



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

ព្រះរាជាណាចក្រកម្ពុជា  
ជាតិ សាសនា ព្រះមហាក្សត្រ

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

អង្គជំនុំជម្រះសាលាដំបូង  
Supreme Court Chamber  
Chambre de Cour suprême

**ឯកសារដើម**  
**ORIGINAL/ORIGINAL**  
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TRANSCRIPT OF APPEAL JUDGEMENT

KAING GUEK EAV "DUCH"

PUBLIC

Case File N° 001/18-07-2007-ECCC-TC/SC

3 February 2012

Before the Judges: KONG Srim, Presiding  
Motoo NOGUCHI  
SOM Sereyvuth  
Agnieszka  
KLOWIECKA-MILART  
SIN Rith  
Chandra Nihal JAYASINGHE  
YA Narin  
MONG Monichariya (Reserve)  
Florence MUMBA (Reserve)

The Accused: KAING Guek Eav

Lawyers for the Accused:  
KAR Savuth  
KANG Ritheary

Lawyers for the civil parties:

Supreme Court Chamber Greffiers/Legal Officers:

SEA Mao  
Christopher RYAN  
PHAN Theoun  
Paolo LOBBA

TY Srinna  
MOCH Sovannary  
HONG Kimsuon  
KIM Mengkhy  
Silke STUDZINSKY  
Martine JACQUIN  
Élisabeth RABESANDRATANA

For the Office of the Co-Prosecutors:

CHEA Leang  
Andrew CAYLEY

For Court Management Section:

KAUV Keoratanak

**List of Speakers:**

Language used unless specified otherwise in the transcript

<b>Speakers</b>	<b>Language</b>
THE PRESIDENT (KONG SRIM, Presiding)	Khmer

1

1 P R O C E E D I N G S

2 (Court opens at 0959H)

3 MR. PRESIDENT:

4 Sit down.

5 On behalf of the Cambodian people and the United Nations, today,  
6 which is Friday the 3rd of February 2012, the Supreme Court  
7 Chamber of the ECCC makes a public hearing pronouncing the Final  
8 Judgment in Case 001, dated 18-07-2007/ECCC/SC, where the Accused  
9 is Kaing Guek Eav, alias Duch.

10 [10.00.27]

11 The Accused, the Prosecution and the Civil Parties, groups 1, 2,  
12 and 3 appealed against the Judgment dated 26 July 2010 of the  
13 Trial Chamber which convicted the accused Kaing Guek Eav, alias  
14 Duch, for crimes against humanity, political persecution and  
15 grave breaches of the Geneva Conventions of 1949, the crimes  
16 stipulated in the Law on the Establishment of the ECCC, for his  
17 commission of crimes in Phnom Penh and throughout the territory  
18 of Cambodia between 17 April 1975 to the 6th of January 1979.

19 Greffier, could you report the attendance of the parties?

20 THE GREFFIER:

21 Mr. President, Your Honours, all parties are present.

22 MR. PRESIDENT:

23 Security guards, you are instructed to bring the accused Kaing  
24 Guek Eav, alias Duch, to the dock.

25 (The accused Kaing Guek Eav is taken to the dock)

1 [10.02.35]

2 I would like to clarify that at this juncture the Supreme Court  
3 Chamber will only pronounce a summary of the Appeal Judgment, and  
4 the Findings, and the Dispositions.

5 Summary of Appeal Judgment.

6 Case File 001, dated 18-07-200/ECCC/SC, Kaing Guek Eav.

7 Date: 3rd February, 2012.

8 A. Introduction.

9 1. The following is a summary of the Supreme Court Chamber's  
10 findings in its Appeal Judgment in Case 001. The authoritative  
11 account of those findings is contained in the written Appeal  
12 Judgement.

13 Khmer and English versions of the Appeal Judgement will be made  
14 available in due course, and a French translation will be  
15 available in due course thereafter

16 2. The Trial Chamber issued its Judgement on 26 July 2010. The  
17 filing of written appeal submissions closed on 25th March 2011,  
18 and an appeal hearing was held from 28 to 30 March 2011. The  
19 duration of these appeal proceedings and the length of the Appeal  
20 Judgement reflect the historic nature of this case, the first  
21 before the ECCC, and the novelty and complexity of the legal  
22 issues in the grounds of appeal.

23 [10.04.46]

24 In its Judgement, the Trial Chamber found that, as Deputy and  
25 then Chairman of S-21, the Accused managed and refined a system,

3

1 over the course of more than three years, that resulted in the  
2 execution of no fewer than 12,272 victims, the majority of whom  
3 were also systematically tortured.

4 The Trial Chamber sentenced the Accused to 35 years of  
5 imprisonment based on convictions for the crime against humanity  
6 of persecution, subsuming the crimes against humanity of  
7 extermination -- encompassing murder -- enslavement,  
8 imprisonment, torture -- including one instance of rape -- and  
9 other inhumane acts, as well as for grave breaches of the Geneva  
10 Conventions of 1949: wilful killing, torture and inhumane  
11 treatment, wilfully causing great suffering or serious injury to  
12 body or health, wilfully depriving a prisoner of war or civilian  
13 of the rights of fair and regular trial, and unlawful confinement  
14 of a civilian.

15 [10.06.40]

16 The Trial Chamber decided that a five-year reduction in sentence  
17 was appropriate given the violation of the Accused's rights  
18 occasioned by his illegal detention by the Cambodian Military  
19 Court between 10 May 1999 and 30 July 2007. The Trial Chamber  
20 also found that the Accused is entitled to credit for the  
21 entirety of his time spent in detention -- that is, from 10 May  
22 1999 to 30 July 2007, under the authority of the Cambodian  
23 Military Court, and from 31st July 2007 until the date of  
24 issuance of this Appeal Judgement.

25 [10.07.39]

4

1 The Trial Chamber granted two reparations to the Civil Parties.

2 The Trial Chamber declared in its Judgement that all admitted

3 Civil Parties suffered harm as a direct consequence of the crimes

4 for which the Accused was convicted, and the Trial Chamber agreed

5 to compile all statements of apology and acknowledgments of

6 responsibility made by the Accused during the course of the trial

7 and to post this compilation on the ECCC's official website

8 within 14 days of the Trial Judgement becoming final.

9 The Supreme Court Chamber will now summarize its findings on the

10 Appellants' grounds of appeal.

11 [10.08.47]

12 B. Personal Jurisdiction.

13 The Accused contends that the Trial Chamber had no personal

14 jurisdiction over him, and accordingly his conviction and

15 sentence ought to be set aside by the Supreme Court Chamber.

16 According to the Accused, neither his operational

17 responsibilities nor the duties he performed during the DK bring

18 him within the description of a senior leader of the Democratic

19 Kampuchea or one of those who were most responsible for the

20 crimes that were committed during the Democratic Kampuchea.

21 [10.09.43]

22 The Co-Prosecutors argue that the Accused's appeal on personal

23 jurisdiction is inadmissible since his Notice of Appeal and

24 Appeal Brief fail to meet the minimum standards of pleading. The

25 Co-Prosecutors also submit that the Trial Chamber was entitled to

5

1 reject the Defence submission on personal jurisdiction as  
2 untimely; the Trial Chamber was right to conclude that the phrase  
3 "senior leaders of Democratic Kampuchea and those who were most  
4 responsible" refers to two distinct categories of suspects; and  
5 the Trial Chamber was right to conclude that it had personal  
6 jurisdiction over the Accused on the basis of his status as one  
7 of those "most responsible" for the crimes committed during the  
8 Democratic Kampuchea. Civil parties Group 3 responded in support  
9 of the Co-Prosecutors.

10 [10.11.20]

11 The Supreme Court Chamber finds that a fair trial demands that  
12 the Accused has the right to raise an objection to a patent or  
13 latent lack of jurisdiction that could vitiate the trial at  
14 whatever time he or she decides safeguards his or her interests.  
15 The Trial Chamber must entertain any and all such objections to  
16 jurisdiction raised by an accused person at the same time as the  
17 Judgement on the merits at the latest. In any event, the Accused  
18 was convicted of a crime and therefore has "the right to his  
19 conviction and sentence being reviewed by a higher tribunal  
20 according to law". On the basis of this law - of this right, the  
21 Accused is entitled to appeal against any alleged error of law or  
22 fact that might invalidate the Trial Judgement or constitute a  
23 miscarriage of justice, respectively, including the Trial  
24 Chamber's decision on personal jurisdiction.

25 [10.12.50]

1 Regarding standards of appellate pleading, the Supreme Court  
2 Chamber finds that the decisive question is whether an appellant  
3 has pleaded his case in a manner that enables an opposing party  
4 to know the case he has to meet and enables the Supreme Court  
5 Chamber to identify and rule upon the issues in dispute.

6 The Supreme Court Chamber finds that the core issues arising for  
7 decision under the Accused's appeal are relatively easy to  
8 identify, and the operative passages of the Trial Judgement are  
9 readily identifiable and set out with clarity the reasoning that  
10 led it to the conclusion that the Accused is one of those "most  
11 responsible".

12 [10.14.06]

13 On the central issue of personal jurisdiction, pursuant to the  
14 ordinary meaning to be given to the term in its context and in  
15 the light of the object and purpose of the United Nations and the  
16 Royal Government of Cambodia Agreement, the Supreme Court Chamber  
17 finds that the term "senior leaders of Democratic Kampuchea and  
18 those who were most responsible" refers to two categories of  
19 Khmer Rouge officials which are not dichotomous. One category is  
20 senior leaders of the Khmer Rouge who are among the most  
21 responsible, because a senior leader is not a suspect on the sole  
22 basis of his or her leadership position.

23 The other category is non-senior leaders of the Khmer Rouge who  
24 are also among the most responsible. Both categories are  
25 "suspects" subject to criminal prosecution before the ECCC.



1 [10.15.25]

2 The Supreme Court Chamber must also consider whether interpreting  
3 the term "senior leaders of Democratic Kampuchea and those who  
4 were most responsible" as a jurisdictional requirement is  
5 consistent with the object and purpose of the UN-RGC Agreement  
6 and whether such an interpretation would lead to a "manifestly  
7 absurd or unreasonable" result. The Supreme Court Chamber finds  
8 that the personal jurisdiction of the ECCC covers Khmer Rouge  
9 officials, and the question of whether an accused was a Khmer  
10 Rouge official is justifiable (sic) before the Trial Chamber.  
11 However, the term "most responsible" cannot be a jurisdictional  
12 requirement for many reasons, including: the notion of  
13 comparative responsibility is inconsistent with the ECCC Law's  
14 prohibition of a defence of superior orders; and the  
15 determination of whether an accused is "most responsible"  
16 requires a large amount of discretion.

17 The Supreme Court Chamber therefore finds that the term "most  
18 responsible" should be interpreted as a non-justifiable (sic)  
19 policy guide for the Co-Investigating Judges and the  
20 Co-Prosecutors in the exercise of their discretion as to the  
21 scope of investigations and prosecutions.

22 [10.17.51]

23 Regarding the term "senior leaders", the Supreme Court Chamber  
24 finds that it, too, is a non-justiciable policy guide rather than  
25 a jurisdictional requirement, due, among other reasons, to the

1 flexibility in the term's definition. In the absence of bad faith  
2 or a showing of unsound professional Judgement, the Trial Chamber  
3 has no power to review the alleged abuse of the Co-Investigating  
4 Judges' or Co-Prosecutors' discretion under Articles 5.3 and 6.3  
5 of the UN-RGC Agreement regarding the scope of investigations and  
6 prosecutions.

7 Whether an accused is a senior leader or one of those most  
8 responsible are exclusively policy decisions for which the  
9 Co-Investigating Judges and Co-Prosecutors, and not the Chambers,  
10 are accountable. The Accused's appeal on personal jurisdiction is  
11 accordingly rejected in full.

12 [10.19.35]

13 C. Crimes Against Humanity.

14 a) The Principle of Legality.

15 The Co-Prosecutors submit that the Trial Chamber erred as a  
16 matter of law in several respects in its determination of the  
17 charges of crimes against humanity brought against the Accused  
18 under Article 5 of the ECC (sic) Law.

19 The Supreme Court Chamber notes that in order to dispense with  
20 these grounds of appeal, it must examine the ECCC's subject  
21 matter jurisdiction over crimes against humanity generally and  
22 the Trial Chamber's definitions of the underlying crimes against  
23 humanity at issue, namely enslavement, torture, rape and  
24 persecution.

25 [10.20.51]

1 The Supreme Court Chamber agrees with the Trial Chamber that, in  
2 order for charged offences and modes of participation to fall  
3 within the ECCC's subject matter jurisdiction, they must be  
4 provided for in the ECCC Law, explicitly or implicitly. In  
5 addition, because the ECCC Law was enacted after the alleged  
6 criminal conduct, they must be examined in light of the principle  
7 of nullum crimen sine lege -- the principle of legality. Pursuant  
8 to Article 33new of the ECCC Law and Article 15 of the  
9 International Covenant on Civil and Political Rights, the  
10 offences or modes of liability charged before the ECCC must have  
11 existed under national law or international law at the time of  
12 the alleged criminal conduct occurring between 17 April 1975 and  
13 6 January 1979. Furthermore, they must have been foreseeable and  
14 accessible to the Accused.

15 [10.22.38]

16 b) Crimes Against Humanity from 1975 to 1979.

17 With respect to the ECCC's jurisdiction over crimes against  
18 humanity, generally from 1975 to 1979, the Supreme Court Chamber  
19 has reviewed the development of crimes against humanity in  
20 international law, starting with antecedents to crimes against  
21 humanity in the 1600s and tracing post-World War I and post-World  
22 War II state practice and opinio juris.

23 The Supreme Court Chamber agrees with the Trial Chamber that a  
24 crime against humanity was an international crime during the  
25 ECCC's temporal jurisdiction. Furthermore, this Chamber holds

1 that the general definition of crimes against humanity found in  
2 the 1950 Nuremberg Principles reflects the state of customary  
3 international law at the time. When examining specific grounds of  
4 appeal, the Supreme Court Chamber will determine whether that  
5 definition persisted under international law from 1975 to 1979.  
6 The Chamber will now proceed to address specific crimes against  
7 humanity.

8 c) Enslavement.

9 Turning to enslavement as a crime against humanity, the  
10 Co-Prosecutors allege that the Trial Chamber erred by failing to  
11 convict the Accused for enslavement of all S-21 detainees. The  
12 Co-Prosecutors allege that the Trial Chamber so erred by  
13 requiring the element of forced labour in its definition of  
14 enslavement as a crime against humanity.

15 [10.25.15]

16 The Supreme Court Chamber finds that the Trial Chamber did not  
17 invoke forced labour as a necessary element in the definition of  
18 enslavement. Instead, it noted that it is merely one factor to be  
19 considered. Thus, this Chamber finds the Co-Prosecutors'  
20 assertion in this regard to be without merit.

21 However, upon consideration of the definition of slavery under  
22 the 1926 Slavery Convention and the prosecution of enslavement as  
23 a crime against humanity in post-World War II jurisprudence, the  
24 Supreme Court Chamber finds that the Trial Chamber did not  
25 articulate with precision the applicable definition of

11

1 enslavement. The definition of enslavement as a crime against  
2 humanity as it existed under customary international law from  
3 1975 to 1979 is: 1) The exercise over persons of the powers that  
4 attach to the right of ownership -- that is, *actus reus*; and 2)  
5 intention to accrue some gain through exercise over persons of  
6 the powers that attach to the right of ownership -- that is, *mens*  
7 *rea*. The Supreme Court Chamber finds that this definition was  
8 both foreseeable and accessible to the Accused.

9 [10.27.25]

10 In applying this more precise definition of enslavement to the  
11 Trial Chamber's factual findings on the treatment of S-21  
12 detainees, the Supreme Court Chamber finds that there is no  
13 evidence of an intention by the Accused to accrue some gain from  
14 the totality of S-21 detainees or of otherwise treating them as a  
15 commodity. Consequently, the Trial Chamber did not err in  
16 limiting its finding of enslavement only to those detainees at  
17 S-21 who had been subjected to forced labour. On this basis, the  
18 Co-Prosecutors' third ground of appeal is hereby rejected.

19 [10.28.27]

20 d) Torture and Rape.

21 The Co-Prosecutors request that the Supreme Court Chamber  
22 commutatively convict the Accused for both rape and torture as  
23 crimes against humanity.

24 Given the lack of support for the existence of rape as a distinct  
25 crime against humanity during the ECCC's temporal jurisdiction,

12

1 the Supreme Court Chamber finds that the Trial Chamber erred in  
2 concluding that the incident that occurred at S-21 constituted  
3 rape as a crime against humanity. Accordingly, this part of the  
4 Co-Prosecutors' appeal fails automatically.

5 Next, the Supreme Court Chamber will determine whether the Trial  
6 Chamber erred in finding that an act of rape could constitute the  
7 crime against humanity of torture during the ECCC's temporal  
8 jurisdiction. The Trial Chamber held that, with respect to the  
9 actus reus of torture, "certain acts are considered by their  
10 nature to constitute severe pain and suffering. These acts  
11 include rape[...]." The Supreme Court Chamber agrees and,  
12 accordingly, finds that the Trial Chamber did not err in  
13 subsuming an act of rape into the definition of torture as a  
14 crime against humanity.

15 [10.30.39]

16 With regard to the principle of legality, the Chamber notes that,  
17 at the time of the Accused's criminal conduct, it was clear that  
18 torture constituted a grave violation of an individual's  
19 fundamental human rights. This widespread recognition of the  
20 community of States of the gravity of torture demonstrates the  
21 foreseeability of criminal prosecution for such conduct as a  
22 crime against humanity.

23 e) Persecution.

24 The Supreme Court Chamber concludes that persecution was a  
25 recognized crime against humanity under international law as of

1 1975. The Supreme Court Chamber agrees with the Trial Chamber  
2 that the mens rea requirement is the "deliberate" perpetration of  
3 an act or omission with the specific intent to persecute on  
4 racial, religious or political grounds. Furthermore, the Chamber  
5 concludes that the majority of the Trial Chamber did not err in  
6 its application of the requisite mens rea for persecution in  
7 reaching the conclusion that the Accused shared the requisite  
8 mens rea in this case.

9 [10.32.30]

10 The Supreme Court Chamber agrees with the Trial Chamber that the  
11 first prong of the actus reus of persecution is that it  
12 constitutes an act or omission that denies or infringes a  
13 fundamental right laid down in customary international law or  
14 treaty law. The crux of that analysis lies in the determining  
15 whether or not the act or omission, when considered cumulatively  
16 and in context, is equal in gravity or severity to other  
17 underlying crimes against humanity, such that the result is a  
18 gross or blatant breach of fundamental rights. The Supreme Court  
19 Chamber also agrees with the second prong of the actus reus as  
20 defined by the Trial Chamber; namely that the persecutory act or  
21 omission must "discriminate in fact" such that there are actual  
22 discriminatory consequences.

23 [10.33.53]

24 Finally, the Supreme Court Chamber turns to consider whether the  
25 Trial Chamber erred in its factual conclusion that every

1 individual detained at S-21 was targeted on political grounds and  
2 therefore was a victim of persecution. The Trial Chamber found  
3 that, over the course of the CPK regime, different groups of  
4 individuals were targeted as perceived or real political enemies  
5 and detained at S-21 under various criteria established by the  
6 CPK. As the revolution wore on, however, individuals were  
7 indiscriminately apprehended, mistreated, and eliminated without  
8 any attempt at rational or coherent -- rather, justification on  
9 political grounds. Such actions were no longer persecution but  
10 constituted a reign of terror where no discernible criteria  
11 applied in targeting the victims. The Accused is responsible for  
12 detention, interrogation, torture, enslavement, and execution of  
13 a number of individuals who were not political enemies. With  
14 respect to these persons, the Supreme Court Chamber considers  
15 that these victims did not fall under the notion of persecution.  
16 [10.35.52]

17 f) Cumulative Convictions.

18 The Co-Prosecutors submit that the Trial Judgement erred in law  
19 by subsuming specific crimes against humanity under the crime of  
20 persecution instead of convicting him for all the crimes against  
21 humanity for which he was found responsible for (sic) the Trial  
22 Chamber.

23 The Supreme Court Chamber finds that, in considering the question  
24 of cumulative convictions, the Trial Chamber correctly resorted  
25 to the Celebici test elaborated in ICTY and ICTR jurisprudence.



1 It however committed an error of law in its application of the  
2 test to persecution vis-à-vis the other crimes against humanity.  
3 This Chamber holds that, when analyzing cumulative convictions,  
4 it is the crime's abstract legal elements that must be compared,  
5 rather than the factual circumstances surrounding the underlying  
6 conduct. The Trial Chamber improperly focused its analysis of  
7 cumulative convictions on the conduct underlying the charges  
8 rather than on the elements of legal definitions of crimes that  
9 is -- that it had found applicable. As a result, it failed to  
10 enter cumulative convictions for persecution and other crimes  
11 against humanity for which the Accused was held responsible.

12 [10.38.15]

13 The Co-Prosecutors' second ground of appeal is therefore granted  
14 in part, and in addition to the Accused's conviction for  
15 persecution as a crimes against humanity, separate convictions  
16 shall also be entered for extermination -- encompassing murder --  
17 enslavement, imprisonment, torture, and other inhumane acts.

18 D. Sentence.

19 The Defence argues that the Trial Chamber erred by imposing an  
20 arbitrary sentence due to its failure to give adequate regard to  
21 Article 95 of the 2009 Criminal Code of Cambodia, which provides  
22 that, where the penalty incurred for an offence is life  
23 imprisonment, a judge who grants "the benefit of mitigating  
24 circumstances may impose a sentence of between fifteen and thirty  
25 years imprisonment". The Defence contends that 30 years is the

1 maximum fixed term sentence permitted at the ECCC.

2 [10.39.46]

3 The Co-Prosecutors respond that Article 9 -- rather, 39 of the  
4 ECCC Law contemplates any prison term "from five years to life  
5 imprisonment" and that, pursuant to Article 668 of the Criminal  
6 Code, the ECCC Law shall prevail over domestic criminal  
7 legislation in the event of a conflict.

8 In light of the language and content of Articles 8 and 668 of the  
9 Criminal Code, the Supreme Court Chamber agrees with the  
10 Co-Prosecutors that the ECCC Law is "special criminal  
11 legislation" within the meaning of Article 668, subparagraph 3.  
12 Hence, the provisions of Book 1, General Provisions, of the  
13 Criminal Code do not prevail over any provisions of the ECCC Law  
14 in the event of a conflict between the Criminal Code of (sic) the  
15 ECCC Law. Accordingly, the range of sentence at the ECCC may be  
16 anywhere from five years imprisonment to life imprisonment as  
17 provided by Article 39 of the ECCC Law.

18 [10.41.27]

19 For these reasons, the Defence's second ground of appeal on  
20 sentence is dismissed.

21 The Co-Prosecutors argue that the Trial Chamber erred in imposing  
22 a sentence that is too lenient. According to the Trial Chamber's  
23 descriptions, two of the four mitigating factors were of  
24 "limited" impact only, and the impact of a third was "undermined"  
25 and "diminished". However, further on in its Judgement, the Trial

1 Chamber, without explanation, described the four mitigating  
2 factors as "significant".  
3 Notwithstanding the broad discretion vested with the Trial  
4 Chamber in determining the weight of mitigating factors, the  
5 Supreme Court Chamber finds that the effect that mitigating  
6 factors had on the Trial Chamber's determination of the sentence  
7 constituted an error of law. The Supreme Court Chamber holds that  
8 the mitigating impact of these factors is limited at most.  
9 Further, the aggravate - rather, the aggravating elements and  
10 exceptional gravity of crimes neutralize the limited impact of  
11 these mitigating factors.

12 [10.43.28]

13 The limited weight of mitigating factors in the present case is  
14 sufficient to overturn the Trial Chamber's finding, made without  
15 reference to any legal authority, that the "significant"  
16 mitigating factors "mandate" a finite sentence. The Trial Chamber  
17 has failed to discuss, and therefore, presumably, did not attach  
18 any weight to relevant Cambodian and international law which  
19 permits life imprisonment, notwithstanding mitigating factors.  
20 The Supreme Court Chamber, therefore, holds that the Trial  
21 Chamber attached undue weight to mitigating circumstances and  
22 insufficient weight to gravity of crimes and aggravating  
23 circumstances. These failures of the Trial Chamber constitute an  
24 error on a question of law, invalidating the sentence in the  
25 Trial Judgement. The intervention of the Supreme Court Chamber is

1 required to determine an appropriate sentence. The  
2 Co-Prosecutors' first ground of appeal is therefore granted.

3 [10.45.01]

4 In the absence of comparable jurisprudence before Cambodian  
5 domestic courts, the Supreme Court Chamber has examined sentences  
6 of other international criminal tribunals addressing similar or  
7 comparable facts and issues.

8 It is well established in international jurisprudence that the  
9 primary factor in sentencing is the gravity of the convicted  
10 person's crimes. The Supreme Court Chamber further observes that  
11 ad hoc tribunals have issued sentences of life imprisonment  
12 mostly in cases in which the accused abused a position of  
13 leadership by planning or ordering the alleged crimes, as well as  
14 cases in which the convicted person exhibited particular cruelty  
15 or zeal in the commission of the crimes. In determining the  
16 appropriate sentence, the Supreme Court Chamber will therefore  
17 consider the gravity of the crimes as well as any aggravating  
18 factors, such as the leadership of Kaing Guek Eav and the  
19 particularly cruel or zealous commission of his crimes.

20 [10.46.39]

21 In the present case, the Trial Chamber determined that the crimes  
22 of Kaing Guek Eav were of a "particularly shocking and heinous  
23 character", based on the number of people who were proven to have  
24 been killed, at least 12,272 victims, as well as the systematic  
25 torture and deplorable conditions of the detention which they

1 suffered. The high number deaths for which Kaing Guek Eav is  
2 responsible, along with the extended period of time over which  
3 the crimes were committed -- more than three years -- undoubtedly  
4 place this case among the gravest before international criminal  
5 tribunals.

6 As to aggravating factors, Kaing Guek Eav held a central  
7 leadership role at S-21, which he abused by training, ordering,  
8 and supervising staff in the systematic torture and execution of  
9 prisoners deemed to be enemies of the DK, and showed "dedication  
10 to refining the operations of S-21". The fact that he was not on  
11 the top of the command chain -- rather, of the command chain in  
12 the DK regime does not justify a lighter sentence. Instead --  
13 indeed, there is no rule that dictates reserving the highest  
14 penalty for perpetrators at the top of the chain of command.  
15 Kaing Guek Eav's sentence must be proportionate to the crimes he  
16 committed, regardless of whether others may have committed more  
17 serious offences.

18 In the Supreme Court Chamber's view, Kaing Guek Eav's leadership  
19 role and particular enthusiasm in the commission of his crimes  
20 are aggravating factors that should be given significant weight  
21 in the determination of this -- of his sentence.

22 The Supreme Court Chamber is of the view that retributive and  
23 deterrent purposes of punishment are particularly relevant to  
24 this case in light of the gravity of Kaing Guek Eav's crimes. The  
25 penalty must be sufficiently harsh to respond to the crimes

1 committed and prevent the recurrence of similar crimes. The  
2 crimes committed by Kaing Guek Eav were undoubtedly among the  
3 worst in recorded human history. They deserve the highest penalty  
4 available to provide a fair and adequate response to the outrage  
5 these crimes invoked in victims, their families and relatives,  
6 the Cambodian people, and all human beings.

7 [10.50.26]

8 The Co-Prosecutors did not exaggerate when they referred to S-21  
9 as "the factory of death". Kaing Guek Eav commanded and operated  
10 this factory of death for more than three years. He is  
11 responsible for the merciless termination of at least 12,272  
12 individuals, including women and children.

13 The lapse of more than 30 years since the commission of crimes  
14 does not weaken the necessity for a high punishment. The  
15 sufferings of victims and their families and relatives are not in  
16 the past, but are continuing and will continue throughout their  
17 lives. Kaing Guek Eav's crimes were an affront to all of  
18 humanity, and in particular to the Cambodian people, inflicting  
19 incurable pain on them. The Cambodian people are still faced with  
20 unprecedented challenges in recovering from the tragedies caused  
21 by the crimes committed by Kaing Guek Eav.

22 [10.52.02]

23 For these reasons, the Supreme Court Chamber holds that the  
24 sentence of 35 years of imprisonment does not appropriately  
25 reflect the gravity of crimes and the individual circumstances of

1 Kaing Guek Eav. The Trial Chamber erred in imposing a manifestly  
2 inadequate sentence. The Supreme Court Chamber decides to impose  
3 a sentence of life imprisonment against Kaing Guek Eav.  
4 On Parole, it is distinctive procedure in the stage of execution  
5 of a sentence of imprisonment. The Supreme Court Chamber holds  
6 that the lack of special provisions on parole in the ECCC's  
7 statutory documents indicates that the issue should be decided  
8 according to procedures in force at the time when parole is to be  
9 considered. The Supreme Court Chamber, therefore, holds that it  
10 does not have competence to decide a priori on Kaing Guek Eav's  
11 eligibility for parole.  
12 [10.53.34]  
13 The Trial Chamber held that the combination of a reduction of  
14 five years and credit for time spent in detention under the  
15 authority of the Cambodian Military Court is an appropriate  
16 remedy for the violation of Kaing Guek Eav's rights occasioned by  
17 his illegal detention by the Cambodian Military Court between the  
18 10th of May 1999 and 30th July 2007.  
19 The Supreme Court Chamber finds that the Trial Chamber  
20 misinterpreted the relevant international jurisprudence to mean  
21 that violations of Kaing Guek Eav's rights should be redressed by  
22 it even in the absence of violations of - of violations  
23 attributed -- rather, attributable to the ECCC and in the absence  
24 of abuse of process. In the absence of both these circumstances,  
25 the Trial Chamber should have rejected Kaing Guek Eav's request

1 for remedy.

2 For these reasons, the Supreme Court Chamber, Judges  
3 Klonowiecka-Milart and Jayasinghe dissenting, holds that this is  
4 not a case in which the ECCC should provide a remedy for  
5 violations of Kaing Guek Eav's rights. The Supreme Court Chamber,  
6 Judges Klonowiecka-Milart and Jayasinghe dissenting, holds that  
7 that the Trial Chamber committed an error of law invalidating the  
8 sentence by affording a reduction of five years and credit for  
9 the time served in detention from 10th of May 1999 to the 30th of  
10 July 2007 as remedies for the violations of Kaing Guek Eav's  
11 rights.

12 [10.56.37]

13 Judges Klonowiecka-Milart and Jayasinghe disagree with the  
14 majority's decision not to grant Kaing Guek Eav a remedy, for the  
15 following reasons.

16 A hybrid court such as the ECCC should, where it is fair and  
17 equitable, in all the circumstances, take responsibility for  
18 excessive domestic pre-trial detention. In this case, these  
19 circumstances include the following.

20 First, as Chambers established "within the existing court  
21 structure of Cambodia", the ECCC is highly integrated into the  
22 Cambodian judicial system.

23 Second, there is a strong nexus between the case against Kaing  
24 Guek Eav at the ECCC and the charges before the Military Court.  
25 In that regard, Judges Klonowiecka-Milart and Jayasinghe note



1 that Cambodian court held Kaing Guek Eav for eight years, during  
2 which time it performed no substantial investigation. It then  
3 transferred him to the ECCC soon after it was established by the  
4 Cambodian state.

5 Third, the gravity of the deprivation of liberty was extreme by  
6 international standards.

7 Fourth, this Court is uniquely positioned to grant a remedy of a  
8 restorative nature.

9 Accordingly, Judges Klonowiecka-Milart and Jayasinghe would grant  
10 Kaing Guek Eav a remedy by commuting the life sentence to a fixed  
11 term of 30 years imprisonment.

12 The Trial Chamber held that Kaing Guek Eav is entitled to credit  
13 for the entirety of his crime -- rather, his time spent in  
14 detention, which was under the authority of the Cambodian  
15 Military Court from the 10th of May 1999 to the 30th of July 2007  
16 and under the authority of the ECCC from the 31st of July 2007  
17 until the Trial Judgement becomes final.

18 [10.59.30]

19 According to the Trial Chamber, while the first period was  
20 granted as part of the remedy for a legal detention, the second  
21 period was derived as a right from Article 503 of the 2007 Code  
22 of Criminal Procedure of Cambodia. Whereas the credit for the  
23 second period is not in dispute, the Supreme Court Chamber finds  
24 that discussion is required with respect to credit for the first  
25 period.

1 The Supreme Court Chamber concurs with the Trial Chamber's  
2 finding that the allegations in the case before the Military  
3 Court were "broadly similar" to those giving rise to the  
4 proceedings before the ECCC. In light of Cambodian and  
5 international law and practice, the Supreme Court Chamber  
6 unanimously holds that Kaing Guek Eav is entitled to credit for  
7 the entirety of his time spent in detention, beginning from the  
8 10th of May 1999. The Supreme Court Chamber decides to apply such  
9 credit against Kaing Guek Eav's sentence of life imprisonment by  
10 finding that Kaing Guek Eav has served 12 years and 269 days of  
11 such sentence, being the amount of time that he spent in  
12 pre-trial detention from the 10th of May 1999 to the 2nd of  
13 February 2012, inclusive.

14 E. Admissibility of Civil Party applications.

15 [11.02.02]

16 A total of 22 Civil Party Applicants in Civil Parties groups 1,  
17 2, and 3 appealed against the Trial Chamber's rejection of their  
18 Civil Party applications in the Trial Judgement.

19 The Civil Party Appellants averred that the Trial Chamber adopted  
20 an arbitrary criterion of special bonds of affection or  
21 dependence with direct victims in determining the admissibility  
22 of applications from indirect victims. The Supreme Court Chamber  
23 finds that the criterion of special bonds of affection or  
24 dependence connecting the applicant with the direct victim  
25 captures the essence of interpersonal relations, the destruction

1 of which is conducive to an injury on the part of indirect  
2 victims. This criterion applies to all persons who claim to be  
3 indirect victims, whether family or not, because, without prior  
4 bonds tying the claimants emotionally, physically or economically  
5 to the direct victim, no injury would have resulted to them from  
6 the commission of the crime.

7 [11.03.51]

8 While the term as such may have been introduced for the first  
9 time in the Trial Judgement, the criterion or test which it  
10 denotes is inherent to the notion of injury under the meaning of  
11 Article 13 of the 2007 Code of Criminal Procedure as applicable  
12 to indirect victims. Therefore, the use of this requirement was  
13 legally correct and foreseeable, just as the requirement to  
14 demonstrate injury must have been foreseeable for all Civil Party  
15 Applicants. Accordingly, the Civil Parties' appeals fail insofar  
16 as they allege an error of law and lack of foreseeability  
17 regarding this criterion.

18 The Supreme Court Chamber notes that bonds of affection and  
19 dependence are dynamics that usually exist amongst close family  
20 members. Therefore, the forced disappearance, imprisonment,  
21 torture, and eventual murder of a family member will likely bring  
22 about suffering, anguish, and other kinds of injury, such as  
23 financial damage, to the victim's close family members. This  
24 conclusion is substantiated by the evidence collected in this  
25 case, common sense, and evidence-based findings under the

1 American Convention on Human Rights and at the International  
2 Criminal Court.

3 [11.05.59]

4 Accordingly, it is not incorrect or unreasonable to relieve the  
5 class of immediate family from discharging the burden of proof of  
6 injury, providing such class has been defined precisely and the  
7 parties have been put on notice.

8 Concerning the scope of the presumption of injury, it would be  
9 reasonable to define it by taking into account the nature of the  
10 injury claimed in the context of Cambodian familial  
11 relationships. In this respect, an expert retained by the Trial  
12 Chamber testified that Cambodian families generally live close  
13 together and co-depend on one another so that strong bonds are  
14 usually formed. Families encompass not just couples and their  
15 offspring, but also "other family members, such as ageing  
16 parents", or "siblings and their families", or "grandparents,  
17 cousins, uncles and aunts". In most circumstances, the older  
18 generation acts as a role model in the lives of the younger  
19 generation, thus generating a very special and close bond.

20 [11.07.46]

21 The Trial Chamber accepted this broad notion of de facto  
22 immediate family members, but nonetheless later found that "only  
23 in exceptional circumstances" will non-immediate family members  
24 be considered to have had "special bonds of affection or  
25 dependence" with the direct victim. Whereas this conclusion

1 defines the scope of presumption more narrowly than could be  
2 justified by the accepted expert testimony, it does not infringe  
3 on the rights of the Civil Party Appellants because the  
4 formulation of a presumption lies in the area of the court's  
5 discretion, and not the parties' right to benefit from it.

6 [11.08.57]

7 Similarly, the Appellants' rights were not affected by the lack  
8 of prior notice, given that the Civil Parties continually had the  
9 burden of proving injury through evidence. Consequently, the  
10 Supreme Court Chamber will consider whether the Trial Chamber  
11 erred in fact in its determination of the merits of the  
12 applications of the Civil Party Appellants.

13 Concerning the averment that the Trial Chamber erred in adopting  
14 a two-tier review of the admissibility of Civil Party  
15 applications, the Supreme Court Chamber recalls that Internal  
16 Rule 100 subrule 1 reflects Article 355 of the 2007 Code of  
17 Criminal Procedure, which is clear in its terms:

18 "In the criminal judgment, the court [of first instance] shall  
19 also decide upon civil remedies. The court shall determine the  
20 admissibility of the civil party application and also decide on  
21 the claims of the civil party against the accused and civil  
22 defendants."

23 The Supreme Court Chamber therefore finds that the Trial Chamber  
24 had a lawful basis in Cambodian criminal procedure to determine  
25 in its Judgement the merits of victims' applications for Civil

1 Party status.

2 [11.11.05]

3 The Supreme Court Chamber holds that the clarity of Article 355  
4 of the 2007 Code of Criminal Procedure and Internal Rule 100  
5 subrule 1 sufficed for notice to the Civil Party Appellants that  
6 their applications would be reassessed in the Trial Judgement.  
7 Moreover, the Trial Chamber did provide ample signals to the  
8 Civil Parties, at the Initial Hearing and during the trial, that  
9 its initial prima facie assessment of Civil Party admissibility  
10 was not final. Accordingly, the Supreme Court Chamber holds that  
11 the Trial Chamber did not commit an error of law by evaluating  
12 whether victimhood had been sufficiently demonstrated at the  
13 reparations stage of the case. The Supreme Court Chamber further  
14 finds that whatever ambiguity could have existed as to the Civil  
15 Parties' standing at the outset of the trial, it did not entail a  
16 prejudice for the Civil Party Appellants' access to the trial  
17 proceedings.

18 [11.12.57]

19 Notwithstanding a lack of legal error on the part of the Trial  
20 Chamber, the Supreme Court Chamber nonetheless notes that this  
21 appears -- there appears to have been a fundamental  
22 misunderstanding between the Trial Chamber and the Civil Party  
23 Appellants as to the merits and legal effect of the initial  
24 review of their applications. The Supreme Court Chamber also  
25 recognizes that the Civil Party admissibility process and the

1 revocation of the Appellants' status in the Trial Judgement may  
2 have caused anguish and frustration at the futility of their  
3 practical and emotional investment in the proceedings.

4 [11.13.56]

5 Having regard to the novel character of the Civil Party framework  
6 before the ECCC and the conceivable lack of clarity as to its  
7 specific arrangements as discussed above, the Supreme Court  
8 Chamber acknowledges the possibility that some among the Civil  
9 Party Appellants may have been confused as to whether submission  
10 of evidence was still expected of them. Therefore, in order to  
11 remedy any missed opportunity, the Supreme Court Chamber decided  
12 to grant the Civil Parties Appellants' motions to submit  
13 additional evidence, irrespective of whether such evidence would  
14 have been available during the first instance proceedings.

15 The Supreme Court Chamber finds that, in addition to those Civil  
16 Parties admitted by the Trial Chamber in the Trial Judgement, the  
17 following Civil Party Appellants have substantiated the  
18 applications on appeal and are therefore admitted as Civil  
19 Parties in Case 001. They are: Ly Hor, alias Ear Hor; Him Mom;  
20 James Jeffrey Rothschild Joshua; Chhay Kan, alias Leang Kan; Hong  
21 Savath; Phaok Khan; Morn Sothea; Chhoem Sitha; and Nam Mon.

22 The Supreme Court Chamber rejects the remainder of the Civil  
23 Party Appellants' applications as inadmissible.

24 [11.16.12]

25 Regarding the appeal by civil party Mr. Chum Sirath, the Supreme

1 Court Chamber accepts that the omission of Ms. Kem Sovannary and  
2 her child from the list of victims in the Trial Judgement amounts  
3 to a clerical error. The Supreme Court Chamber therefore corrects  
4 the clerical error itself to include Ms. Kem Sovannary and her  
5 child's name in the Trial Judgement.

6 F. Civil Party Reparations.

7 [11.16.56]

8 The Trial Chamber ruled on the reparation request: a) by granting  
9 the inclusion of Civil Parties' names in the Judgement; and, b)  
10 by committing to compile and publish all statements of apology  
11 and acknowledgements of responsibility expressed by Kaing Guek  
12 Eav in the course of the trial. All other Civil Party claims for  
13 reparations were rejected on the grounds that they either lacked  
14 specificity or were beyond the scope of available reparations  
15 before the ECCC.

16 Even though Civil Parties Group 1 has not lodged an appeal  
17 against the Trial Chamber's findings on reparations, it requests  
18 that, in the event that the grounds of appeal on reparation just  
19 -- put forward by Civil Party groups 2 and 3 are granted, the  
20 benefits deriving from any reparations that are awarded by the  
21 Supreme Court Chamber be extended also to the Civil Parties in  
22 Civil Parties Group 1.

23 [11.18.21]

24 Civil Party Group 2 articulates extensive submissions on  
25 reparations and requests the Supreme Court Chamber to overturn



1 the Trial Chamber's rejection of its nine reparation requests and  
2 consequently grant these claims in their entirety. Civil Party  
3 Group 3 also request the Supreme Court Chamber to grant the Civil  
4 Parties' original claims for reparations filed before the Trial  
5 Chamber but refused in the Trial Judgement.

6 At the outset, the Supreme Court Chamber will outline the legal  
7 framework related to reparations before the ECCC. While the Civil  
8 Party Appellants relied on a variety of international legal  
9 authorities as sources to engage in a more flexible approach on  
10 reparations, this Chamber emphasizes that the ECCC forms part of  
11 a unique legal system and that only limited analogy and guidance  
12 may be drawn from distinct frameworks. [11.19.49]

13 Whereas it is correct that Cambodia is a State Party to several  
14 of the international instruments that enshrine the right of  
15 victims to an effective remedy, the ECCC is not vested with the  
16 authority to assess Cambodia's compliance with these  
17 international obligations. The Supreme Court Chamber also holds  
18 that it has no jurisdiction to grant requests for reparation that  
19 entail, either explicitly or by necessary implication, an active  
20 involvement of the Cambodian authorities in order for the  
21 measures to be realized. It also lacks the competence to enforce  
22 reparation awards.

23 [11.21.06]

24 Therefore, while the ECCC is competent to grant reparations, this  
25 competence must be interpreted in view of its narrow mandate and

1 purpose. Internal Rule 23 mandates that reparations are limited  
2 to "collective and moral" awards. The term "moral" denotes the  
3 aim of repairing moral damages rather than material ones, whereas  
4 the term "collective" excludes individual awards, whether or not  
5 of a financial nature, and privileges those measures that benefit  
6 as many victims as possible.

7 Another key feature of the ECCC system of reparations is that  
8 awards are borne exclusively by convicted persons. The present  
9 case involves a convicted person who was found to be indigent. It  
10 is of primary importance to limit reparations to such awards that  
11 can realistically be implemented so as to avoid the issuance of  
12 orders that, in all probability, will never be enforced and would  
13 be confusing and frustrating for the victims. Hence, the Chamber  
14 will refrain from granting requests that would necessitate the  
15 financial means of Kaing Guek Eav to be implemented.

16 [11.23.05]

17 The Chamber finds that a number of the claims are predestined for  
18 rejection, due to the fact that their realization would imply an  
19 order against the Cambodian State. This is the case, for  
20 instance, of the requests for State apology, organization of  
21 health care, institution of national commemoration days, and  
22 naming of public buildings after the victims. Other parts of the  
23 claims are dismissed because of the lack of financial means to  
24 ensure their implementation. This is the case, for example, of  
25 the requests for construction of memorials and for paid visits to

1 memorial sites. The requests for the Court to order Kaing Guek  
2 Eav to write letters to the government are rejected as  
3 non-enforceable. As for the request related to the dissemination  
4 of materials concerning the ECCC proceedings, the Chamber notes  
5 that they fall within the mandate of the Public Affairs and the  
6 Victims Support sections.

7 G. Dispositions.

8 The Supreme Court Chamber will now read the Disposition of the  
9 Appeal Judgement.

10 The Disposition, which is full and final, has been signed by the  
11 Judges of the Supreme Court Chamber and is included in this  
12 Summary.

13 Mr. Kaing Guek Eav, stand in order to listen to the Disposition.  
14 Disposition.

15 For the foregoing reasons, the Supreme Court Chamber, pursuant to  
16 Article 4.1(b) and 36new of ECCC Law, and Articles 14new.1(b) and  
17 Internal Rule 111 Revision 8, noting the respective written  
18 appeal submissions of the parties and the arguments they  
19 presented at the Appeal Hearing, from 28 to 30 March 2011;

20 In respect of Kaing Guek Eav's Appeal, dismisses the Defence  
21 appeal;

22 In respect of the Co-Prosecutors' Appeal, grants in part and  
23 dismisses in part the Co-Prosecutors' Ground of Appeal 2 and  
24 quashes the Trial Chamber's decision to subsume under the crime  
25 against humanity of persecution the other crimes against humanity

1 for which it found Kaing Guek Eav responsible; affirms Kaing Guek  
2 Eav's conviction for the crime against humanity of persecution  
3 and enters additional convictions for the crimes against humanity  
4 of extermination -- encompassing murder -- enslavement,  
5 imprisonment, torture, and other inhumane acts; grants the  
6 Co-Prosecutors' Ground of Appeal 1 and quashes the Trial  
7 Chamber's decision to sentence Kaing Guek Eav to 35 years of  
8 imprisonment; quashes the Trial Chamber's decision to grant a  
9 remedy for the violations of Kaing Guek Eav's rights occasioned  
10 by his illegal detention by the Cambodian Military Court between  
11 10 May 1999 and 30 July 2007; enters a sentence of life  
12 imprisonment and finds that Kaing Guek Eav has served 12 years  
13 and 269 days of such sentence; dismisses the Co-Prosecutors'  
14 Ground of Appeal 3;  
15 In respect of Civil Parties groups 1, 2, and 3's appeals, grants  
16 in part and dismisses in part the Civil Parties' grounds of  
17 appeal on admissibility of their Civil Party applications and  
18 declares that, in addition to those Civil Parties admitted by the  
19 Trial Chamber in the Trial Judgement, the following Civil Party  
20 Appellants have demonstrated on appeal that they have suffered  
21 harm as a direct consequence of the crimes for which Kaing Guek  
22 Eav has been convicted; they are: Ly Hor, alias Ear Hor; Him Mom;  
23 James Jeffrey Rothschild Joshua; Chhay Kan, alias Leang Kan; Hong  
24 Savath; Phaok Khan; Morn Sothea; Chhoem Sitha; Nam Mon; and  
25 rejects the remainder of the Civil Party Appellants' applications

1 as inadmissible; dismisses the Civil Parties' grounds of appeal  
2 on reparations, and affirms the Trial Chamber's decision to  
3 compile and post on the ECCC's official website all statements of  
4 apology and acknowledgements of responsibility made by Kaing Guek  
5 Eav during the course of the trial, including the appeal stage,  
6 and affirms the Trial Chamber's rejection of all other Civil  
7 Party claims for reparations;

8 Pursuant to Internal Rules 111 subparagraph 5 and 113  
9 subparagraphs 1 and (sic) 3, orders that Kaing Guek Eav remain in  
10 the custody of the ECCC pending the finalization of arrangements  
11 for his transfer, in accordance with the law, to the prison in  
12 which his sentence will be continued to be served.

13 [11.31.46]

14 Done in Khmer and English, this was the Summary of the Appeal  
15 Judgement and full -- and Final Disposition.

16 The appeal proceedings in this case have come to an end.

17 Security personnels are now instructed to take the convicted  
18 person, Kaing Guek Eav, to the detention facility.

19 (Kaing Guek Eav exits the courtroom)

20 [11.32.30]

21 This hearing is adjourned.

22 GREFFIER:

23 All rise.

24 (Court Adjourns at 1132H)

25