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CO-PROSECUTORS' APPEAL AGAINST THE JUDGEMENT OF THE TRIAL CHAMBER IN THE CASE OF KAING GUEK EAV ALIAS DUCH

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A. INTRODUCTION

1. By its Judgement of 26 July 2010, the Trial Chamber found the Respondent Kaing Guek Eav, *alias* Duch, guilty of crimes against humanity and grave breaches of the Geneva Conventions of 1949 and sentenced him to a term of imprisonment of thirty-five years.[1] The Trial Chamber determined that the Respondent, for more than three years, as Deputy and then the Chairman of the Security Office S-21 in Phnom Penh, managed and refined a system of criminality that resulted in the execution of at least 12,272 victims, a majority of whom were also systematically tortured.[2] Victims who were not executed died as a result of the conditions of detention, which led to widespread disease, malnourishment and physical and psychological pain, as well as extreme fear.[3] Only a very small number of those detained at S-21 survived.[4] The survivors testified to the lasting physical and psychological impact of their ordeal.[5] Relatives of S-21 detainees testified to the devastating consequences of the Respondent's crimes on detainees' families.[6]

2. The Trial Chamber found that the Respondent worked tirelessly without any regard for the humanity of the detainees in his charge. The Respondent wanted to ensure that S-21 ran as efficiently as possible. The Respondent had unquestioning loyalty to his superiors and the Communist Party of Kampuchea ("Party") ideology.[7] Under his authority, S-21 became a highly efficient instrument of persecution, in furtherance of the Party's politically motivated criminal policy of discrimination.[8]

3. For these acts, which it considered "extremely grave",[9] the Trial Chamber found the Respondent individually criminally responsible for almost all of the charges in his indictment:[10] murder, extermination, enslavement, imprisonment, torture (including rape), persecution on political grounds, and other inhumane acts as crimes against

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1 Judgement, Case File No. 001/18-07-2007-ECCC/TC, Trial Chamber, 26 July 2010, E188 ("Judgement"), paras. 677, 679-680.
2 Judgement, para. 597.
3 Judgement, para. 597.
4 Judgement, para. 598.
5 Judgement, para. 598.
6 Judgement, para. 598.
7 Judgement, para. 597.
8 Judgement, para. 597.
9 Judgement, para. 600.
10 Decision on Appeal Against the Closing Order Indicting Kaing Guek Eav alias Duch, Case File No. 001/18-07-2007-ECCC/OCIJ (PTC 02), Pre-Trial Chamber, 5 December 2008, D99/3/42 ("Amended Closing Order"). The charges of national crimes were not adjudicated owing to a lack of super-majority amongst the judges of the Trial Chamber. *See* Judgement, para. 678 (referring to Decision on the Defence Preliminary Objection Concerning the Statute of Limitations of Domestic Crimes, Case File No. 001/18-07-2007-ECCC/TC, Trial Chamber, 26 July 2010, E187).

humanity; and wilful killing, torture and inhumane treatment, wilfully causing great suffering or serious injury to body and health, wilfully depriving a prisoner of war or civilian of the rights of fair and regular trial, and unlawful confinement of civilians as grave breaches of the Geneva Conventions of 1949.[11]

4. Having found him guilty for these "crimes of a particularly shocking and heinous character",[12] the Trial Chamber sentenced the Respondent to a single term of imprisonment of thirty-five years.[13] The sentence was reduced to nineteen years due to credit for time served and consideration for prior illegal detention.[14]

5. The Co-Prosecutors submit that a sentence of thirty-five years for crimes of this magnitude is plainly unjust. It undermines the gravity of the Respondent's criminal conduct and leads to an unmistakable conclusion that the Trial Chamber failed to exercise its sentencing discretion properly.

6. The Judgement also fails to reflect the full extent of the Respondent's criminality by not convicting him for: (1) all of the crimes for which he was found responsible and by subsuming a majority of them in the crime against humanity of persecution, and (2) by not convicting him for the crime of enslavement of all the detainees of S-21 by adopting an erroneous definition of that crime. The Co-Prosecutors are, therefore, appealing the Judgement.[15]

7. The Co-Prosecutors have identified three principal errors of law in the Judgement as their grounds of Appeal.[16]

8. As *Ground One,* the Co-Prosecutors maintain that the Trial Chamber erred in law by giving insufficient weight to the gravity of the Respondent's crimes at S-21 and his leading role and willing participation in those crimes. The Trial Chamber also placed undue weight on mitigating circumstances applicable to the Respondent. In addition, the Co-Prosecutors contend that the length of sentence of thirty-five years has been arbitrarily determined without any consideration of the applicable international

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11 Judgement, para. 567.
12 Judgement, para. 597.
13 Judgement, para. 631.
14 Judgement, paras. 632-633.
15 Co-Prosecutors file this Appeal pursuant to Internal Rules, Rev.6, 17 September 2010 ("Rules"), rules 105(1)(a), 110(4).
16 Co-Prosecutors' Notice of Appeal Against the Judgement of the Trial Chamber in the Case of Kaing Guek Eav alias Duch, Case File No. 001/18-07-2007-ECCC/TC, 16 August 2010, E188/2 ("Notice of Appeal").

jurisprudence.[17] The sentence is manifestly inadequate, given the inherent inhumanity of this factory of torture and death that the Respondent assisted in establishing and presided over for nearly three years. The Respondent was at the centre of some of the worst crimes committed during the Democratic Kampuchea period. The sentence imposed by the Trial Chamber does not adequately reflect the seriousness of the crimes or the Respondent's role in those crimes.[18]

9. As *Ground Two*, the Co-Prosecutors maintain that the Trial Chamber erred in law in failing to reflect the full extent of the Respondent's criminality by not separately convicting him of the crimes against humanity of extermination, murder, enslavement, imprisonment, torture, rape, and other inhumane acts. The Co-Prosecutors argue that these crimes should not have been subsumed, as the Trial Chamber did, into the crime against humanity of persecution. Similarly, the crime against humanity of rape should not have been subsumed within the crime against humanity of torture.[19]

10. As *Ground Three*, the Co-Prosecutors maintain that the Trial Chamber erred in law in not convicting the Respondent for the enslavement of all the detainees of S-21. The Trial Chamber incorrectly required that for such a conviction the victims of enslavement should have been subjected to forced labour. There is no such requirement under international law.[20]

11. Relying on these grounds, the Co-Prosecutors request that the Supreme Court Chamber (1) increase the Respondent's sentence to imprisonment for life as requested by the Co-Prosecutors during their closing arguments, (2) enter separate convictions for all the charges proved against the Respondent, and (3) enter a conviction recognising the enslavement of a majority of detainees at S-21.

B. PRELIMINARY SUBMISSION

B1. THE CHAMBER SHOULD HOLD AN ORAL PUBLIC HEARING OF THE APPEAL

12. Almost all the proceedings in this case have been held in public: (1) the Co-Investigating Judges issued a public Closing Order,[21] (2) the Pre-Trial Chamber

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17 Notice of Appeal, paras. 3-4.
18 Notice of Appeal, paras. 3-4.
19 Notice of Appeal, paras. 5-6.
20 Notice of Appeal, para. 7.
21 Closing Order Indicting Kaing Guek Eav alias Duch, Case File No. 001/18-07-2007-ECCC/OCIJ, Co-Investigating Judges, 8 August 2008, D99 ("Closing Order").

issued a public decision on appeal against that Closing Order,[22] (3) the entire substantive trial was held in public,[23] and (4) the Trial Chamber issued a public Judgement.[24] More than twenty-eight thousand Cambodians and others attended the trial proceedings and millions of others followed them through the electronic media.[25] The Judgement and its contents aroused considerable public debate in Cambodia and elsewhere.[26] In addition, this Court was the first of its kind to provide party rights to the victims of the crimes and to stress victim participation at every stage of its proceedings. Thousands of victims, as civil parties, complainants and otherwise, closely followed the trial proceedings. The Co-Prosecutors, therefore, submit that an oral public hearing of this Appeal will advance this established practice, serve the interests of justice, and promote the objectives of the establishment of this Court.

13. In addition, the Internal Rules ("Rules") of this Court foresee oral hearings of all appeals before the Supreme Court Chamber against final judgements of the Trial Chamber.[27] Only "immediate [or interlocutory] appeals" may be decided on written submissions alone.[28]

14. The Rules create a presumption in favour of holding those oral hearings in public. Proceedings may only be held *in camera*, in part or in full, if the Supreme Court Chamber determines that holding them in public would be prejudicial to public order or for reasons of the protection of victims and witnesses.[29]

15. No prejudice would be caused to the public order if this Appeal is heard in public. Incidental imperatives of witness or victim protection can be addressed by holding the

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22 *See* Amended Closing Order.

23 Most of the substantive trial was held in public and the transcripts are available online at the ECCC website at "http://www.eccc.gov.kh/english/caseInfo001.aspx". However, the initial Trial Management Meetings were held in Closed Sessions. *See* Judgement, Annex I: Procedural History, para. 13 (describing that these meetings assisted the Trial Chamber in dealing with many trial related procedural matters).

24 *See* Scheduling Order for the Pronouncement of Judgement (Time), Case File No. 001/18-07-2007-ECCC/TC, Trial Chamber, 30 June 2010, E184.

25 ECCC Press Release, 26 July 2010, available online on the ECCC Website at "http://www.eccc.gov.kh/english/cabinet/press/162/20100726_Press_Release_Case_001_ENG.pdf" (describing that 28,000 attendees followed the trial proceedings from the public galleries); *see also* Recent Developments at the Extraordinary Chambers in the Courts of Cambodia, a report by the Court Monitor of the Open Society Justice Initiative ("OSJI"), New York, available online at "http://www.soros.org/initiatives/justice/focus/international_justice/articles_publications/publications/cambodia-report-20109002/cambodia-report-20100902.pdf" ("OSJI September 2010 Report") (stating at p. 7 that millions of Cambodians watched the proceedings on televisions).

26 OSJI September 2010 Report, p. 4.

27 *See* Rules, rule 109.

28 Rules, rule 109(1).

29 Rules, rules 109(1)-(3).

part of the hearing *in camera* that specifically deals with those individuals. While this will be the first hearing before the Supreme Court Chamber, the Pre-Trial Chamber has held many oral hearings in public with certain parts, as required, *in camera*.[30]

16. The Co-Prosecutors, therefore, request that the Supreme Court Chamber hold a public oral hearing of this Appeal.

C. STANDARD OF APPELLATE REVIEW

C1. GENERAL

17. Rule 104(1) of the Rules grants jurisdiction to the Supreme Court Chamber to decide an appeal against judgement on the following grounds: (1) an error on a question of law invalidating the judgement or decision, or (2) an error of fact that has occasioned a miscarriage of justice.

18. This is the first appeal, under Rule 104(1) of the Rules, of a trial judgement before the Supreme Court Chamber. There is no judicial precedent of this Court interpreting this legal provision. However, Rule 104(1) of the Rules mirrors Article 25(1) of the Statute of the International Criminal Tribunal for the Former Yugoslavia ("ICTY" and "ICTY Statute" respectively).[31] Rule 104(1) of the Rules initially provided a very broad right of appeal to the Supreme Court Chamber, consistent with the Cambodian practice whereby an appeal is almost a trial *de novo*. On 5 September 2008, Rule 104(1) was amended in the Plenary to allow for grounds of appeal similar to those provided in the ICTY Statute.[32] Rule 104(1), therefore, represents an adaptation of the Cambodian procedure consistent with international standards owing to the special nature of cases tried by this Court. Accordingly, international jurisprudence from the ICTY and other tribunals can be helpful in interpreting Rule 104(1).

19. As this Appeal only alleges errors of law invalidating the Judgement, the Co-Prosecutors will only survey the jurisprudence regarding the standard of appellate review on grounds of an error of law. According to the ICTY Appeals Chamber, a party alleging an error of law must identify the alleged error, present arguments in

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30 Decision on Appeal Against the Provisional Detention Order of Ieng Thirith, Case File No. 002/19-09-2007-ECCC/OCIJ (PTC 02), Pre-Trial Chamber, 9 July 2008, C20/I/27, para. 6.

31 Statute of the International Criminal Tribunal for the Former Yugoslavia ("ICTY Statute"), article 25(1).

32 Before its amendment on 5 September 2008, Rule 104(1) read as follows: "The Supreme Court Chamber will decide appeals, on any issue of fact or law, against decisions of the Trial Chamber."

support of its claim, and explain how the error invalidates the judgement.[33] An allegation of an error of law that has no prospect of changing the outcome of a judgement may be rejected on that ground.[34] In addition, even if the appellant's arguments are insufficient to support the contention of an error of law, the Appeals Chamber may conclude for other reasons that there is an error of law.[35]

C2. STANDARD OF REVIEW IN SENTENCING

20. Appeals against sentences, like appeals against other trial judgements, are appeals *stricto sensu*; they are of a corrective nature and are not trials *de novo*.[36] Trial chambers have a broad discretion in determining an appropriate sentence due to their obligation to individualise the penalties to fit the circumstances of the accused and the gravity of their crimes.[37] Accordingly, as a general rule, an appellate authority will not revise a sentence unless the trial chamber has committed a "discernible error" in exercising its discretion or has failed to follow the applicable law.[38]

21. To show that a trial chamber committed a discernable error in exercising its discretion, the appellant has to demonstrate that either the trial chamber gave weight to extraneous or irrelevant considerations, failed to give weight or sufficient weight to relevant considerations or made a clear error about the facts upon which it exercised its discretion, or that the trial chamber's decision was so unreasonable or plainly unjust that the appeals chamber is able to infer that the trial chamber must have failed to exercise its discretion properly.[39]

D. GROUND ONE: THE TRIAL CHAMBER COMMITTED A DISCERNABLE ERROR IN THE EXERCISE OF ITS SENTENCING DISCRETION BY IMPOSING A MANIFESTLY INADEQUATE SENTENCE

D1. OVERVIEW

22. After correctly finding the Respondent responsible for "crimes of a particularly shocking and heinous character",[40] the Trial Chamber committed an error of law invalidating the Judgement by not giving sufficient weight to the gravity of the crimes

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33 *Prosecutor v. Galić*, Judgement, IT-98-29-A, ICTY Appeals Chamber, 30 November 2006 ("*Galić* Appeals Judgement"), para. 7.
34 *Galić* Appeals Judgement, para. 7.
35 *Galić* Appeals Judgement, para. 7.
36 *Galić* Appeals Judgement, para. 393.
37 *Galić* Appeals Judgement, para. 393.
38 *Galić* Appeals Judgement, para. 393 (citing *Prosecutor v. Miodrag Jokić*, Judgement on Sentencing Appeal, IT-01-42/I-A, ICTY Appeals Chamber, 30 August 2005, para. 8).
39 *Galić* Appeals Judgement, para. 394 (citing *Prosecutor v. Babić*, Judgement on Sentencing Appeal, IT-03-72-A, ICTY Appeals Chamber, 18 July 2005, para. 44).
40 Judgement, para. 597.

at S-21, the Respondent's leading role and willing participation in those crimes and other compelling aggravating circumstances attaching to his situation. In addition, the Trial Chamber placed undue weight on what it considered "significant mitigating factors" which, in the Co-Prosecutors' submission, were not proven in the case. Most important, following the Respondent's request at the end of the trial for an acquittal, his contrition and remorse must be placed in very serious doubt.

23. The Trial Chamber also erred by not relying on the settled international jurisprudence cited and relied on by the Co-Prosecutors, or indeed *ex facie* on any relevant jurisprudence or practice, by reaching a single consolidated figure of thirty-five years of imprisonment.[41] The Judgement does not indicate how the Trial Chamber reached this figure or whether it relied on any assessment of comparable sentences handed down in cases of similar magnitude and gravity before criminal tribunals prosecuting similar cases. This arbitrary figure, howsoever reached, is manifestly inadequate for the Respondent's proven and admitted crimes, which fall into the worst category to come before any tribunal of this nature.

24. The Co-Prosecutors submit, as they did in their final arguments, that the Trial Chamber's appropriate sentence, as a starting point, should have been life imprisonment. Only after considering that term of imprisonment should the Trial Chamber have potentially considered, if appropriate, any reduction due to mitigation. In essence, therefore, the Trial Chamber took the sentence of thirty-five years "from the wrong shelf".[42]

25. The Co-Prosecutors request that the Supreme Court Chamber find that the Trial Chamber committed a discernable error in arriving at the sentence of thirty-five years and, accordingly, substitute it with a sentence of life imprisonment with limited mitigation as submitted by the Co-Prosecutors at trial and as reiterated in the following paragraphs.

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41 Co-Prosecutors' Final Trial Submission with Annexes 1-5, Case File No. 001/18-07-2007-ECCC/TC, 11 November 2009, E159/9 ("Final Trial Submission"), paras. 357-472.

42 *Galić* Appeals Judgement, para. 455.

D2. THE CHAMBER PLACED INSUFFICIENT WEIGHT ON RELEVANT CIRCUMSTANCES

D.2.1 Gravity of crimes

D.2.1.1 The law

26. At sentencing, international tribunals first look at the gravity of the offence committed by the convicted person.[43] This factor is the "litmus test" when assessing an appropriate sentence.[44] Gravity of the crimes is determined by examining the nature of the crime and the role of the accused in those crimes. In *Momir Nikolić,* the ICTY Appeals Chamber broke down the "gravity of the offence" into an assessment of the scope and impact of the criminal activity (including the number of people affected by the crime and the harm caused to them), as well as the role of the accused in committing the criminal activity (including his formal role and the manner and circumstances in which that role was performed).[45]

27. When assessing the nature and scope of crimes against humanity, international tribunals have found the crimes of torture, execution, and persecution to be particularly heinous and meriting a heightened penalty. For example in determining a heightened sentence in *Momir Nikolić*, the ICTY gave substantial weight to the scope of Momir Nikolić's acts including the joint criminal responsibility for the torture and execution of seven thousand Bosnian Muslims.[46] The Tribunal placed additional weight on the fact that Momir Nikolić's crimes included persecution, which they found to be a particularly grave crime.[47] The ICTY reached a similar conclusion in *Dragan Nikolić*, justifying a heightened punishment because of the high number of victims and the multitude of criminal acts committed.[48] In that case, the accused admitted to taking part in, or being responsible for, acts of persecution, murder, rape and torture of Bosnian detainees at a detention camp under his authority.[49]

28. In *Bisengimana*, the International Criminal Tribunal for Rwanda ("ICTR") found the crimes of extermination and murder to be particularly egregious, meriting an extended

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43 ICTY Statute, article 24(2); Statute of the International Criminal Tribunal of Rwanda ("ICTR Statute"), article 23(2); Statute of the Special Court for Sierra Leone ("SCSL Statute"), article 19(2); Rome Statute, article 78.

44 *Prosecutor v. Dragan Nikolić*, Sentencing Judgment, IT-94-2-S, ICTY Trial Chamber, 18 December 2003 ("*Dragan Nikolić* Sentencing Judgement"), para. 144.

45 *Prosecutor v. Momir Nikolić*, Sentencing Judgement, IT-02-60/1-S, ICTY Trial Chamber, 2 December 2003 ("*Momir Nikolić* Sentencing Trial Judgement"), para. 103.

46 *Momir Nikolić* Sentencing Trial Judgement, para. 121.

47 *Momir Nikolić* Sentencing Trial Judgement, para. 105.

48 *Dragan Nikolić* Sentencing Judgement, para. 213.

49 *Dragan Nikolić* Sentencing Judgement, paras. 65-104.

sentence.[50] It put substantial weight on a finding that the scope of the crimes included the execution of several thousand civilians.[51] Lastly, the Tribunal noted that the scope and impact of the crimes were not limited to executions, but encompassed the physical and mental torture suffered by the victims of the criminal activity.[52]

29. When the crimes committed are particularly grave—as they are in the Respondent's case—international criminal tribunals issue their most severe penalties, as merited by the crimes. The ICTY Appeals Chamber issued sentences of life imprisonment for Stanislav Galić, convicted of acts of violence by conducting a campaign of shelling and sniper attacks resulting in the murder of hundreds of civilians, and forty years for Milomir Stakić, who was found responsible for the murder and execution of over 1,700 persons.[53] The ICTR Appeals Chamber issued four sentences of life imprisonment for Clément Kayishema who was found guilty of genocide, and three sentences of life imprisonment for Mikaeli Muhimana who was convicted of genocide, rape and murder, causing the death of hundreds of Tutsis.[54] The Special Court for Sierra Leone ("SCSL") issued sentences of fifty-two years for Issa Hassan Sesay, the interim leader of the Revolutionary United Front of Sierra Leone, found guilty of crimes against humanity and other war crimes, and fifty years for Alex Tamba Brima, a soldier in the Armed Forces Revolutionary Council who was found guilty of crimes against humanity and other war crimes, including the crime of using child soldiers.[55]

D.2.1.2 The findings

30. The Trial Chamber in this case agreed with the Co-Prosecutors that while evaluating the gravity of crimes, it should consider the role of the Respondent in their commission, the impact of the crimes on the victims and their families, and the Respondent's individual circumstances.[56] It noted that it had found the Respondent criminally responsible for "crimes of a particularly shocking and heinous character."[57] It found that over a course of more than three years, while the Respondent was the

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50 *Prosecutor v. Bisengimana*, Judgement and Sentence, ICTR-00-60-T, ICTR Trial Chamber, 13 April 2006 ("*Bisengimana* Trial Judgement"), para. 112.

51 *Bisengimana* Trial Judgement, para. 112.

52 *Bisengimana* Trial Judgement, para. 118.

53 *Galić* Appeals Judgement; *Stakić* Appeals Judgement. *See* Annex C for the Case Information Sheets.

54 *Kayishema* Appeals Judgement; *Muhimana* Appeals Judgement. *See* Annex C for the Case Information Sheets.

55 *Sesay* Appeals Judgement; *Brima* Appeals Judgement. *See* Annex C for the Case Information Sheets.

56 Judgement, para. 596.

57 Judgement, para. 597.

Deputy and then the Chairman of S-21, he managed and refined a system that resulted in the execution of at least 12,272 victims, a majority of whom were also systematically tortured.[58] Victims who were not executed died as a result of conditions of detention, including widespread disease, malnourishment, physical and psychological pain and extreme fear.[59] Only a very small number of those detained at S-21 survived, some of whom testified to the lasting physical and psychological impact of their ordeal.[60] Relatives of the deceased detainees testified to the devastating consequences of the Respondent's crimes on their families.[61]

31. The Trial Chamber found that the Respondent worked tirelessly to ensure that S-21 ran as efficiently as possible and did so out of unquestioning loyalty to his superiors and to the Party ideology, without regard to the detainees he oversaw.[62] Under his authority, S-21 became a highly efficient instrument of persecution in furtherance of the Party's politically motivated criminal policy of discrimination.[63] The Trial Chamber found the Respondent to be an intelligent and educated man who fully understood the nature of his acts at that time.[64]

D.2.1.3 The error

32. The Trial Chamber's description of the gravity of the crimes of the Respondent reflects that these were crimes situated at the worst end of the spectrum. The crimes were committed over a period of more than three years by a willing, dedicated and intelligent camp commander. Thousands of men, women and children became his victims. Based upon its findings that the Respondent's crimes were extremely grave,[65] the Trial Chamber erred in not imposing the highest sentence available to it under the ECCC Law, that of imprisonment for life.

33. A sentence must reflect both the particular circumstances of the offence and the role and responsibility of the accused.[66] The Trial Chamber failed to take note of the international jurisprudence cited by the Co-Prosecutors that the gravity of the offence

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58 Judgement, para. 597.
59 Judgement, para. 597.
60 Judgement, para. 598.
61 Judgement, para. 598.
62 Judgement, para. 597.
63 Judgement, para. 597.
64 Judgement, para. 599.
65 Judgement, para. 600.
66 *Galić* Appeals Judgement, para. 409.

is the principal factor in determining the sentence.[67] This jurisprudence demonstrates that it was incumbent upon the Trial Chamber to first determine a quantum of sentence based on the gravity of the crimes and any aggravating circumstances. The ICTY has held that "[m]itigating circumstances may result in an adjustment of the sentence that would otherwise be imposed on a convicted person";[68] therefore, only after determining a sentence should the Trial Chamber have considered mitigating circumstances that could cause a potential reduction of sentence. In this case, however, the Trial Chamber arbitrarily arrived at a term of imprisonment of thirty-five years without giving any explanation as to its starting point, the extent of any sentence reduction, and the mitigating factors it considered in making that reduction.

34. The sentence of thirty-five years, aside from being arbitrary, fails to give sufficient weight to the objective gravity of the crimes of murder, extermination, enslavement, imprisonment, torture, rape, persecution on political grounds, and other inhumane acts as crimes against humanity; and wilful killing, torture and inhumane treatment, wilfully causing great suffering or serious injury to body and health, wilfully depriving a prisoner of war or civilian of the rights of a fair and regular trial, and unlawful confinement of civilians as grave breaches of the Geneva Conventions. These crimes represent the entire spectrum of crimes for which the Respondent could have been charged under the ECCC Law. They warranted the highest penalty and the Trial Chamber failed to impose it.

D.2.2 Individual Circumstances of the Respondent

D.2.2.1 The law

35. The statutes of other international criminal tribunals state that "[i]n imposing the sentences, the Trial Chambers should take into account such factors as the [...] individual circumstances of the convicted person."[69] Accordingly, when examining the role of the accused, tribunals examine the mental state of the accused and their contribution to the crimes for which they were tried.

36. The ICTY has interpreted the role of the accused to mean his or her relative significance in carrying out the criminal activity. It is not necessary that the accused

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67 Final Trial Submission, paras. 368-386.

68 *Prosecutor v. Bralo*, Sentencing Judgement, IT-95-17, ICTY Trial Chamber, 7 December 2005, para. 42.

69 ICTY Statute, article 24(2); ICTR Statute, article 23(2); SCSL Statute, article 19(2).

be deemed the most responsible actor with respect to the criminal activity for his or her role to be considered an aggravating factor in sentencing. Indeed, in ICTY case law, the role of accused who performed functions similar to that of the Respondent—presiding over detention camps or occupying prominent security and intelligence roles—has been considered an aggravating factor in the sentencing. For example, in *Dragan Nikolić*, the Tribunal held that the accused's sentence should be increased as he held the position of commander at Sušica Detention Camp, where he was in charge of the staff that committed crimes against humanity, including torture and murder.[70] The Tribunal found Dragan Nikolić's offences more grave because he was not only following orders but was also actively furthering the criminal activity by managing and coordinating the detention and execution of the victims, and because he committed the crimes with a methodical efficiency that displayed a total disregard for humanity.[71] In *Momir Nikolić*, the ICTY held that, while the accused was implementing orders from his superiors, his position as Assistant Commander and Chief of Security and Intelligence put him in a position of authority and he thus played an important part in carrying out the "murder operation".[72] Therefore, the Tribunal found this fact to be aggravating at sentencing.[73] In *Jelisić*, the ICTY also justified a heightened penalty based on the findings that the particularly cruel manner in which executions were carried out indicated that the accused had enthusiastically committed his crimes.[74]

37. In *Kambanda*, the ICTR held that the accused's leadership role was an aggravating factor.[75] In *Bisengimana*, the ICTR addressed a case where the accused held a position as a local government leader in a village where Hutu fighters under his authority massacred a group of Tutsi civilians.[76] Although he did not participate or order the crimes, the Tribunal still found that he played a substantial role in the executions because his failure to prevent them violated his duty to protect his Tutsi constituents and his silence encouraged the Hutu fighters to carry out the crimes.[77]

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70 *Dragan Nikolić* Sentencing Judgement, para. 179.
71 *Dragan Nikolić* Sentencing Judgement, para. 213.
72 *Momir Nikolić* Sentencing Trial Judgement, para. 135.
73 *Momir Nikolić* Sentencing Trial Judgement, para. 135.
74 *Prosecutor v. Jelisić*, Judgement, IT-95-10-T, ICTY Trial Chamber, 14 December 1999 ("*Jelisić* Trial Judgement"), paras. 130-31.
75 *Prosecutor v. Kambanda*, Sentencing Judgement, ICTR-97-23-S, ICTR Trial Chamber, 4 August 1998 ("*Kambanda* Sentencing Trial Judgement"), paras. 61-62.
76 *Bisengimana* Trial Judgement, para. 120.
77 *Bisengimana* Trial Judgement, para. 120.

Therefore, the Tribunal found that the role of the accused justified a heightened punishment.

38. Similarly, in the determination of the range of the sentence, the International Criminal Court ("ICC") takes into account "the age, education, social and economic condition of the convicted person."[78] In addition, international courts have found that an accused's tertiary education is an aggravating circumstance in sentencing because it should have enabled him to appreciate "the dignity and value of human life and [be] aware of the need for and value of a peaceful co-existence between communities"[79] as well as to recognise "the import and consequences of his actions."[80]

D.2.2.2 The findings

39. The Trial Chamber found that the Respondent was an intelligent and educated man who as the Deputy and then the Chairman of S-21 fully understood the nature of his acts and the crimes he committed at S-21.[81] He worked tirelessly to ensure that S-21 ran as efficiently as possible and did so out of an unquestioning loyalty to his superiors and the Party ideology.[82]

40. The expert psychologists testified at trial that the Respondent was "highly intelligent, with an excellent memory, as well as meticulous, rigid, detail-oriented and obsessional".[83] The Trial Chamber concurred with this assessment, as it was also "apparent to the Chamber during the trial."[84]

41. The expert psychologists described—and the Trial Chamber duly noted—the Respondent as an individual "lacking in empathy" who could "construct powerful defence mechanisms insulating him from emotional reactions and inner conflicts created by his external reality".[85] They described these mechanisms as ultimately enabling the Respondent to nurture and care for his own family while overseeing the killing of children at S-21.[86] In addition, having been the subject of imprisonment on

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78 Rules of Procedure and Evidence of the ICC ("ICC RPE"), rule 145(1)(c). In the RPEs of the ICTY, ICTR and SCSL, this factor is not specifically mentioned.
79 *Bisengimana* Trial Judgement, para. 120.
80 *Prosecutor v. Brđanin*, Judgement, IT-99-36-T, ICTY Trial Chamber, 1 September 2004 ("*Brđanin* Trial Judgement"), para. 1114.
81 Judgement, para. 599.
82 Judgement, para. 597.
83 Judgement, para. 615.
84 Judgement, para. 615.
85 Judgement, para. 614.
86 Judgement, para. 614.

political grounds,[87] the Respondent could appreciate the ethical and moral depravity of extra-judicial imprisonment, torture and execution of innocent individuals. Nevertheless, he showed no empathy, insisting that "my duty is my duty."[88]

42. The Respondent's background as a teacher heightened the egregious nature of his crimes and demonstrated his betrayal of the trust bestowed in him by his community. He understood the power of education, particularly in influencing young people. Experts at trial testified that the Respondent "was trained in the pedagogical area and psychological area, and that made him understand the psychology of the children, the adolescents and the adults."[89] This is particularly relevant to the Respondent's indoctrination of children and young people who were S-21 guards, interrogators, torturers and executioners—an exceptionally depraved aspect of his conduct.

D.2.2.3 The error

43. The Trial Chamber, therefore, erred by imposing a lenient and plainly unjust sentence on the Respondent by ignoring his specific circumstances. As stated above, it was incumbent upon the Trial Chamber to have first determined a quantum of sentence solely on the gravity of the crimes, the circumstances of the Respondent and the other aggravating circumstances. Only after making this determination should the Trial Chamber have considered mitigating circumstances. In this case, the Trial Chamber arbitrarily arrived at a figure of thirty-five years without giving any indication as to its starting point, the extent of any sentence reduction, and the mitigating circumstances it took into account in making that reduction.

D.2.3 Aggravating Circumstances

D.2.3.1 The law

44. Whereas the Rules of Procedure and Evidence of the ICC enumerate several aggravating factors to be considered by a trial chamber in sentencing,[90] a very limited list is provided in the procedural rules of the other international tribunals.[91] Trial chambers generally maintain considerable discretion in what factors to consider and

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87 Judgement, para. 113.
88 Judgement, para. 122
89 Trial Transcript, Françoise Sironi-Guilbard and Ka Sunbaunat, 31 August 2009, T.49.
90 Rome Statute, article 78; ICC RPE, article 145(2).
91 ICTY Statute, article 24; ICTR Statute, article 23; SCSL Statute, article 19; Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia ("ICTY RPE"), rule 101; Rules of Procedure and Evidence, International Criminal Tribunal for Rwanda, ("ICTR RPE"), rule 101; Rules of Procedure and Evidence, Special Court for Sierra Leone ("SCSL RPE"), rule 101.

the weight to give them in light of the facts of the individual case and the guilt of the accused.[92]

D.2.3.2 The findings

45. The Trial Chamber, in its Judgement, agreed with the Co-Prosecutor that it may consider the following aggravating circumstances in determining the sentence for the Respondent: (1) the Respondent's abuse of power or official capacity, (2) the cruelty of his crimes, (3) the defencelessness of the victims, and (4) the discriminatory intent with which the crimes were committed.[93]

46. The Trial Chamber found that the Respondent exercised his authority by indoctrinating, training and supervising staff in their commission of crimes against the S-21 detainees.[94] It further found that many of the S-21 staff were very young and were corrupted by the requirement to treat the detainees with great cruelty.[95] The Trial Chamber noted that although it convicted the Respondent on the basis of direct forms of individual criminal responsibility, the Respondent's superior position over the S-21 cadres constituted an aggravating factor in relation to those crimes.[96]

47. The Trial Chamber found that many of the crimes committed at S-21 were also carried out in a particularly cruel manner.[97] The detainees were subjected to a host of brutal torture techniques and were, in some instances, literally beaten to death.[98] The Trial Chamber correctly considered that the sheer number of the victims of the crimes at S-21, no fewer than 12,273, served as an additional aggravating factor.[99]

48. The Trial Chamber also found that the S-21 detainees, including children, spouses and family members of other detainees, were clearly defenceless and vulnerable.[100] Throughout their detention, every facet of these detainees' lives was under the control of their captors, including the date and the manner of their execution.[101]

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92 *Prosecutor v. Blaškić*, Judgement, IT-95-14-A, ICTY Appeals Chamber, 29 July 2004, para. 685; *Prosecutor v. Jelisić*, Judgement, IT-95-10-A, ICTY Appeals Chamber, 5 July 2001 ("*Jelisić* Appeals Judgement"), para. 100.
93 Judgement, para. 601.
94 Judgement, para. 602.
95 Judgement, para. 602.
96 Judgement, para. 602.
97 Judgement, para. 603.
98 Judgement, para. 603.
99 Judgement, para. 603.
100 Judgement, para. 604.
101 Judgement, para. 604.

49. The Trial Chamber also considered that, with the exception of persecution as a crime against humanity (for which a discriminatory intent is a legal ingredient of the offence), a discriminatory intent in the commission of the crimes should be treated as an aggravating factor in sentencing.[102] Relying on *Simić*, the Trial Chamber held that such intent may be inferred from the circumstances of the crimes where the Respondent knowingly participated in a system that discriminated on political grounds.[103] The Chamber found that the Respondent carried out his crimes with a specific discriminatory intent based on the victims' perceived political opposition and their status as the enemies of the Party.

D.2.3.3 The error

50. Having assessed the aggravating circumstances based on the factors suggested by the Co-Prosecutors, the Trial Chamber failed to assign sufficient weight to them. As a result, it failed to situate the Respondent's crimes in their proper place at the worst end of the spectrum of criminality and aggravation such that they would not be amenable to be mitigated by any mitigating circumstances that existed in this case.

D.2.3.3.1 Abuse of authority

51. The Trial Chamber failed to place sufficient weight on the aggravating circumstance that from the beginning of S-21, as its Deputy, until the day he fled S-21 as its Chairman, the Respondent consciously and flagrantly abused his *de jure* and *de facto* authority. As the official head of S-21, he was responsible for ensuring that the basic legal and humanitarian protections of those detained under his supervision were respected, regardless of whether they were Cambodians, prisoners of war or other foreigners. The Respondent clearly failed to exercise his authority to prevent the abuses of his prisoners' fundamental human rights and to punish abuses committed by his subordinates. Instead, the Respondent used his power to help establish and manage one of the most terrifying, violent and brutal detention centres in modern history. In every possible manner, he used his power against the prisoners rather than for their protection. He used that power to train interrogators to torture and abuse the prisoners, to identify more targets for arrest, and to ensure executions were committed in an

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102 Judgement, para. 605.

103 Judgement, para. 605 (citing *Prosecutor v. Simić*, Judgement, IT-95-9-T, ICTY Trial Chamber, 17 October 2003, para. 51).

efficient and secret manner. The evidence of the deliberate, unquestioning manner in which he abused the powers inherent in his authority at S-21 was overwhelming.[104]

D.2.3.3.2 No mercy was shown to the victims

52. The Trial Chamber failed to place sufficient weight on the aggravating circumstance that at S-21 no mercy was shown to any prisoners including children. As the evidence at trial illustrated, the prison was essentially an enormous torture and execution processing centre which operated with unrelenting brutality and horrific efficiency. Numerous methods of torture were systematically employed, most involving the infliction of extensive physical injuries and/or pain, as well as extreme psychological shock, humiliation and fear. This torture resulted in death on a number of occasions. Most of those arrested and taken to S-21 probably knew little about where they were going and exactly why they were arrested. However, during their confinement, mistreatment and torture, the vast majority of victims would have come to realise the fate that awaited them before they were actually taken to be executed. Prisoners whose family members were also arrested would have realised that the same fate awaited their loved ones. Realisations such as these would have led to despair, trauma and mental pain in addition to the physical pain resulting from the inhumane conditions and torture. All these are particularly aggravating circumstances. The Respondent organised, perpetrated, observed and permitted this cruelty to continue at every step of the processing of prisoners through S-21 over more than three years.[105]

D.2.3.3.3 Victims were defenceless and vulnerable

53. The Trial Chamber failed to place sufficient weight on the aggravating circumstance that S-21 prisoners were defenceless and vulnerable, held at the complete mercy of their captors and denied their most basic human rights. They were humiliated, tortured, malnourished, and kept in disease-ridden environments. Spouses, children and other family members of prisoners were routinely arrested, imprisoned and executed. All were held in confinement under constant armed guard, in inhumane and abhorrent conditions. Fully aware of the entire cycle of inhumane detention conditions, constant fear, repeated torture and executions, the Respondent showed no

[104] Final Trial Submission, paras. 391-392.
[105] Final Trial Submission, paras. 396-398.

compassion, took no steps to ease the victims' suffering and remained persistent in the commission of his crimes.[106]

D.2.3.3.4 Crimes were committed with a discriminatory intent

54. By convicting the Respondent only for the crime against humanity of persecution, the Trial Chamber failed to consider the aggravating circumstances of a discriminatory intent in respect of the crimes against humanity of murder, extermination, enslavement, imprisonment, torture, rape, and other inhumane acts although facts supporting this intent for these crimes were proved at trial.[107] The Trial Chamber failed to consider that the Respondent committed his crimes with a specific discriminatory intent based on the victims' political opinion (i.e. with respect to those prisoners who were perceived as having opposing political views to those of the regime) and ethnicity/nationality (i.e. with respect to Vietnamese prisoners). The Respondent's training and education of interrogators and staff, as well as his annotations on confessions, clearly demonstrate his disdain for these "enemies." He instructed his subordinates to view the prisoners at S-21 as sub-human because of who they were or what they represented, playing a crucial role in hardening the young interrogators and encouraging them to employ extreme methods of torture against the prisoners. This discriminatory intent on the part of the Respondent should, therefore, have been considered an aggravating factor in sentencing the Respondent for his crimes, except for persecution as a crime against humanity.[108]

55. Because the Trial Chamber found facts supporting strong aggravating circumstances, the Co-Prosecutors submit that the Trial Chamber failed to exercise its discretion by placing insufficient weight on those circumstances. Consequently, the Trial Chamber did not impose the sentence warranted by this form of criminality and the Respondent's central participation in it; that is, imprisonment for life.

D3. THE CHAMBER PLACED UNDUE WEIGHT ON MITIGATING CIRCUMSTANCES

D.3.1 The Law

56. A finding of mitigating circumstances relates to an assessment of the sentence and in no way derogates from the gravity of the crime[109]—it mitigates the punishment, not

106 Final Trial Submission, paras. 402-403.
107 Judgement, para. 605.
108 Final Trial Submission, para. 408.
109 *Kambanda* Sentencing Trial Judgement, para. 56.

the crime.[110] Any consideration of mitigation must be secondary to considerations of the seriousness of the crimes and interests of the victims.[111]

57. Proof of mitigating circumstances does not automatically entitle an accused to "credit" in the determination of the sentence.[112] A trial chamber should impose a life sentence when the gravity of the crimes requires it.[113]

D.3.2 The Findings

58. In view of the extended period of time over which the crimes were committed, the large number of the victims and the Respondent's dedication to refining the operations of S-21, the Trial Chamber correctly concluded that the Respondent failed to establish that superior orders could be considered a mitigating factor.[114] Similarly, the Trial Chamber found that the Respondent failed to establish duress as a mitigating factor.[115] However, the Trial Chamber erroneously "place[d] limited weight on the coercive climate in DK and [the Respondent's] subordinate position within the CPK."[116]

59. While the Respondent purportedly made public apologies and expressed remorse for his crimes, the Trial Chamber found that the mitigating impact of his remorse was undermined by his failure to offer a full and unequivocal admission of his responsibility.[117] The Trial Chamber found that the Respondent's request during the closing statements for acquittal diminished the extent to which his remorse could otherwise mitigate the Respondent's sentence.[118] Notwithstanding this finding, the Trial Chamber considered his cooperation as a mitigating factor.

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110 *Brđanin* Trial Judgement, para. 1117.
111 Trial Transcript, Richard Goldstone, 14 September 2009, T.23-24.
112 *Prosecutor v. Niyitegeka*, Judgement, ICTR-96-14-A, ICTR Appeals Chamber, 9 July 2004, para. 267.
113 *Prosecutor v. Musema,* Judgement, ICTR-96-13-A, ICTR Appeals Chamber, 16 November 2001, para. 396. *See Prosecutor v. Stakić*, Judgement, IT-97-24-A, ICTY Appeals Chamber, 22 March 2006 ("*Stakić* Appeals Judgement"), para. 407 (noting that even where mitigating circumstances have been found, judges may consider that factors such as the gravity of the offense require the imposition of the maximum sentence).
114 Judgement, para. 607.
115 Judgement, para. 608.
116 Judgement, para. 608.
117 Judgement, para. 610.
118 Judgement, para. 610.

60. Despite the holding of the ICTY Appeals Chamber that rehabilitation is not a factor "which should be given undue weight",[119] the Trial Chamber accorded "limited consideration to the [Respondent's] propensity for rehabilitation".[120]

D.3.3 The Error

D.3.3.1 General

61. Despite finding that the mitigating circumstances submitted by the Respondent needed to be attached "limited" or "diminished" weight,[121] in its final finding on sentencing the Trial Chamber chose to describe these circumstances as "significant";[122] consequently, the Trial Chamber erroneously came to a conclusion that the highest sentence that it could have imposed—imprisonment for life—needed to be reduced to "a finite term"[123] of thirty-five years.[124]

62. In its order of 15 June 2009, the Trial Chamber had noted the pre-ECCC detention of the Respondent and had found that he would be entitled to credit for the time served and a further reduction in his sentence for the violation of his rights.[125]

63. The Trial Chamber failed to consider the Co-Prosecutors' initial submission that only limited allowance should be made for the Respondent's "general" cooperation with the Court, limited acceptance of the responsibility and its potential impact on national reconciliation.[126] The Trial Chamber further failed to consider the Co-Prosecutors' concluding submission that given the Respondent's change of defence and the request for acquittal, no mitigating factors should be considered.[127]

D.3.3.2 "Coercive climate"

64. The Trial Chamber erred by failing to rule on the Co-Prosecutors' submission that the Respondent was both a senior leader of Democratic Kampuchea and also a person most responsible for the crimes of that regime.[128] If the Trial Chamber had made this determination, it would not have placed any weight on the "coercive climate in DK

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119 Judgement, para. 611 (citing *Prosecutor v. Delalić*, Judgement, IT-96-21-A, ICTY Appeals Chamber, 20 February 2001 ("*Čelebići* Appeals Judgement"), para. 806).
120 Judgement, para. 611.
121 Judgement, paras. 608, 610-611.
122 Judgement, para. 629.
123 Judgement, para. 629.
124 Judgement, para. 631.
125 Decision on Request for Release, Case File No. 001/18-07-2007-ECCC/TC, 15 June 2009, E39/5.
126 Judgement, para. 606.
127 Judgement, para. 606.
128 Judgement, para. 25.

and [the Respondent's] subordinate position within the CPK."[129] The Co-Prosecutors submit that the Respondent, as the *de jure* and *de facto* head of the principal detention facility of Democratic Kampuchea, was a co-creator rather than victim of this "coercive climate" and did not deserve any mitigation in sentence.[130]

65. The Trial Chamber erred in the exercise of its discretion, first by finding the "coercive climate" to be a mitigating circumstance and, second, by according it any weight whatsoever.

D.3.3.3 Cooperation with the Court

66. The Trial Chamber erred by placing undue weight on the Respondent's cooperation with the Court.[131] The Co-Prosecutors submitted at trial that although the Respondent cooperated with the authorities from an early stage, showing a general willingness to testify, commenting on the available evidence and otherwise participating in the investigation and the trial, this cooperation was limited.[132] While he accepted the crimes at S-21 and his overall responsibility for them, the Respondent contested numerous allegations relating to his direct involvement and sought to portray his role at S-21 in a manner that was inconsistent with available evidence.[133] On many occasions during the trial, when confronted with questions on the issue of his power to order, his willingness, intent and level of participation in the crimes, the Respondent gave incomplete, evasive and misleading testimony.[134]

67. Furthermore, throughout the judicial investigation and trial, the Respondent (1) refused to divulge the whole truth of the events at and surrounding S-21, (2) sought to minimise his role and personal participation in the crimes, and (3) claimed inability to recollect or refused to answer questions on issues which were clearly within his knowledge.[135] Through his counsel, he (1) objected to the allegation that he was a senior or most responsible individual responsible for crimes in Democratic Kampuchea and subject to the jurisdiction of this Court, (2) objected to his liability for committing crimes via joint criminal enterprise, (3) objected to his liability for crimes under the Cambodian Penal Code of 1956, (4) objected to the Co-Prosecutors'

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129 Judgement, para. 608.
130 Final Trial Submission, para. 244.
131 Judgement, para. 609.
132 Final Trial Submission, para. 425.
133 Final Trial Submission, para. 425.
134 Final Trial Submission, para. 425.
135 Final Trial Submission, para. 426.

request for a reserve trial witness list, (5) objected to the admission of relevant and probative documentary evidence, (6) objected to a request for the admission of witness statement summaries to assist the Trial Chamber, (7) objected extensively without substantial foundation throughout the questioning of a key expert, Craig Etcheson, and (8) sought to aggravate trial witnesses' fear of prosecution in national courts, thereby reducing the probative value of their testimony at trial and necessarily negating any arguable reconciliatory or mitigating measure.[136]

68. The Respondent's cooperation, therefore, facilitated the economy of the trial only to a limited extent. The information he provided had a limited impact on achieving a greater understanding of S-21 crimes or his role there. This minimised the effect of mitigation to which the Respondent was entitled. The Trial Chamber erred in failing to recognise that the Respondent could not seek mitigation of sentence by presenting himself as fully cooperative while at the same time refusing to cooperate and contesting significant aspects of the case against him.[137]

69. The Trial Chamber also failed to note that the Respondent's cooperation was not forthcoming for some twenty years after the fall of the Democratic Kampuchea regime, that is, until his chance discovery by the journalist Nic Dunlop. The Respondent, in fact, continued to be a part of, and provided support to, the Khmer Rouge for years after the fall of that regime. He did not come forward to assist the authorities in the investigation of the crimes at S-21, even after purportedly becoming disillusioned with the Khmer Rouge, but rather, decided to stay in hiding. At different stages of the trial, usually when confronted with evidence or questions relating to his personal involvement, he was evasive and often non-responsive to direct questions. On these issues, he also disingenuously claimed an inability to recollect significant events (despite his excellent memory of matters which were beneficial to him) or gave implausible accounts which were inconsistent with the evidence before the Court.[138]

70. The Trial Chamber, therefore, erred in placing undue weight on the Respondent's very selective and opportunistic cooperation with this Court.

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136 Final Trial Submission, para. 426.
137 Final Trial Submission, para. 427.
138 Final Trial Submission, para. 440.

D.3.3.4 Acceptance of responsibility and remorse

71. The Trial Chamber recognised that the Respondent made public apologies and expressed remorse at trial; however, it found that the mitigating impact of this remorse was undermined by his failure to offer a full and unequivocal admission of his responsibility.[139] The Chamber found, in particular, that the Respondent's request for acquittal during the closing arguments, "despite earlier apparent admissions of responsibility," diminished the extent to which his remorse could otherwise mitigate his guilt.[140]

72. The Co-Prosecutors acknowledge that the Respondent made occasional public apologies and statements of remorse. Nevertheless, the Trial Chamber failed to note the degree to which the Respondent's remorse was undermined by the fact that it arose from attempts to limit his direct responsibility for the crimes, and by his hostility during the proceedings towards witnesses, experts and other participants.[141]

73. At trial, the Trial Chamber directly addressed the Respondent's conduct on a number of occasions, reproaching him for laughing and gesturing and for his "attitude".[142] It censured the Respondent for using inappropriate language.[143] On occasions, the Respondent refused to answer[144] or was unresponsive to questions,[145] including those from the Trial Chamber.[146]

74. Psychologists, who examined the Respondent, testified that for most of his adult life the Respondent has been unable to process empathy, compassion or emotions concerning the suffering or the pain of others.[147] Confirming this assessment, the Respondent's history and conduct at trial suggested that his remorse was insincere.[148]

75. The psychologists, one Cambodian and another international, testified that the Respondent was "willing to accept what is proven, and what cannot be proven, well, he does not accept it."[149] Trial transcripts contain numerous examples supporting this

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139 Judgement, para. 610.
140 Judgement, para. 610.
141 Final Trial Submission, para. 447.
142 Trial Transcript, Kaing Guek Eav alias Duch, 29 April 2009, T.76.
143 Trial Transcript, Kaing Guek Eav alias Duch, 8 June 2009, T.83.
144 Trial Transcript, Kaing Guek Eav alias Duch, 9 June 2009, T.27.
145 Trial Transcript, Kaing Guek Eav alias Duch, 7 April 2009, T.106-108; 27 May 2009, T.3-5.
146 Trial Transcript, Kaing Guek Eav alias Duch, 21 April 2009, T.15-16.
147 Trial Transcript, Françoise Sironi-Guilbard and Ka Sunbaunat, 31 Aug 2009, T.32-34.
148 Final Trial Submission, para. 449.
149 Trial Transcript, Françoise Sironi-Guilbard and Ka Sunbaunat, 31 Aug 2009, T.93.

conclusion.[150] A notable illustration is the Respondent's challenge to the evidence given by Norng Chanphal, a child survivor of S-21. The Respondent initially did not "recognise" that Norng Chanphal was ever at S-21,[151] but once confronted with documentary and video evidence to the contrary, he recanted, stating that "at that time I did not have the document and I would not accept it, but now I would accept it entirely."[152]

76. An accused who denies culpability is certainly entitled to put the prosecution to the proof on each element of the crime and each aspect of his personal responsibility. However, an accused pleading remorse and acceptance of guilt in seeking mitigation of his sentence should provide genuine cooperation as opposed to scrutinising every piece of evidence, refusing to answer questions on issues within his knowledge, and minimising his responsibility despite clear evidence to the contrary. The two approaches are mutually exclusive. The Trial Chamber failed to consider that a highly qualified willingness to cooperate must lead to virtually no mitigation of sentence.[153]

77. The Respondent's predilection to admit guilt for crimes committed at S-21 generally, and simultaneous rejection of a significant number of facts illustrating his direct involvement, raised legitimate doubt about the genuineness of his remorse and his desire to assist the ascertainment of truth. Indeed, it suggested that the Respondent admitted guilt not out of a sense of empathy for the victims, but out of self-interest in easing the burden of punishment he was facing.[154] This was confirmed by his request for acquittal and release on the last day of the trial.

78. The Co-Prosecutors, therefore, submit that the Trial Chamber erred in placing undue weight on the purported admission of responsibility and remorse of the Respondent.

D.3.3.5 National reconciliation

79. The Trial Chamber erred in concluding that, despite his request for acquittal, the Respondent's cooperation with the Court "assisted in the pursuit of national reconciliation, one of the goals of the ECCC."[155]

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150 *E.g.*, Trial Transcript, Kaing Guek Eav alias Duch, 13 July 2009, T.56-58; 27 July 2009, T.47-50; 24 Aug 2009, T.85.
151 Trial Transcript, Kaing Guek Eav alias Duch, 2 July 2009, T.85.
152 Trial Transcript, Kaing Guek Eav alias Duch, 8 July 2009, T.5.
153 Final Trial Submission, para. 451.
154 Final Trial Submission, para. 452.
155 Judgement, para. 609.

80. National reconciliation is promoted where an accused's guilty plea prompts others to recognise their responsibility.[156] Mitigation for national reconciliation may also be given where an accused assists families and victims.[157] These factors do not, and did not, apply in the case of the Respondent.

81. The Respondent's recognition of his responsibility and minor expressions of remorse during certain phases of the trial (despite his ultimate plea for acquittal) may arguably have been beneficial to the process of national reconciliation in Cambodia. However, the Co-Prosecutors asked the Trial Chamber to assess the Respondent's contribution to the process of national reconciliation in the light of the significant qualifications on his acceptance of responsibility and cooperation.[158]

82. Experts testified at trial that the greatest influence a criminal trial can have on national reconciliation is by the establishment of a "single history of what happened".[159] Stephane Hessel, a Holocaust survivor who testified at the request of the Respondent, stated that "reconciliation can only go hand in hand with the concept of truth."[160] Because full disclosure and unqualified acceptance of responsibility for serious crimes are necessary pre-conditions for reconciliation, the Respondent's efforts to minimise the amount of trial evidence and his attempts to challenge the Co-Prosecutors' case logically minimised the value of his contribution.[161] The Co-Prosecutors also note that the victims heard by the Trial Chamber were unwilling to forgive the Respondent,[162] which is indicative of the feelings of a significant part of the Cambodian community.[163]

83. The Co-Prosecutors, therefore, submit that the Trial Chamber erred in placing undue weight on national reconciliation based on the Respondent's acts and conduct.

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156 *Prosecutor v. Nzabirinda*, Sentencing Judgement, ICTR-2001-77-T, ICTR Trial Chamber, 23 February 2007, para. 68; *Bisengimana* Trial Judgement, para. 201.

157 *Dragan Nikolić* Sentencing Judgement, paras. 247-248, 252.

158 Final Trial Submission, para. 439.

159 Trial Transcript, Richard Goldstone, 14 September 2009, T.26.

160 Trial Transcript, Stephane Hessel, 15 September 2009, T.63.

161 Final Trial Submission, para. 441.

162 The Co-Prosecutors refer generally to the trial transcripts of the following witnesses and are, therefore, not providing complete citations: Hamill Robert, Toch Monin, Im Sunty, Seang Vandy, Phung Guth Sunthary, Phaok Khan, Ou Savrith, So Saung, Chum Sirath, Ouk Neary, Lefeuvre Martine, Tioulong Antonya, Chum Neou, Chhin Navy, Neth Phally and Hav Sophea.

163 Final Trial Submission, para. 442.

D.3.3.6 Rehabilitation and reintegration

84. The Trial Chamber erred in placing undue weight on the Respondent's capacity for rehabilitation and reintegration into the society.[164]

85. The Trial Chamber erroneously came to this finding in respect of a Respondent who: (1) was held responsible for crimes of "extreme gravity" and the worst category that could come before any international tribunal, (2) sought acquittal for those crimes, (3) claimed that he was neither a senior leader nor the person most responsible for the crimes of the Democratic Kampuchea regime, and (4) challenged the very jurisdiction of this Court to prosecute him. The Trial Chamber's assessment of the Respondent's capacity to reintegrate amongst the victims of the Khmer Rouge is further contradicted by the Respondent's assertion in his notice of appeal against the Judgement that this Court should find him to be only "a witness of the events" of S-21 and Democratic Kampuchea.[165]

86. The Trial Chamber erroneously came to this conclusion despite hearing testimony from expert psychologists that the Respondent lacked empathy and was able to construct powerful defence mechanisms insulating himself from emotional reactions and inner conflicts created by his external reality: mechanisms that the experts described as ultimately enabling the Respondent to nurture his own family while overseeing the death of children at S-21.[166]

87. The Trial Chamber also failed to consider that the two predominant justifications for sentencing in international criminal law are deterrence and retribution.[167] Deterrence takes two forms: individual and general.[168] Individual deterrence is directed at discouraging an accused from recidivism while general deterrence attempts to deter societies in general from committing international crimes.[169]

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164 Judgement, para. 616.

165 Notice of Appeal by the Co-Lawyers of Kaing Guek Eav alias Duch Against the Trial Chamber Judgement of 26 July 2010, Case File No. 001/18-07-2007-ECCC/TC, 24 August 2010, E188/8, para. 8.

166 Judgement, para. 614.

167 *Prosecutor v. Barayagwiza*, Judgement, ICTR-99-52-A, ICTR Appeals Chamber, 28 November 2007, para. 1057; *Stakić* Appeals Judgement, para. 402; *Čelebići* Appeals Judgement, para. 806.

168 *Prosecutor v. Kordić* and *Čerkez*, Judgement, IT-95-14/2-A, ICTY Appeals Chamber, 17 December 2004 ("*Kordić* and *Čerkez* Appeals Judgement"), para. 1076.

169 *Kordić* and *Čerkez* Appeals Judgement, para. 1077-1078.

88. The concept of retribution is equated with a sense of "just deserts" as opposed to vengeance.[170] A penalty that "properly reflects the [...] culpability of the offender" [171] runs parallel with a trial chamber's overriding duty to tailor and impose an appropriate sentence on an accused in light of the gravity of the crimes and the accused's circumstances and role therein. Furthermore, retribution correlates with moral admonition and with bringing integrity to the international criminal enforcement mechanism, as it "duly express[es] the outrage of the international community at these crimes."[172]

89. While international tribunals have referred to rehabilitation as a factor in sentencing,[173] in the Co-Prosecutors' submission, the Trial Chamber erred in placing undue weight, or indeed any weight at all, on the Respondent's unproven capacity of rehabilitation.

D.3.4 Conclusion

90. The Co-Prosecutors submit that the Trial Chamber erred in placing undue weight on the erroneously found "significant mitigating circumstances" and, as such, committed a discernable error in exercising its sentencing discretion and arriving at an arbitrarily determined and manifestly inadequate sentence.

D4. THE SENTENCE IS ARBITRARY AND MANIFESTLY INADEQUATE

D.4.1 Overview

91. All decisions of judicial bodies should be reasoned; this is an international standard[174] and applies equally to discretionary decisions, like decisions on sentencing.[175] This allows parties to know the reasons for decisions and, in case of an appeal, allows the

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170 *Kordić* and *Čerkez* Appeals Judgement, para. 1075.

171 *Kordić* and *Čerkez* Appeals Judgement, para. 1075 (citing *R. v. M. (C.A.)* [1996] 1 S.C.R. 500, para. 80).

172 *Prosecutor v. Aleksovski*, Judgement, IT-95-14/1-A, ICTY Appeals Chamber, 24 March 2000 ("*Aleksovski* Appeals Judgement"), para. 185.

173 Even though rehabilitation is a legitimate sentencing purpose, courts also emphasize that it should not be given undue weight. *See Kordić* and *Čerkez* Appeals Judgement, para. 1079; *Prosecutor v. Blagojević* and *Jokić*, Judgement, IT-02-60-T, ICTY Trial Chamber, 17 January 2005, para. 824.

174 Decision on Nuon Chea's Appeal Against Order Refusing Annulment, Case File No. 002/19-09-2007/ECCC/OCIJ (PTC 06), Pre-Trial Chamber, 26 August 2008, D55/I/8 ("Nuon Chea Appeal Against Annulment Refusal"), para. 21 (citing decisions of the United Nations Human Rights Committee, European Court of Human Rights ("ECHR") and ICTY).

175 Decision on Ieng Thirith's Defence Appeal Against "Order on Request for Investigative Action by the Defence for Ieng Thirith", Case File No. 002/19-09-2007-ECCC/OCIJ (PTC 62), Pre-Trial Chamber, 14 June 2010, D353/2/3 ("Ieng Thirith Investigative Action Decision"), para. 23.

appellate authority to conduct an effective appellate review.[176] When law requires a judicial decision-maker to give reasons for its decisions, a failure to do so amounts to an error of law.[177]

92. The Judgement fails to give reasons for the Trial Chamber's decision to impose a thirty-five year sentence on the Respondent, and has therefore (1) determined the sentence arbitrarily (2) without relying upon any jurisprudence from comparable cases and indeed upon the relevant law cited by the Co-Prosecutors at trial. This means that the Trial Chamber has committed a discernable error of law in arriving at a manifestly unjust sentence for the Respondent that is clearly outside the range of sentences available to the Trial Chamber in the circumstances of this case.

93. It is settled international jurisprudence that "[a] previous decision on sentence may indeed provide guidance if it relates to the same offence and was committed in substantially similar circumstances".[178] While trial chambers have the discretion to impose different sentences, the ICTY Appeals Chamber has stated that "in cases involving similar factual circumstances and similar convictions [...] there should be no substantial disparity in sentence unless justified by the circumstances of the particular accused."[179]

94. In the Judgement, the Trial Chamber has not cited any reason, much less a legal authority, that prompted it to determine a thirty-five year sentence against the Respondent; nor has it indicated why that figure became the starting point for its consideration of mitigating circumstances. The Trial Chamber gave no justification for its departure from international practice; indeed none exists. This is a discernable error of law that the Supreme Court Chamber should correct by substituting the sentence of thirty-five years with a more severe sentence. It should do so by imposing a sentence from the range of sentences that are applicable to the case of the Respondent on the basis of cases of similarly situated defendants before international tribunals trying similar cases.

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176 Ieng Thirith Investigative Action Decision, para. 28 (citing decisions of the ECHR and the ICTY).

177 Decision on Co-Prosecutors' Appeal Against the Co-Investigating Judges Order on Request to Place Additional Evidentiary Material on the Case File Which Assists in Proving the Charged Persons' Knowledge of the Crimes, Case File No. 002/19-09-2007-ECCC/OIJ (PTC 67), Pre-Trial Chamber, 15 June 2010, D365/2/10, para. 26.

178 *Prosecutor v. Furundžija*, Judgement, IT-95-17/1-A, ICTY Appeals Chamber, 21 July 2000, para. 250.

179 *Čelebići* Appeals Judgement, para. 758.

D.4.2 Failure to Consider the Applicable Law

D.4.2.1 General

95. At paragraph 631 of the Judgement, the Trial Chamber determined that "on the basis of the foregoing" it considered that the appropriate sentence for the Respondent would be thirty-five years. However, a review of the previous paragraphs of the Judgement indicate that the Trial Chamber did not cite or consider any law, including that submitted by the Co-Prosecutors, that governed ranges of sentences in similar cases. Indeed, the discussion immediately preceding the dispositive paragraph 631 concerns aggravating and mitigating factors applicable in the case of the Respondent.[180] Only in one sentence, unsupported by any analysis of the applicable law, did the Trial Chamber mention that there are "significant mitigating factors which mandate the imposition of a finite term of imprisonment other than a life sentence."[181]

96. This analysis, or lack thereof, on the part of the Trial Chamber does not meet the strict requirements of a reasoned judgement of an international criminal court trying some of the most egregious crimes ever tried by a judicial body. Indeed, it amounts to an error of law by the Trial Chamber that *ipso jure* invalidates the Judgement.[182] It is therefore a fit case for the Supreme Court Chamber to intervene to replace the Trial Chamber's unreasoned decision on the length of sentence with its own reasoning.

D.4.2.2 The Judgement ignored the relevant jurisprudence cited by the Co-Prosecutors

97. Besides not relying upon any legal authority on the length of the sentence, the Trial Chamber also ignored the jurisprudence and analysis cited by the Co-Prosecutors.[183] In their Final Trial Submission, the Co-Prosecutors provided an analysis of sentencing in comparable cases before international tribunals like the ICTY, ICTR and the SCSL, focusing on convictions of accused who held a significant degree of authority, were responsible for a large number of deaths (one hundred or more), and committed their

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180 Judgement, paras. 601-605 (dealing with aggravating circumstances), 606-611 (dealing with mitigating circumstances), 612-616 (dealing with psychiatric and psychological assessment of the Respondent), 617-622 (dealing with character witnesses), 623-627 (dealing with the impact of the prior human rights violations of the Respondent upon his sentence), 628-630 (concerning sentencing generally without dealing with permissible ranges).

181 Judgement, para. 629.

182 This is a requirement for the maintainability of this Appeal under Rule 104(1)(a).

183 Final Trial Submission, *inter alia*, paras. 453-456.

crimes over an extended period of time.[184] In particular, the Co-Prosecutors submitted the following:[185]

a) Since 2000, 76 accused have been convicted and sentenced at the ICTY at either the trial or appellate level. Of those, 40 held significant positions of authority[186] and of the 40, 21 were responsible for the deaths of over 100 people.[187] On an average, these accused received 25.6 years of imprisonment. More specifically, of these 21 cases, where the crimes were committed over a period of one month or more, the average sentence received was 26 years. If the duration of time where crimes were committed is extended to over one year, as in this case, the average sentence is 44 years.[188]

b) Since 1998, there have been 39 accused convicted and sentenced at the ICTR at either the trial or appellate level.[189] Of those, 22 held significant positions of

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184 Final Trial Submission, para. 453.

185 This assessment was made as of 11 November 2009, the date of filing of the Final Trial Submission.

186 The Co-Prosecutors refer generally to the following cases and, in support, are providing fact information sheets about the following cases in Annex C: Selected Case Information Sheets from the ICTY, the ICTR (as provided by the Hague Justice Portal) and the SCSL: *Aleksovski* Appeals Judgement; *Babić* Appeals Judgement; *Blagojević* Appeals Judgement; *Blaškić* Appeals Judgement; *Brahimaj* Trial Judgement; *Brđanin* Appeals Judgement; *Delić* Trial Judgement; *Delić* Appeals Judgement; *Deronjić* Appeals Judgement; *Galić* Appeals Judgement; *Hadžihasanović* Trial Judgement; *Jelisić* Appeals Judgement; *Jokić* Appeals Judgement; *Kordić* Trial Judgement; *Krajišnik* Appeals Judgement; *Krnojelac* Appeals Judgement; *Krstić* Appeals Judgement; *Kunarac* Appeals Judgement; *Kvočka* Appeals Judgement; *Lazarević* Trial Judgement; *Milan Lukić* Trial Judgement; *Sreten Lukić* Trial Judgement; *Martić* Appeals Judgement; *Dragomir Milošević* Trial Judgement; *Mrkšić* Appeals Judgement; *Mucić* Appeals Judgement; *Naletilić* Appeals Judgement; *Dragan Nikolić* Appeals Judgement; *Momir Nikolić* Appeals Judgement; *Obrenović* Trial Judgement; *Ojdanić* Trial Judgement; *Pavković* Trial Judgement; *Plavšić* Trial Judgement; *Rajić* Trial Judgement; *Šainović* Trial Judgement; *Sikirica* Trial Judgement; *Simić* Appeals Judgement; *Stakić* Appeals Judgement; *Strugar* Appeals Judgement; *Todorović* Trial Judgement.

187 *See* Annex C: *Babić* Appeals Judgement; *Blagojević* Appeals Judgement; *Blaškić* Appeals Judgement; *Brđanin* Appeals Judgement; *Galić* Appeals Judgement; *Kordić* Trial Judgement; *Krajišnik* Appeals Judgement; *Krstić* Appeals Judgement; *Lazarević* Trial Judgement; *Milan Lukić* Trial Judgement; *Sreten Lukić* Trial Judgement; *Martić* Appeals Judgement; *Dragomir Milošević* Trial Judgement; *Mrkšić* Appeals Judgement; *Naletilić* Appeals Judgement; *Momir Nikolić* Appeals Judgement; *Obrenović* Trial Judgement; *Ojdanić* Trial Judgement; *Pavković* Trial Judgement; *Šainović* Trial Judgement; *Stakić* Appeals Judgement.

188 Final Trial Submission, para. 454.

189 *See* Annex C: *Akayesu* Appeals Judgement; *Bagosora* Trial Judgement; *Barayagwiza* Appeals Judgement; *Bikindi* Trial Judgement; *Bisengimana* Trial Judgement; *Gacumbitsi* Appeals Judgement; *Imanishimwe* Appeals Judgement; *Kajelijeli* Appeals Judgement; *Kalimanzira* Trial Judgement; *Kambanda* Appeals Judgement; *Kamuhanda* Appeals Judgement; *Karera* Appeals Judgement; *Kayishema* Appeals Judgement; *Muhimana* Appeals Judgement; *Musema* Appeals Judgement; *Nahimana* Appeals Judgement; *Nchamihigo* Trial Judgement; *Ndindabahizi* Appeals Judgement; *Ngeze* Appeals Judgement; *Niyitegeka* Appeals Judgement; *Nsengiyumva* Trial Judgement; *Nshogoza* Trial Judgement; *Ntabakuze* Trial Judgement; *Ntakirutimana* Appeals Judgement; *Nzabirinda* Trial Judgement; *Renzaho* Trial Judgement; *Rugambarara* Trial Judgement; *Ruggiu* Trial Judgement; *Rukundo* Trial Judgement; *Rutaganda* Appeals Judgement; *Rutanganira* Trial Judgement; *Ruzindana* Appeals Judgement; *Semanza* Trial Judgement; *Seromba* Trial Judgement; *Seromba* Appeals

authority,[190] and of those, 20 were responsible for the deaths of over 100 people.[191] On an average, these accused received 37.85 years of imprisonment. More specifically, of these cases, where the crimes were committed over a period of one month or more, the average sentence received was 45.42 years.[192]

c) Since 2000, eight accused have been convicted and sentenced at the SCSL at either the trial or appellate level.[193] All accused held positions of significant authority and all were responsible for the deaths of more than 100 people. The average sentence was 37 years of imprisonment. All accused were convicted for crimes that were committed over a period of one month or more. Unlike the case of the Respondent, none of these accused committed their crimes over an extended period of time.[194]

98. Besides not giving any reasons supporting the determination of the length of sentence of thirty-five years, the Trial Chamber also failed to give any reasons why it ignored, or did not rely upon, the practice and jurisprudence cited by the Co-Prosecutors. This is an erroneous exercise of discretion and warrants intervention by the Supreme Court Chamber.

99. For the assistance and ease of reference of the Supreme Court Chamber, the Co-Prosecutors provide, in Annex A, a survey of sentences by the ICTY, ICTR and SCSL

Judgement; *Serugendo* Trial Judgement; *Serushago* Appeals Judgement; *Simba* Appeals Judgement; *Zigiranyirazo* Trial Judgement.

190 *See* Annex C: *Akayesu* Appeals Judgement; *Bagosora* Trial Judgement; *Bisengimana* Trial Judgement; *Gacumbitsi* Appeals Judgement; *Imanishimwe* Appeals Judgement; *Kajelijeli* Appeals Judgement; *Kalimanzira* Trial Judgement; *Kambanda* Appeals Judgement; *Kamuhanda* Appeals Judgement; *Karera* Appeals Judgement; *Kayishema* Appeals Judgement; *Muhimana* Appeals Judgement; *Ndindabahizi* Appeals Judgement; *Niyitegeka* Appeals Judgement; *Nsengiyumva* Trial Judgement; *Ntabakuze* Trial Judgement; *Renzaho* Trial Judgement; *Rugambarara* Trial Judgement; *Rutaganira* Trial Judgement; *Semanza* Trial Judgement; *Serushago* Appeals Judgement; *Simba* Appeals Judgement.

191 *See* Annex C: *Akayesu* Appeals Judgement; *Bagosora* Trial Judgement; *Bisengimana* Trial Judgement; *Gacumbitsi* Appeals Judgement; *Kajelijeli* Appeals Judgement; *Kalimanzira* Trial Judgement; *Kambanda* Appeals Judgement; *Karera* Appeals Judgement; *Kayishema* Appeals Judgement; *Muhimana* Appeals Judgement; *Ndindabahizi* Appeals Judgement; *Niyitegeka* Appeals Judgement; *Nsengiyumva* Trial Judgement; *Ntabakuze* Trial Judgement; *Renzaho* Trial Judgement; *Rugambarara* Trial Judgement; *Rutaganira* Trial Judgement; *Semanza* Trial Judgement; *Serushago* Appeals Judgement; *Simba* Appeals Judgement.

192 Final Trial Submission, para. 455.

193 *See* Annex C: *Brima* Appeals Judgement; *Fofana* and *Kondewa* Appeals Judgement; *Sesay* Trial Judgement.

194 Final Trial Submission, para. 456.

in respect of accused persons, like the Respondent, in leadership positions found responsible for deaths of more than one hundred victims.[195]

D.4.2.3 This case belongs to the "worst category" of cases

100. Although discretion can be exercised by a trial chamber in sentencing matters, the Respondent's sentence constitutes a discernable error, as it is a sentence that clearly does not reflect the extreme gravity of the crimes (including murder and torture with a discriminatory intent) and the senior position and role of the Respondent.

101. Whereas this Court is a relatively new jurisdiction, other national and international jurisdictions have dealt with innumerable cases involving serious crimes and have developed relevant sentencing principles. As this Court is based at the intersection of domestic and international law and procedure, the Co-Prosecutors submit that a review of the development and application of sentencing principles of Cambodian and other national and international jurisdictions would be informative for the Supreme Court Chamber in the determination of this Appeal. This is particularly so because the purposes of sentencing, at the international and domestic levels, are largely shared.[196]

102. The Co-Prosecutors recall the seriousness with which the taking of life, coupled with torture with a discriminatory intent, is considered in domestic jurisdictions. Under the Cambodian Penal Code of 1956—which was applicable during Democratic Kampuchea—crimes of torture and homicide of the magnitude of crimes against humanity would have entailed the death penalty.[197] In addition, the Cambodian Penal Code of 2009 prescribes a life sentence for the serious crimes of crimes against humanity, war crimes and genocide.[198]

103. In a sample of twenty-one other national jurisdictions, a single (aggravated) homicide ("*assassinat*", "murder", "intentional murder", or "first degree murder") can result in the maximum sentence available; in nineteen of these twenty-one countries the maximum sentence for murder is life imprisonment (or death); and in eleven of these

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195 Annex A: Imprisonment Sentences at the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda and the Special Court for Sierra Leone for Convicted Persons Responsible for Deaths of More than One Hundred Persons.

196 As stated by the ICTY Trial Chamber in *Prosecutor v. Stakić*, Judgement, IT-97-24-T, ICTY Trial Chamber, 31 July 2003 ("*Stakić* Trial Judgement"): "Within this framework it is universally accepted and reflected in judgements of this Tribunal and the Rwanda Tribunal that deterrence and retribution are general factors to be taken into account when imposing sentence." (para. 900).

197 Judgement, para. 574.

198 Penal Code of Cambodia 2009, articles 184, 189, 195 (dealing respectively with genocide, crimes against humanity and war crimes).

jurisdictions aggravated murder is considered so serious that the minimum sentence is a life sentence.[199] The Co-Prosecutors have analysed these jurisdictions and have tabulated the resulting data in Annex B.

104. This shows that crimes involving the intentional deprivation of life are universally considered as especially grave. The need for deterrence and retribution for such crimes is thus particularly important—so important, indeed, that many jurisdictions impose a mandatory maximum sentence for such offences. Moreover, countries that have enacted special legislation to deal with international crimes have made the most severe punishment applicable to these crimes.[200]

105. This widespread national practice reflects the fact that for serious crimes such as murder, it is only possible to achieve deterrence and adequately express the outrage of the community through the imposition of the most severe sentences. Where domestic courts have been faced with international crimes in the form of war crimes and crimes against humanity involving the loss of human lives, there is nothing to indicate that those courts view such crimes as any less serious than other types of crimes with respect to sentencing.[201]

106. Where domestic courts have been given discretion to apply sentences within a range, they have reserved their most severe sentence for "cases falling within the worst category of cases for which that penalty is prescribed."[202] However, it does not necessarily follow that "because it is possible to envisage, and indeed to find it in the court files, cases which are worse than the present case, [that a particular case] is not

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199 *See* Annex B: Minimum and Maximum Penalties for Aggravated Murder in Twenty-One Domestic Jurisdictions.

200 *England and Wales*: International Criminal Court Act 2001, chapter 17, part 5, sections 53, 60, incorporating the Murder (Abolition of Death Penalty) Act 1965, chapter 71, article 1(1), requires a mandatory sentence of life imprisonment for murder. *Canada*: 2001 Crimes Against Humanity and War Crimes Act, S.C. 2000, c. 24, revised 31 August 2010, section 4, establishes that life sentence is mandatory if an intentional killing forms the basis of a conviction for genocide, crimes against humanity or war crimes. *France*: *Code Pénal*, article 212-1 prescribes life imprisonment for crimes against humanity. *Germany*: Code of Crimes against International Law, 26 June 2002, sections 7-8, provide for mandatory life sentences for crimes against humanity and war crimes involving murder. *New Zealand*: International Crimes and International Criminal Court Act 2000, 6 September 2000, part 2, sections 9-11, state that if offences of genocide, crimes against humanity or war crimes include wilful killings then the penalty will be the same as for murder, which is mandatory life imprisonment. *Rwanda*: Organic Law No. 8/96 on the Organization of Prosecutions for Offences Constituting the Crime of Genocide or Crimes against Humanity, 30 August 1996, articles 68-69, define four categories of perpetrators of genocide. An accused belonging to the first or second category receives mandatory death and life sentences, respectively.

201 As an example of domestic adjudication of war crimes and crimes against humanity, *see United Kingdom*: *Regina v. Sawoniuk*, Court of Appeal (Criminal Division), [2000] 2 Criminal Law Reports 220, 10 February 2000, sentencing the accused to life imprisonment under the War Crimes Act (1991).

202 *Veen v. Regina (No. 2)*, (1988) 164 CLR 465 F.C. 88/001, para. 15.

one appropriate for the imposition of the maximum sentence".[203] The ICTY has also endorsed the notion that the worst case category is not limited to the most severe case that can be imagined: for instance, an ICTY Trial Chamber stressed that "on both the international and national levels the imposition of the maximum sanction is not restricted to the most serious imaginable criminal conduct."[204]

107. Comparing the case of the Respondent to cases at the international level also leads to the same inescapable conclusion. In *Galić*, the ICTY Appeals Chamber determined that the accused, who was responsible for a systematic campaign of terror against civilian men, women and children by orchestrating the siege of Sarajevo, deserved the Tribunal's highest sentence of life imprisonment.[205] In *Jelisić*, the ICTY handed down a sentence of 40 years for war crimes and crimes against humanity related to the execution of Bosnian Muslim prisoners at the Luka Camp.[206] The sentence in that case was compounded by the lack of mitigating circumstances combined with aggravating factors related to the accused's enthusiastic approach to committing the torture and execution of prisoners under his control.[207] While Jelisić pleaded guilty and expressed remorse, the Tribunal found both of these acts to be insincere and, therefore, gave them little weight.[208] In *Kambanda*, the accused pleaded guilty and cooperated with the prosecution, but still received life imprisonment from the ICTR due to the aggravating factors of occupying a high ministerial post and committing the crimes in a premeditated way, and because of the intrinsic gravity of systematic genocide.[209]

108. In all cases, what must be considered is whether there is something about the crimes, the conduct of the accused, the circumstances of a particular offender or the facts of a particular case, which places it within the category of the worst type of offence and/or the worst type of offender. Life imprisonment is appropriate for those cases "where the level of culpability is so extreme that the community interest in retribution and punishment can only be met through the imposition of the maximum penalty."[210]

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203 *Regina v. Twala* [1994] NSWCCA [4 November 1994].
204 *Stakić* Trial Judgement, para. 932.
205 *Galić* Appeals Judgement. *See* Annex C for the Case Information Sheet.
206 *Jelisić* Trial Judgement, paras. 138-39.
207 *Jelisić* Trial Judgement, paras. 124-34.
208 *Jelisić* Trial Judgement, paras. 127.
209 *Kambanda* Sentencing Trial Judgement, para. 61.
210 *Regina v. Garforth* [1994] NSWCCA 13 [23 May 1994].

D.4.2.4 International appellate chambers have enhanced sentences on appeal

109. The Appeals Chambers of both the ICTY and ICTR have previously enhanced sentences due to their Trial Chambers' improper assessment of the gravity of offences or aggravating or mitigating factors. The ECCC Supreme Court Chamber should do the same in this case.

110. The majority of sentence revisions at the ICTY and the ICTR have been due to "one of the three reasons: because of changes in convictions, acquittals, or the applicable mode of participation; because of factual error related to an aggravating or mitigating circumstance; or because the Trial Chamber gave improper weight to an aggravating or mitigating factor or to the gravity of the offense."[211] As of 2008, in five sentencing appeal cases (four at the ICTY and one at the ICTR), the Appeals Chamber ruled that the Trial Chamber erred in assessing the gravity of the offence and/or the weight of aggravating or mitigating factors.[212] Of these five cases, the Appeals Chamber increased the sentence imposed by the Trial Chamber in four cases (three at the ICTY and one at the ICTR),[213] each time emphasising the accused's position of authority as an aggravating factor.[214]

111. The following is a brief assessment of the four cases:

a) *Zlatko Aleksovski*: Commander of the Kaonik prison, Aleksovski was convicted of the war crime of outrage upon personal dignity, primarily for failing to prevent abuse of detainees. At trial, Aleksovski received a sentence of two-and-a-half years. The Appeals Chamber ruled that there was a "discernible error in the Trial Chamber's exercise of discretion in imposing sentence." The Appeals Chamber found that the original two-and-a-half-year

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211 Jennifer J. Clark, *Zero to Life: Sentencing Appeals at the International Criminal Tribunals for the Former Yugoslavia and Rwanda*, 96 GEO. L.J. 1685, June 2008 ("Clark"), 1703-1704. At the ICTY and ICTR, there have been numerous sentencing appeals. Of the ninety-five convictions returned by the Trial Chambers by the end of 2007, sixty-two resulted in a final judgment after appeal and four cases involved a second round of appeal after remand to the Trial Chamber. All of these appeals have included a separate challenge to the Trial Chamber's sentence. Twenty-five appeals resulted in revised sentences (seven sentences were increased and eighteen were decreased). *See* Clark, 1703.

212 *Aleksovski* Appeals Judgment; *Gacumbitsi v. Prosecutor*, Judgement, ICTR-2001-64-A, ICTR Appeals Chamber, 7 July 2006 ("*Gacumbitsi* Appeals Judgement"); *Galić* Appeals Judgement; *Prosecutor v. Krnojelac*, Judgement, IT-97-25-A, ICTY Appeals Chamber, 17 September 2003; *Čelebići* Appeals Judgment. *See* Annex C for the Case Information Sheets.

213 *Aleksovski* Appeals Judgment; *Gacumbitsi* Appeals Judgement, para. 207; *Galić* Appeals Judgement, para. 455; *Čelebići* Appeals Judgment.

214 Clark, 1712.

sentence was "manifestly inadequate"[215] and that the Trial Chamber gave insufficient weight to the gravity of Aleksovski's conduct.[216] Although the Trial Chamber correctly found that Aleksovski occupied a command role and that his direct participation in the abuse was limited, it failed to recognize that as a commander, "his direct participation [...] provided additional encouragement to his subordinates to commit similar acts."[217] The Appeals Chamber revised the sentence upwards to seven years.[218]

b) *Zdravko Mucić*: Commander of the Čelebići prison camp, Mucić was convicted for superior responsibility for grave breaches of the Geneva Conventions including inhumane treatment, wilfully causing great suffering, torture and wilful killing. Mucić was sentenced at trial to multiple concurrent seven-year prison terms.[219] The Appeals Chamber remanded the case, holding that the Trial Chamber sentence failed to adequately take into account (a) the influential effect of a camp commander encouraging or promoting crimes and an atmosphere of lawlessness within the camp by his ongoing failure to exercise his duties of supervision, (b) the gravity of his offences, and specifically the gravity of the underlying crimes, and (c) the fact that both direct and superior responsibility was involved in the wilful causing of great suffering or serious injury to body or health by virtue of the inhumane conditions in the camp. The new Trial Chamber imposed a sentence of nine years, which the Appeals Chamber subsequently upheld.[220]

c) *Stanislav Galić*: Commander of the Sarajevo Romanija Corps, Galić received a sentence at trial of twenty years imprisonment for his role in the siege of Sarajevo. The Appeals Chamber acknowledged that the Trial Chamber did not err in its determination of the relevant facts. Nevertheless, the Appeals Chamber held that the sentence imposed by the Trial Chamber did not adequately reflect the level of gravity of the crimes committed by Galić and his

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215 *Aleksovski* Appeals Judgement, para. 187.
216 *Aleksovski* Appeals Judgement, para. 183.
217 *Aleksovski* Appeals Judgement, para. 183.
218 *Aleksovski* Appeals Judgement, para. 191.
219 *Čelebići* Appeals Judgment, paras. 727-728.
220 *See* Case Information Sheet, ICTY, "*Čelebići* Camp (IT-96-21), *Mucić et al.*"

degree of participation.[221] The Appeals Chamber revised the sentence, imposing the first final life sentence on an ICTY defendant.[222]

d) *Sylvestre Gacumbitsi*: Mayor of the Rusumo commune in Rwanda, Gacumbitsi was acquitted of the crime against humanity of murder, but was sentenced at trial to thirty years imprisonment for genocide and the crimes against humanity of extermination and rape.[223] The Appeals Chamber reversed the murder acquittal and further held that Gacumbitsi ordered additional groups of perpetrators to commit genocide, extermination and rape. The Appeals Chamber sentenced Gacumbitsi to life imprisonment.[224] The Appeals Chamber also sustained the Prosecutor's challenge to the sentence itself, ruling that the Trial Chamber failed "to give proper weight to the gravity of the crimes committed by the Appellant and to his central role in those crimes."[225] Focusing solely on the original convictions and the Trial Chamber's factual determinations related to those charges, the Appeals Chamber held: "[I]n light of the massive nature of the crimes and the Appellant's leading role in them, as well as the relative insignificance of the purported mitigating factors, the Trial Chamber ventured outside its scope of discretion by imposing a sentence of only thirty years' imprisonment."[226] Therefore, while the final determination included a new conviction, the Appeals Chamber would have revised the sentence upwards even in the absence of additional convictions.

112. The Co-Prosecutors submit that the instant case similarly warrants intervention by the Supreme Court Chamber to revise the plainly unjust sentence imposed by the Trial Chamber.

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221 *Galić* Appeals Judgment, para. 455.

222 *See* Press Release, ICTY, Stanislav Galić Sentenced to Life Imprisonment by Appeals Chamber for Crimes Committed during the Siege of Sarajevo, RH/MOW/1131e, 30 November 2006, available online at "http://www.icty.org/x/cases/galic/press/en/PR1131e%20Stanislav%20galic%20Appeal%20Judgement.pdf".

223 *Prosecutor v. Gacumbitsi*, Judgement, ICTR-2001-64-T, ICTR Trial Chamber, 17 June 2004, paras. 334, 356.

224 *Gacumbitsi* Appeals Judgment, para. 207.

225 *Gacumbitsi* Appeals Judgment, para. 206.

226 *Gacumbitsi* Appeals Judgment, para. 205.

D.4.3 Failure to Consider the Purposes of Sentencing

D.4.3.1 General

113. The Trial Chamber failed to consider that international sentencing principles provided support for giving the Respondent the maximum sentence. International tribunals have regularly relied on notions of retribution and social deterrence as justifications for sentencing. The former justifies a heightened punishment for the Respondent on the grounds that his crimes were of a most heinous nature and should, therefore, be condemned as strongly as possible. The latter justifies a heightened punishment because, given the heinous nature of the Respondent's crimes, it was incumbent on the Trial Chamber to have applied a punishment that would act as a powerful deterrent against similar crimes in the future.

D.4.3.2 Purposes of sentencing

114. One or more of the following theories of punishment have generally been cited as justification for criminal sentencing: deterrence, retribution, rehabilitation and social defence.[227]

115. According to the deterrence theory of punishment, the main goal of sentencing is to send a message strong enough to deter a person from committing a crime that he or she would otherwise have committed.[228] Indeed, the theory supposes that the idea of punishment will persuade the potential criminal not to commit a crime so as to avoid the punishment.[229] This theory focuses on punishment being for the benefit and safety of society as a whole and less on the effects on the individual being sanctioned.

116. The retribution theory evokes ideals of responsibility and fairness to justify punishment.[230] It expresses the notion that a crime should be punished with a sentence proportional to the wrongfulness of the criminal act.[231] A court that wishes to follow such a theory would consider the wrongfulness of a crime and impose a penalty that

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227 Andrew Dubinsky, *An Examination of International Sentencing Guidelines and a Proposal for Amendments to the International Criminal Court's Sentencing Structure,* 33 N.E. J. ON CRIM & CIV. CON. 609, Summer 2007 ("Dubinsky"), 618.

228 Dubinsky, 618.

229 Dubinsky, 618.

230 Dubinsky, 618.

231 Dubinsky, 618.

reflects the gravity of the offence. Consequently, the harm caused by the criminal act would be directly considered when determining the sentencing.[232]

117. The rehabilitation theory focuses on the needs of the individual who committed a crime, and seeks to rehabilitate the criminal so that he or she is able to rejoin society. When sentencing with the intention of rehabilitation, a court must consider the individual's personal situation, and what punishment is necessary to prevent the individual from committing more crimes in the future.[233]

118. The social defence theory presupposes that crimes will occur unless actively prevented by society. When a convicted person is being sentenced, the court considers how sentencing should reflect the need to protect society from that criminal.[234]

119. In their rulings, international tribunals have most often cited deterrence and retribution as reasons for sentencing, with rehabilitation sometimes added as a third consideration, but one that is given less weight than the others.[235] Deterrence was one of the principles referenced by the Security Council justifying the establishment of both the ICTY and ICTR.[236] Furthermore, the Trial and Appeals Chambers of the ICTY and ICTR frequently cite deterrence as one of the key factors when determining sentencing.[237] Indeed, the Trial Chamber of the ICTY observed in *Todorović* that sentencing must have "sufficient deterrent value to ensure that those who would consider committing similar crimes will be dissuaded from doing so."[238]

120. Along with deterrence, retribution is the other doctrine most often cited by international tribunals as a principal consideration for sentencing. As the ICTY noted in *Erdemović*, an essential function of sentencing for a crime against humanity is to reflect the international community's indignation over heinous crimes and denunciation of the perpetrators.[239] At the ICTR, the Trial Chamber in *Kambanda* observed that the "aim for the establishment of the Tribunal was to prosecute and

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232 Dubinsky, 618.
233 Dubinsky, 619.
234 Dubinsky, 618-619.
235 Alison Marston Danner, *Constructing a Hierarchy of Crimes in International Criminal Law Sentencing*, 87 VA. L. REV. 415, May 2001 ("Danner"), 444-445, fn 110; *see also Momir Nikolić*, Sentencing Trial Judgement, para. 85 ("The Trial Chamber finds that the purposes of punishment recognized under the jurisprudence of the Tribunal are retribution, deterrence and rehabilitation").
236 Danner, 445-446, fn 113.
237 Danner, 446-447, fn 117.
238 *Prosecutor v. Todorović*, Sentencing Judgment, IT-95-9/1-S, ICTY Trial Chamber, 31 July 2001, para. 30.
239 *Prosecutor v. Erdemović*, Sentencing Judgement, IT-96-22-T, ICTY Trial Chamber, 29 November 1996, para. 65.

punish the perpetrators of the atrocities in Rwanda in such a way as to put an end to impunity and thereby to promote national reconciliation and the restoration of peace."[240]

D.4.3.3 Conclusion

121. The sentence imposed by the Trial Chamber does not adequately reflect the fundamental goals of international criminal sentencing, in particular the goals of deterrence and retribution. The Respondent was convicted of some of the most heinous crimes imaginable, including murder and torture committed with discriminatory intent, carried out over an extended period of time. Anything less than life imprisonment would not sufficiently reflect the domestic and international outrage expressed in respect of his crimes and would not sufficiently deter the commission of future crimes of this nature.

D.4.4 The Respondent is not entitled to parole

122. This Court does not allow for parole to a convicted accused. As such, after final judgement from the Supreme Court Chamber, none should be available to the Respondent while he serves his sentence in a Cambodian prison.

123. In the Judgement, the Trial Chamber held that the ECCC is a "*sui generis* sentencing regime".[241] This entails the ECCC retaining full discretion over all aspects of sentencing, including parole. Relying on this independent sentencing regime, the Trial Chamber imposed a sentence on the Respondent greater than the thirty-year maximum period provided in the Cambodian Penal Code, holding that it had the "discretion to impose a term of imprisonment other than a life sentence."[242] By exceeding the maximum number of years for a fixed sentence, as permitted by Cambodian domestic law, the Trial Chamber confirmed this Court's *sui generis* sentencing regime and simultaneously emphasised its ability to make its own sentencing determination without deferring to Cambodian domestic practice.

124. While parole is expressly permitted in other international tribunals, no ECCC governing document refers to the parole of an accused. International tribunals that allow parole include specific parole provisions (commonly referred to as commutation of sentence) in their statutes and rules of procedure and evidence. Such determination

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240 *Kambanda* Sentencing Trial Judgement, para. 26.
241 Judgement, para. 574.
242 Judgement, para. 595.

is done by the tribunals themselves and not by any other external national or international authority. At the ICTY, ICTR and SCSL, for example, a convicted accused can apply to the president of the respective tribunals for early release; the president consults with the sentencing judges to evaluate the application in consideration of "the interest of justice and the general principles of law".[243] The president considers the gravity of the crimes, comparable treatment of other inmates, rehabilitation, and cooperation with the prosecutor while incarcerated.[244] Similarly, at the ICC, a three-judge panel reviews numerous factors in determining eligibility for parole, including the impact of early release on victims and their families, continuing cooperation with the prosecutor and the inmate's genuine disassociation with the crimes while incarcerated.[245]

125. The fact that the founding documents of this *sui generis* special internationalised tribunal do not contain parole provisions indicates that the drafters did not envision that parole would be available for the convicted accused of this Court. In so submitting, the Co-Prosecutors are cognisant of the very focused mandate of this Court to try a select number of senior leaders of Democratic Kampuchea and those most responsible for the appalling crimes of that regime.

126. Alternatively, the Co-Prosecutors submit that any benefit of parole under the Cambodian Code of Criminal Procedure ("CCP") is similarly not available to this Respondent as he has been convicted solely for international crimes. As such, only the international sentencing regime should apply. There are no crimes of comparable gravity in the 1956 Cambodian Penal Code for which the Respondent has been convicted.[246] In addition, although Book Two of the 2009 Cambodian Penal Code references genocide, crimes against humanity and war crimes, this Book has not been promulgated and has no governing effect.[247] In addition, the Trial Chamber expressed doubt that this Court could follow national legislative amendments because "[s]uch an

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243 ICTY Statute, article 28; ICTR Statute, article 27; SCSL Statute, article 23; SCSL RPE, articles 123-24.

244 ICTY RPE, rules 123-25; ICTR RPE, rules 124-26.

245 Rome Statute, article 110; ICC RPE, rules 223-24.

246 Law on the Establishment of the Extraordinary Chambers, with amendments, 27 October 2004 (NS/RKM/1004/006) ("ECCC Law"), chapter II, article 3.

247 Judgement, para. 574

interpretation could mean that future acts of the national legislature concerning sentence might frustrate the [ECCC] Agreement."[248]

127. In any case, the law of this Court has not changed, and the principle of *lex mitior* requires application of a less severe penalty only when the law specific to a court is changed.[249] Domestic law amendments are not imported to this Court[250] because "the focus of the ECCC differs substantially enough from the normal operation of Cambodian criminal courts to warrant a specialized system."[251] Therefore, the Respondent cannot benefit from an inapplicable domestic law not adopted by this Court.

128. Domestic legal provisions concerning parole also do not readily apply here given the unique nature of convictions for international crimes. International and hybrid tribunals have developed far more detailed criteria to guide their discretion to award commutation or early release than those set out in the CCP.[252] By way of comparison, Article 512 of the CCP limits parole considerations to a prisoner's good behaviour and prospect of reintegration; it is a statutory provision not designed for international crimes.[253] It would be, therefore, inappropriate to apply Cambodian sentencing guidelines to international crimes that do not exist within the Cambodian domestic legal framework.

129. Furthermore, allowing parole under the CCP removes the Respondent from the jurisdiction of this Court which is inconsistent with the principles of international tribunals. According to international standards, the tribunal imposing the initial punishment retains the decision-making power on the issue of sentence reduction.[254] Article 514 of the CCP, adopted after the establishment of the ECCC, expressly does not include the ECCC. Thus, any decision-making process in respect of parole must

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248 Judgement, para. 574.

249 International Covenant on Civil and Political Rights ("ICCPR"), article 15.

250 The Trial Chamber noted that the ECCC Law "creates *a sui generis* sentencing regime." Judgement, para. 574.

251 Nuon Chea Appeal Against Annulment Refusal, para. 14

252 ICTY Statute, article 28; ICTR Statute, article 27; SCSL Statute, article 23; Rome Statute, article 110; ICTY RPE, rules 123-25; ICTR RPE, rules 124-26; SCSL RPE, article 123-24; ICC RPE, rules 223-24.

253 Cambodian Code of Criminal Procedure 2007, article 512: "Any convicted person who is serving one or more imprisonment sentences may be paroled, provided that he has shown good behaviour during imprisonment and appears to be able to reintegrate into society."

254 ICTY Statute, article 28; ICTR Statute, article 27; SCSL Statute, article 23; ICC Statute, article 110; ICTY RPE, articles 123-25; ICTR RPE, articles 124-26; SCSL RPE, articles 123-24; ICC RPE, articles 233-34.

remain within the ECCC.[255] Permitting the commutation of the Respondent's sentence by a court lacking jurisdiction over international crimes is inapposite and undermines the very purpose for which this Court was established. The Co-Prosecutors, however, note that the question of early release may be considered by either this Court, if it is still in operation at the time of that consideration, or any residual judicial mechanism that is put in place after the ECCC dissolves.

D.4.5 Conclusion

130. The Trial Chamber failed to consider that the sentence imposed on the Respondent must reflect the horror and outrage with which all human beings view these crimes, which in every sense were crimes against all humanity. The Co-Prosecutors submit, as they submitted at trial, that a sentence of imprisonment for life would have been the only appropriate penalty for the Respondent's role in these crimes.[256] The Trial Chamber erred in not imposing this sentence.

131. Only after finding a sentence of life imprisonment should the Trial Chamber have reduced it to an express and measurable term of forty-five years to provide an appropriate remedy for the Respondent's unlawful detention. Since the Respondent requested acquittal, the Co-Prosecutors submit that no mitigating factors should be considered. If the Supreme Court Chamber were to consider very limited mitigating circumstances, an absolute maximum reduction of up to five years could have been granted. The sentence to be imposed by the Trial Chamber should, therefore, have been forty years imprisonment, without the possibility of parole.[257]

E. GROUND TWO: THE RESPONDENT SHOULD HAVE BEEN CONVICTED FOR ALL THE CRIMES FOR WHICH HE WAS FOUND RESPONSIBLE

E1. OVERVIEW

132. The Trial Chamber committed an error of law invalidating the Judgement by failing to convict the Respondent cumulatively for the crimes against humanity of enslavement, imprisonment, torture, rape, extermination, murder and other inhumane acts, and by subsuming those crimes under the crime against humanity of persecution on political grounds.

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255 Cambodian Code of Criminal Procedure 2007, article 514: "The President of the Court of First Instance at the place of detention has the authority to grant parole to a convicted person. He shall make this decision after having received the opinion from a national commission which meets at the Ministry of Justice."

256 Final Trial Submission, para. 485.

257 Final Trial Submission, para. 486.

133. The Trial Chamber committed a further error of law by characterising the crime against humanity of rape as torture and by failing to convict the Respondent for the distinct crimes against humanity of rape and torture.

E2. THE TRIAL CHAMBER INCORRECTLY SUBSUMED OTHER CRIMES UNDER THE CRIME AGAINST HUMANITY OF PERSECUTION

E.2.1 Introduction

134. The Co-Prosecutors submit that: (1) each crime against humanity with which the Respondent was charged has a materially distinct element not found in the others, (2) the Trial Chamber's failure to convict the Respondent of all the crimes against humanity with which he was charged undermines the twin aims of the cumulative convictions test, (3) the rationale for not allowing cumulative convictions does not apply in this case, and (4) the Trial Chamber failed to fully consider the societal interests protected by each enumerated crime and the need for a complete and historical record of the Respondent's criminal conduct in these events.

E.2.2 Each charged crime has a materially distinct element

135. The ICTY Appeals Chamber in *Čelebići* formulated the current test for determining the permissibility of multiple convictions for the same act or omission, stating that "multiple criminal convictions entered under different statutory provisions but based on the same conduct are permissible only if each statutory provision involved has a materially distinct element not contained in the other. An element is materially distinct from another if it requires proof of a fact not required by the other".[258]

136. In *Popović*, the ICTY Trial Chamber recently held that cumulative convictions for the crimes against humanity of persecution, extermination, and other inhumane acts are permissible.[259] In reaching their conclusion, the *Popović* Trial Chamber applied the "*Čelebići* test" and found that each of the three crimes against humanity contains a materially distinct element not found in the others.[260]

137. Similarly, in the current case, the crimes against humanity which were subsumed—murder, extermination, enslavement, imprisonment, torture, rape, and other inhumane

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258 *Čelebići* Appeals Judgement, para. 412.

259 *Prosecutor v. Popović*, Judgement, IT-05-88-T, ICTY Trial Chamber, 10 June 2010 ("*Popović* Trial Judgement"), para. 2113.

260 *Popović* Trial Judgement, paras. 2111-2113.

acts—all contain a materially distinct element not found in the crime against humanity of persecution on political grounds.

E.2.2.1 Crimes of murder and persecution on political grounds

138. The crime against humanity of murder consists of three elements: (i) the death of the victim resulting from an unlawful act or omission by the perpetrator;[261] (ii) substantial contribution of the conduct of the perpetrator to the death of the victim;[262] and (iii) the intent either to kill or cause serious bodily harm in the reasonable knowledge that the act or omission would likely lead to death.[263]

139. In contrast, the crime against humanity of persecution on political grounds consists of two elements: (i) a discriminatory act or omission committed on a large-scale, involving massive criminality,[264] and (ii) a specific intent to discriminate on political grounds.[265]

140. The crime against humanity of persecution on political grounds does not require proof that the discriminatory act and the intent of the perpetrator resulted in the death of a victim. Moreover, the requisite degree of causation and homicidal intent for the crime of murder need not be proven to establish that the crime against humanity of persecution on political grounds occurred.

141. The crime against humanity of murder requires neither a large scale discriminatory act or omission nor a specific intent to discriminate on political, racial, or religious grounds.

142. Therefore, as the crimes against humanity of murder and persecution on political grounds each contain materially distinct elements, not found in the other, the Trial Chamber erred in failing to separately convict the Respondent for the crime against humanity of murder.

E.2.2.2 Crimes of extermination and persecution on political grounds

143. The crime against humanity of extermination consists of two elements: (i) an act, omission or combination of each that results in the death of persons on a massive

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261 Judgement, para. 331.
262 Judgement, para. 331.
263 Judgement, para. 333.
264 Judgement, para. 374.
265 Judgement, para. 379.

scale,[266] and (ii) the intent to kill persons on a massive scale, or to inflict serious bodily injury or to create conditions of life that lead to death in the reasonable knowledge that such act or omission is likely to cause the death of a large number of persons.[267]

144. The crime against humanity of persecution on political grounds does not require that the perpetrator's act resulted in the death of persons on a massive scale. Furthermore, the intent to kill persons on a massive scale need not be proven to convict an accused of perpetrating the crime against humanity of persecution on political grounds.

145. The crime against humanity of extermination requires neither a large scale discriminatory act or omission nor a specific intent to discriminate on political, racial, or religious grounds.

146. Therefore, as the crimes against humanity of extermination and persecution on political grounds each contain materially distinct elements not found in the other, the Trial Chamber erred in failing to separately convict the Respondent for the crime against humanity of extermination.

E.2.2.3 Crimes of enslavement and persecution on political grounds

147. The crime against humanity of enslavement consists of two elements: (i) the exercise of any or all powers attaching to the right of ownership over a person,[268] and (ii) the intent to exercise any or all of the powers attaching to the right of ownership.[269]

148. The crime against humanity of persecution on political grounds does not require that the perpetrator intentionally exercised any or all of the powers attaching to the right of ownership over a person.

149. The crime against humanity of enslavement requires neither a large scale discriminatory act or omission nor a specific intent to discriminate on political, racial, or religious grounds.

150. Therefore, as the crimes against humanity of enslavement and persecution on political grounds each contain materially distinct elements, not found in the other, the Trial Chamber erred in failing to separately convict the Respondent for the crime against humanity of enslavement.

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266 Judgement, para. 334.
267 Judgement, para. 338.
268 Judgement, para. 342.
269 Judgement, para. 345.

E.2.2.4 Crimes of imprisonment and persecution on political grounds

151. The crime against humanity of imprisonment consists of two elements: (i) the arbitrary deprivation of an individual's liberty without the due process of law,[270] and (ii) the intent by the perpetrator to arbitrarily deprive an individual of liberty, or an act by the perpetrator with the reasonable knowledge that his or her actions were likely to cause the arbitrary deprivation of physical liberty.[271]

152. The crime against humanity of persecution on political grounds does not require that the perpetrator intentionally deprived an individual of his or her liberty arbitrarily without the due process of law.

153. The crime against humanity of imprisonment requires neither a large scale discriminatory act or omission nor a specific intent to discriminate on political, racial, or religious grounds.

154. Therefore, as the crimes against humanity of imprisonment and persecution on political grounds each contain materially distinct elements not found in the other, the Trial Chamber erred in failing to separately convict the Respondent for the crime against humanity of imprisonment.

E.2.2.5 Crimes of torture and persecution on political grounds

155. The crime against humanity of torture, in 1975, consisted of four elements: (i) the infliction, by an act or omission, of severe pain or suffering, whether physical or mental;[272] (ii) the aim of inflicting severe pain or suffering in order to attain a certain result or purpose;[273] (iii) the involvement of a State official in the infliction;[274] and, (iv) the intent to inflict pain and suffering amounting to torture.[275]

156. The crime against humanity of persecution on political grounds does not require that a State official was involved in the intentional infliction of severe pain or suffering in order to attain a certain result or purpose.

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270 Judgement, para. 347.
271 Judgement, para. 350.
272 Judgement, para. 354.
273 Judgement, para. 356.
274 Judgement, para. 357.
275 Judgement, para. 358.

157. The crime against humanity of torture requires neither a large scale discriminatory act or omission nor a specific intent to discriminate on political, racial, or religious grounds.

158. Therefore, as the crimes against humanity of torture and persecution on political grounds each contain materially distinct elements, not found in the other, the Trial Chamber erred in failing to separately convict the Respondent for the crime against humanity of torture.

E.2.2.6 Crimes of rape and persecution on political grounds

159. The crime against humanity of rape consists of three elements: (i) sexual penetration;[276] (ii) lack of consent of the victim;[277] and (iii) the intent to effect the penetration with the knowledge that it occurs without the consent of the victim.[278]

160. The crime against humanity of persecution on political grounds does not require intentional sexual penetration by the perpetrator with the knowledge that it occurs without the consent of the victim.

161. The crime against humanity of rape requires neither a large scale discriminatory act or omission nor a specific intent to discriminate on political, racial, or religious grounds.

162. Therefore, as the crimes against humanity of rape and persecution on political grounds each contain materially distinct elements, not found in the other, the Trial Chamber erred in failing to separately convict the Respondent for the crime against humanity of rape.

E.2.2.7 Crimes of other inhumane acts and persecution on political grounds

163. The crime against humanity of other inhumane acts consists of three elements: (i) an act or omission of the perpetrator that caused the victim to suffer serious harm to body or mind;[279] (ii) sufficient similarity between the gravity of the act or omission to the other enumerated crimes;[280] and (iii) the intention by the perpetrator, at the time of the act or omission, to inflict serious physical or mental suffering or to commit a serious attack upon the dignity of the victim; knowledge by the perpetrator that the act or

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276 Judgement, para. 362.
277 Judgement, para. 362.
278 Judgement, para. 365.
279 Judgement, para. 368.
280 Judgement, para. 367.

omission was likely to cause serious physical or mental suffering or a serious attack upon the person's dignity suffices.[281]

164. The crime against humanity of persecution on political grounds does not require an act or omission with similar gravity to the other enumerated crimes that causes serious harm to the victim's body or mind committed by the perpetrator with the intention to inflict serious physical or mental suffering.

165. The crime against humanity of other inhumane acts requires neither a large scale discriminatory act or omission nor a specific intent to discriminate on political, racial, or religious grounds.

166. Therefore, as the crimes against humanity of other inhumane acts and persecution on political grounds each contain materially distinct elements, not found in the other, the Trial Chamber erred in failing to separately convict the Respondent for the crime against humanity of other inhumane acts.

E.2.3 The Trial Chamber failed to meet the aims of cumulative convictions

167. The ICTY Appeals Chamber in *Kordić* articulated the twin aims of the *Čelebići* cumulative convictions test as (i) ensuring that the accused is convicted only for distinct offences, and (ii) ensuring that the convictions entered fully reflect his criminality.[282] The *Kordić* Appeals Chamber, adhering to the jurisprudence of the ICTY and ICTR Appeals Chambers in *Jelisić*, *Kupreškić*, *Kunarac*, and *Musema*,[283] reiterated that "[w]hen applying the *Čelebići* test, what must be considered are the legal elements of each offence, not the acts or omissions giving rise to the offence."[284]

168. The twin aims of the test on cumulative convictions, laid down in *Čelebići,* will only be satisfied in this case if the Supreme Court Chamber finds that the Trial Chamber erred in failing to convict the Respondent of each crime against humanity with which he was charged.

169. As detailed above, each crime against humanity which the Respondent was charged with is a distinct offence. By failing to convict the Respondent of each offence, the Trial Chamber has undermined the legitimacy and effectiveness of the cumulative convictions test. At the same time, by subsuming seven distinct crimes against

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281 Judgement, para. 371.
282 *Kordić* and *Čerkez* Appeals Judgement, para. 1033.
283 *Kordić* and *Čerkez* Appeals Judgement, para. 1040.
284 *Kordić* and *Čerkez* Appeals Judgement, para. 1033.

humanity under the singular crime against humanity of persecution on political grounds, the Trial Chamber has undercut the second pillar of the cumulative convictions test—that is, ensuring that the convictions entered fully reflect the accused's criminality. A single conviction for discriminatory acts or omissions, in a situation involving a number of forms of mass criminality does not capture the full extent of the Respondent's involvement in the horrific crimes of S-21.

E.2.4 Rationale for not allowing cumulative convictions does not apply here

170. Judges Hunt and Bennouna explained in their dissenting opinion in the *Čelebići* Appeals Judgement that the rationale for not allowing cumulative convictions is that "[p]rejudice to the rights of the accused—or the very real risk of such prejudice—lies in allowing cumulative convictions."[285] The perceived risk of prejudice to the accused is not justified in this case because the two concerns underpinning the rationale for not allowing cumulative convictions are not applicable here.

E.2.4.1 The eligibility of an early release is not a valid concern

171. One concern underpinning the rationale for not allowing cumulative convictions is that "under the law of the State enforcing the sentence, the eligibility of a convicted person for early release will depend not only on the sentence passed but also on the number and/or nature of convictions."[286]

172. This concern is not applicable in the present case. The Co-Prosecutors maintain that the Respondent is not eligible for early release. As stated above, it is solely this Court which is the appropriate authority to enforce the Respondent's sentence. Therefore, as this Court will be the one to enforce the Respondent's sentence, and the Respondent is not eligible for early release under the authority of this Court, this concern should not be a factor in determining whether to permit cumulative convictions.

E.2.4.2 Application of 'habitual offender' laws is not a valid concern

173. A second concern supporting the rationale for not allowing cumulative convictions is that "cumulative convictions may also expose the convicted person to the risk of increased sentences and/or to the application of 'habitual offender' laws in case of subsequent convictions in another jurisdiction."[287]

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285 *Čelebići* Appeals Judgement, Separate and Dissenting Opinion of Judges Hunt and Bennouna, para. 23.
286 *Čelebići* Appeals Judgement, Separate and Dissenting Opinion of Judges Hunt and Bennouna, para. 23.
287 *Čelebići* Appeals Judgement, Separate and Dissenting Opinion of Judges Hunt and Bennouna, para. 23.

174. This concern is also not applicable in the present case. The Respondent, born on 17 November 1942, will be at least eighty-seven years of age when he is released from prison under the current sentence. The likelihood that the Respondent will leave Cambodia for another jurisdiction, much less be convicted in another jurisdiction, is effectively non-existent.

E.2.5 The Trial Chamber failed to consider the societal interests in cumulative convictions

E.2.5.1 Overview

175. In *Akayesu*, the Trial Chamber concluded that it is acceptable to convict the accused of two offences in relation to the same set of facts in the following circumstances: (1) where the offences have different elements, (2) where the provisions creating the offences protect different interests, or (3) where it is necessary to record a conviction for both offences in order fully to describe what the accused did.[288]

176. Although international tribunals have since adopted the "*Čelebići* test", the factors laid out in *Akayesu* are still pertinent to a thorough inquiry into the propriety of cumulative convictions.

E.2.5.2 The Judgement should paint a complete picture of the Respondent's criminality

177. The Joint Dissenting Opinion of Judges Schomburg and Güney in *Kordić*, which the Trial Chamber relies on to support its sentencing decision, [289] notably acknowledges that "multiple convictions serve to describe the full culpability of a particular accused or provide a complete picture of his criminal conduct".[290]

178. The ICTY Trial Chamber in *Kordić* has noted that the international crime of persecution has never been comprehensively defined.[291]

179. Therefore, subsuming seven distinct crimes against humanity under the single crime against humanity of persecution is impermissibly vague and fails to provide a complete picture of the Respondent's criminality.

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288 *Akayesu* Trial Judgement, para. 468.

289 Judgement, paras. 560, 565.

290 *Kordić* and *Čerkez* Appeals Judgement, Joint Dissenting Opinion of Judge Schomburg and Judge Güney on Cumulative Convictions, para. 2 (citing *Prosecutor v. Kunarac*, Judgement, IT-96-23 & IT-96-23/1-A, ICTY Appeals Chamber, 12 June 2002 ("*Kunarac* Appeals Judgement"), para. 169).

291 *Prosecutor v. Kordić*, Judgement, IT-95-14/2-T, ICTY Trial Chamber, 26 February 2001 ("*Kordić* Trial Judgement"), para. 192.

E.2.5.3 Each charged crime protects a fundamental value

180. Identifying the underlying conduct upon which the conviction for persecution has been based is insufficient. It is the recognition of the breach and the protection of each infringed fundamental value, expressed as cumulative convictions, which most adequately recognises the wrong.

181. Judge Shahabuddeen's Partial Dissenting Opinion in *Jelisić* provides strong support in favour of cumulative convictions in the present case. He states,

> [O]nce something is accepted to be an element of the crime [...] that element has to be dutifully taken into account by the courts in making any comparison of elements for the purpose of determining whether cumulative convictions are possible [...]. [I]t is only by proceeding in this way that a criminal justice system can take account of all of the public interests which are intended to be protected. Even though the actual conduct may be the same, it could injure different public interests; the existence of these differences in public interests may well be signalled by the presence of the unique elements.[292]

182. In the present case, each of the seven crimes against humanity which were subsumed protects a distinct fundamental value that has been eroded by the Trial Chamber's failure to convict the Respondent for each of the crimes with which he was charged.

183. The prohibition against murder protects the right to life. As stated in Article 6 of the International Covenant on Civil and Political Rights ("ICCPR"), "[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life".[293]

184. The prohibition against extermination protects the right to life as well as the right to be free from artificially created conditions of life likely to cause death.[294] The prohibition against murder does not protect this additional societal interest.[295]

185. The prohibition against enslavement protects the right to be free from slavery, servitude, or forced labour. Article 8 of the ICCPR proclaims: "No one shall be held in slavery; No one shall be held in servitude; No one shall be required to perform forced or compulsory labour".[296]

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292 *Jelisić* Appeals Judgement, Partial Dissenting Opinion of Judge Shahabuddeen, paras. 41-42.
293 ICCPR, article 6.
294 Judgement, para. 338.
295 Judgement, paras. 331-333.
296 ICCPR, article 8.

186. The prohibition against imprisonment protects the right to be free from arbitrary deprivation of liberty without the due process of law. This fundamental value is encapsulated in Article 9 of the ICCPR, which states: "Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds, and in accordance with such procedure, as are established by law".[297]

187. The prohibition against torture protects the right to be free of intentional infliction of severe pain or suffering. This fundamental value is prescribed in Article 5 of the Universal Declaration of Human Rights and Article 7 of the ICCPR, which both state: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment".[298]

188. The prohibition against rape protects the right to decide matters relating to one's sexuality. The prohibition against rape also protects one's personal dignity.[299] When directed against a woman, as it was in the present case, the crime of rape violates the Convention on the Elimination of all Forms of Discrimination Against Women which protects women against gender-based violence.[300]

189. The prohibition against other inhumane acts protects the right to physical and mental integrity, health, and human dignity.[301] Its enumeration in the Charter of the Nuremberg Tribunal,[302] the statutes of the ICTY,[303] and the ICTR,[304] as well as in Article 5 of the ECCC Law[305] reflects the international community's interest in protecting these fundamental rights.

190. As Judge Shahabuddeen noted in his *Jelisić* dissenting opinion: "The full protection of these distinct societal interests requires cumulative convictions. To convict of one offence only is to leave unnoticed the injury to the other interest of international

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297 ICCPR, article 9.
298 Universal Declaration of Human Rights, article 5; ICCPR, article 7.
299 *Prosecutor v. Akayesu*, Judgement, ICTR-96-4-T, Trial Chamber, 2 September 1998 ("*Akayesu* Trial Judgement"), para. 597.
300 *See* General Recommendations made by the Committee on the Elimination of Discrimination Against Women, General Recommendation No. 19, 11th Session, 1992, Specific Recommendation 24, available online at "http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm".
301 Yearbook of the International Law Commission, volume II, part 2 (Report to the Commission to the General Assembly on the Work of its Forty-Eighth Session), article 18, para. 17.
302 Nuremberg Trial Proceedings, Charter of the International Military Tribunal ("Nuremberg Charter"), 8 August 1945, article 6(c).
303 ICTY Statute, article 5.
304 ICTY Statute, article 3.
305 ECCC Law, article 5.

society and to fail to describe the true extent of the criminal conduct of the accused."[306]

E.2.6 Conclusion

191. The Co-Prosecutors submit that the Trial Chamber erred in failing to convict the Respondent of each crime against humanity for which he was found responsible. Accordingly, the Co-Prosecutors request that the Supreme Court Chamber set aside the Judgement in respect of the cumulative convictions for the following reasons: (1) each crime against humanity for which the Respondent was found responsible has a materially distinct element not found in the others, (2) the Trial Chamber's failure to convict the Respondent of all of the crimes against humanity for which he was found responsible undermines the twin aims of the cumulative convictions test, (3) the rationale, expressed in the dissenting opinion of Judges Hunt and Bennouna in the *Čelebići* Appeals Judgement for not allowing cumulative convictions does not apply in this case, and (4) the Trial Chamber failed to fully consider the societal interests protected by each enumerated crime and whether a more complete description of the Respondent's criminal conduct was needed for the sake of posterity and this Court's historical record.

E3. THE TRIAL CHAMBER INCORRECTLY CHARACTERISED RAPE AS A CRIME AGAINST HUMANITY OF TORTURE

E.3.1 Introduction

192. The Trial Chamber found the Respondent guilty of torture as a crime against humanity subsuming the crime against humanity of rape.[307] It erred in law in characterising the crime against humanity of rape as torture and by failing to convict the Respondent of rape as a distinct crime against humanity.

E.3.2 Rape as Torture

193. Under international jurisprudence, rape can constitute a form of torture: "Like torture, rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person. Like torture, rape is a violation of personal dignity, and rape in fact constitutes torture when inflicted by or

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306 *Jelisić* Appeals Judgement, Partial Dissenting Opinion of Judge Shahabuddeen, para. 42.
307 Judgement, paras. 246, 366, 677.

at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."[308]

194. In *Delalić*, the ICTY considered that "whenever rape and other forms of sexual violence meet the aforementioned criteria, then they shall constitute torture, in the same manner as any other acts that meet this criteria."[309] In *Furundžija,* the ICTY held that "[torture] can take on various forms" and that "[i]nternational case law [...] and the reports of the United Nations Special Rapporteur evince a momentum towards addressing, through legal process, the use of rape in the course of detention and interrogation as a means of torture and, therefore, as a violation of international law."[310] The Tribunal found that rape can amount to torture and has been found by international judicial bodies to constitute a violation of the norm prohibiting torture.[311] However, examining the relationship between rape and torture the *Furundžija* Trial Chamber concluded: "Depending upon the circumstances, under international criminal law rape may acquire the status of a crime distinct from torture".[312]

195. In *Kvočka*, the ICTY Trial Chamber found: "The jurisprudence of the Tribunals, consistent with the jurisprudence of human rights bodies, has held that rape may constitute severe pain and suffering amounting to torture, provided that the other elements of torture, such as a prohibited purpose, are met."[313] Similarly, in *Kunarac*, the ICTY Appeals Chamber held: "The physical pain, fear, anguish, uncertainty and humiliation to which the Appellants repeatedly subjected their victims elevate their acts to those of torture."[314]

E.3.3 Rape as a Discrete Crime Against Humanity

196. Despite the jurisprudence that the act of rape may amount to the crime of torture, international tribunals have consistently characterized rape as a crime against humanity distinct from torture even if the same criminal act amounts both to rape and torture. The Trial Chamber acknowledged that rape constitutes a separate and

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308 *Akayesu* Trial Judgement, paras. 597, 687.
309 *Prosecutor v. Delalić*, Judgement, IT-96-21-T, Trial Chamber, 16 November 1998 ("*Čelebići* Trial Judgement"), para. 496.
310 *Prosecutor v. Furundžija*, Judgement, IT-95-17/1-T, ICTY Trial Chamber, 10 December 1998 ("*Furundžija* Trial Judgement"), para. 163.
311 *Furundžija* Trial Judgement, para. 163.
312 *Furundžija* Trial Judgement, para. 164.
313 *Prosecutor v. Kvočka*, Judgement, IT-98-30/1-T, ICTY Trial Chamber, 2 November 2001, para. 145.
314 *Kunarac* Appeals Judgement, para. 185.

recognized offence within both ECCC law and international criminal law,[315] and that "[r]ape has long been prohibited in customary international law and has been described as 'one of the worst suffering a human being can inflict upon another.'"[316]

197. In *Akayesu*, the ICTR convicted the accused of the discrete crime against humanity of rape for multiple acts of rape as well as the crimes against humanity of torture and other inhumane acts for other conduct.[317] Subsequent cases have followed this approach. In *Kunarac*, the ICTY Trial Chamber convicted two of the three accused of both torture and rape as crimes against humanity in respect of the same conduct (that is, acts of rape).[318] Further, the ICTY Appeals Chamber in the same case held that its considerations on rape and torture as grave breaches of the Geneva Conventions also applied to the crimes of rape and torture as crimes against humanity.[319] Similarly, in *Furundžija*, the ICTY convicted the accused of both torture and outrages upon personal dignity including rape as grave breaches of the Geneva Conventions in respect of the same conduct (that is, multiple acts of rape).[320] In *Semanza*, the ICTR Trial Chamber convicted the accused for both instigating rape as a crime against humanity and instigating torture as a crime against humanity in respect of the same conduct.[321] These cases demonstrate that the practice of the international tribunals has not been to subsume the crime of rape within the crime of torture, but rather has been to convict the accused of the discrete crime of rape for conduct that constitutes rape as an international crime, thus reflecting in full the gravity of the conduct.

198. In *Akayesu*, the ICTR characterised an act very similar to the act committed at S-21 as a crime against humanity of rape: "An act such as that described by Witness KK in her testimony—the Interahamwes thrusting a piece of wood into the sexual organs of

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315 Judgement, para. 366.

316 Judgement, para. 361 (citing *Prosecutor v. Kunarac*, Judgement, IT-96-23-T & IT-96-23/1-T, ICTY Trial Chamber, 22 February 2001 ("*Kunarac* Trial Judgement"), para. 655); *Prosecutor v. Sesay*, Judgement, SCSL-04-15-T, SCSL Trial Chamber, 2 March 2009 ("*Sesay* Trial Judgement"), para. 144; Control Council, Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity ("Control Council, Law No. 10"), 1945, article II(1)(c); General Orders 100: The Lieber Code, Instructions for the Government of Armies of the United States in the Field, 24 April 1863, article 44; Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, 12 August 1949, article 27.

317 *Akayesu* Trial Judgement, para. 696.

318 *Kunarac* Trial Judgement, paras. 686-687, 715, 822.

319 *Kunarac* Appeals Judgement, para. 189.

320 *Furundžija* Trial Judgement, paras. 269, 275.

321 *Prosecutor v. Semanza*, Judgement and Sentence, ICTR-97-20-T, ICTR Trial Chamber, 15 May 2003, paras. 475-488, 588.

a woman as she lay dying—constitutes rape in the Tribunal's view."[322] The Respondent testified that an S-21 staff member inserted a stick into the vagina of a detainee during an interrogation.[323] The Trial Chamber found that the evidence supporting the charge of rape was credible[324] and considered "this instance of rape to have comprised [...] an egregious component of the prolonged and brutal torture inflicted upon the victim".[325] Therefore, there can be no doubt that according to settled international jurisprudence, the act in question at S-21 should be characterised as the discrete crime against humanity of rape.

199. The Trial Chamber acknowledged that "[m]ost cases of rape as a crime against humanity will be committed in coercive circumstances in which true consent will not be possible".[326] Consistent with this pattern, in the present case the rape occurred while the victim detainee was being interrogated at S-21. The Trial Chamber was "satisfied that this allegation of rape has been proved to the required standard"[327] and that the acts alleged "clearly satisfy the legal ingredients of both rape and also of torture."[328] Given the brutality and coercive nature of the act, the Trial Chamber erred in not ruling in accordance with its own findings and in not convicting the Respondent of rape as a distinct crime against humanity.

E.3.4 CONCLUSION

200. The Co-Prosecutors submit that the Trial Chamber erred in law by subsuming the crime against humanity of rape under the crime against humanity of torture and characterising it as such. The Co-Prosecutors request that the Supreme Court Chamber allow this ground of appeal and convict the Respondent of the discrete crime against humanity of rape.

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322 *Akayesu* Trial Judgement, para. 686.
323 Defence Position on the Facts Contained in the Closing Order, Case File No. 001/18-07-2007-ECCC/TC, 30 January 2009, E5/11/6.1, para. 231; Trial Transcript, Kaing Guek Eav alias Duch, 23 April 2009, T.35.
324 Judgement, para. 366.
325 Judgement, para. 366
326 Judgement, para. 363.
327 Judgement, para. 246.
328 Judgement, para. 366.

F. GROUND THREE: THE RESPONDENT SHOULD HAVE BEEN CONVICTED FOR THE ENSLAVEMENT OF ALL THE DETAINEES OF S-21

F1. OVERVIEW

201. The Judgement found the Respondent guilty of enslavement as a crime against humanity "over the S-24 detainees and over a small number of detainees assigned to work within the S-21 complex."[329] The Trial Chamber erred in law in its definition of enslavement as a crime against humanity. Enslavement as a crime against humanity is defined as "the exercise of any or all of the powers attaching to the right of ownership over a person."[330] The Trial Chamber erroneously read an element of forced labour into the definition of enslavement as a crime against humanity.[331]

F2. THE TRIAL CHAMBER INCORRECTLY REQUIRED THAT FORCED LABOUR WAS AN ESSENTIAL ELEMENT OF THE CRIME OF ENSLAVEMENT

202. The Trial Chamber defined enslavement as a crime against humanity, in effect, requiring forced labour as an essential element of that crime.[332] The Judgement stated that enslavement required "forced or involuntary labour, coupled with [...] detention".[333] Accordingly, it found that the enslavement as a crime against humanity had only been made out in respect of "the S-24 detainees and [...] a small number of detainees assigned to work within the S-21 complex."[334] The Co-Prosecutors submit that the Trial Chamber erred in law in using this restrictive definition of enslavement as a crime against humanity.

203. The definition of enslavement is based on the definition of slavery in the Slavery Convention of 1926.[335] This definition was reaffirmed in the Supplementary Slavery Convention of 1956.[336] Enslavement as a crime against humanity was included in the Nuremberg Charter[337] and the Tokyo Charter,[338] as well as the Control Council Law

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329 Judgement, paras. 346, 677.
330 *Kunarac* Trial Judgement, para. 539.
331 Judgement, para. 346.
332 Judgement, para. 346.
333 Judgement, para. 346.
334 Judgement, para. 346.
335 Slavery Convention, 25 September 1926, article 1(1) (defining slavery as "the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised").
336 Supplementary Convention on the Abolition Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 30 April 1957, article 7(a) (referring to the definition of slavery in the Slavery Convention and defining a 'slave' as a person in such a status or condition over whom any or all of the powers attaching to the right of ownership are exercised).
337 Nuremberg Charter, article 6(c) ("Crimes against humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population [...]").

No. 10.[339] The definition of enslavement as a crime against humanity was developed most notably in the cases of *Milch* and *Pohl*[340] at Nuremberg and in *Kunarac* at the ICTY.[341] International jurisprudence has confirmed that the crime of enslavement forms part of customary international law.[342] It has also been included in the Rome Statute of the ICC.[343]

204. Under international law, enslavement as a crime against humanity is defined as "the exercise of any or all of the powers attaching to the right of ownership over a person."[344] The ICTY enumerated a number of factors to be considered in deciding whether the offending act constitutes enslavement: "the control of someone's movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour."[345] The *mens rea* of the crime is the intentional exercise of such powers.[346]

205. Therefore, requiring an element of forced labour would reduce the scope of the definition of enslavement recognized under customary and conventional international law. The ICTY has found that "the exaction of forced or compulsory labour or service, often without remuneration and often, though not necessarily, involving physical hardship" constitutes one of a number of indications of enslavement but does

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338 Charter of the International Military Tribunal for the Far East, 19 January 1946 ("Tokyo Charter"), article 5(c) ("Crimes against Humanity: Namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population [...]").

339 Control Council, Law No. 10, article II(1)(c) ("Crimes against Humanity: Atrocities and offenses, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated").

340 *United States v. Milch*, Judgement, Case 2, United States Nuremberg Military Tribunal, 17 April 1947; *United States v. Pohl*, Judgement, Case 4, United States Nuremberg Military Tribunal, 3 November 1947 (the court considered slavery a crime against humanity), pp. 13-14, 35-38.

341 *See Kunarac* Trial Judgement; *Kunarac* Appeals Judgement.

342 *Kunarac* Appeals Judgement, para. 124; *Prosecutor v. Krnojelac*, Judgement, IT-97-25-T, ICTY Trial Chamber, 15 March 2002, paras. 353, 355; *Sesay* Trial Judgement, para. 196.

343 Rome Statute, article 7(2)(c).

344 *Kunarac* Trial Judgement, para. 539.

345 *Kunarac* Trial Judgement, para. 543.

346 *Kunarac* Trial Judgement, para. 540.

not form part of the definition of enslavement.[347] The SCSL also noted these indicia of enslavement in *Sesay*.[348]

206. The Co-Prosecutors submit that the Trial Chamber's definition of enslavement requiring an ingredient of forced labour is inconsistent with international jurisprudence. By adopting this requirement, the Trial Chamber failed to convict the Respondent for the crime against humanity of enslavement of a majority of the detainees at S-21, who were not subjected to forced or involuntary labour.

207. In the Judgement, the Trial Chamber found that the majority of acts establishing enslavement as a crime against humanity were proven, amongst them the control of the detainees' movement,[349] the control of physical environment,[350] psychological control,[351] measures taken to prevent or deter escape,[352] threat of force and coercion,[353] and subjection to cruel treatment and abuse.[354] Moreover, the Respondent himself has acknowledged that he exerted a control over life and death over the detainees at S-21.[355]

208. Therefore, the Trial Chamber found that powers attaching to the right of ownership were exercised at S-21–fulfilling the definitional requirements for enslavement as a crime against humanity.[356] Moreover, those acts were committed intentionally,[357] and with the purpose of exercising ownership over the detainees.[358]

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347 *Kunarac* Trial Judgement, para. 542 ("indications of enslavement include exploitation; the exaction of forced or compulsory labour or service, often without remuneration and often, though not necessarily, involving physical hardship; sex; prostitution; and human trafficking"); *Kunarac* Appeals Judgement, para. 119 (confirming the Trial Chamber's definition of enslavement and indicia of enslavement).

348 *Sesay* Trial Judgement, paras. 198-199.

349 Judgement, paras. 260, 263.

350 Judgement, paras. 260, 268, 270, 272.

351 Judgement, para. 258 (finding that "[t]he Accused agreed that the living conditions, combined with the detention, interrogation and disappearance of detainees, severely impaired their physical and psychological health and that they lived in a permanent climate of fear"). *See also* Judgement, paras. 261-265.

352 Judgement, para. 260.

353 Judgement, para. 164.

354 Judgement, paras. 263-264.

355 Judgement, para. 259 (finding that "[t]he Accused indicated that, as everyone was destined for execution, there was no need to treat detainees humanely").

356 *Kunarac* Trial Judgement, para. 539.

357 Judgement, para. 252 (finding that, "[a]ccording to the Accused, the purpose of torture at S-21 was 'the infliction of suffering, of additional suffering, to the victims to force them to confess'" (citing Trial Transcript, Kaing Guek Eav alias Duch, 16 June 2009, T.51)); Judgement, para. 259 (noting that "[the Respondent] indicated that, as everyone was destined for execution, there was no need to treat detainees humanely").

358 *Kunarac* Trial Judgement, paras. 539, 543; *Kunarac* Appeals Judgement, paras. 118-119 (finding that enslavement as a crime against humanity consists of the exercise of any or all powers attaching to the right of ownership over a person).

F3. Conclusion

209. The Co-Prosecutors request that the Supreme Court Chamber accept this ground of appeal and hold that the Trial Chamber erred in law in its definition of enslavement as a crime against humanity and further hold that enslavement does not require the element of forced or involuntary labour. The Co-Prosecutors request that the Supreme Court Chamber accordingly convict the Respondent for the crime against humanity of enslavement in respect of all the detainees at S-21 irrespective of whether they were subjected to forced or involuntary labour.

G. CONCLUSION

210. There comes a point where the crimes committed are sufficiently grave and the offender sufficiently notorious, or in such a position of authority, that the highest sentence must be imposed. That point was reached and passed here. In this case, a senior and responsible cadre of the Communist Party of Kampuchea presided over the factory of death of S-21. Principles of deterrence and retribution can only be adequately satisfied by the imposition of the highest sentence.

211. The facts are stubborn. They will not go away. The Respondent was found responsible for all the international crimes with he was charged. The legal hallmarks of these crimes were compounded by a number of serious aggravating circumstances:

a) The Respondent's abuse of authority and his discriminatory intent against perceived opponents of the Party and Vietnamese prisoners of war and civilians;

b) The particular cruelty of the crimes, exemplified by the systematic use of physical and psychological torture, humiliation, inhumane treatment and cold-blooded killings;

c) The defencelessness and vulnerability of the victims, which included children and women who were held at the complete mercy of the Respondent and his subordinates; and

d) The denial of every sense of victims' dignity or humanity, and their reduction to the status of animals in order to make it easier for the interrogators and guards to torture and execute them.

212. It is true that the Respondent did not personally commit most of the acts alleged but the remark of the District Court of Jerusalem in *Eichmann* should be recalled: "the degree of responsibility generally increases as we draw further away from the man who uses the fatal instrument with his own hands and reach the higher levels of command".[359] The Respondent was such a man in a position of authority and responsibility. "War", said a distinguished international jurist "is not a condition of anarchy or lawlessness".[360] What took place at S-21 was not anarchy. It was organised, brutal and terrifying. Human beings, the vulnerable, the young, the innocent, were robbed of their very humanity. They were tortured, raped and murdered. And the Respondent now pleads for his freedom. The very man who commanded this factory of death and torture.

213. Except for the consideration of unlawful detention by the Cambodian military authorities in reducing the Respondent's sentence, the Trial Chamber erroneously exercised its discretion by first finding certain factors "significant[ly]" mitigating and, second, by giving them undue weight.

214. While every leniency may not amount to an error, an error is manifest where a court of appeal considers that the leniency calls into question the very soundness of the conviction. Where no reasonable trial chamber would have imposed a sentence as lenient as the one imposed, the Supreme Court Chamber must intervene. The question is not how the sentence imposed appears in absolute terms; thus viewed a sentence of thirty-five years may appear to be substantial. The question is how the sentence imposed appears in relation to the sentence which is reasonably judged to be merited by the gravity of the Respondent's crimes. Looking at the gravity of the Respondent's crimes, no reasonable trial chamber could have imposed a sentence as low as thirty-five years.

215. The circumstances of this case can result in the imposition of only one sentence: imprisonment for life with a reduction to compensate for the period of unlawful detention and insignificant mitigating circumstances.

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359 *Galić* Appeals Judgement, Separate Opinion of Judge Shahabuddeen, para. 41 (citing *Attorney General of the Government of Israel v. Adolf Eichmann*, Judgement, District Court of Jerusalem, 36 ILR 18, 1961).

360 *Galić* Appeals Judgement, Separate Opinion of Judge Shahabuddeen, para. 41 (citing Sir Hersch Lauterpacht).

H. RELIEF REQUESTED

216. The Co-Prosecutors, therefore, request that the Supreme Court Chamber set aside the Trial Chamber's Judgement, in part, and:

a) CONVICT the Respondent cumulatively for the crimes against humanity of extermination (subsuming murder), enslavement, imprisonment, torture, rape, persecution on political grounds, and other inhumane acts;

b) CONVICT the Respondent for the crime against humanity of enslavement of the entirety of detainees of S-21 during the entire period relevant to the indictment;

c) REVISE the sentence imposed by the Trial Chamber to a sentence of life imprisonment;

d) ORDER that this sentence of life imprisonment be reduced to a term of forty-five years to provide an appropriate remedy for the Respondent's unlawful pre-ECCC detention;

e) ORDER that a further reduction be made as appropriate for the very limited mitigating circumstances obtaining in the circumstances of this case; and

f) HOLD that the Respondent will serve this sentence without the possibility of a parole.

Respectfully submitted,

Date	Name	Place / Signature
13 October 2010	CHEA Leang Co-Prosecutor	Phnom Penh
	Andrew CAYLEY Co-Prosecutor	