgement, para. 674.
[1408] Trial Judgement, para. 675.

696. Civil Parties Group 2 argues that the Trial Chamber misunderstood the claim, as its request only referred to treatment for 17 people, not for a large number of individual victims.[1409] The request was also allegedly misinterpreted because, by rejecting it on the ground that it sought to impose obligations upon national authorities, the Trial Chamber failed to appreciate its "clear and plain" meaning, which was that the cost of such physical and psychological treatment is to be borne by KAING Guek Eav and that these services are not necessarily intended to be carried out by national healthcare structures.[1410]

697. Civil Parties Groups 2 and 3 further submit that the Trial Chamber based its decision on an erroneous interpretation of the meaning of "collective and moral" reparations.[1411] Civil Parties Group 2 maintains that a broad interpretation of "collective and moral" reparations should be adopted in accordance with international legal standards as developed, for example, under the ACHR.[1412] Civil Parties Group 2 therefore submits that collective and moral reparations: (a) encompass "anything beyond individual financial compensation";[1413] (b) may still involve some implementing costs; and (c) far from being limited to measures apt to benefit only the collective as a whole, may entail individual benefit for victims.[1414] The request for medical and psychological treatment is moral because of its non-financial nature, and is collective since it is targeted at individuals who suffered from human rights violations as a group.[1415]

698. Finally, the Civil Party Appellants confront the issue of whether or not a causal link between the reparations requested and the crimes for which KAING Guek Eav was found responsible must be established.[1416] Civil Parties Group 2 posits that, by requesting proof of such causation, the Trial Chamber committed an error of law that violated the victims' right to reparation enshrined in Internal Rule 23, given that neither the Internal Rules, the 2007 Code of Criminal Procedure, nor international law

[1409] CPG2 Appeal on Reparations, para. 90.
[1410] CPG2 Appeal on Reparations, paras 88, 91, 105.
[1411] CPG2 Appeal on Reparations, paras 92, 110; CPG3 Appeal, para. 97.
[1412] CPG2 Appeal on Reparations, paras 92-93, 97, 107.
[1413] T. (EN), 30 March 2011, F1/4.1, p. 54 (lines 20-21).
[1414] CPG2 Appeal on Reparations, para. 97.
[1415] CPG2 Appeal on Reparations, paras 108-109.
[1416] CPG2 Appeal on Reparations, para. 112.

provides a legal basis for such requirement.[1417] Civil Parties Group 3 also alleges an error committed by the Trial Chamber in this respect.[1418] While apparently accepting the causal link as a prerequisite for grants of reparation, it contends that the link was indeed "crystal clear" as to the requests for health care.[1419]

699. The Supreme Court Chamber shall first discuss the requirement of a causal link between the reparation measures sought by each Civil Party Appellant and the injury produced by the crimes for which KAING Guek Eav was found responsible. The Supreme Court Chamber first wishes to note that CPG2 is incorrect in claiming the unprecedented character of the requirement of showing the causal link between the crime and the form of reparations sought. Such articulation of the necessary nexus between the prohibited conduct giving rise to reparations and the form of reparations sought has been expressed both under the ECHR and ACHR, and, albeit not entirely precise, is however relatively easy to interpret.[1420] In the context of the ECCC, as discussed above, the causality that needs to be demonstrated for the purpose of admissibility of civil party applications concerns the presence of an injury suffered as a direct consequence of the crime.[1421] The presence of the injury is conducive to the right to seek reparation. Accordingly, once the Trial Chamber satisfied itself with the presence of injury and the civil party status of the applicant, eligibility for reparation is established. As concerns the form of reparation, the Supreme Court Chamber considers that its relation with the harm lies in the form of reparation being aimed at, and suitable to, removing the consequences of the criminal wrongdoing, as well as restoring, to the extent possible, the prior lawful status. Given that the injury established on the part of the victims is the damage to their physical and/or psychological health, the provision of physical and psychological treatment of the injury is a suitable form of reparation under this test.

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[1417] CPG2 Appeal on Reparations, para. 112.
[1418] CPG3 Appeal, para. 102.
[1419] CPG3 Appeal, para. 102.
[1420] *See, e.g. Contreras et al. v. El Salvador*, Judgment (Merits, Reparations and Costs), para. 179 ("reparations must have a causal connection to the facts of the case, the violations declared and the damage proved, and the measures requested to repair the corresponding harm. Therefore, the Court must verify the concurrence of these elements in order to rule in keeping with law"); *Shesti Mai Engineering Ood and Others v. Bulgaria*, ECtHR, Chamber Judgment, App. No. 17854/04, 20 September 2011, para. 101 ("the nature and the extent of the just satisfaction to be afforded by the Court under Article 41 of the Convention directly depend on the nature of the breach. Moreover, there must be a clear causal connection between the damage claimed by the applicant and the breach") (citations omitted).
[1421] 2007 Code of Criminal Procedure, Art. 13; Internal Rule 23 *bis*(1)(b) (Rev. 8).

700. The next question before the Supreme Court Chamber is whether the measure sought qualifies as "collective and moral." The Supreme Court Chamber notes that, indeed, in numerous instances the IACtHR has granted injured parties free access to medical and psychological treatment as an appropriate form of reparation. In *Plan de Sánchez Massacre v. Guatemala*, regarding the torture and subsequent killing of over 250 people, the respondent State was ordered to establish a health centre in the communities affected by the crimes so that the victims and their next of kin could receive adequate medical and psychological care through the respondent State's specialised health institutions.[1422] In that case the IACtHR was unable to specifically identify the totality of victims, and consequently all the beneficiaries of reparations. Ultimately this inability was considered a reason to reject pecuniary compensation for those who had not been individualised at the time of the IACtHR's judgement and to determine instead "other forms of reparations" which would benefit "all the members of the communities affected by the facts of the case."[1423] Among these other forms of reparations ordered, the provision of free medical care is relevant to the present case. Notably, this form of reparation had been expressly suggested by the respondent State, which pleaded:

> Given the difficult[y] of identifying each of the victims who died in the massacre, as well as their next of kin and beneficiaries, reparation measures will be ordered that dignify and rehabilitate the surviving next of kin and victims, instead of merely providing individual financial reparation.[1424]

701. This and other judgements of the IACtHR confirm that provision of medical and psychological care is internationally acknowledged as an appropriate form of reparation. The Supreme Court Chamber therefore finds that such requests advanced by the Civil Party Appellants in the present case fall under the term "collective and moral" reparations as stipulated in Internal Rule 23(1)(b), and accordingly fall within the measures that this Court is potentially empowered to sanction.

702. The remaining question is that of enforceability. The Supreme Court Chamber notes that in *Plan de Sánchez Massacre v. Guatemala* and *"Juvenile Reeducation Institute" v. Paraguay*, detailed instructions were given by the IACtHR in relation to

[1422] *Plan de Sánchez Massacre v. Guatemala*, Judgment (Reparations and Costs), para. 107.
[1423] *Plan de Sánchez Massacre v. Guatemala*, Judgment (Reparations and Costs), para. 62.
[1424] *Plan de Sánchez Massacre v. Guatemala*, Judgment (Reparations and Costs), para. 92.

the committee that the Court ordered to be set up to evaluate the individual needs of the victims, with the assistance of appropriate non-governmental organisations.[1425] Interestingly, in *19 Merchants v. Colombia*, the IACtHR further ordered the establishment of a mechanism, which included newspaper, radio and television announcements, to locate the next of kin of the victims who it had been unable to identify and yet were eligible to receive reparations.[1426]

703. These cases under the ACHR demonstrate that these kinds of measures require a sophisticated administrative structure to be implemented. Under the ACHR, they were to be executed by the respondent State's apparatus, through its specialised health institutions, and within a framework in which the IACtHR maintained a monitoring role. To this aim, committees were created, external organisations were involved, and the implementation stage was partially monitored by the IACtHR itself. Such mechanisms of execution were vital to rendering the IACtHR's orders enforceable in practice, for instance by assisting in the identification of beneficiaries and in the evaluation of their needs. By contrast, the ECCC is not vested with powers to issue binding orders against the Cambodian State or its executive branch, nor is it faced with a State explicitly proposing or able to assist a potentially large, undefined category of beneficiaries.[1427] In the context of the ECCC, orders can only be borne by convicted persons.[1428] Given the indigence of KAING Guek Eav, and absent wider powers to adjudicate and implement measures with the support of a State apparatus, the Supreme Court Chamber is unable to grant the Civil Party Appellants' requests.

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[1425] *Plan de Sánchez Massacre v. Guatemala*, Judgment (Reparations and Costs), para. 108; *Case of the "Juvenile Reeducation Institute" v. Paraguay*, IACtHR, Judgment (Preliminary Objections, Merits, Reparations and Costs), 2 September 2004, paras 318-320. *See also Serrano-Cruz Sisters v. El Salvador*, IACtHR, Judgment (Merits, Reparations and Costs), 1 March 2005, para. 198 (finding that a non-governmental institution should be involved in the implementation of the medical and psychological treatment). On medical and psychological treatment as forms of reparation, *see generally 19 Merchants v. Colombia*, IACtHR, Judgment (Merits, Reparations and Costs), 5 July 2004, para. 278; *Huilca-Tecse v. Peru*, IACtHR, Judgment (Merits, Reparations and Costs), 3 March 2005, paras 103[7], 116; *De La Cruz-Flores v. Peru*, IACtHR, Judgment (Merits, Reparations and Costs), 18 November 2004, para. 168.
[1426] *19 Merchants v. Colombia*, Judgment (Merits, Reparations and Costs), paras 233-234.
[1427] *Cf. Plan de Sánchez Massacre v. Guatemala*, Judgment (Reparations and Costs), para. 92 (in which it was the respondent State itself, taking into account the difficulty of identifying the totality of potential beneficiaries, that proposed measures capable of dignifying and rehabilitating the victims, such as medical and psychological treatment as well as social and educational services for the affected community).
[1428] Internal Rule 23(11).

704. Since, at this stage, the Supreme Court Chamber is not in a position to establish essential features of the reparation orders sought, including the estimated cost of the reparations, the number and identities of beneficiaries, as well as the nature, duration and modality of the treatments needed,[1429] the reparation request at hand is not mature to be singled out for the Chamber's individual endorsement. That said, the Supreme Court Chamber considers that provision of medical care, in general, would be an appropriate form of reparation.[1430]

*vi. Production and Dissemination of Audio and Video Material about Case 001*

705. The Civil Parties advanced several requests before the Trial Chamber generally concerning the dissemination of the Trial Judgement and other outreach activities, including the production of at least 100 hours of audio-visual material on the present proceedings.[1431] These requests cover the distribution of the material to provinces and communes together with additional written and audio documents summarising and explaining the final Judgement, the notification of the Judgement

[1429] Whereas on appeal CPG2 affirms that its request involves treatment for 17 people only, the Civil Parties maintained a different position before the Trial Chamber. During the trial proceedings, CPG2 had referred to medical and psychological treatment intended for direct survivors of S-21 and S-24 and for indirect victims who could establish a causal link between their suffering and the DK regime. CPG2 Final Submission, para. 18. Civil Parties Group 1 had advanced a request before the Trial Chamber for free medical care for victims in general and for the victims of S-21 in particular. Civil Party Group 1 – Final Submission, E159/7, 10 November 2009, pp. 48-49. Likewise, CPG3 requested free medical care for S-21 and S-24 survivors as well as treatment to cure the psychological trauma suffered by direct and indirect victims. Co-Lawyers for Civil Parties (Group 3) Final Submission, E159/5, 11 November 2009, paras 157-158. The Civil Parties Joint Submissions to the Trial Chamber related to physical and psychological medical care, including transportation to medical facilities, for Civil Parties in general. Civil Parties Joint Submissions, paras 17-22. Therefore, the Trial Chamber was correct in holding that the beneficiaries of this reparation request had not been clearly identified. With respect to the claims for free medical care, the Supreme Court Chamber further observes that their connection to the crimes for which Duch was found responsible is not as obvious as those claims regarding psychological treatment aimed at curing post-traumatic mental disorder. Accordingly, the request would need to specify whether an overall medical care is sought or one limited to somatic conditions resulting from the injuries suffered as a result of the crimes. In the latter case mechanisms for establishing eligibility would be required to give effect to the award.

[1430] For this purpose a workable solution may be the establishment of an externally-subsidised trust fund, the administrative structure of which would be tasked with the implementation of the measures sought. Recent amendments to the Internal Rules explicitly provide for an innovative mechanism in which the ECCC can recognise reparation projects designed and identified by the Civil Parties' Lead Co-Lawyers in cooperation with the ECCC Victims Support Section. The Supreme Court Chamber welcomes this new legal framework but at the same time notes that it does not apply to the present case. Internal Rule 114(3) (Rev. 8); Trial Judgement, para. 670 (correctly dismissing the request to establish a trust fund, as it falls outside the scope of the available reparations before the ECCC). Civil Parties Group 3's unsubstantiated claim that the "Trial Chamber erred in law in that it omitted to address the issue of establishing a trust fund" is therefore without merit. CPG3 Appeal, para. 101. At this juncture, the Supreme Court Chamber can merely encourage the Civil Parties in Case 001, many of whom are also participating in Case 002 (out of the 94 civil party applicants in Case 001, 69 have been admitted as Civil Parties in Case 002), to seek this form of reparation through the amended system.

[1431] Trial Judgement, paras 654, 656-657.

through the official gazette and other national newspapers, and broadcast of the Judgement on national radio and television networks.[1432]

706. Although the Trial Chamber did not directly address the requests to disseminate audio, video and documentary material about the trial, it can be safely assumed that these claims were dealt with under the heading "Requests concerning publication of the judgment and outreach."[1433] The Trial Chamber rejected the claims under this heading due to their lack of specificity, as "the precise nature of the measures sought and their costs are uncertain and indeterminable."[1434] The Trial Chamber nevertheless observed that: (a) the Judgement will be available to the media through the ECCC website; and (b) the diffusion of information regarding the Judgement will take place as part of the ECCC Public Affair Section's ("PAS") outreach activities.[1435]

707. Recalling the arguments put forth in respect of the requests for memorials, CPG2 submits that the Trial Chamber set an excessively high threshold with regard to the requirement of specificity for the present claims, thereby violating Internal Rules 21(a) and (c) and 23.[1436] By requiring such a severe level of specificity in the absence of a legal basis, the Trial Chamber overburdened the Civil Parties and infringed Internal Rule 21(1)(a) on procedural fairness and victims' rights.[1437] Further, CPG2 argues that the Trial Chamber committed an error of fact by overlooking the detailed particulars related to the requests at hand.[1438]

708. The Supreme Court Chamber emphasises that wide dissemination of material concerning the proceedings before this Court and its factual and legal findings is consistent with the ECCC's mandate, which includes contributing to national reconciliation and providing documentary support to the progressive quest for historical truth. Public awareness of, and open debate on, these tragic pages of the history of Cambodia form part of the efforts to bring closure to the Cambodian

[1432] Trial Judgement, paras 654, 656-657.
[1433] Trial Judgement, heading 4.4.3.3 related to para. 669.
[1434] Trial Judgement, para. 669.
[1435] Trial Judgement, para. 669.
[1436] CPG2 Appeal on Reparations, para. 116.
[1437] CPG2 Appeal on Reparations, paras 117-118.
[1438] CPG2 Appeal on Reparations, para. 119.

people.[1439] The Supreme Court Chamber considers that the wide circulation of the court's findings may contribute to the goals of national healing and reconciliation by promoting a public and genuine discussion on the past grounded upon a firm basis, thereby minimising denial, distortion of facts, and partial truths.

709. The Supreme Court Chamber therefore acknowledges that the dissemination of materials of the ECCC proceedings is an appropriate form of reparation. It has to be reiterated that ordering such measures to be implemented at the expense of KAING Guek Eav is not available due to his indigence. The Supreme Court however observes that many Civil Party Appellants' proposals are within the mandates of the PAS and VSS, which encompass outreach activities related to victims[1440] and the dissemination of information regarding the ECCC.[1441] The Supreme Court Chamber welcomes the efforts undertaken to date in ensuring the distribution of the Trial Judgement, brochures, and audio-visual material to most communes and provincial offices, and, on demand, to media outlets, and further directs these ECCC Sections to undertake appropriate additional outreach activities, including dissemination of and information about this Appeal Judgement, attaching due consideration to the present claims for reparation of the Civil Party Appellants.

*vii. Naming 17 Public Buildings after the Victims and Associated Ceremonies*

710. The Civil Parties requested the proclamation of a national commemoration day to memorialise the victims of the Khmer Rouge regime, the conferral on Civil Parties of the right to name a public building of their choice after the victims that they represent, the holding of official ceremonies, and the erection of informative and memorialising plaques.[1442] The Trial Chamber did not render a decision specifically addressing these requests, but it can be assumed that they were included under the

[1439] *See Lehideux and Isorni v. France*, ECtHR, Grand Chamber Judgment, App. No. 24662/94, 23 September 1998, para. 55 (finding that, in relation to a painful page of the history of France such as the contentious policy of collaboration with the Nazi Germany in the extermination of Jews, it is inappropriate for the State authorities to curtail public debate on the country's own history, notwithstanding the eventuality that that discussion will reopen the controversy and revive memories of past sufferings). The Supreme Court Chamber concurs that "such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'." *Lehideux and Isorni v. France*, Grand Chamber Judgment, para. 55.
[1440] Internal Rule 12(2)(h) (Rev. 3); Internal Rule 12 *bis*(1)(h) (Rev. 8).
[1441] Internal Rule 9(4) (Revs. 3 and 8); Internal Rule 12 *bis*(1)(e) (Rev. 8).
[1442] Trial Judgement, paras 654, 656-657.

heading, "Requests for Measures by the Royal Government of Cambodia."[1443] They were accordingly dismissed by the Trial Chamber as falling outside the jurisdiction of this Court since the ECCC has no competence to compel national authorities.[1444]

711. Civil Parties Group 2 submits that the Trial Chamber's failure to render a decision on the request to name public buildings constitutes an error of fact and a violation of Internal Rule 100(1).[1445] Additionally, it argues that the Trial Chamber should not have been prevented from issuing reparation orders that require non-pecuniary and administrative support by the RGC.[1446]

712. The Supreme Court Chamber notes that instituting such measures is the prerogative of the relevant administrative authorities or territorial government. It further reiterates that the ECCC is not vested with the power to issue binding orders against any third-party or orders that would create obligations on the part of a person or entity other than KAING Guek Eav. The Supreme Court Chamber thus finds that the totality of the present requests exceeds the ECCC's competence. Accordingly, the Trial Chamber correctly rejected the requests.

713. At the same time, the Supreme Court Chamber confirms that designating a national commemoration day, holding of official ceremonies, and erection of informative and memorialising plaques are appropriate measures of reparation in the circumstances of the present case.

*viii. Writing an Open Letter to the RGC Requesting Part of the Entrance Fees to be Used to Fund Reparations*

714. The Civil Parties requested that the Trial Chamber order KAING Guek Eav to write an open letter to the RGC requesting that one third of the entrance fees for the Tuol Sleng museum and Choeung Ek be used to finance their reparation requests, and that the remaining funds be granted to the Civil Parties as monetary awards.[1447] The Trial Chamber did not expressly decide on this request.

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[1443] Trial Judgement, heading 4.4.3.5 related to para. 671.
[1444] Trial Judgement, para. 671.
[1445] CPG2 Appeal on Reparations, paras 121, 123.
[1446] CPG2 Appeal on Reparations, para. 122.
[1447] Trial Judgement, para. 656.

715. First, CPG2 submits that the Trial Chamber violated Internal Rule 100(1) by not rendering an explicit decision on this request. Second, assuming that the request was probably included under the heading "Requests for individual monetary awards to Civil Parties or establishment of a fund," or under "Requests for measures by the Royal Government of Cambodia," the Trial Chamber allegedly committed an error of fact by misinterpreting the Civil Party Appellants' claim and by overlooking its clear meaning.[1448]

716. The Supreme Court Chamber recalls its above reasoning in regard to the Civil Party Appellants' request for a letter from KAING Guek Eav demanding an apology by the RGC,[1449] and reiterates that the ECCC is not vested with powers to issue binding orders against the RGC. Accordingly, the dismissal of the present claim by the Trial Chamber was correct.

### 3. Conclusion

717. The Supreme Court Chamber recognises the suffering of the victims as well as their right to obtain effective forms of reparation under internationally established standards. It further notes that the Civil Party Appellants, and CPG2 in particular, have advanced numerous requests that represent, in general terms, appropriate forms of reparation for the harm suffered (for instance, the provision of medical and psychological treatment for direct and indirect victims, naming public buildings after victims and installation of informative plaques, holding commemorative ceremonies, and erection of memorials such as pagodas, pagoda fences and monuments). Nevertheless, due to the constraints stemming from the ECCC reparation framework as outlined above, these specific requests cannot be granted. Considering that several requests have been rejected also on the basis of KAING Guek Eav's indigence, and while appreciating that some of them have been adequately specified, the Supreme Court Chamber encourages national authorities, the international community, and other potential donors to provide financial and other forms of support to develop and implement these appropriate forms of reparation.

[1448] CPG2 Appeal on Reparations, paras 126-129.
[1449] Above Sub-section ii "Letter Requesting an Apology from the Government".

# VIII. DISPOSITION

For the foregoing reasons, **THE SUPREME COURT CHAMBER**,

**PURSUANT TO** Article 4(1)(b) of the UN-RGC Agreement, Articles 14 new(1)(b) and 36 new of the ECCC Law, and Internal Rule 111 (Rev. 8),

**NOTING** the respective written appeal submissions of the Parties and the arguments they presented at the Appeal Hearing from 28-30 March 2011;

In respect of KAING Guek Eav's appeal,

**DISMISSES** the Defence Appeal;

In respect of the Co-Prosecutors' Appeal,

**GRANTS**, in part, and **DISMISSES**, in part, the Co-Prosecutors' Ground of Appeal 2, and:

**QUASHES** the Trial Chamber's decision to subsume under the crime against humanity of persecution the other crimes against humanity for which it found KAING Guek Eav responsible;

**AFFIRMS** KAING Guek Eav's conviction for the crime against humanity of persecution; and

**ENTERS** additional convictions for the crimes against humanity of extermination (encompassing murder), enslavement, imprisonment, torture, and other inhumane acts;

**GRANTS** the Co-Prosecutors' Ground of Appeal 1, and:

**QUASHES** the Trial Chamber's decision to sentence KAING Guek Eav to 35 years of imprisonment;

**QUASHES** the Trial Chamber's decision to grant a remedy for the violation of KAING Guek Eav's rights occasioned by his illegal detention by the Cambodian Military Court between 10 May 1999 and 30 July 2007;

**ENTERS** a sentence of life imprisonment; and

**FINDS** that KAING Guek Eav has served 12 years and 269 days of such sentence;

**DISMISSES** the Co-Prosecutors' Ground of Appeal 3;

In respect of Civil Parties Groups 1, 2, and 3's Appeals,

**GRANTS**, in part, and **DISMISSES**, in part, the Civil Party Appellants' grounds of appeal on admissibility of their civil party applications, and **DECLARES** that, in addition to those Civil Parties admitted by the Trial Chamber in the Trial Judgement, the following Civil Party Appellants have demonstrated on appeal that they have suffered harm as a direct consequence of the crimes for which KAING Guek Eav has been convicted:

- E2/61, LY Hor alias EAR Hor
- E2/62, HIM Mom
- E2/86 and E2/88, Jeffrey JAMES and Joshua ROTHSCHILD
- E2/35, CHHAY Kan alias LIENG Kân
- E2/83, HONG Savath
- E2/33, PHAOK Khan
- E2/82, MÂN Sothea
- E2/22, CHHOEM Sitha
- E2/32, NAM Mon;[1450]

And **REJECTS** the remainder of the Civil Party Appellants' applications as inadmissible;

**DISMISSES** the Civil Party Appellants' grounds of appeal on reparations, and **AFFIRMS** the Trial Chamber's decision to compile and post on the ECCC's official website all statements of apology and acknowledgements of responsibility made by KAING Guek Eav during the course of the trial, including the appeal stage,[1451] and **AFFIRMS** the Trial Chamber's rejection of all other claims for reparations;

**PURSUANT TO** Internal Rules 111(5) and 113(1)-(3),

**ORDERS** that KAING Guek Eav remain in the custody of the ECCC pending the finalization of arrangements for his transfer, in accordance with the law, to the prison in which his sentence will continue to be served.

[1450] A list of victims who were admitted as Civil Parties in the Case 001 Trial or Appeal Judgement is attached to this Appeal Judgement as document F28.2.
[1451] This compilation is attached to this Appeal Judgement as document F28.1, filed 16 February 2012 and corrected 20 March 2012.

Done in Khmer and English.
Dated this third day of February 2012
At Phnom Penh
Cambodia

Greffiers

SEA Mao Christopher RYAN PHAN Theoun Paolo LOBBA

Judge KONG Srim
President

Judge Motoo NOGUCHI

Judge SOM Sereyvuth

Judge Agnieszka KLONOWIECKA-MILART

Judge SIN Rith

Judge Chandra Nihal JAYASINGHE

Judge YA Narin

Judges Agnieszka KLONOWIECKA-MILART and Chandra Nihal JAYASINGHE append a partially dissenting joint opinion.

# IX. PARTIALLY DISSENTING JOINT OPINION OF JUDGES AGNIESZKA KLONOWIECKA-MILART AND CHANDRA NIHAL JAYASINGHE

1. The majority decides, contrary to the opinion of the Trial Chamber and beyond the request of the Prosecution, to impose a sentence of life in prison.[1452] Based on our evaluation of the gravity of the crimes charged, individual circumstances of the accused, and relevant aggravating factors, we concur that life imprisonment is warranted. We cannot, however, agree with the decision of the majority to deny a remedy for the severe violation of KAING Guek Eav's fundamental rights occasioned by his lengthy pre-trial detention.[1453]

2. The Trial Chamber found that KAING Guek Eav's eight year detention by the domestic Military Court exceeded the three year limit under the law then in force, and furthermore that although the repeated extensions of KAING Guek Eav's pre-trial detention were explained by the needs of an ongoing investigation, there is no evidence that any substantial and systematic investigation took place. In some instances, extensions of the detention of the accused were ordered by the Prosecutor, rather than the competent judicial authorities.[1454] These findings are not contested by any of the parties or the majority opinion; moreover, the Co-Prosecutors have expressly recognized the need to reduce the sentence to a fixed term as a remedy for unlawful detention.[1455] We note further that KAING Guek Eav's pre-trial detention, which exceeded the statutory limit and continued for ten years, is inconsistent with the standards established by Articles 9(1), (3) and 14(3)(c) of the ICCPR, to which Cambodia is a party and which constitutes binding law before the ECCC.[1456] We

[1452] Appeal Judgement, section VIII, Disposition.
[1453] Appeal Judgement, paras 337-405 ("Majority Opinion on Sentence"), paras 389-399.
[1454] Decision on Request for Release, paras 19-20; Trial Judgement, paras 624, 626.
[1455] Co-Prosecutors' Appeal, para. 131 ("Only after finding a sentence of life imprisonment should the Trial Chamber have reduced it to an express and measurable term of forty-five years to provide an appropriate remedy for the Respondent's unlawful detention").
[1456] ICCPR, Art. 9 ("1 […] No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law […] 3. Anyone arrested or detained on a criminal charge shall be …entitled to trial within a reasonable time or to release"); *see also* Human Rights Committee, General Comment No 8 – Article 9: Right to liberty and security of persons, U.N. Doc. HRI/GEN/1/Rev.6 at 130 (30 June 1982), ("General Comment 8"), para. 3 ("Pre-trial detention should be an exception and as short as possible"); Human Rights Committee, General Comment No. 32 - Article 14: Right to equality before courts and tribunals and to a fair trial, U.N. Doc. CCPR/C/GC/32 (23 August 2007), para. 35 (requiring that the deprivation of liberty last no longer than necessary under

therefore limit our analysis to whether the deprivation of KAING Guek Eav's liberty is attributable to the ECCC, and if so, the remedy to which he is entitled.

3. The majority opinion holds, referencing case law from the *ad hoc* tribunals, that a convicted person is entitled to a remedy for a prior infringement of his rights only where "at least some responsibility" for such infringement lies with the tribunal.[1457] Citing the Trial Chamber's finding that the ECCC is a "separately constituted, independent and internationalised court," the majority concludes that this Court is not responsible for the breach of the Accused's rights occasioned by the conduct of the Cambodian authorities in relation to criminal proceedings prior to the constitution of the ECCC.[1458] In support of that conclusion, the majority relies exclusively on the jurisprudence of the ICTY and ICTR, which have typically accepted responsibility for violations of the rights of the accused during pre-trial detention only following the point at which the international prosecutor submitted a request for provisional detention to the domestic authorities under Rule 40 of the ICTY and ICTR RPEs.[1459] The majority's view differs from that of the Trial Chamber, which ultimately held that an international court must consider the legality of an accused's prior detention, even if such detention cannot be attributed to that tribunal.[1460]

4. We agree with the majority's statement of the *ad hoc* tribunals' case law to the extent that some link between the sentencing court and the illegality of detention is required for a remedy to be granted. We disagree, however, with the majority's

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the circumstances, taking into account the complexity of the case, conduct of the accused, and manner in which it was dealt with by the authorities), fn. 72 (reviewing the jurisprudence of the Committee, in which several examples of pre-trial detention far shorter than the ten years at issue in this case were found to violate Article 14(3)(c)).

[1457] Majority Opinion on Sentence, para. 392.

[1458] Majority Opinion on Sentence, para. 393. The majority's conclusion is also based on two additional holdings: that the Military Court detention did not constitute an abuse of process and that there was no evidence of "concerted action" between the domestic authorities and the ECCC. *See* Majority Opinion on Sentence, paras 392-394. We express no opinion on abuse of process, as our analysis is based entirely on our conclusion that the conduct of the domestic authorities is attributable to the ECCC. As to concerted action, for the reasons that follow in our view the absence of explicit concerted action is not conclusive under these circumstances.

[1459] Majority Opinion on Sentence, para. 397, citing *Semanza* Decision, paras 4, 5, 79, *Kajelijeli* Appeal Judgement, paras 227, 323 and 324, *Rwamakuba* Decision on Illegal Arrest and Detention, paras 27 and 30. The majority also distinguishes the *Barayagwiza* Decision on the basis of its finding that the deprivation of the defendant's rights constituted an abuse of process, a point we decline to address in this opinion. *See* Majority Opinion on Sentence, para. 396.

[1460] Decision on Request for Release, para. 16.

mechanistic application of the ICTY and ICTR approach to the facts of this case. We find that adopting the *ad hoc* tribunals' approach is inappropriate in light of the obvious differences regarding the position held by the ECCC, as compared with the *ad hoc* criminal tribunals, *vis a vis* the national systems that occasioned the violations.

5. The ICTY and ICTR are international tribunals, established under the authority of the UN Security Council pursuant to Chapter VII of the UN Charter.[1461] The constitutive documents of the tribunals, including the relevant Security Council resolutions and their respective statutes, were similarly promulgated by the Security Council acting under Chapter VII authority.[1462] The creation of the tribunals was based on no agreement with the Rwandan or Yugoslavian governments and no legislation enacted in the Rwandan or Yugoslavian legislatures. Domestic rules of criminal law and procedure are not applicable at either tribunal.[1463]

6. The nature of the ECCC, as an "internationalised" court, is different. We do recognize that the ECCC has certain international characteristics, including the fact that (i) one of its constitutive documents is the UN-RGC Agreement; (ii) it employs international judges; and (iii) it applies international law for some purposes.[1464] It remains, however, a domestic court in key respects (which we discuss below).[1465]

7. Given the unique "hybrid" structure of the ECCC, the majority's observation that the ICTY and ICTR have granted a remedy only for those violations occurring after the international prosecutor's request for provisional detention under ICTR/Y RPE Rule 40 is unpersuasive. The ICTY and ICTR have declined to assume

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[1461] *Establishment of an International Tribunal and adoption of the Statute of the Tribunal*, S.C. Res. 955, UN SCOR, 3454th Mtg, UN Doc. S/RES/955 (8 November 1994) ("S.C. Res 955"); *Tribunal (Former Yugoslavia)*, S.C. Res. 808, UN SCOR, 3175th Mtg, UN Doc. S/RES/808 (22 February 1993) ("S.C. Res 808"); *Tribunal (Former Yugoslavia)*, S.C. Res. 827, UN SCOR, 3217th Mtg, UN Doc. S/RES/827 (25 May 1993) ("S.C. Res 827").

[1462] S.C. Res. 955, para. 1; Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UN Doc. S/25704 (3 May 1993); S.C. Res 827, para. 2.

[1463] For one exception, *see* ICTR Statute, Art. 23 (noting that the Tribunal shall "have recourse to the general practice regarding prison sentences in the courts of Rwanda" in formulating sentences); ICTR RPE, Rule 101(B)(iii) (same); ICTY Statute, Art. 24 (same); ICTY RPE, Rule 101(B)(iii) (same).

[1464] *See, e.g.* UN-RGC Agreement, Art. 12(1); ECCC Law, Arts 4, 5, 33 new.

[1465] As concerns the other characteristics invoked by the majority, we point out that the fact that the ECCC is "separately constituted" merely marks its organizational segregation, whereas "independence" is a requisite feature of any court under international standards and a constitutional requirement for all domestic courts. *See* Constitution of the Kingdom of Cambodia, Art. 109. Thus, these features *per se* do not confer autonomy from the state system of Cambodia.

responsibility for violations attributable to jurisdictionally distinct authorities of sovereign states over which the international tribunal exercised no control.[1466] This approach is consistent with the general principle of international law that statutory implementation of human rights and specific protection of the individual against violations of these rights are primarily domestic concerns.[1467] However, while the responsibility of an international court for domestic conduct may be limited to explicit "concerted action",[1468] a different analysis is required of an "internationalised" court, which is an emanation of the state that called it into being. We propose that it is a larger principle of shared responsibility that controls the question whether a hybrid court ought to be accountable for the acts of the domestic system. The extent of a tribunal's "shared responsibility" must be determined as a matter of fairness, taking into account the entirety of the circumstances.

8. In particular, we believe that the following considerations are relevant: (i) the extent to which the sentencing court is integrated into the domestic system; (ii) the nexus between the violation and the proceedings before the sentencing court; (iii) the gravity of the violation, which must rise to a violation of fundamental rights; (iv) whether an appropriate remedy is within the jurisdiction of the sentencing court; and (v) whether granting the remedy would frustrate the mandate of the sentencing court (for example by requiring the immediate release of the defendant). Based on our analysis of these factors in this case, we conclude that this Court is obligated to consider its responsibility for KAING Guek Eav's detention by the Military Court prior to his transfer to ECCC custody.

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[1466] *Karadžić* Decision on Remedy for Violation of Rights in Connection with Arrest, paras 2, 6 (when he was first arrested by Serbian authorities, the defendant was held *incommunicado* for four days prior to his first appearance before a domestic judge); *Semanza* Decision, paras 4-12, 79 (court declined to attribute to the ICTR the initial 19-day period of detention prior to the ICTR prosecutor's request for provisional detention, as well as a subsequent period of detention following the prosecution's affirmative decision to drop the charges against the accused); *Rwamakuba* Decision on Illegal Arrest and Detention, paras 30 and 34 (ICTR held that the prosecution was not even *aware* of the detention of the accused for the first five months of his six month detention, and that it informed the domestic authorities within 27 days of learning of the detention that it was not in possession of sufficient evidence to merit continued detention); *Kajelijeli* Appeal Judgement, paras 227, 323, 324 (Court determined that the arrest by the domestic authorities did occur at the behest of the prosecution, and awarded a full remedy in the form of a sentence reduction).

[1467] Manfred Nowak, *UN Covenant on Civil and Political Rights. CCPR Commentary*, 2nd rev. ed., N.P. Engel, 2005, p. 57 ("[Article 2 para. 3] embodies the general principle of international law that not only the statutory implementation and structuring of international norms of human rights but also the specific protection of the individual against violations of these rights are primarily domestic concerns").

[1468] Majority Opinion on Sentence, paras 392, 397.

9. First, and most important in this case, the ECCC was established by and within the domestic system. This is plainly evident from the following: (i) the preamble to the Agreement identifies the ECCC as being established "within the existing court structure of Cambodia";[1469] (ii) the ECCC was established by the ECCC Law, a national statute enacted by the Cambodian legislature, as contemplated by the UN-RGC Agreement; [1470] (iii) the phrase "in the courts of Cambodia" was incorporated into the title of the ECCC Law, and the ECCC Law explicitly refers to the ECCC being "established in the existing court structure";[1471] (iv) earlier versions of the ECCC Law replicated the hierarchy of the Cambodian judiciary; [1472] (v) international judges are appointed by the Supreme Council of the Magistracy, a Cambodian institution;[1473] and (vi) the ECCC applies national substantive law to the extent delineated in the ECCC Law and UN-RGC Agreement.[1474] The domestic character of the Tribunal was, moreover, a heavily negotiated aspect of the ECCC Law and UN-RGC Agreement that was formulated deliberately by its drafters. Indeed, the Cambodian government stood by its position of having a national tribunal with international assistance nearly to the point of rupture.[1475]

10. Furthermore, the framers of the ECCC legal regime intended for Cambodian procedure to be the primary source of procedural law at the ECCC. This is plain from the text of the law: (i) the framers incorporated "under Cambodian law" into the title of the Agreement; (ii) the phrase "Cambodian law" is the first source of law listed throughout the Agreement[1476] and the ECCC Law; [1477] (iii) "Cambodian law" is explicitly recognized as a primary source of the proceedings in the Agreement[1478] and "existing procedures" are explicitly recognized by the ECCC Law;[1479] and (iv) the Court was given the authority to seek guidance in rules established at the international

[1469] UN-RGC Agreement, Preamble.
[1470] UN-RGC Agreement, Art. 2(2).
[1471] ECCC Law, Art. 2 new.
[1472] 2001 ECCC Law, Arts 2, 9 (establishing a three-tiered system including a Trial Court, Appeals Court and Supreme Court).
[1473] ECCC Law, Art. 11 new.
[1474] UN-RGC Agreement, Art. 9; ECCC Law, Art. 3 new.
[1475] David Scheffer, "The Extraordinary Chambers in the Courts of Cambodia" in M. Cherif Bassiouni (ed.), *International Criminal Law*, 3rd ed., Koninklijke Brill NV, 2008, pp. 224-239.
[1476] UN-RGC Agreement, Arts 1, 5(3), 6(3).
[1477] ECCC Law, Art. 1.
[1478] UN-RGC Agreement, Art. 12(1).
[1479] ECCC Law, Arts 23 new, 25, 33 new, 34 new.

level only where Cambodian law is silent, uncertain or inconsistent with international standards.[1480]

11. The domestic nature of the ECCC is especially visible with regard to enforcement. Whatever the international character of the Court for the purposes of adjudication, convicted persons are incarcerated and administered by ordinary prison authorities.[1481] In our view, the international characteristics of the court are less relevant with respect to an issue such as detention, which was clearly intended to be governed by domestic law and procedure, than it might be, for example, to determining the law applicable to proceedings before the court.

12. Second, the background of KAING Guek Eav's detention by the Military Court demonstrates the intimate connection between that period of detention and the case against KAING Guek Eav at the ECCC. KAING Guek Eav was first detained in 1999, roughly two years after the RGC's initial request for assistance in prosecuting certain former members of the Khmer Rouge was transmitted to the UN.[1482] He was held throughout the lengthy period of negotiation that led to the conclusion of the UN-RGC Agreement in 2003 and the adoption of the final version of the ECCC Law in 2004. During those negotiations, senior RGC officials made numerous statements indicating their expectation that KAING Guek Eav was a likely candidate for prosecution at the yet-to-be-established Tribunal.[1483] Shortly after the Court became operational, the ECCC Co-Prosecutors opened a judicial investigation against him[1484] and just two weeks later, he was transferred to the custody of the ECCC.[1485] The

[1480] UN-RGC Agreement, Art. 12(1).
[1481] *See* UN-RGC Agreement, ECCC Law, and Internal Rules, making no provision for post-conviction incarceration with the exception of Internal Rule 113, pursuant to which enforcement shall be made "at the initiative of the Co-Prosecutors" who may "seek the assistance of the law enforcement authorities." By contrast, the Rules and Statutes of the ICTR and ICTY have explicit rules: *see* ICTR Statute, Arts 26 (place of imprisonment designated by international tribunal and subject to its supervision), 27 (pardon within authority of the tribunal); ICTR RPE, Rules 102 through 104 (place of imprisonment designated by international tribunal and subject to its supervision); ICTY Statute, Arts 27 and 28 (similar); ICTY RPE, Rules 102 through 104 (similar).
[1482] Indictment, Military Prosecutor (Military Court No. 012/99), 10 May 1999, E52/4.3; Detention Order, Investigating Judge of the Military Court (Military Court No. 142/99), 10 May 1999, E52/4.8.
[1483] *See* David Scheffer, "The Negotiating History of the ECCC's Personal Jurisdiction," 22 May 2011, p. 4 <http://www.cambodiatribunal.org/>; Steve Heder, "A Review of the Negotiations Leading to the Establishment of the Personal Jurisdiction of the Extraordinary Chambers in the Courts of Cambodia," 2 August 2011, pp. 31, 37, 39, 41 <http://www.cambodiatribunal.org/blog>.
[1484] Co-Prosecutors' Introductory Submission, 8 July 2007, D3.
[1485] Arrest Warrant, 30 July 2007, C1; Written Record of Handover of the Offender, 31 July 2007, E52/4.65.

Military Court subsequently relinquished its jurisdiction over the Accused in favour of the ECCC,[1486] and the Trial Chamber held that no substantial and systematic investigation was undertaken over the course of this entire period.[1487] Under these circumstances, it is clear that the case against KAING Guek Eav at the ECCC is functionally an extension of the charges originally brought by the Military Court in 1999.

13. These facts stand in stark contrast with those at issue in the jurisprudence from the *ad hoc* tribunals relied upon by the majority. Those cases involve relatively brief periods of detention by jurisdictionally distinct authorities and, to the extent those courts rejected the request for a remedy, there was no indication of a relevant causal link between the proceedings before the international tribunals and the continuing detention by the national authorities.[1488] By contrast, the state of Cambodia held KAING Guek Eav for eight years without any substantive proceedings while it negotiated the creation of the ECCC, and then transferred him to a court of its own creation for investigation into "broadly similar" allegations.[1489] In our view, there is a clear nexus between the prior detention and the case before the Court.

14. Third, while every deprivation of liberty without sufficient grounds is a violation of a fundamental right, the prejudice to KAING Guek Eav's liberty was extreme. The Human Rights Committee and the European Court of Human Rights have deemed far shorter periods of detention unlawful under applicable international human rights standards.[1490] While the complexity of a case can justify, within statutory limits, a lengthier period of detention, in this case the authorities exceeded

[1486] Order, Investigating Judge of the Military Court, 21 July 2008, E52/4.66.
[1487] Decision on Request for Release, para. 20.
[1488] *See* cases cited in fn. 1466, *supra*.
[1489] Majority Opinion on Sentence, para. 403 and fn. 851.
[1490] *See Sextus v. Trinidad and Tobago*, United Nations Human Rights Committee, Views, U.N. Doc CCPR/C/72/D/818/1998 (1 August 2001), ("Sextus v. Trinidad and Tobago"), para. 7.2 (22 month detention prior to trial inconsistent with Articles 9(3) and 14(3)(c)); *Siewpersaud et al. v. Trinidad and Tobago*, United Nations Human Rights Committee, Views, U.N. Doc CCPR/C/81/D/938/2000 (19 August 2004), ("Siewpersaud et al. v. Trinidad and Tobago"), para. 6.1, (34 month detention prior to trial inconsistent with Article 9(3)); *Dzelili v. Germany*, ECtHR, Chamber Judgement, App No. 65745/01, 10 November 2005, ("*Dzelili* Judgement"), paras 68, 81 (4 year, 8 month pre-trial detention inconsistent with ECHR article 5(3)).

the statutory maximum and failed to proceed expeditiously over an eight-year period.[1491]

15. Finally, as demonstrated below, the ECCC is uniquely placed to grant an effective remedy that will not frustrate the mandate of the Court.

16. The Appeal Judgement reviews in detail the international law on the right to a remedy in the context of its analysis of civil party reparations.[1492] As the Chamber concludes, the individual's right to a remedy for violations of core human rights is established in numerous international instruments, several of which are binding on Cambodia under international law and recognized in Cambodia by virtue of Article 31(1) of the Constitution.[1493] Among them, Article 2(3)(a) of the ICCPR provides for the right to an "effective remedy" for the violation of any right guaranteed under the Covenant. The right to a "proportionate remedy" for a violation of an accused's fundamental rights has been confirmed by ICTR.[1494]

17. The right to a remedy is specifically emphasized in relation to unlawful detention. Although Cambodian law does not address the consequences of illegal pre-trial detention, the Constitution of the Kingdom of Cambodia is deeply protective of the right to liberty.[1495] Rules established at the international level confirm that a state which unlawfully limits an individual's physical liberty is obligated to provide an adequate remedy. Article 9 of the ICCPR, which guarantees protection from arbitrary arrest or detention, provides in subparagraph 4 that anyone who is deprived of such protection may apply to a court for release. Paragraph 5 similarly provides for a right to compensation. Interpreting Article 9, the Human Rights Committee has noted the

[1491] *See* General Comment 32, para. 35 (reasonableness of pre-trial detention determined by "the complexity of the case, the conduct of the accused, and the manner in which the matter was dealt with by the administrative and judicial authorities"); *Barayagwiza* Decision, paras 2, 91-101 (criticizing prosecutor's lack of diligence over an 18 month period of investigation prior to the issuance of an indictment).
[1492] Appeal Judgement, paras 645-652.
[1493] Appeal Judgement, para. 653.
[1494] *Semanza* Decision, para. 125.
[1495] *See* Constitution of the Kingdom of Cambodia, Arts 31, 32 and 38; *see also* 2007 Code of Criminal Procedure, Art. 507 ("Any judge or prosecutor who has received a complaint regarding any illegal detention shall immediately examine it").

obligation to provide an effective remedy for a deprivation of liberty in violation of the Covenant.[1496]

18. The objective of a remedy for the infringement of a right guaranteed under international law is to render the complainant whole.[1497] As stated by the Permanent Court of International Justice in the *Chorzow Factory* case, "reparation must, as far as possible, wipe-out all consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed."[1498] In that regard, the "mere possibility" of obtaining compensation is insufficient.[1499] The remedy granted should rather be actually "capable of affording redress."[1500]

19. In the criminal context, international courts have therefore sought to remedy unlawful detention by restoring to the defendant the liberty of which he was deprived. The ECtHR has held in the context of unlawful detention that the state is required to "put an end to the violation found by the Court and make all feasible reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach."[1501] Thus, established jurisprudence from the ECtHR holds that a sentence reduction is an appropriate remedy for excessive or unlawful detention[1502]

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[1496] General Comment 8, para. 1.
[1497] *See* Appeal Judgement, paras 645-646. *See also Paniagua-Morales et al. v. Guatemala ("Case of the white van")*, IACtHR, Judgment (Reparations and Costs), 25 May 2001, paras 76, 79 (reparation requires "full restitution […] which constitutes in the re-establishment of the previous situation").
[1498] *Chorzow Factory*, Judgment (Claim for Indemnity) (The Merits), p. 47. These standards have been applied by the Chamber in its discussion on reparations: Appeal Judgement, paras 645-646.
[1499] *Agudo v. Spain*, United Nations Human Rights Committee, Views, U.N. Doc. CCPR/C/76/D/890/1999 (31 October 2002), para 9.1.
[1500] *Menesheva v. Russia*, ECtHR, Chamber Judgement, App. No. 59261/00, 9 March 2006, para. 76 (a remedy that was unlikely to materialize into tangible compensation was "theoretical and illusory" and therefore did not satisfy the requirements of the Convention); *Vernillo v. France*, ECtHR, Chamber Judgement, App. No. 11889/85, 20 February 1991, para. 27 ("remedies must be sufficiently certain not only in theory but also in practice"); *Selmouni v. France*, ECtHR, Grand Chamber Judgement, App. No. 25803/94, 28 July 1999, para. 76 (remedy must be "an effective one available in theory and in practice at the relevant time, that is to say, that it was accessible, was one which was capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success").
[1501] *Assanidze v. Georgia*, ECtHR, Grand Chamber Judgement, App. No. 71503/01, 8 April 2004, para. 198. *See also id.*, para. 202 (holding that the only possible remedy for an applicant's unlawful detention was, under those circumstances, immediate release).
[1502] *Chraidi v. Germany*, ECtHR, Chamber Judgement, App. No. 65655/01, 26 October 2006, ("*Chraidi* Judgement"), paras 24-25; *Dzelili* Judgement, paras 83-85. *See also* Report on the Effectiveness of National Remedies in Respect of Excessive Length of Proceedings, Study No. 316/2004, adopted by the European Commission for Democracy Through Law, 69th Plenary Sess., 3 April 2007, ("Venice Commission Report"), para. 228 ("taking into account the delays in the assessment of punishment must be considered an appropriate form of redress in criminal proceedings").

and that such reduction must constitute "adequate redress" for the violation alleged.[1503] The *ad hoc* tribunals have consistently granted reduced sentences in addition to credit for time served as compensation for illegal pre-trial detention.[1504]

20. Pursuant to this analysis, KAING Guek Eav is entitled to a remedy for the infringement of his right to liberty. That remedy includes both our acknowledgement of the violation of his rights in this opinion as well as a restorative remedy in the form of a reduction in his sentence. In light of the Chamber's unanimous decision that the gravity of KAING Guek Eav's crimes warrants a sentence of life in prison, such a remedy can only be achieved by transforming his sentence into a fixed term of imprisonment. Such an approach has support in the practice of the ad hoc tribunals.[1505]

21. We now turn to consider the appropriate length of KAING Guek Eav's fixed term sentence. Article 39 of the ECCC Law contemplates a prison term of between five years and life imprisonment for crimes falling under the jurisdiction of the Court. Article 46 of the 2009 Criminal Code permits either a life sentence or a fixed term of up to 30 years in prison. The majority opinion holds, invoking Article 668 of the 2009 Criminal Code, that the ECCC Law constitutes *lex specialis* in relation to the *lege generalis* of Book 1 of the 2009 Criminal Code and therefore supersedes Book 1 of the 2009 Criminal Code in the event of a conflict. Accordingly, the majority holds that Article 39 of the ECCC Law prevails over Article 46 of the 2009 Criminal Code with respect to the permissible range of this Court's discretion on sentencing.[1506] We disagree with the majority's reliance on the principle of *lex specialis*, which in our view is inapplicable to this case.

22. Under general principles of international law, the maxim *lex specialis derogat lege generali* is applicable only where there is an equivalence of the juxtaposed norms, meaning that the *ratione materiae* of the two norms is substantially similar in

[1503] *Chraidi* Judgement, para. 24.
[1504] *Prosecutor v. Barayagwiza et al.*, ICTR-99-52-T, "Judgement and Sentence", Trial Chamber, 3 December 2003, ("*Barayagwiza* Trial Judgement"), paras 1106-1107; *Semanza* Appeal Judgement, paras 323-329; *Kajelijeli* Appeal Judgement, para. 324.
[1505] *Barayagwiza* Trial Judgement, paras 1106-1107; *Kajelijeli* Appeal Judgement, para. 324.
[1506] Majority Opinion on Sentence, paras 348-351.

terms of both their content and function.[1507] For the purpose of sentencing, a provision such as Article 39 of the ECCC Law, which establishes a range of available penalties, can constitute *lex specialis* in relation to another provision only if both rules are intended to sanction a similar criminal proscription.

23. The specific question in this case is whether the norms pursuant to which KAING Guek Eav is charged under Article 5 of the ECCC Law (crimes against humanity) enter into a *lex specialis, lex generalis* relationship with similar crimes as they are defined in Article 188 of the 2009 Criminal Code. As noted in our Judgement, the ECCC law does not *define* crimes in their material sense, but rather establishes ECCC jurisdiction over international crimes as they existed in 1975-79 under international law. By contrast, the Criminal Code is the source of the criminalisation of certain forms of conduct under domestic law with effect for the future. In our opinion, crimes against humanity as defined under international law (custom in particular) and Article 188 of the Criminal Code are technically speaking of a different genre and as such do not submit to a *lex specialis, lex generalis* comparison. Accordingly, punishments foreseen by the 2009 Criminal Code would be binding in relation to crimes defined under international law only on the basis of a specific legislative enactment to that effect. Such an enactment is not found in the 2009 Criminal Code, which appears to limit the applicability of Book One to crimes established by statute.[1508] The preferred conclusion is therefore that sentences imposed by the 2009 Criminal Code are not applicable before the ECCC in respect of international crimes.[1509]

24. For several reasons, we nevertheless conclude that this Court should accord substantial weight to domestic sentencing practices, which include Article 46 of the 2009 Criminal Code.

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[1507] *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission, Draft conclusions of the work of the Study Group, Finalized by Martti Koskenniemi, U.N. Doc A/CN.4/L.682/Add.1 (2 May 2006), para. 5 (articulating a methodology applicable also (and primarily) at the municipal level).
[1508] *See*, *e.g.* 2009 Criminal Code, Arts 1, 2, 5.
[1509] The same does not hold true of crimes proscribed under the national law that fall under the ECCC's jurisdiction (*see* Article 3 new of the ECCC Law). In relation to these crimes the Criminal Code would be applicable, at a minimum, insofar as it would have a *lex mitior* effect. *See* ICCPR, Art. 15(1); UN-RGC Agreement, Art. 12(2); 2009 Criminal Code, Art. 10.

25. Firstly, the range of punishment foreseen by Article 39 of the ECCC Law is very broad and there is little guidance on sentencing elsewhere in the ECCC Law.[1510]

26. Secondly, sentencing guidelines at the international level are limited. Prior to the advent of the ad hoc tribunals, there was "virtually no body of law" in the realm of sentencing for serious international crimes.[1511] In 2000, the ICTY Appeals Chamber in *Furundžija* held that it was still "premature to speak of an emerging penal regime" at the international level.[1512] Although the ad hoc tribunals have continued to develop a body of sentencing law, there was limited codification of those guidelines until the adoption of the ICC Rules of Procedure and Evidence.[1513] Even these guidelines describe only the factors relevant to sentencing but do not translate those factors into a tangible range of penalties for various offences. Moreover, because those guidelines which do exist were developed long after the crimes within the jurisdiction of the ECCC took place, this Court could risk infringing upon the principle of legality by relying exclusively or primarily on the jurisprudence of those courts.[1514] For these reasons, both the ICTY and ICTR RPEs instruct the court to consider "the general practice regarding prison sentences" in the courts of the domestic state.[1515]

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[1510] Mark D. Kielsgard, "The Legality Principle in Sentencing at the ECCC: Making Up Law as It Goes Along?", *Asian Journal of International Law*, Vol. 2 (2012), pp. 119-120 ("Nor do the ECCC constitutive documents provide sufficient guidance. Indeed, the drafting of the ECCC law (both as originally promulgated and the newer 2004 version) on sentencing is sparse, flawed, and at times confusing. This ECCC treatment particularly impacts the principle of legality […]").
[1511] Mirko Bagaric and John Morss, "International Sentencing Law: In Search of a Justification and Coherent Framework", *International Criminal Law Review*, Vol. 6 (2006), p. 192, citing William A. Schabas, "Sentencing by International Tribunals: A Human Rights Approach", *Duke Journal of Comparative & International Law*, Vol. 7 (1999), pp. 461-462; Barbara Hola *et al*., "International Sentencing Facts and Figures: Sentencing Practice at the ICTY and ICTR", *Journal of International Criminal Justice*, Vol. 9 (2011), p. 411 (noting that ad hoc tribunals have been "pioneers" in "developing a first set of sentencing principles"), p. 412 (sentencing argumentation at Nuremberg and Tokyo was "very basic").
[1512] *Furundžija* Appeal Judgement, para. 237.
[1513] *See* ICC RPE, Rule 145 (elaborating relevant aggravating and mitigating factors); *cf.* ICTY Statute, Art. 24(2) and ICTY RPE, Rule 101 (stating only that the Court should consider the gravity of the offence, individual circumstances of the accused, aggravating factors, mitigating factors including cooperation with the Prosecutor, and general prison practice within Yugoslavia).
[1514] Shahram Dana, "Beyond Retroactivity to Realizing Justice: A Theory on the Principle of Legality in International Criminal Law Sentencing", *Journal of Criminal Law & Criminology*, Vol. 99:4 (2009), pp. 887-905.
[1515] ICTY RPE, Rule 101(B)(iii); ICTR RPE, Rule 101(B)(iii). *See also* Shahram Dana, "Beyond Retroactivity to Realizing Justice: A Theory on the Principle of Legality in International Criminal Law Sentencing", pp. 887-905.

27. Thirdly, the rationale for deferring to sentencing regimes at the domestic level is at least as compelling in the context of chambers, such as the ECCC, established within the "existing court structure of Cambodia".[1516] As evidence of the practicability of this approach, we note that both the Trial Judgement and this Chamber's Judgement resorted to the 2009 Criminal Code in matters concerning, for example, the imposition of a single sentence for multiple convictions for international crimes.[1517] We would therefore propose that in such situations where there is no established international standard, the ECCC should deviate from the Cambodian sentencing regime only where there is good reason under the circumstances.[1518] Such reasons could include, for instance, a scenario where the domestic system does not criminalize the relevant conduct, or where Cambodian law contemplates a sentence that is clearly inadequate under international practice, either because it is too harsh[1519] or because it is too lenient.

28. In this case, Article 46 of the 2009 Criminal Code would dictate that the maximum possible sentence short of life in prison is a thirty year finite term. By adopting such a limit the legislative authority of Cambodia has taken a criminal policy decision, consistent with the practice of the continental legal systems, that a finite term of imprisonment is a term of such duration that can potentially be served within the life-span of a statistical offender. Neither that policy nor the thirty year finite term it would require in this case are inconsistent with international standards. Indeed, Article 46 of the 2009 Criminal Code replicates the sentencing regime at the ICC, which similarly restricts fixed term sentences to a maximum of thirty years.[1520] A survey of twenty-three national legal systems commissioned by the ICTY Trial Chamber in the *Nikolić* case found that nineteen states – including all but one civil

[1516] The statute of the Special Court for Sierra Leone directs the trial chamber to have recourse, where appropriate, to sentencing practice in the national courts of Sierra Leone and the ICTR, but conspicuously omits the ICTY, reflecting a national and regional, but not international approach to sentencing. *See* SCSL Statute, Art. 19(1).
[1517] Trial Judgement, para. 589; Appeal Judgement, para. 328. *See also* Trial Judgement, para. 585 (citing the 2009 Criminal Code with respect to mitigating factors).
[1518] Even at the ICTY, the Appeals Chamber has explained that "Trial Chambers have to take into account the sentencing practices in the former Yugoslavia and, should they depart from the sentencing limits set in those practices, *must give reasons for such departure*." *Nikolić* Appeal Judgement, para. 69 (emphasis added).
[1519] *Prosecutor v. Fofana and Kondewa*, SCSL-04-14-T, "Judgement on the Sentencing of Moinina Fofana and Allieu Kondewa", Trial Chamber, 9 October 2007, ("*Fofana and Kondewa* Sentencing Judgement"), para. 43.
[1520] ICC Statute, Art. 77(1)(a).

law jurisdiction – contemplated a maximum fixed-term sentence of thirty years or lower.[1521] At the *ad hoc* tribunals, only twelve defendants (excluding sentences reduced on appeal) have received a fixed term sentence of greater than 30 years in prison[1522] and only three greater than 35 years,[1523] even though those courts are not constrained by any upward limit on fixed term sentences in Rwandan or Yugoslavian law. Furthermore, in only two of these cases did the sentence include a remedy for excessive pre-trial detention. Such cases are too few in number, and involve too many distinguishing features (including far shorter periods of detention and a different, and not easily comparable assortment of criminal charges) to constitute a trend or pattern of authority applicable to this case.[1524]

29. In light of these considerations, actual sentencing practice at the *ad hoc* tribunals is not sufficiently coherent or comparable to offer a rebuke to the thirty year finite term established by Cambodian law.[1525] In this regard we note a degree of hesitance in the Co-Prosecutors' appellate submissions in articulating the basis for the requested increase of the punishment from the thirty-five years (effectively thirty) imposed by the Trial Chamber to forty five years.[1526] We observe that there does not

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[1521] Dr. Ulrich Sieber, "Expert Report: The Punishment of Serious Crimes - A comparative analysis of sentencing law and practice - Version 2.0/10 November 2003", IT-94-2-S (p. 5863 - p. 5724), pp. 74-75. According to the Report, Mexico, the only civil law jurisdiction to permit fixed term sentences greater than 30 years, nevertheless limits fixed term sentences to a maximum of 60 years. *Id.*

[1522] At the ICTY, these include: Drago Nikolić, Milan Martić, Milomir Stakić, Radislav Krstić and Goran Jelisić. *See* Judgement List, <http://www.icty.org/sid/10095>. At the ICTR, these include Hassan Ngeze, Joseph Kanyabashi, Theoneste Bagosara, Jean-Bosco Barayagwiza, Laurent Semanza, Juvénal Kajelijeli and Siméon Nchamihigo.

[1523] At the ICTY, these include Milomir Stakić and Goran Jelisić. *See* Judgement List, <http://www.icty.org/sid/10095>. At the ICTR, this includes Juvénal Kajelijeli.

[1524] T. (EN), 29 March 2011, F1/3.2, p. 64 - p. 65 (international co-prosecutor noting that violation of the rights of the accused in certain ICTR cases was "much less severe than in this case"). *See, e.g. Kajelijeli* Appeal Judgement, paras 323-324 (reducing two life sentences and 15 year fixed term imposed upon conviction for genocide, public incitement to genocide and extermination as a crime against humanity, to a single 45 year term as a consequence of a 306 day period of detention without being informed of the charges against him or being granted an appearance before a judge); *Barayagwiza* Trial Judgement, paras 1106-1107 (reducing life sentence imposed upon convictions for genocide, conspiracy to commit genocide, direct and public incitement to genocide, and persecution and extermination as crimes against humanity, to a fixed term of 35 years for 18 month period of detention prior to the issuance of the indictment); *see also Barayagwiza* Decision, paras 91-99.

[1525] *See* Barbara Hola *et al.*, "International Sentencing Facts and Figures: Sentencing Practice at the ICTY and ICTR", for an empirical analysis of the sentencing regime at the ICTY and ICTR.

[1526] T. (EN), 29 March 2011, F1/3.2, p. 66 (line 19) – p. 67 (line 15) (international co-prosecutor citing two cases in support of the 45-year request, of which one imposed a sentence of 35 years), p. 68 (line 10) – p. 69 (line 6) (Co-Prosecutors would not object if the Chamber "were to come up with a different figure […] as long as there was an increase on the 35 years"). *See also* Co-Prosecutors' Appeal, para. 131 (adding in the alternative to its request for a forty five year sentence that mitigating factors could, if considered, permit a further five year reduction).

seem to be support in international jurisprudence for the specific figure of forty five years of imprisonment. Indeed, the Co-Prosecutors admitted as much in their final trial submissions,[1527] and chose instead to "defer to the wisdom of the Chamber" with respect to the quantum of the reduction.[1528] On the other hand, there would be a very clear practical outcome of such an increase: that the Accused, age sixty-seven at the date of the Trial Chamber's sentence, would in all likelihood not benefit from the remedy granted. As such, the remedy would be purely symbolic.[1529] For all these reasons, we consider that the domestic sentencing regime provides valuable guidance to the ECCC sentencing framework and alleviates concerns of arbitrariness.

30. Finally, our preferred remedy would not frustrate the mandate of this Court, which is to bring to trial senior leaders of Democratic Kampuchea and those most responsible for the serious violations of Cambodian and international law committed during that regime.[1530] Our remedy ensures that KAING Guek Eav's crimes are strongly condemned and forcefully punished. It also ensures, however, that his sentence is consistent with internationally recognized standards of fairness and that this Court continues to serve as a model for fair trials conducted with due respect for the rights of the accused.

31. We would grant KAING Guek Eav a reduced sentence of thirty years' imprisonment as a remedy for the violation of his fundamental rights at the hands of the domestic authorities. As a technical remark we wish to add that under the applicable criminal procedure, a sentence reduction by the trying court does not justify pronouncing two separate punishments: the initial one and the reduced one.[1531]

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[1527] Co-Prosecutors' Final Trial Submission With Annexes 1-5, 11 November 2009, E159/9, para. 469 ("the relevant jurisprudence does not provide clear guidance as to the quantification of a remedy in a case such as this one")
[1528] Co-Prosecutors' Final Trial Submission With Annexes 1-5, para. 472.
[1529] *See* fn. 1500, *supra*, citing *inter alia*, *Menesheva v. Russia*, para. 76 (remedy must be "actually capable of affording redress"; remedy that was unlikely to materialize into tangible compensation was "theoretical and illusory" and did not satisfy the requirements of the Convention).
[1530] UN-RGC Agreement, Art. 1. As the Co-Investigating Judges recognized, the violations of KAING Guek Eav's rights, although severe, would not, for instance, justify his release in light of the gravity of the crimes of which he has been convicted. *See* Order of Provisional Detention, 31 July 2007, C3, para. 21.
[1531] *See*, *e.g.* 2007 Code of Criminal Procedure, Art. 357 ("the court shall note […] *the* sentence") (emphasis added); Venice Commission Report, para. 240 ("In the motivation used by the judge when assessing the length of the proceedings, the link between the latter and the assessment of the

The convicted person receives one punishment. The considerations leading to the determination of that sentence, including the punishment due in the abstract and the reduction subsequently granted, are to be contained in the reasoning.

punishment should be made explicit, and it would seem appropriate to indicate what sentence would have been imposed if the duration had been reasonable").

# X. ANNEX I: APPELLATE PROCEDURAL BACKGROUND[1532]

## A. Co-Prosecutors' Appeal

1. On 16 August 2010, the Co-Prosecutors filed a notice of appeal[1533] against the Trial Judgement requesting the correction of errors of law and an enhancement of the term of imprisonment. On 18 October 2010, the Supreme Court Chamber granted the Co-Prosecutors' applications[1534] for extensions of the page limit of their appeal brief.[1535] The Co-Prosecutors' appeal brief was filed on 18 October 2010.[1536] No response was filed to the Co-Prosecutors' appeal brief.

## B. Defence Appeal

2. On 24 August 2010, the Defence filed a notice of appeal[1537] requesting the Supreme Court Chamber to acquit him, find that he was a witness during the period of Democratic Kampuchea, and consider his period of detention as "witness protection."

3. On 10 September 2010, the Defence requested the Supreme Court Chamber to extend by 30 days the time limit for filing its appeal brief.[1538] On 18 October 2010, the Supreme Court Chamber granted the request for an extension of time and also found that the Co-Prosecutors' response[1539] was impermissibly late and therefore inadmissible.[1540]

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[1532] Trial Judgement, Annex I, provides a detailed procedural background from the arrest, transfer, and detention of KAING Guek Eav through to and including the delivery of the Trial Judgement.
[1533] Co-Prosecutors' Notice of Appeal Against the Judgement of the Trial Chamber in the Case of KAING Guek Eav *Alias* Duch, 16 August 2010, E188/2.
[1534] Co-Prosecutors' Application for Extension of Page Limit for Their Appeal Brief, 7 September 2010, F5; Co-Prosecutors' Application for a Further Extension of Page Limit to File their Appeal Brief, 29 September 2010, F5/1.
[1535] Decision on Co-Prosecutors' Two Applications for Extension of Page Limit for Their Appeal Brief, 18 October 2010, F5/2.
[1536] Co-Prosecutors' Appeal Against the Judgement of the Trial Chamber in the Case of KAING Guek Eav Alias Duch, 18 October 2010, F10.
[1537] Notice of Appeal by the Co-Lawyers for KAING Guek Eav Alias Duch Against the Trial Chamber Judgement of 26 July 2010, 24 August 2010, E188/8.
[1538] Request of the Co-Lawyers for KAING Guek Eav *Alias* Duch to Extend the Time Limit for Filing of an Appeal Brief Against the Judgement of the Trial Chamber Issued on 26 July 2010, 10 September 2010, F6.
[1539] Co-Prosecutors' Response to Kaing Guek Eav Alias Duch's Application for Extension of Time to File His Appeal Brief, 28 September 2010, F6/1.
[1540] Decision on Request of the Co-Lawyers for Kaing Guek Eav *Alias* Duch to Extend the Time Limit for Filing of an Appeal Brief Against the Judgement of the Trial Chamber of 26 July 2010, 18 October 2010, F6/2.

4. On 18 November 2010, the Defence filed its appeal brief.[1541] Two subsequent corrections to the English translation were filed on 9 December 2010 and 3 February 2011.[1542]

5. On 26 November 2010, the Co-Prosecutors requested[1543] the Supreme Court Chamber to grant them an extension of 15 days to file a response to the Defence appeal brief. The Supreme Court Chamber granted their request on 7 December 2010.[1544]

6. On 03 December 2010, Civil Parties Group 3 filed their response to the Defence appeal brief.[1545]

7. On 20 December 2010, the Co-Prosecutors submitted their response to the Defence appeal brief.[1546]

8. The Supreme Court Chamber granted leave to the Defence to file a reply to the Co-Prosecutors' response in accordance with Article 8.4 of the Practice Direction on the Filing of Documents Before the ECCC (Rev. 5) on 22 December 2010.[1547] On 14 January 2011, the Defence filed its reply to the Co-Prosecutors' response.[1548]

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[1541] Appeal Brief by the Co-Lawyers for KAING Guek Eav Alias "Duch" Against the Trial Chamber Judgement of 26 July 2010, 18 November 2010, F14. The Defence appeal brief was filed in Khmer on 18 November 2010 and the final corrected English translation was filed on 3 February 2011.
[1542] Request for Correction to Accused's Appeal Brief, 9 December 2010, F14/Corr-1; Request for Correction to Accused's Appeal Brief, 3 February 2011, F14/Corr-2.
[1543] Co-Prosecutors' Application for Extension of Time to File Their Response to the Appeal Brief by the Co-Lawyers for KAING Guek Eav Alias "Duch" Against the Trial Chamber Judgement of 26 July 2010, 26 November 2010, F14/1.
[1544] Decision on Co-Prosecutors' Application for Extension of Time to Respond to the Accused Appeal Brief, 7 December 2010, F14/3.
[1545] Response of the Lawyers for the Group 3 Civil Parties, to the Appeal of the Co-Lawyers for Duch Against the Judgement of 26 July 2010, Khmer filed 3 December 2010, English translation filed 24 January 2011, F14/2.
[1546] Co-Prosecutors' Response to the Appeal Brief by the Co-Lawyers for KAING Guek Eav Alias "Duch" Against the Trial Chamber Judgement of 26 July 2010, 20 December 2010, F14/4.
[1547] Decision Granting Leave to the Co-Lawyers for the Accused to Reply to the Response of the Co-Prosecutors, 22 December 2010, F14/4/1.
[1548] Reply by the Co-Lawyers for KAING Guek Eav Alias "Duch" to the Co-Prosecutors' Response of 20 December 2010, Khmer filed 14 January 2011, English translation filed 17 February 2011, F14/4/2.

9. On 16 March 2011, the Co-Prosecutors filed observations on the corrected English version of the Defence appeal brief.[1549]

### C. Civil Parties Group 1's Appeal

10. On 24 August 2010, Civil Parties Group 1 filed an "immediate appeal" in relation to the revocation of civil party status.[1550] The Supreme Court Chamber decided to characterise the "immediate appeal" as both a notice of appeal and an appeal brief on 30 September 2010.[1551]

11. Pursuant to the Supreme Court Chamber's invitation,[1552] on 28 October 2010, Civil Parties Group 1 notified the Supreme Court Chamber that they did not intend to file an additional brief or to enlarge the issues raised to include the issue of reparations.[1553]

12. On 18 March 2011, Civil Parties Group 1 filed a request to withdraw protective measures for Civil Party Appellant E2/62,[1554] which the Supreme Court Chamber granted on 25 March 2011.[1555]

### D. Civil Parties Group 2's Appeal

13. On 24 August 2010, Civil Parties Group 2 filed its first notice of appeal[1556] regarding the admissibility of civil party applications. On 22 October 2010, Civil

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[1549] Co-Prosecutors' Observations on the Corrected English Version of the Appeal Brief by the Co-Lawyers for Kaing Guek Eav *Alias* "Duch" Against the Trial Chamber Judgement, 16 March 2011, F14/5.
[1550] Group 1—Civil Parties' Co-Lawyers' Immediate Appeal of Civil Party Status Determinations from the Final Judgement, 16 September 2010, F8. Although the CPG1 Appeal was originally filed on 24 August 2010, it was re-filed on 16 September 2010 to include the powers of attorney signed by the nine appellants in CPG1.
[1551] Decision on Characterisation of Group 1 – Civil Party Co-Lawyers' Immediate Appeal of Civil Party Status Determinations in the Trial Judgment, 30 September 2010, F8/1.
[1552] Decision on Characterisation of Group 1 – Civil Party Co-Lawyers' Immediate Appeal of Civil Party Status Determinations in the Trial Judgment, 30 September 2010, F8/1, para. 6.
[1553] Group 1--Civil Parties' Co-Lawyers' Notice of Intent Supplemental Filing, 28 October 2010, F12.
[1554] Group 1--Civil Parties' Co- Lawyers' Request to the Withdrawal of Protective Measures for E2/62, 18 March 2011, F23.
[1555] Decision on Group 1- Civil Parties' Co- Lawyers' Request to Cancel Protective Measures, 25 March 2011, F23/1.
[1556] Notice of Appeal of Co-Lawyers for Civil Parties (Group 2), 24 August 2010, E188/6.

Parties Group 2 submitted its appeal brief which is limited to the rejection of five civil party applicants.[1557]

14. On 6 September 2010, Civil Parties Group 2 filed a second notice of appeal[1558] against the decision of the Trial Chamber rejecting most of their requests for reparations. This second appeal brief was filed on 2 November 2010.[1559]

15. On 6 September 2010, Civil Parties Group 2 filed its third notice of appeal on behalf of Civil Party Mr. CHUM Sirath for the omission of the name of his sister-in-law and her child in the Trial Judgement.[1560]

### E. Civil Parties Group 3's Appeal

16. On 20 August 2010, Civil Parties Group 3 filed its notice of appeal concerning the admissibility of civil party applications and claims for reparations.[1561] On 6 October 2010, the appeal brief of Civil Parties Group 3 was filed.[1562]

17. Civil Parties Group 3 filed supplementary submissions concerning reparations on 25 March 2011.[1563]

### F. Additional Evidence

18. The Defence and Civil Parties Groups 1, 2, and 3 each submitted requests to the Supreme Court Chamber for additional evidence.[1564] On 25 and 29 March 2011

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[1557] Appeal Against Rejection of Civil Party Applicants in the Judgment – Co-Lawyers for Civil Parties – Group 2, 22 October 2010, F11.
[1558] Notice of Appeal of Co-Lawyers for Civil Parties (Group 2) on the Reparation Order, 6 September 2010, E188/14.
[1559] Appeal Against Judgment on Reparations by Co-Lawyers for Civil Parties – Group 2, 2 November 2010, F13.
[1560] Notice of Appeal of Co-Lawyers for Civil Parties (Group 2) and Grounds of Appeal Against Judgment, 6 September 2010, E188/12. This filing was confirmed by email as also being the substantive appeal brief.
[1561] Notice of Appeal by the Co-Lawyers for Civil Party Group 3, Khmer filed 20 August 2010, English translation filed 6 September 2010, E188/4.
[1562] Appeal of the Co-Lawyers for the Group 3 Civil Parties against the Judgement of 26 July 2010, Khmer filed 6 October 2010, English translation filed 10 November 2010, F9.
[1563] Supplemental Submissions Concerning Reparations, Khmer filed 25 March 2011, English translation filed 30 March 2011, F25.
[1564] Request by the Co-Lawyers for Mr. KAING Guek Eav *alias* Duch to Admit New Evidence, Khmer filed 25 February 2011, English translation filed 24 March 2011, F2/2; Annex A to Defence appeal brief, F14.2 (and attachments); Annex A to Defence reply to Co-Prosecutors' response to Defence appeal brief, F14/4/2.2 (and attachments); Co-Prosecutors' Response to the Co-Lawyers for Kaing Guek Eav *Alias* "Duch"s Request to Admit New Additional Evidence and Annex A Against the Trial

and 1 April 2011, the Supreme Court Chamber issued decisions admitting additional evidence that was requested by these Appellants.[1565]

### G. Amicus Curiae

19. On 14 September 2010, the Defence Support Section filed a request[1566] to submit an *amicus curiae* brief, and the Co-Prosecutors responded[1567] on 21 September 2010.

20. On 9 December 2010, the Supreme Court Chamber rendered its decision[1568] on the *amicus* request, finding that an *amicus curiae* must be unaffiliated with the court or any of its offices, and that since KAING Guek Eav is represented by two national Co-Lawyers, the only appropriate capacity in which the Defence Support Section may fulfil its mandate is by offering legal assistance and support to the Defence in accordance with Internal Rule 11(2)(j). The request was thereby rejected.

21. On 28 January 2011, the Defence Support Section filed a second *amicus* request[1569] asking the Supreme Court Chamber to invite one or more *amicus curiae* briefs from independent third parties for the purpose of ensuring "a full airing of legal

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Chamber Judgment, 25 March 2011, F2/2/1; Group 1 – Civil Parties' Co-Lawyers' Request to File Additional Evidence in Support of their Appeal Against the Judgment, 11 March 2011, F2/3; Appeal Against Rejection of Civil Party Applicants in the Judgment Co-Lawyers for Civil Parties – Group 2, 22 October 2010, F11 (requests to admit additional evidence in paragraphs 71-86, 105, 107-08); Request to Submit Additional Evidence in Support of Appeal Brief by the Co-Lawyers for Civil Parties Group 3, Khmer filed 4 March 2011, English translation filed 16 March 2011, F2/1; Group 1—Civil Parties' Co-Lawyers' Supplementary Request to File Additional Evidence in Support of their Appeal Against the Judgment, 25 March 2011, F2/5; T. (EN), 30 March 2011, F1/4.1, pp. 19, 108-109 (Civil Parties Group 1), pp. 78, 102 (Civil Parties Group 3). *See also* Interoffice Memorandum from Greffiers of Supreme Court Chamber to Co-Lawyers for KAING Guek Eav regarding additional evidence, 22 February 2011, F17; Interoffice Memorandum from Greffiers of Supreme Court Chamber to Co-Lawyers for Civil Parties Group 3 regarding additional evidence, 22 February 2011, F18.

[1565] Decision on Requests by Co-Lawyers for Accused and Civil Parties Groups 1, 2 and 3 to Admit Additional Evidence, 25 March 2011, F2/4; Decision on Group 1 Civil Parties' Co-Lawyers' Supplementary Request to Admit Additional Evidence, 29 March 2011, F2/5/1; Decision to File Additional Evidence Admitted by Oral Decision of the Chamber During the Appeal Hearing, 1 April 2011, F2/6; T. (EN), 30 March 2011, F1/4.1, p. 32 (regarding Civil Parties Group 1), pp. 78-79 (regarding Civil Parties Group 3).

[1566] DSS Request to Submit an *Amicus Curiae* Brief to the Supreme Court Chamber, 14 September 2010, F7.

[1567] Co-Prosecutors' Response to the DSS Request to Submit an *Amicus Curiae* Brief to the Supreme Court Chamber, 21 September 2010, F7/1.

[1568] Decision on DSS Request to Submit an *Amicus Curiae* Brief to the Supreme Court Chamber, 9 December 2010, F7/2.

[1569] DSS Request for the Supreme Court Chamber to Exercise its Power under ECCC Internal Rule 33, 28 January 2011, F16.

arguments."[1570] The Co-Prosecutors responded[1571] on 3 February 2011 and the Defence Support Section filed its reply on 9 February 2011.[1572]

22. The Supreme Court Chamber rendered its decision on the second *amicus* request on 3 March 2011, finding that it would be inappropriate to invite the submission of an *amicus* brief under Internal Rule 33(1).[1573]

23. On 9 August 2011, the Supreme Court Chamber issued its decision rejecting an application by Mr. Wayne Jordash for leave to submit an *amicus curiae* brief.[1574]

### H. Appeal Hearing

24. A management meeting regarding the Appeal Hearing was held on 23 March 2011,[1575] and the substantive hearing was held for three days from 28 to 30 March 2011. In accordance with the Supreme Court Chamber's "Order Scheduling Appeal Hearing,"[1576] the appeal hearing was divided into the following four thematic legal issues:

1) Personal jurisdiction (Day 1);
2) Crimes against humanity (Day 2 morning);
3) Sentencing (Day 2 afternoon); and
4) Civil parties (Day 3).

25. KAING Guek Eav provided personal statements at the beginning of Day 1 and at the conclusion of Day 3. Co-Lawyers for KAING Guek Eav and the Co-

[1570] DSS Request for the Supreme Court Chamber to Exercise its Power under ECCC Internal Rule 33, 28 January 2011, F16, para. 16.
[1571] Co-Prosecutors' Response to the DSS Request for the Supreme Court Chamber to Invite the Submission of *Amicus Curiae* Briefs, 3 February 2011, F16/1.
[1572] DSS Reply to the Co-Prosecutors' Response to the DSS Request for the Supreme Court Chamber to Exercise its Power under ECCC Internal Rule 33, 9 February 2011, F16/2.
[1573] Decision on DSS Request to the Supreme Court Chamber to Invite *Amicus Curiae* Briefs from Independent Third Parties, 3 March 2011, F16/3.
[1574] Notice of Decision on application to submit *amicus curiae* brief, dated 9 August 2011, filed 10 February 2012, F27. The Greffiers of the Supreme Court Chamber emailed this document to Mr. Jordash on 9 August 2011, 9.40am (local time).
[1575] Order Scheduling Appeal Hearing Management Meeting, 4 March 2011, F19; Transcript of Appeal Proceedings – KAING Guek Eav "Duch" Management Meeting – In Camera, 23 March 2011, F1/1.1.
[1576] 4 March 2011, F20. *See also* Order to Appoint Co-Rapporteurs, 14 March 2011, F21; Co-Prosecutors' Request for Amendment of Supreme Court Chamber's Apparent Approach to the Scope of Appellate Review at the ECCC, 25 March 2011, F24; Decision on Co-Prosecutors' Request for Amendment of Supreme Court Chamber's Apparent Approach to the Scope of Appellate Review at the ECCC, dated 28 March 2011, filed 12 March 2012, F24/1 (emailed to Appellants on 28 March 2011 at 5:20pm local time).

Prosecutors made oral submissions on all four thematic issues. The three Civil Parties Groups made oral submissions on the issues of admissibility of civil party applications and reparations. Civil Parties Group 3 also made oral submissions on the issue of personal jurisdiction.[1577]

## I. Pronouncement and Filing of Appeal Judgement

26. On 17 November 2011, the Supreme Court Chamber issued an order scheduling a public hearing for the pronouncement of the Appeal Judgement on 3 February 2012.[1578] At the public hearing on 3 February 2012, the President of the Supreme Court Chamber read a summary and the final disposition of the Appeal Judgement,[1579] and copies of the summary and disposition were made available to the public.

27. The Supreme Court Chamber filed the full, written Appeal Judgement on 9 April 2012 in Khmer and English. A French translation of the Appeal Judgement is expected in due course.

[1577] Transcripts of Appeal Proceedings, 28-30 March 2011, F1/2.1, F1/3.2, F1/4.1.
[1578] Order Scheduling Pronouncement of Appeal Judgement, 17 November 2011, F26.
[1579] Transcript of Appeal Judgement, 3 February 2012, F1/5.1.

# XI. ANNEX II: GLOSSARY AND ABBREVIATIONS

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| **1950 Nuremberg Principles** | Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal. |
| **1956 Penal Code** | Criminal Code of the Kingdom of Cambodia (1956), promulgated on 21 February 1955 by the King (Kram no. 933NS); Kingdom of Cambodia, Recueil Judiciaire, Special Edition, 1956, pp. 11-403. |
| **1975 Declaration on Torture** | Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 3452 (XXX), 9 December 1975. |
| **1984 Convention Against Torture** | Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987). |
| **2007 Code of Criminal Procedure** | Code of Criminal Procedure of the Kingdom of Cambodia, promulgated by the King on 10 August 2007. |
| **2009 Criminal Code** | Criminal Code of the Kingdom of Cambodia, promulgated by the King on 30 November 2009 (Book 1 entered into force in December 2009; the other provisions of the Code entered into force one year thereafter). |
| **Accused** | KAING Guek Eav *alias* Duch. |
| **ACHR** | American Convention on Human Rights. |
| **Additional Protocol I** | Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, adopted 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978). |
| **Additional Protocol II** | Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, adopted 8 June 1977, 1125 UNTS 609 (entered into force 7 December 1978). |

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| **Amended Closing Order** | The Closing Order issued by the Co-Investigating Judges in Case 001, as amended by the Pre-Trial Chamber's Decision on Appeal against the Closing Order Indicting KAING Guek Eav alias "DUCH", 8 December 2008, D99/3/42. The Amended Closing Order established the factual allegations for the Trial Chamber to determine at trial. |
| **CIJ(s)** | Co-Investigating Judge(s) of the Extraordinary Chambers in the Courts of Cambodia. |
| **Closing Order** | Closing Order Indicting KAING Guek Eav *alias* Duch, 8 August 2008, D99. |
| **Constitution of the Kingdom of Cambodia** | Constitution of the Kingdom of Cambodia (1993), adopted by the Constitutional Assembly and signed by the President on 21 September 1993. |
| **Control Council Law No. 10** | Allied Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace, signed in Berlin, 20 December 1945, published in (1946) 3 Official Gazette Control Council for Germany at 50-55. |
| **CPG1, CPG2, CPG3** | Civil Parties Groups 1, 2, or 3. |
| **CPK** | Communist Party of Kampuchea. |
| **DC-Cam** | Documentation Center of Cambodia, a Cambodian Non-Governmental Organization. |
| **Defence** | Defence for the Accused. |
| **DK** | Democratic Kampuchea. |
| **ECCC** | Extraordinary Chambers in the Courts of Cambodia. |
| **ECCC Law** | Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, 10 August 2001, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006). |
| **ECHR** | Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature on 4 November 1950, 213 UNTS 221 (entered into force on 3 September 1953), as amended by Protocols Nos. 11 and 14. |

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| **ECtHR** | European Court of Human Rights. |
| **e.g.** | for example. |
| **fn., fns** | Footnote, footnotes. |
| **Geneva Convention IV** | Geneva Convention Relative to the Protection of Civilian Persons in Time of War, adopted 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950). |
| **IACtHR** | Inter-American Court of Human Rights. |
| **ICC** | International Criminal Court. |
| **ICCPR** | International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976). |
| **ICC Statute** | Rome Statute of the International Criminal Court, opened for signature 17 July 1998, 2187 UNTS 3 (entered into force on 1 July 2002). |
| **ICJ** | International Court of Justice. |
| **ICRC** | International Committee of the Red Cross. |
| **ICTR** | International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighboring States, between 1 January 1994 and 31 December 1994. |
| **ICTY** | International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991. |
| **ILC** | International Law Commission. |
| **IMT** | Nuremberg International Military Tribunal. |
| **IMT Charter** | Charter of the International Military Tribunal for the Trial of the Major War Criminals, appended to the London Agreement, 8 August 1945, *Trial of the Major War Criminals Before the International Military Tribunal*, 14 November 1945 – 1 October 1946, Vol. I, pp. 10-18. |
| **IMTFE** | 1946 International Military Tribunal for the Far East. |

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| **IMTFE Charter** | Charter of the International Military Tribunal for the Far East, 26 April 1946, reprinted in Neil Boister and Robert Cryer (eds.), *Documents on the Tokyo International Military Tribunal: Charter, Indictment and Judgments*, Oxford University Press, 2008. |
| **Internal Rules** | ECCC Internal Rules. |
| **M-13** | Security centre in the Kampong Speu province. |
| **NMT(s)** | Nuremberg Military Tribunal(s). |
| **no.** | number. |
| **p., pp.** | Page, pages. |
| **para., paras** | Paragraph, paragraphs. |
| **PTC** | Pre-Trial Chamber of the ECCC. |
| **RGC** | Royal Government of Cambodia. |
| **RPE** | Rules of Procedure and Evidence. |
| **S-21** | The area of S-21 in Phnom Penh, including, unless the context otherwise requires, both the S-21 buildings at the current Tuol Sleng Genocide Museum site, as well as associated sites of Choeung Ek and S-24. |
| **S-24** | Re-education Camp Prey Sâr. |
| **SCC** | Supreme Court Chamber of the ECCC. |
| **SCSL** | Special Court for Sierra Leone. |
| **Slavery Convention** | Convention to Suppress the Slave Trade and Slavery, opened for signature 25 September 1926, 60 LNTS 254 (entered into force 9 March 1927). |
| **STL** | Special Tribunal for Lebanon. |
| **Supplementary Slavery Convention** | Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, opened for signature 7 September 1956, 226 UNTS 3 (entered into force 30 April 1957). |
| **UNAKRT** | United Nations Assistance to the Khmer Rouge Trials. |
| **UN Basic Principles on Reparations** | United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, General Assembly Resolution 60/147, |

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| | UN GAOR, 60th Session, U.N. Doc A/RES/60/147 (21 March 2006). |
| **UNCC** | United Nations Compensation Commission. |
| **UN Declaration of Basic Principles of Justice for Victims** | United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, General Assembly Resolution 40/34, UN GAOR, 40th Session, U.N. Doc. A/RES/40/34 (29 November 1985). |
| **UNESCO** | United Nations Educational, Scientific and Cultural Organization. |
| **UN-RGC Agreement** | Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodia Law of Crimes Committed During the Period of Democratic Kampuchea, signed 6 June 2003 (entered into force 29 April 2005). |
| **UNWCC** | United Nations War Crimes Commission. |