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BEFORE THE SUPREME COURT CHAMBER

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APPEAL AGAINST JUDGMENT ON REPARATIONS
BY CO-LAWYERS FOR CIVIL PARTIES – GROUP 2

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I. INTRODUCTION AND PROCEDURAL BACKGROUND

1. On 26 July 2010, the Trial Chamber (*"TC"*) announced the Judgment[1] against Mr. KAING Guek Eav. Under section 4 of the Judgment, the Trial Chamber decided on reparations requests of Civil Parties and, as a prerequisite thereof, on the admissibility of all Civil Parties[2] and Civil Party Applicants.[3]
2. By submission of all Civil Party groups, Co-Lawyers for Civil Parties have generally outlined the forms of reparations and awards according to the Internal Rules (*"IR"*).[4] In addition, Co-Lawyers for Civil Parties (group 2) limited their Final Submission to a specified request for reparations within the framework of the general motion.[5] This Appeal is limited to the rejected requests of the Final Submission and the rejected part of the apology compilation request of the Joint Submission.
3. Co-Lawyers for Civil Parties requested[6]:
   - 1st request: Compilation and dissemination of apologetic statements including the comments of the Civil Parties on these apologies[7];
   - 2nd request: Writing a letter to the Government requesting a State apology[8];
   - 3rd and 4th request: Installation of memorials in S-21 and Choeung Ek and transformation of Prey Sar as a memorial site[9];
   - 5th request: Paid visits for Civil Parties to memorial sites[10];
   - 6th request: Provision of medical treatment and psychological services for Civil Parties[11];
   - 7th request: Production and dissemination of audio and video material about the trial[12];

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[1] Judgment, 26 July 2010, Doc. No. E188 (hereinafter: Judgment).
[2] The Trial Chamber re-assessed the admissibility of Civil Parties already admitted by OCIJ. The Internal Rules are silent on such a two-step-recognition process which suggests that this approach is not envisaged by the Internal Rules.
[3] Judgment, para. 635-675.
[4] Civil Parties' Co-Lawyers' Joint Submission on Reparations", E159/3. 14 September 2009 (hereinafter: Joint Submission).
[5] Co-Lawyers for Civil Parties (Group 2) – Final Submission, E159/6, 5 October 2009, paras. 14-21 (hereinafter: Final Submission).
[6] This Appeal is limited to the listed rejected requests. See requests in detail in the Joint and Final submissions, see supra note 4 and 5.
[7] Joint Submission, para. 45.
[8] Final Submission, para. 9-14.
[9] Final Submission para. 15, 16.
[10] Final Submission, para. 17.
[11] Final Submission, para. 18.
[12] Final Submission, para. 19.

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- 8th request: Naming 17 public buildings with victims' names and ceremonies[13]; 9th request: Writing a letter to the Government requesting that part of the entrance fees of S-21 and Choeung Ek to be used for reparations[14].

4. In its decision on reparations the TC granted only the Civil Parties' request that their names and those of the immediate victims be included in the final judgment, including a specification as to their connection with the crimes committed at S-21 and the compilation and publication of all statements of apology made by KAING Guek Eav on the ECCC's website.[15] The TC rejected the second part of the request[16] to include the statements of Civil Parties on those apologies.[17]
5. This submission is on behalf the following Civil Parties: Mr. BOU Meng (D25/1), Ms. CHHIN Navy (D25/2), Mr. CHUM Mey (D25/3), Mr. CHUM Sirath (D25/6), Ms. PHUNG Guth Sunthary (D25/5), Ms. IM Sunthy (D25/7), Mr. THAT Lorn (D25/21), Mr. SEANG Vanndi (D25/13), Ms. IEM Soy (E2/21), Mr. SIN Lim Sea (E2/25), Ms. UL Say alias Ream (E2/24), Ms. PENH Sokhen (E2/66) and the following Civil Party applicants of group 2 who were rejected as Civil Parties by the Trial Chamber: Ms. NAM Mon (E2/32). Ms. CHHAY Kan alias LEANG Kan (E2/35), Ms. HONG Savath (E2/83), Mr. CHHOEUM Sitha (E2/22) and Ms. NHEB Kimsrea (E2/64).
6. On 6 September 2010, Co-Lawyers for Civil Parties gave notice of appeal with a summary of the grounds of appeal.[18]
7. With regard to the applicable Revision of the Internal Rules, Co-Lawyers for Civil Parties adopt the approach of the TC to apply Revision 3 of the Internal Rules unless the context indicates otherwise.[19]
8. This Appeal seeks to have the judgment on reparations which were rejected overturned.

II. RELEVANT LAW AND RULES

9. The relevant law and Internal Rules to which this Appeal refers are IR 21, 23, 72, 83, 100, 101, 104, 105, 106 and 107, and Articles 20 new, 23 new and 33 new of the Law on the

[13] Final Submission, para. 20.
[14] Final Submission, para. 21.
[15] Supra note1, para. 667, 668, 683.
[16] See Joint Submission, footnote 4, para. 45.
[17] Supra note 1, para. 668.
[18] Notice of Appeal of Co-Lawyers for Civil Parties (Group 2) on the Reparation Order, 6 September 2010, Doc.no. E188/14.
[19] Supra note 1, para. 635 with further explanations in footnote 1061 of the Judgment.

Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes committed During the Period of Democratic Kampuchea[20] (*"ECCC Law"*).

III. STANDARD OF APPEAL

10. Pursuant to IR 104(1) (a) and (b), the standard for the Supreme Court Chamber (*"SCC"*) regarding the review of an appeal against a judgment or a decision of the TC is either the existence of "(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."
11. Rule 100 (1), under the title "Judgment on Civil Party claims" states "The 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." Thus, the IR consider the decision on Civil Party claims as a part of the judgment. Therefore, Co-Lawyers for Civil Parties submit that the Rules on an *appeal against a judgment* do apply.
12. Thus, the standard of review is limited to "...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."

IV. ADMISSIBILITY OF THE APPEAL

13. According to IR 105(1), an appeal is admissible for "c) ***Victims***, in respect of their rights under Rule 23(4); and c) [sic] ***The Civil Parties*** in respect of their other civil interests, but only when the Co-Prosecutors have appealed." (Emphasis added). Co-Prosecutors filed a Notice of Appeal against the Judgment.[21] Therefore, Civil Parties' appeal against the judgment on Civil Party claims is admissible because the Prosecution appealed the Judgment.
14. The applicable procedure and deadline follows IR 105 (3) and 107 (4) which allow to give notice of appeal according to IR 107 (4), which states that when a party has appealed, other parties have an additional 15 days after the initial deadline of 30 days. The initial deadline expired on 24 August 2010. Thus, the deadline for the notice of appeal expired on 7 September 2010. Co-Lawyers for Civil Parties' notice of appeal was filed on 6 September 2010[22], thus within the deadline. The appeal brief with the grounds has to be filed within 60 days of the date of filing the notice of appeal. The deadline of

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[20] Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes committed During the Period of Democratic Kampuchea, as promulgated on 27 October 2004, http://www.eccc.gov.kh/english/cabinet/law/4/KR_Law_as_amended_27_Oct_2004_Eng.pdf.

[21] Co-Prosecutors' Notice of Appeal against the judgment of the Trial Chamber in the case of Kaing Guek Eav alias Duch, 16 August 2010, Doc. No.E188/2.

[22] Paragraph 6 of this Appeal.

this Appeal brief expires on 4 November 2010. Consequently, the appeal is timely submitted.

15. Moreover, the appeal is also admissible on behalf of the five Civil Party applicants whose Civil Party applications were rejected. These Civil Party applicants appealed the decision on admissibility of Civil Party applicants.[23] If their appeal is successful, the decision about admissibility will be after the deadline for the "Appeal Against Judgment on Reparations", and, thereby, they will no longer be able to appeal the reparations order.
16. It is noted that the Internal Rules in IR 105 (1) use different terms for the appellants, either as victims to appeal a decision on admissibility, IR 23 (4), or as Civil Parties against a reparations order. If these terms are strictly applied, the five Civil Party applicants whose applications were rejected can not appeal the reparations order because only Civil Parties are allowed to do so.
17. A decision on admissibility of a Civil Party applicant within the judgment is not envisaged by the Internal Rules. On the contrary, the issuance of (in)admissibility decisions within the judgment is not in accordance with the Internal Rules and against the interests of justice. The decision on admissibility must be issued at the earliest moment and latest at the initial hearing, as stated in IR 83 (1), in order to allow the Applicants to exercise their participation rights as Civil Parties which they cannot do unless they are admitted as Civil Parties.
18. Nevertheless, the Trial Chamber decided on the admissibility **within** the judgment. Consequently, those Civil Party Applicants whose applications were rejected would be left without a legal remedy against the rejection of the reparations.
19. Therefore, Co-Lawyers for Civil Parties submit that, by analogy to the existing Internal Rules, Civil Party Applicants also have the right to file an appeal against the reparations order when the Co-Prosecutors appeal.
20. Thus, this Appeal brief is admissible in relation to the subject matter, and is submitted within the deadline.

V. PRELIMINARY REMARKS

21. Co-Lawyers for Civil Parties note that States are responsible for reparations.[24] "According to the principle of the continuity of the State in international law,

[23] Appeal against Judgment, 24 August 2010, Doc. No. E188/6.
[24] Lisa Magarell, "Reparations in Theory and Practice", in: International Center for Transitional Justice (ed.), Reparative Justice Series, p. 10.

responsibility exists both independently of changes of government over a period of time and continuously from the time of the act that creates responsibility to the time when the act is declared illegal."[25]

22. The right to reparations has been affirmed by a range of treaties[26], United Nations Bodies[27], regional courts[28] as well as in a series of declarative instruments[29]. It is an international legal obligation that an internationally wrongful act be remedied to the fullest possible extent.[30]

23. The Cambodian State has an obligation to grant reparations to victims of the atrocities committed by the Khmer Rouge. The Kingdom of Cambodia is a party to a number of human rights treaties, most of which provide legal obligations for state parties to guarantee effective remedies for victims of human rights violations.[31]

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[25] Inter American Court on Human Rights (IACHR), Case of Velásquez-Rodriguez v. Honduras, Judgment of July 29, 1988 (Merits), Series C no. 4, para. 184.

[26] For example, the International Covenant on Civil and Political Rights (ICCPR) (1966) (Arts. 2(3), 9(5) and 14(6); International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) (1965) (Art. 6); Convention of the Rights of the Child (1989) (Art. 39); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) (1984) (Art. 14); and Statute of the International Criminal Court (1998) (art. 75). It has also figured in regional instruments, e.g. European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) (Arts. 5(5), 13 and 41); the American Convention on Human Rights (ACHR) (1969) (Arts. 25, 63(1) and 68); and the African Charter on Human and Peoples' Rights (ACHPR) (1981) (Art. 21(2). See also, the International Convention for the Protection of all Persons from Enforced Disappearance (ICPPED), (2006-- not yet entered into force. At time of writing, the Convention has 83 signatures and 19 ratifications.) (Art. 24).

[27] See, for example, Human Rights Committee (HRC), General Comment (GC) No. 31 [80] Nature of the General Legal Obligation Imposed on States Parties to the Covenant 26/05/2004, (U.N. Doc. No. CCPR/C/21/Rev.1/Add.13, at para. 15-17; United Nations Committee against Torture (CAT), GC No. 2, Implementation of Article 2 by States Parties, U.N. Doc. CAT/C/GC/2/CRP. 1/Rev.4 (2007).) at para. 15.

[28] See, e.g., IACHR, Case of Velásquez-Rodriguez v. Honduras, para. 174. See also European Court of Human Rights (ECHR), Case of Papamichalopoulos v. Greece (Art. 50), (Appl. no. 14556/89) Judgment (31 Oct. 1995) at para. 36.

[29] 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, UN General Assembly resolution 60/147 of 16 December 2005. See also the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by General Assembly resolution 40/34 of 29 Nov. 1985; and the Universal Declaration of Human Rights (UDHR) (1948), (Art. 8).

[30] See Permanent Court of International Justice, Case concerning the factory at Chorzów, Series A, No. 17, 13 September 1928 (Merits), p. 29, 47; Series A, No. 9, 26 July 1927 (Claim for indemnity), p. 21; IACHR, Case of Velázquez-Rodríguez v. Honduras, Judgment off 21 July 1989 (Reparations and Costs), para. 25.

[31] For example, Article 2 (3) of the International Covenant on Civil and Political Rights provides: "Each State Party to the present Covenant undertakes: (a) to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in and official capacity; (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; (c) To ensure that the competent authorities shall enforce such remedies when granted."
Article 14 of the UN Convention against Torture provides, "1. Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation. 2. Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law."

24. The UN Basic Principles and Guidelines on the Right to a Remedy and Reparations for Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law and Serious Violations of International Humanitarian Law[32] (*"UN Basic Principles"*) state that victims of such abuses have a right to prompt, adequate and effective measures.
25. Nevertheless, the TC is correct that it has no jurisdiction to order reparations borne by the Kingdom of Cambodia. However, this does not prevent the TC from issuing a reparations order against the Accused which might need the **assistance** of the Government to be realized and which consists of **non-pecuniary and administrative** support rather than a financial contribution. Such kind of assistance is a general duty of States to take care of the needs of their population whom they have to serve. Therefore, those reparations awards that need state assistance, such as permission for the construction of buildings on public territory or permission to name a public building with the name of a victim etc., are admissible awards because they are not a "conviction" of the Kingdom of Cambodia. By their very nature, most kinds of collective and moral reparations can only be realized with the Government's support.
26. Furthermore, Co-Lawyers for Civil Parties stress the fact that, despite the Accused being indigent, and the fact that the source of financing is thus insecure, the TC is not prevented from granting reparations. IR 23 (11) states "(...) [T]hese (awards) shall be awarded against, and be borne by convicted persons." The indigence of an Accused cannot have any effect on the issuance of the reparations order. It is possible that the Accused may not be indigent in the future. Therefore, reparations orders have to be issued regardless of their financing and execution and the indigence of the Accused.
27. In addition, Co-Lawyers for Civil Parties note that according to IR 23 (1) (b) and 23 (11), victims can seek "collective and moral reparations". Such awards may take the following forms according to IR 23 (12): "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."
28. Thus, the ECCC has the power to issue reparations orders within the scope of IR 23 (12) – in particular, IR 23 (12) (c) opens a wide range of possible awards.

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[32] See supra note 29.

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VI. ARGUMENT

A. FIRST AND COMMON GROUND OF APPEAL RELATED TO ALL REJECTED REQUESTS

By abstracting the requests for reparations, not pointing out exactly which request is analyzed under which paragraph and thus by not giving reasons for each rejection, the TC erred in law and violated the fundamental principal of procedural fairness to provide reasoned decisions

29. The TC analyses the 36 requests for reparations by Civil Parties[33] in only 9 paragraphs.[34] In this analysis, the TC abstracts the requests without exactly pointing out which request is examined under which paragraph and does not link its analysis with the respective request.

30. The TC's inadequate and insufficient reasoning infringes the fundamental principle of law that proper reasons must be given for a judicial decision. Similarly, inadequate and/or insufficient reasoning does not provide the Supreme Court Chamber (*"SSC"*) the requisite threshold of information upon which to conduct a proper and effective appellate review of the rejection.[35]

1. Right to a Reasoned Decision as a Fundamental Principal of Law

31. As the current Internal Rules are silent on the requirement of a reasoned decision, the ECCC Law allows the TC to seek guidance from international procedural rules.[36] The right to a fair determination of a matter is protected under Article 14.1 of the International Covenant on Civil and Political Rights (*"ICCPR"*).[37] The TC's failure to give a properly reasoned decision to each request is a clear denial of the right to a fair determination of the matter. Specifically, this includes the right to know exactly why a request has been rejected, and, by extension, since Civil Parties cannot respond to a rejection without knowing the reasons, the right to be properly heard.

32. Article 45 § 1 of the European Convention on Human Rights (*"ECHR Convention"*) states that "[r]easons shall be given for judgments as well as for decisions declaring applications admissible or inadmissible." This article enshrines one of the fundamental

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[33] Eight requests on behalf of Group 1, nine requests on behalf of Group 2 and fourteen requests on behalf of Group 3.
[34] Judgment, para 667-674.
[35] Decision on the Ieng Thirith Defence Appeal against "Order on Requests for Investigative Action by the Defence for Ieng Thirith" of 15 March 2010, 4 June 2010, D353/2/3, para. 23, (*hereinafter*: Decision on Ieng Thirith Defence Appeal)
[36] See ECCC Law, Article 20 new, 23 new and 33 new.
[37] Article 14 (1) ICCPR states: "All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law".

principles of law. Referring to Article 6 § 1 of the Convention, the European Court of Human Rights (ECHR) has also held in several decisions that "according to its settled case-law, judgments of courts and tribunals should adequately state the reasons on which they are based."[38] This is because "[s]uch reasoning is essential to the very quality of justice and provides a safeguard against arbitrariness."[39] Other International(ised) Tribunals, including the ECCC, have upheld this fundamental requirement.[40]

33. The ECCC's PTC has adopted this requirement from the ECHR,[41] and the Supreme Court Chamber should continue to apply it in this case. In a unanimous decision, the PTC held that although the above ECHR case-law dealt with final verdicts on guilt, "their import is relevant to the pre-trial context at the ECCC."[42] The appellant in that matter successfully appealed a decision of the CIJs rejecting a request for investigative action on the grounds that the CIJs did not issue a reasoned decision in its rejection order.[43]

34. Failure to provide detailed and sufficient reasons in rejecting reparations requests is an infringement of the fundamental right of Civil Parties to a reasoned decision. By granting the right to appeal a judgment on Civil Parties' claims, the ECCC acknowledges the importance of this procedural right. Thus, the order should be sufficiently detailed to make this last recourse possible and, moreover, meaningful.

35. As the ECHR held in *Taxquet*, "[t]he extent to which this duty to give reasons applies may vary according to the nature of the decision and must be determined in the light of the circumstances of the case (...)"[44] In the case of rejection of most of the reparations requests, Civil Parties require reasons of a detailed nature, given the significance of

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[38] European Court on Human Rights (ECHR), *Taxquet v. Belgium*, Application no. 926/05, Chamber Decision of 13 January 2009, para. 40.

[39] *Ibid.* at para. 43.

[40] *See* Decision on the Ieng Thirith Defence Appeal at para. 29, quoting an Appeals Judgment of the ICTY but without further information as to which Judgment is referred to. Similarly, the Appeals Chamber of the ICTY has held that the right to a reasoned decision is an element of the right to a fair trial and that only on the basis of a reasoned decision will proper appellate review be possible (see Prosecutor v. Momir Nikolic, Judgment on Sentencing Appeal, 8 March 2006, Case No. IT-02-60/1-A, para. 96; Prosecutor v. Dragoljub Kunarac et al, Judgment, 12 June 2002, Case No. IT-96-23&23/1-A, para. 41). In paragraph 11 of its "Decision on Interlocutory Appeal from Trial Chamber Decision Granting Nebojsa Pavkovic's Provisional Release" on 1 November 2005 in the case of Prosecutor v. Milutinovic et al. (Case No. IT-05-87-AR65.1), the Appeals Chamber of the ICTY held that "as a minimum, the Trial Chamber must provide reasoning to support its findings regarding the substantive considerations relevant to its decision". See also: Prosecutor v. Lubanga. ICC-01/04-01/06-774 OA6, Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I, Second Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81, 14 December 2006, para. 30: "[T]he right to a reasoned decision is an element of the right to a fair trial and that only on the basis of a reasoned decision will proper appellate review be possible".

[41] Decision on Ieng Thirith Defence Appeal, para. 28.

[42] *Ibid.*

[43] *Ibid.* at para. 30 (cf. para. 31, PTC noted that the CIJ's error of law would have required PTC to overturn the CIJ's order, but there were other valid reasons to uphold it).

[44] Supra note 42, para. 40.

reparations for victims of gross human rights violations. Moreover, unless there is certainty about the commencement of further cases in the ECCC, in practice, most victims have only one opportunity to apply for reparations as a Civil Party. Importantly, without proper reasons, there can be no basis for any meaningful appeal.

36. For these reasons, a failure to issue a properly reasoned decision is also a violation of Principle 4 of the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, which provides that victims should be treated with compassion and respect for their dignity.[45] A rejection without a properly reasoned decision is not only a deprivation of a fundamental procedural right, it is also an affront to the dignity of victims and has the effect of victimising them yet again, this time by an internationalised judicial institution.

2. The Extent of the Reasoning

37. IR 21 states:

> *"The applicable ECCC Law, Internal Rules, Practice Directions and Administrative Regulations shall be interpreted so as to always safe guard the interests of (...) Victims, and so as to ensure legal certainty and transparency of proceedings ... In this respect:... (c) The ECCC shall ensure that victims are kept informed and that their rights are respected throughout the proceedings..."*

38. In failing to provide sufficiently detailed reasons, the TC has failed to fulfill its obligations under IR 21 "to ensure legal certainty and transparency". It further violates IR 21(c) by failing to keep victims properly informed of the basis for decisions adverse to the victims' interests, and thereby failing to respect victims' rights throughout the proceedings.

39. International Jurisprudence acknowledges two principal reasons underlying the right to a reasoned decision.[46] Firstly, the concerned person must be able to identify the reasons for a rejection against which s/he wants to appeal; secondly, an Appeal Chamber cannot conduct a fair and comprehensive appellate review of a decision if no reasons are given.

40. International Courts have abstained from defining the exact extent of reasoning required, deciding instead that the scope of reasons must be considered on a case-by-case basis, depending on the circumstances. The International Criminal Court ("*ICC*") stated in *The Prosecutor v Lubanga*:

> *"Decisions of a Pre-Trial Chamber authorizing the non-disclosure to the defence of the identity of a witness of the Prosecutor must be supported by sufficient reasoning.*

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[45] Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by the UN General Assembly resolution 40/34, 29 November 1985, principle 4.

[46] See the examples in supra note 40.

> *The extent of the reasoning will depend on the circumstances of the case, but it is essential that it indicates with sufficient clarity the basis of the decision. Such reasoning will not necessarily require reciting each and every factor that was before the Pre-Trial Chamber to be individually set out, but it must identify which facts it found to be relevant in coming to its conclusion.'*[47]

41. According to the Lubanga case, the given reasons must at least clearly articulate the relevant facts which lead to the given conclusion. The formulaic repetition and catch-all ground for rejection, or the rejection *en masse* of a wide range of requests on broad or ambiguous grounds is not sufficient to fulfill with the requirement of providing sufficient reasons for a decision. A properly reasoned decision would have, at the very least, referred to each of the reparations requests and discussed these facts in application of the Internal Rules[48] and international jurisprudence on reparations.
42. In the Decision on IENG Thirith's Appeal,[49] the PTC was not satisfied with CIJs reference to "information already on the case file" and determined that "at a minimum a representative sample of such information including where appropriate the relevant document numbers" have to be provided.
43. By applying this standard on the impugned Judgment on reparations, Co-Lawyers for Civil Parties note that none of the TC's analyses refer to the specific requests – neither in footnotes nor in the text – making it impossible for Civil Parties to link the "analysis" with the respective request.
44. Fundamental principles of justice require that Civil Parties be informed about the reasons for the rejection of their requests for reparations and therefore that each request is considered carefully and that the analysis shows explicitly which request is examined under which paragraph. The TC violated this principle.

B. 1st REQUEST: COMPILATION AND DISSEMINATION OF APOLOGETIC STATEMENTS

45. Co-Lawyers for Civil Parties requested "the compilation and dissemination of apologetic statements made by Duch throughout the trial which acknowledge the pain and suffering of victims, including the comments of Civil Parties on these apologies"[50]. The Chamber

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[47] See supra note 44, *Prosecutor vs. Thomas Lubanga Dyilo*, Judgment, 14 December 2006, para 30. The Statute and the Rules of Procedure and Evidence stress in various places the importance of sufficient reasoning, for example in the context of evidentiary matters rule 64 (2) of the Rules of Procedure and Evidence, which requires a Chamber to "give reasons for any rulings it makes".
[48] IR 23 (1) (b) and 23 (11) and (12).
[49] Supra note 39.
[50] Joint Submission, para. 45.

partly granted this request, but it rejected the further claim to include the comments of Civil Parties on these apologies.

46. Since the beginning of the proceedings, Civil Parties expressed that they have doubts as to whether the Accused person's apologies are genuine and honest. The purpose of the request was to give expression to these doubts and to demonstrate the interaction between the Accused's apologies and the Civil Parties perception of those apologies. After the National Defense Counsel requested the Accused's acquittal and release on 27 November 2009, the very last day of the closing statements, this reparations request is no longer meaningful and even less so without the statements of Civil Parties on these apologies during trial.

Second Ground of Appeal: Violation of Rule 21 (a) and (c)

47. Internal Rules 21(1)(a) and (c) stipulate that

> *"The applicable ECCC Law, Internal Rules, Practice Directions and Administrative Regulations shall be interpreted so as to always safeguard the interests of... Victims and so as to ensure legal certainty and transparency of proceedings...*
> *(a) ECCC proceedings shall be fair and adversarial and preserve a balance between the rights of the parties . . ."*
> *(b)(. . .)*
>
> *(c) The ECCC shall ensure that victims are kept informed and that their rights are respected throughout the proceedings."*

48. The Chamber based its rejection on the "grounds" that such statements

    (i) are distinct from the apologies made by KAING Guek Eav, and

    (ii) that their content has not been specified.

49. The first part is obvious and logical and is a given fact that statements/comments of Civil Parties on the apologies are different from the apologies themselves. The fact that the statements of the Civil Parties are distinct is not a reason.

50. The second part is simply wrong – this becomes obvious when both requests are compared with one another. The level of specification is the same: The request for the compilation of apologies made by the Accused during trial is not further specified. Nevertheless, the TC has granted this request.

51. The request to add the comments of Civil Parties **on these apologies** is likewise not further specified and exactly identical with the request for the compilation of apologies made by the Accused.

52. Thus, the TC contradicts itself when granting a rather unspecified request but rejecting the correspondent that same level of specification in a request to add the comments of

Civil Parties on these apologies. Contradictory reasoning is poor and insufficient reasoning.

53. Accordingly, by ignoring this and basing the rejection on this ground, the Chamber committed an error in law by failing to give a reasoned decision and violated its duty to ensure that the rights of victims are respected and safeguarded throughout the proceedings as stated in Rule 21 (1) (a) and (c) to ensure legal certainty.

C. 2ND REQUEST: WRITING AN OPEN LETTER TO THE GOVERNMENT REQUESTING STATE APOLOGY

54. Civil Parties requested the TC to order KAING Guek Eav to write an open letter to the Royal Government of Cambodia on behalf of the Civil Parties, requesting an official, serious, genuine and truthful apology.[51] The TC did not examine this request at all.

Third Ground of Appeal: Violation of Rule 100 (1)

55. Rule 100 (1) states that the Chamber shall make a decision on any Civil Party claims. Therefore, by not making a decision on this request, TC violated Rule 100 (1).

56. As the Trial Chamber did not make references between the ''analysis,'' and the requests, Co-Lawyers for Civil Parties assume that the Trial Chamber wanted to subsume this request under "Requests for measures by the Government of Cambodia"[52]. It rejects such kind of requests on the grounds that they fall outside the jurisdiction and that official statements of apology fall exclusively within national governmental prerogatives which the ECCC has no competence to compel.[53]

57. If it is the case that the Trial Chamber wanted to subsume this request under "Requests for measures by the Government of Cambodia," the Trial Chamber completely misperceived the content of the clear and plain request, which was: writing a letter to the government— not more and not less. Civil Parties did **not** request measures by the Government but asked the TC to order the Accused to write a letter to the Government. Co-Lawyers for Civil Parties are taken by surprise that the clear and plain meaning of the request could be misperceived by the Trial Chamber as to be a request for a measure by the Government.

57. Therefore, the TC erred when it presumably classified this request as "request for measures by the government". The Chamber has indeed the competence to order KAING

[51] Final Submission, paras. 9-14.
[52] Judgment, para. 671.
[53] Ibid..

Guek Eav to write a letter to the government, but the Chamber, in violation of Rule 100 (1) did not render a decision regarding this request.

Fourth Ground of Appeal: Error of fact

58. By not making a decision at all regarding this request, the TC committed an error of fact that has occasioned a miscarriage of justice.

59. Similarly, if the TC qualified this request as a request for a "measure by the government", it overlooked or misunderstood the clear meaning of the request. This obvious wrong understanding of the request constitutes an error of fact that has occasioned a miscarriage of justice.

60. Thus, the TC either did not render a decision about this request at all or overlooked the clear meaning of the request and committed an error of fact.

D. 3 RD REQUEST: INSTALLATION OF MEMORIALS IN S-21 AND CHOEUNG EK AND 4TH REQUEST: TRANSFORMATION OF PREY SAR AS A MEMORIAL SITE

61. Civil Parties asked for the installation of memorials in the courtyard of Toul Sleng museum and on the left and right hand side of the Stupa in Choeung Ek. The memorials should have the names of the Civil Parties who are direct survivors and the names of Civil Parties with relatives who were killed or died at S-21 and/or Choeung Ek carved with black lettering on white marble, including their date of entry to S-21, their date of death and the reason for and/or the location of their death. Also, some information regarding the character and life of the victims should be included. The text, written by the respective Civil Party, should not exceed 200 words and shall be displayed on additional tablets (one per each person/family) bearing the story and one photo of the victim. The text should be written and provided as well in audio in Khmer, English and French. Each of the memorials should include a short summary and result of the first trial at the ECCC not exceeding 300 words.[54]

62. Civil Parties also asked for the transformation of Prey Sar (S-24) into a memorial site to remember, pay respect to victims, and conduct Buddhist ceremonies. Additionally, it should provide information on the history and serve as a center for future education with a permanent exposition about the function and role of Prey Sar as revealed in the first trial at the ECCC and in accordance with scientific research results. The historical truth should be demonstrated as should the role and responsibility of the Accused. The site design should be decided by holding an international architectural competition. There should be

[54] Final Submission, para. 15.

a Stupa included that is at least 20 meters by 20 meters in size and at least 35 meter height. The interior room should be able to hold Buddhist ceremonies. The Civil Parties should decide which proposal they prefer. [55]

63. The TC did not consider these requests expressly. It rejects "Requests for the construction of pagodas and other memorials" on the grounds of not being able to issue an enforceable order against KAING Guek Eav based on the material before it as it "lacks sufficient specificity regarding the exact number of memorials sought and their nature, their envisaged location, or estimated cost."[56]

64. In particular, it criticizes that "no information has been provided, for example, regarding the identity of the owners of all proposed sites, whether they consent to the construction of each proposed memorial, or whether additional administrative authorizations such as building permits would be necessary to give effect to each measure."[57]

Fifth Ground of Appeal: Violation of Rule 21 (1) (a), 21 (1) (c) and 23

65. Internal Rules 21(1)(a) and (c) stipulate that proceedings shall be fair and that the rights of the victims shall be respected.[58]

66. However, the request was very detailed and thus sufficiently specified as it included the number, the nature and the location of the memorials. In addition, the request specifies in great detail the design of the memorials. It was part of the request to give the Civil Parties a choice on the different proposals that will be presented by the architectural competition.

67. By requesting more details than already submitted and by not examining, or by overlooking the detailed information before it, the Chamber failed to comply with its duty to ensure that the rights of victims are respected throughout the proceedings as stated in Rule 21 (1) (a) and (c). The right to reparations becomes meaningless if the TC obliges Civil Parties to provide more details. The TC listed as examples the lack of the consent of the owners of these sites and/or the lack of building permits. The TC is silent what exactly it requires, and, much less, it did not inform Civil Parties about Trial Chamber's criteria and requirements in advance. Should the request already contain a plan by an architect? How could Civil Parties pay for this? The Trial Chamber exceeded and exaggerated a reasonable threshold. This renders, in fact, any reparations request impossible. By applying an extremely high threshold which impossible for Civil Parties

[55] Final Submission, para. 16.
[56] Judgment, para. 672.
[57] Judgment, para. 671.
[58] See para. 47 of this Appeal.

to make out, the Trial Chamber thwarts the right to reparations in violation of IR 21. In addition, the TC failed to inform the victims in advance about any criteria on admissible reparations requests.

68. Moreover, no legal basis can be found in the IRs for the high standard for which the TC makes out. Co-Lawyers for Civil Parties note that the IRs are silent regarding the prerequisites for a Civil Party claim.
69. Rule 23 (1)-(13) gives a detailed description on the procedure for Civil Party action before the ECCC. It regulates all relevant prerequisites for Civil Party action, *inter alia*, the requirements for application or the status of Civil Parties during the proceedings.
70. However, there are no expressed requirements for Civil Parties regarding the specificity of their requests for their claims. Rule 23 (1) (b) stipulates as a purpose of Civil Party action that victims "seek collective and moral reparations, as provided in this Rule". Rule 23 (11) states that the Chamber may only award collective and moral reparations to Civil Parties. Thus, no legal basis can be found in the IRs for the extremely high standard the TC asks for and which makes any reparations request impossible.
71. Whilst it is accepted that the ECCC mechanism is "claimant-driven"[59], the burden cannot be solely on Civil Parties, as a private parties, to obtain such detailed information at their own cost in relation to the planning, costs, and implementation of prospective reparations measures. The ECCC does not appear to differentiate between the domestic standard applied in relation to claims for pecuniary damage and one that should be applied in relation to victims' claims for satisfaction measures. The standard of proof and the specificity of the request of reparations should be substantially lower in the case of satisfaction measures than that of compensation awards. Satisfaction measures are much more difficult for claimants to quantify without any expertise in this area and without judicial assistance. It is particularly difficult for victims of gross human rights violations to prove the harm caused to them and substantiate its exact cost several decades after the violations occurred. International human rights law has clearly established that the burden of proof must be relaxed in such cases, and the ECCC should similarly develop a more flexible, pragmatic and feasible approach to reparations requests.
72. As previously delineated in paragraph 31, when the IRs are silent on an issue, international law should inform the Chamber's decisions. The right to adequate and

[59] Supra note 1, para. 665.

effective reparations is an established principle of international law[60], set out in a number of international human rights instruments to which Cambodia is a party[61] and most comprehensively in the UN Basic Principles[62]. As a body set up by the Cambodian state and the United Nations, the ECCC is therefore obliged to facilitate and assist victims[63] in obtaining redress for the harm caused to them to the fullest extent[64] and in the most appropriate form possible. Accordingly, the provision for reparations must not be applied restrictively, but in a manner that enables it to be effective in practice[65]. Setting an unrealistically high burden on the Civil Parties to specify the costs and details of a request for reparations measures does not satisfy this requirement and is contrary to the interests of justice. Although assisted by the Parties, the ultimate task of designing a just and equitable remedy for the injured party must lie with the decision-maker. This is clearly established by international practice as set out in the paragraphs below.

73. The Inter-American Court of Human Rights ("*IACHR*") is another mechanism dealing with gross human rights violations. In its jurisprudence over the last 20 years, the Court itself created a new paradigm for reparations and remains at the forefront in ordering and enforcing collective and moral reparations for mass human rights violations.[66] Thus, the IACHR creates the reparations it deems appropriate and is even not bound by the victims' requests.

74. The IACHR does not establish any requirements for the victims as to the specification of their claims. Instead, the Court itself "found creative ways to address the specific needs

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[60] *Permanent Court of International Justice, Factory at Chorzow (Claim for Indemnity) case, (Germany v. Poland), (Merits), PCIJ (ser. A) No. 17, 1928, p. 29*, 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, Res'n 2005/35 (UN Doc. No. E/CN.4/RES/2005/35 (2005)) and GA Res'n 60/147 (UN Doc. No. A/RES/60/147 (2006)).

[61] The International Covenant on Civil and Political Rights (ICCPR) (1966) (Arts. 2(3), 9(5) and 14(6)) (see Human Rights Committee (HRC), General Comment (GC) No. 31 [80] *Nature of the General Legal Obligation Imposed on States Parties to the Covenant* 26/05/2004, (U.N. Doc. No. CCPR/C/21/Rev.1/Add.13, at paras. 15-17); International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) (1965) (Art.6); Convention of the Rights of the Child (1989) (Art. 39); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) (1984) (Art. 14) (see United Nations Committee against Torture (CAT), GC No. 2, *Implementation of Article 2 by States Parties*, (U.N. Doc. CAT/C/GC/2/CRP. 1/Rev.4 (2007).) at para. 15); and Statute of the International Criminal Court (1998) (art. 75).

[62] UN Basic Principles, supra note 29.

[63] *Ibid.*, paras. 12(c) and 13.

[64] *Permanent Court of International Justice, Factory at Chorzow (Claim for Indemnity) case, (Germany v. Poland), (Merits), PCIJ (ser. A) No. 17, 1928, p. 29.*

[65] General Comment 31, para. 20, supra note 27; UN Basic Principles Art. 11(b), supra note 29.

[66] 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, 2009, p. 1.

and injuries of the victims who appeared before it"[67]. The Court has ordered a number of reparations resembling those requested before the ECCC such as the building of memorials, the naming of streets after victims[68], access to medical and psychological care[69], the provision of development plans[70] and public apologies[71]. Notably, the standard of specificity of claims made by the victims or their representatives in these cases is significantly lower than that applied by the ECCC particularly in cases where there are multiple victims and where violations occurred many years previously—passing some burden onto the State to execute the order—and the IACHR exerts some discretion in specifying claims.

75. For example, regarding the building of a monument in *Myrna Mack Chang,* the victims merely submitted that they desired "a monument to Myrna Mack Chang to be built, located in the region of Guatemala where she worked intensely".[72] The IACHR also requested the State to name a "well-known street or square" in honor of the victim.[73] From this it can be seen that the measures requested by the victim are more general than required before the ECCC and that the IACHR orders give the State discretion in how they are executed. Further, in *Plan de Sánchez,* the Court ordered a development program to be instituted and only had to specify which communities were to benefit and what general measures this encapsulated, for example, the building of roads.[74] When making the claim, the victims specified the bare minimum of necessary medical professionals required as part of the program, with the rest being left to the State to instigate.[75] Lastly, when claiming for the building of a monument the victims asked for the nature and significance of the monument to be organized by the State in co-ordination with local civil society.[76]

76. The IACHR is celebrated for its reparations record, and the ECCC should look to the IACHR's experiences in designing their reparations policy. The IACHR adjusts the standard of proof and substantiation of claims required of victims in accordance with their

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[67] Ibid., p. 8.
[68] *Case of Myrna Mack-Chang v Guatemala*, IACtHR, 25 November 2003, para. 286, Series C No. 101.
[69] See, for example, *Case of Children's Rehabilitation* v *Paraguay*, IACtHR, 2 September 2004, paras. 318-320, Series C No.112; *Case of Plan de Sánchez Massacre v Guatemala,* IACtHR, 29 April 2004, paras. 107-108, Series C No.105.
[70] *Case of Children's Rehabilitation* v *Paraguay*, IACtHR, 2 September 2004, paras. 316-317, Series C No.112.
[71] *Case of Plan de Sánchez Massacre v Guatemala, supra n.23*, paras. 100-101.
[72] *Case of Myrna Mack-Chang v Guatemala*, para. 270(d)(iii).
[73] *Ibid*, para. 286.
[74] *Case of Plan de Sánchez Massacre v Guatemala*, para. 109-110.
[75] *Ibid*, para. 91(b).
[76] *Case of Plan de Sánchez Massacre v Guatemala*, para. 91(c).

needs and the circumstances of each case. The Court also provides substantial assistance to victims in formulating reparations measures where symbolic reparations are required. Victim assistance in trials involving gross and systematic violations of human rights is clearly essential to realizing their right to adequate and effective reparations.

77. The current standard applied by the Chamber for specificity of claims for reparations is ambiguous as to its basis in law: it is not provided for in the Internal Rules, nor may it be clarified by recourse to domestic Cambodian law. The ECCC should therefore seek guidance from the International Criminal Court as the only analogous system providing civil reparations claims in criminal proceedings under international law, in addition to drawing experience from regional courts like the IACHR. The Rome Statute is also of particularly significance as a source of guidance for the ECCC as Cambodia is a party to the Rome Statute and subject to its provisions of "complementarity".[77]

78. The ICC determines the appropriate form of reparations to order on behalf of victims on the basis of equity. Thus, under Article 75(1) of the Rome Statute, "The Court shall establish principles relating to reparations... [and] on this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances" award reparations according to the scope and extent of injury. Rule 94 provides that where a victim submits a request for reparations under Article 75 he/she should provide details of the harm caused, a description of any assets, property or other tangible items sought for restitution and particulars of claims for compensation, rehabilitation or other forms of remedy. Finally the Rule provides that the victims should provide "*to the extent possible*, any relevant supporting documentation" (emphasis added). The Rules therefore do not set an excessively high burden of specificity of claim on the victim, but allow for flexibility and for the Court to determine the scope and form of reparations of its own motion. Most notably, where there is uncertainty, the Court may take account of representations from the victim and other relevant parties (Article 75 (3) Rome Statute) as well as appoint relevant experts (Rule 97 (2)) to assist in determining appropriate types and modalities of reparations.

79. Furthermore, in other international documents, such as the UN Basic Principles or other relevant instruments that guarantee effective remedies for victims of human rights violations,[78] do not require a very detailed request for reparations.

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[77] Article 17(1)(1) Rome Statute of the International Criminal Court.

[78] E.g., The International Covenant on Civil and Political Rights, 16 December 1966, 999 U.N.T.S. 171, Art. 2 (3), and International Convention on the Elimination of All Forms of Racial Discrimination, 1965, 660

80. As a result, by requiring specified requests without having a legal basis, the TC does not respect procedural fairness and the victims' rights and thus violates Rule 21 (1) (a) and (c) and Rule 23.

81. Finally, the Chamber's demands regarding the provision of information about the identity of the owners of the sites, their consent to the construction of each proposed memorial and the need for additional administrative authorizations such as buildings permits exceed the requirements for a sufficiently specified and enforceable request.

82. Moreover, providing details like administrative authorizations or even an outline plan would greatly overcharge Civil Parties and their lawyers. This would mean an excessive additional amount of resources including money that Civil Parties do not have. Such kind of requirement would thwart any request for reparations and constitutes a violation of procedural fairness and the duty to safeguard the interests of victims 21 (1).

Sixth Ground of Appeal: Error of fact

83. Rejecting the request on the ground of lack of specificity, TC committed an error of fact. The TC overlooked and did not consider the details in the submitted request.

84. Co-Lawyers for Civil Parties submit that the TC rejection order is based on this error of fact. If the TC had considered the details submitted, the TC would have had to acknowledge that the request is sufficiently detailed. This error in fact leads to a miscarriage of justice as it deprives Civil Parties from reparations.

E. 5TH REQUEST: PAID VISITS FOR CIVIL PARTIES TO MEMORIAL SITES

85. Civil Parties requested that they should have the paid opportunity to visit the memorial sites at Tuol Sleng, Choeung Ek and Prey Sar three times per year, each time for four days. This should include the right of each Civil Party to be substituted by an authorized person or/and accompanied by one person, if necessary.[79]

The Chamber did not render a decision regarding this request.

Seventh Ground of Appeal: Violation of Rule 100 (1)

86. Rule 100 (1) states that the Chamber shall make a decision on any Civil Party claims. By not making any decision regarding this request TC violated Rule 100 (1).

Eighth Ground of Appeal: Error of fact

U.N.T.S. 195, 199, Art. 6, International Convention on the Rights of the Child, 20 November 1989, 1577 U.N.T.S. 3, 56, Art. 39.

[79] Final Submission, para. 17.

87. Not rendering a decision at all regarding this request, the rejection order is based on an error of fact. This error in fact leads to a miscarriage of justice as it deprives Civil Parties from reparations and invalidates the judgment.

F. 6TH REQUEST: PROVISION OF MEDICAL TREATMENT AND PSYCHOLOGICAL SERVICES FOR CIVIL PARTIES

88. Civil Parties requested to have the general right to receive all medical treatment including psychological support at least for direct survivors of S-21 and for indirect victims if they demonstrate prima facie that their suffering is caused or might be caused by the DK regime. KAING Guek Eav should bear the costs for the treatment itself, medication and, if necessary, for transportation.[80] The request is clear and plain that the costs for this reparations should be borne by the Accused and is exactly in the competence of the TC.
89. Nevertheless, the Chamber rejects this request on three grounds: (i) such kind of requests are not symbolic by their nature; (ii) they are designed to benefit a large number of individual victims and (iii) the requests are outside the scope of available reparations because the Court can not impose obligations on national healthcare authorities.[81]
90. Co-Lawyers for Civil Parties note that the TC misunderstood the request as it was not meant to provide medical treatment and psychological services to benefit a large number of individual victims. These benefits should only be provided for the direct survivors of S-21 and S-24 and indirect victims. The number of requesting Civil Parties is 17 in total, including five rejected Applicants.
91. In addition, the Trial Chamber misperceived the clear and plain request that was not directed to the Cambodian government to maintain or create health centers but intended that the Accused bears the cost of treatment, medication and transportation, if necessary, regardless who would provide the service. Co-Lawyers for Civil Parties are taken by surprise that the TC could misunderstand the clear and plain request.

Ninth Ground of Appeal: Violation of Rule 23 (1) (b)

92. The TC's decision is based on a wrong understanding of the term "collective and moral reparations" as stipulated in Rule 23 (1) (b).
93. First of all, Co-Lawyers for Civil Parties note that collective and moral reparations intend to restore dignity to victims and to prevent future human rights violations. All objects or

[80] Final Submission, para. 18.
[81] Judgment, para. 674.

acts of reparation have a symbolic meaning to individuals.[82] Thus, the TC errs by rejecting the request because health care is "not symbolic by nature". It remains unclear if the TC argues that **therefore** the requested health care services can not be granted as they do not fall under the category of "collective and moral" reparations.

94. The Trial Chamber fails to define "collective and moral" reparations. Co-Lawyers for Civil Parties can only assume and derive from the statement of the TC that this request is "non symbolic by nature" that the TC has the vague idea that reparations in the meaning of IR 23 are limited to be symbolic. However, the Trial Chamber misunderstands and errs in this regard because, in principal, all acts or objects of reparations have a symbolic character.

95. There are only five legal classification of reparations' form: restitution, compensation, rehabilitation, satisfaction, or guarantees of non-repetition.[83] Collective and moral reparations are not included in any legal classification of reparations.

96. In the absence of further guidance, the area of intersection between moral and collective should therefore be interpreted as broadly as possible to cover the widest possible field of application, in order to get as close as possible to international law standards.

97. Co-Lawyers for Civil Parties can further only assume that the TC's vague and unexpressed understanding of "collective and moral" is that individual benefit such as getting individual access to mental health service is perceived as non-symbolic because an individual gets health care and therefore this kind of reparation would be not collective and moral.

98. The TC errs by classifying health care services as "non-symbolic" and therefore not available as "collective and moral reparation."

99. Co-Lawyers for Civil Parties observe that the Internal Rules do not define the term "collective and moral". Material of the drafting process of the Internal Rules is not available as the Plenary is confidential and not accessible for Civil Parties or their Lawyers[84]. In addition, at the time of the adoption of the first Internal Rules victims had not yet applied as Civil Parties.

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[82] Brandon Hamber, ''Narrowing the micro and the macro: A psychological perspective on reparations in societies in transition,'' in: *The Handbook of Reparations*, International Center for Transitional Justice (ed.), Oxford University Press, (2006), p. 560-588 (565).

[83] See Basic Principles, supra note 29, paras. 18-23.

[84] Internal Rule 18 (10) stipulates that the Plenary is confidential unless the Plenary decides otherwise. To the knowledge of Co-Lawyers for Civil Parties, there were no explanatory notes ever published which describe what the understanding of "moral and collective" reparations could be. Only the Press Release on the adoption of the first Internal Rules, dated 13 June 2007, provides an indication that collective means non-financial

100. The statement of one of the drafters of the Internal Rules could assist in defining the terms "collective and moral": "In these circumstances, the establishment of an independent victims' trust fund for the purpose of organizing more **collective forms** of reparations, such as the construction of memorials and the **provision of psychological services,** should not be excluded".[85] (*emphasis added*).

101. REDRESS, a NGO specialized on seeking reparation for torture victims, defined collective reparations as follows: "Collective forms of reparation are simply measures that are adopted to respond to the harm suffered by several persons or groups collectively. Collective measures can respond to a variety of needs including material, restitutive and/or symbolic"[86].

102. Co-Lawyers for Civil Parties stress that according to this definition "collective" does not mean that this kind of reparation must not cost anything. Further, it should be highlighted that the understanding of collective reparations includes psycho-social support with a range of activities[87] and is clearly a collective measure although individuals benefit from it as well as the collective as a whole.

103. Likewise, as there is no precise definition of the meaning of "moral" reparations, neither in law nor in doctrine. Thus, if adopting a strict reading of the rules, there is *a priori* no reason to assume that the ECCC cannot grant *any* material reparation measure.

104. In addition, Co-Lawyers for Civil Parties note that in Rule 23 (1) (b) the term of "collective and moral" reparations is used to make clear that the ECCC can not grant **individual financial awards** to individuals. By using this wording, the IRs intend to exclude individual monetary awards. The term "moral" has to be understood as "non-pecuniary".[88] The reparations requests have to be analyzed keeping these aims in mind. Thus, every award that is not aimed exclusively at the financial compensation of one individual fulfills the requirement of being "collective and moral". As a result of the

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reparation: "However, due to the specific character of the ECCC, we have decided that only collective, non-financial reparation is possible." at http://www.eccc.gov.kh/english/cabinet/press/29/Joint_Press_Statement__on_internal_rules_eng_fr_13_june_2007.pdf. This cannot mean that collective reparations must not cost any money, as the examples listed in IR 23 such as publication of the judgment cost money.

[85] Boyle, David, "The Rights of Victims," Journal of International Criminal Justice 4 (2006), 307-313, at p. 312.

[86] "Considering Reparations for Victims of the Khmer Rouge Regime," Discussion paper by Cambodian Human Rights Action Committee and REDRESS, November 2009, at p. 8, http://www.unhcr.org/refworld/pdfid/4b388dcd2.pdf, last accessed 24 September 2010.

[87] Ibid, p.10.

[88] Arturo J. Carrillo, "The Relevance of Inter-American Human Rights Law," in: *The Handbook of Reparations,* International Center for Transitional Justice (ed.), Oxford University Press, (2006), p. 504-538 (512).

above, Co-Lawyers for Civil Parties stress that collective and moral reparations are to be distinguished from individual, pecuniary reparations.

105. Furthermore, the TC is misled when it reasons that it cannot grant the request because it is unable to impose obligations on national healthcare authorities. Granting this request does not necessarily mean that the provision of medical treatment has to be carried out by national healthcare authorities. A good example is the Transcultural and Socio-psychological Organization (TPO) which is a Non-Governmental Organization and provides mental health care for victims.

106. The role of collective programs for medical and psychosocial rehabilitation is to repair **specifically** the harm and suffering endured.[89] Rehabilitation is intended to assist the victim in his or her recovery from serious physical or psychological harm and encompasses all future medical and clinical treatment aimed at caring for the victim's short – or long-term injuries.[90]

107. Particularly the Inter-American Court of Human Rights granted services of medical treatment and psychosocial healthcare as a form of reparation, highlighting the importance of these services.[91] In its judgments on reparations, the IACHR considers in different sections "pecuniary reparations" and "other forms of reparations". The provision of medical and psychosocial services is being discussed under the section of "other forms of reparations"[92]. Accordingly, the IACHR qualifies medical and psychological care as measures of satisfaction seeking to repair the non-pecuniary damage in a way that is non-monetary.[93]

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[89] REDRESS, Collective Reparations: Concepts & Principles, p. 8, http://www.redress.org/downloads/events/CollectiveReparationsMG.pdf (last visited on 24 August 2010).

[90] Carrillo, supra note 96, p. 512.

[91] For example IACHR 19 Merchants v. Colombia, Judgment, Series C No. 109, 5 July 2004, Merits, Reparations and Costs, paras. 275-278. In para. 278 it ruled that "the State has the obligation to provide without charge, through its specialized health institutions, the medical and psychological treatment required by the next of kin of the victims, including the medication they require (...). Bearing in mind the opinion of the expert, who has evaluated or treated many of the next of kin (...), psychological treatment must be provided that takes into account the particular circumstances and needs of each of the next of kin, so that they can be provided with collective, family or individual treatment, as agreed with each of them and following individual assessment. Within one year, Colombia must inform the next of kin of the victims in which health establishments or specialized institutes they will receive medical and psychological treatment, and these institutions must be fully informed about this measure of reparation so that the treatment is provided as ordered above.
In para. 281-9, it ruled: "(...) that the State shall provide, free of charge, through its specialized health institutions, the medical and psychological treatment required by the next of kin of the victims (...)." For other examples see also IACHR, Durand and Ugarte v. Peru, Judgment of December 3, 2001, Reparations and Costs, Series C No. 89, paras. 36, 37, 45-3, IACHR, Case of Barrios Altos v. Peru, Judgment of November 30, 2001, Reparations and Costs, Series C No. 87, para. 50-3.

[92] See for example IACHR, Durand and Ugarte v. Peru , supra note 99, or IACHR, Case of Barrios Altos v. Peru, supra note 99.

[93] IACHR 19 Merchants v. Colombia, Judgment, supra note 99, para. 253.

108. The request for medical and psychosocial services is not aimed at granting a financial sum but at providing the possibility of utilizing a service. As a result, when filing the request, Civil Parties did not intend to be granted individual financial awards but the provision of services. Thus, the requested claim is "moral".

109. Additionally, the requested measure is also "collective". Collective reparations are focused on delivering a benefit to people that suffered from human rights violations as a group.[94] The requested measures are to be provided for the group or the "collective" of Civil Parties and are to be distinguished from individual financial compensation for individual material loss or other damages.

110. Thus, by misinterpreting the notions of "collective and moral reparations" and consequently estimating the above request outside of the scope of available reparations, the TC violated Rule 23 (1) (b).

Tenth Ground of Appeal: Violation of Rule 23 by requiring a link between the claim and the crime without having a legal basis

111. The Chamber states that "even if awards of this sort were within the scope of Internal Rule 23 (1)(b), proof would be required as to the link between the measure sought by each claimant and the crimes for which KAING Guek Eav has been found responsible. No such material has been provided to the Chamber."[95]

112. The TC asks for a link between the reparations request and the committed crime without providing the legal basis for such requirement. Co-Lawyers for Civil Parties could not find any legal basis for this link neither in the Internal Rules nor in the Cambodian Procedure Code. Moreover, neither in national nor in international law such a link as condition to receive reparations can be found. By demanding this link, TC violated the right of Civil Parties to reparations and thus violated Internal Rule 23.

G. 7TH REQUEST: PRODUCTION AND DISSEMINATION OF AUDIO AND VIDEO MATERIAL ABOUT THE TRIAL

113. Civil Parties asked for the production of at least 100 hours of audio and video material of the main components of the trial, including footage of the Accused on the day of the announcement of the Judgment. The video and audio should also include an explanation of the role of the Civil Parties, with editing rights given to them. Each province and commune should receive five copies. At least ten photos of the trial should be distributed

[94] Supra note 97, p. 5.
[95] Judgment, para. 674.

to each commune and displayed in the local pagoda with ten written and audio documents of the final judgment placed in a pagoda of each commune.[96]

114. In its analysis of the reparations claims called "requests concerning publication of the judgment and outreach," the TC grants that the judgment will be issued publicly and made available on the ECCC website, where it will be accessible to all media outlets wishing to make reference to it. In addition, it notes "that public provision of information regarding the judgment will occur as a feature of the ECCC Public Affairs Section's outreach activities, which are likely to contribute significantly to reconciliation initiatives within Cambodian society at large and public education."[97]

115. However, the TC rejects the claim for "the production of documentaries and the dissemination in the broadcast media of portions of the judgment (...) on grounds of lack of specificity."[98]

Eleventh Ground of Appeal: Violation of Rule 21 (1)(a) and (c) and Rule 23

116. In contrast to the rulings of the Chamber, the request sufficiently specified the content of the documentaries and the way in which they would be disseminated.[99] By rejecting the request on grounds of lacks of specificity although the request was detailed and specified, TC violated IR 21 (a) and (c) and 23. Co-Lawyers for Civil Parties incorporate by reference and refer to the arguments in paragraphs 68-78 of this Appeal.

117. When requiring specified requests without having a legal basis for this requirement, neither in the IR nor in International Law, the TC does not respect procedural fairness and the victims' rights and thus violates Rule 21 (1) (a) and (c) and Rule 23.[100]

118. Furthermore, TC violates IR 21 (1) (a) ensuring procedural fairness when overcharging Civil Parties and their lawyers by requiring exceedingly specified requests.[101]

Twelfth Ground of Appeal: Error of fact

119. By rejecting the request on the grounds of lacks of specificity, the TC committed an error of fact. The TC overlooked and did not consider important details listed above submitted by Civil Parties. The TC rejection order is based on this error of fact. If the TC had considered the details submitted, the TC would have had to acknowledge that the

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[96] Final Submission, para. 19.
[97] Judgment, para. 669.
[98] *Ibid.*
[99] See Final Submission, para. 19.
[100] *Ibid.*
[101] *Ibid.*

required details had been provided. This error in fact leads to a miscarriage of justice as it deprives the Civil Parties from reparations.[102]

H. 8TH REQUEST: NAMING 17 PUBLIC BUILDINGS WITH VICTIMS' NAMES AND CEREMONIES

120. Civil Parties requested that each Civil Party should have the right to choose a public building such as a hospital or school to be named on behalf of the victim for whom he/she represents. This process should be commemorated with a public ceremony and a physical memory should be included, with the name of the victim and information about the victim's fate. A speech with his/her story should be delivered at the time. The ceremony should be broadcasted and a copy of the broadcast retained at each one of the three memorial sites.[103] The TC did not render a decision regarding this request. It only ruled about "Measures by the Royal Government of Cambodia"[104].

Thirteenth Ground of Appeal: Violation of Rule 100 (1)

121. By not making any decision regarding this request, TC violated Rule 100 (1). The TC's reasoning regarding measures by the Royal Government of Cambodia does not encompass this request. The analysis refers only to the request for a commemoration day and issuance of official statements of apology but not to the naming of public buildings.

122. In addition, Co-Lawyers for Civil Parties submit that, as discussed above in the preliminary remarks,[105] the Chamber is not prevented from ruling that the Accused has to finance this reparations request although non-pecuniary and administrative assistance by the Government is needed for its execution.

Fourteenth Ground of Appeal: Error of fact

123. Furthermore, by not rendering a decision at all regarding this request, the rejection order is based on an error of fact. This error in fact leads to a miscarriage of justice as it deprives Civil Parties from reparations and invalidates the judgment.

I. 9TH REQUEST: WRITING AN OPEN LETTER TO THE GOVERNMENT REQUESTING PART OF THE ENTRANCE FEES

124. Civil Parties requested that KAING Guek Eav should be ordered to submit a public letter to the Royal Government of Cambodia requesting them to participate in the reparations process by setting aside funds for the Civil Parties. It should be requested that the Royal Government use one-third of the entrance fees of Tuol Sleng and Choeung Ek

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[102] See paras. 84 and 85 of this Appeal
[103] Final Submission, para. 19.
[104] Judgment, para. 671.
[105] See paras. 25-28 of this Appeal.

toward funding the above-mentioned reparations requests and that the reminder be divided as a monetary award among the Civil Parties.[106]

125. The TC rules that the establishment of a trust fund for the victims to finance the above reparations is beyond the scope of available reparations.[107] However, Civil Parties did not request an order to establish a fund but asked to order the Accused to submit a public letter to the Cambodian Government requesting that one-third of the entrance fees of S-21 and Choeung Ek be used toward funding the reparations requests. Ordering the Accused to write a letter to the Government is within the scope of available collective and moral reparations.

126. The TC did not decide at all on this particular request of ordering the Accused to write a letter to the Government.

Fifteenth Ground of Appeal: Violation of Rule 100 (1)

127. By not rendering any decision on the request to order KAING Guek Eav to write this letter, the TC violated Rule 100 (1) which stipulates that the Trial Chamber decides on Civil Party claims in the judgment.

Sixteenth Ground of Appeal: Error of fact

128. By not making a decision at all regarding this request, the TC also erred on facts which has occasioned a miscarriage of justice. TC erred when it presumably classified this request as a "request for measures by the government" or a "request for the establishment of a fund". This apparently incorrect understanding of the request constitutes an error of fact that has occasioned a miscarriage of justice. The Chamber, in fact, has the competence to order KAING Guek Eav to write a letter to the government, but ignored this fact, in the request.[108] Again, Co-Lawyers for Civil Parties are taken by surprise that the clear and plain meaning of the request could be misperceived by the Trial Chamber.

129. Thus, the TC overlooked the clear meaning of the request and hence erred on facts that have occasioned a miscarriage of justice.

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[106] Final Submission, para. 20.
[107] Judgment, para. 670.
[108] See paras. 58 and 59 of this Appeal.

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VII. CONCLUSION AND REQUEST

130. For all the foregoing reasons, Co-Lawyers for Civil Parties submit that the Trial Chamber erroneously interpreted the Law/Internal Rules and erred in facts which occasioned a miscarriage of justice and invalidate the judgment related to the rejection of the reparations requests.

Co-Lawyers for Civil Parties therefore respectfully request the Supreme Court Chamber:

- Declare the Appeal admissible;
- Overturn the Judgment on Civil Party claims; and
- Grant all reparations requests in full.

Mr. HONG Kimsuon

Mr. KONG Pisey

Mr. YUNG Phanit

Ms. Silke STUDZINSKY

Signed in Phnom Penh, Kingdom of Cambodia on 2 November 2010.