GUIDE TO THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

Volume 2: Jurisprudence

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Extraordinary Chambers
in the Courts of Cambodia

GUIDE TO THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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Frequently cited authorities and their abbreviations

Legal framework

Long citation	Abbreviated citation
Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, *entered into force* 29 April 2005, 2329 U.N.T.S. 117	UN-RGC Agreement
Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes committed during the Period of Democratic Kampuchea, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006)	ECCC Law
Internal Rules (Rev. 10), as revised on 27 October 2022	Internal Rules

Practice Directions

Long citation	Abbreviated citation
Filing of Documents before the ECCC, Practice Direction ECCC/01/2007/Rev. 8, as revised on 7 March 2012	Practice Direction on the Filing of Documents
Victim Participation, Practice Direction 02/2007/Rev. 1, as revised on 27 October 2008	Practice Direction on Victim Participation
Protective Measures, Practice Direction ECCC/03/2007/Rev. 1, as revised on 29 April 2008	Practice Direction on Protective Measures

Jurisprudence

Long citation	Abbreviated citation
Closing Order indicting Kaing Guek Eav alias Duch, 8 August 2008, **D99**	Case 001, Closing Order

Decision on Appeal against Closing Order indicting Kaing Guek Eav alias "Duch", 5 December 2008, **D99/3/42**	Case 001, Decision on Closing Order Appeal
Judgement, 26 July 2007, **E188**	Case 001, Judgment
Appeal Judgement, 3 February 2012, **F28**	Case 001, Appeal Judgment
Closing Order, 15 September 2010, **D427**	Case 002, Closing Order
Decision on Khieu Samphan's Appeal against the Closing Order, 21 January 2011, **D427/4/15**	Case 002, Decision on Closing Order Appeal (Khieu Samphan)
Decision on Appeals by Nuon Chea and Ieng Thirith against the Closing Order, 15 February 2011, **D427/2/15 & D427/3/15**	Case 002, Decision on Closing Order Appeals (Nuon Chea and Ieng Thirith)
Decision on Ieng Sary's Appeal against the Closing Order, 11 April 2011, **D427/1/30**	Case 002, Decision on Closing Order Appeal (Ieng Sary)
Case 002/01 Judgement, 7 August 2014, **E313**	Case 002/01, Judgment
Appeal Judgement, 23 November 2016, **F36**	Case 002/01, Appeal Judgment
Case 002/02 Judgement, 16 November 2018, **E465**	Case 002/02, Judgment
Appeal Judgment, 23 December 2022, **F76**	Case 002/02, Appeal Judgment
Order Dismissing the Case against Meas Muth, 28 November 2018, **D266**	Case 003, Dismissal Order
Closing Order, 28 November 2018, **D267**	Case 003, Closing Order (Indictment)
Considerations on Appeals against Closing Orders, 7 April 2021, **D266/27 & D267/35**	Case 003, Considerations on Closing Order Appeals

Order Dismissing the Case against Yim Tith, 28 June 2019, **D381**	Case 004, Dismissal Order
Closing Order, 28 June 2019, **D382**	Case 004, Closing Order (Indictment)
Considerations on Appeals against Closing Orders, 17 September 2021, **D381/45 & D382/43**	Case 004, Considerations on Closing Order Appeals
Closing Order (Reasons), 10 July 2017, **D308/3**	Case 004/01, Dismissal Order
Considerations on the International Co-Prosecutor's Appeals of Closing Order (Reasons), 28 June 2018, **D308/3/1/20**	Case 004/01, Considerations on Closing Order Appeal
Order Dismissing the Case against Ao An, 16 August 2018, **D359**	Case 004/02, Dismissal Order
Closing Order (Indictment), 16 August 2018, **D360**	Case 004/02, Closing Order (Indictment)
Considerations on Appeals against Closing Orders, 19 December 2019, **D359/24 & D360/33**	Case 004/02, Considerations on Closing Order Appeals

1. Jurisdiction

1.1. Personal jurisdiction

The ECCC was established by an agreement between the United Nations ("UN") and the Royal Government of Cambodia ("RGC") reached on 6 June 2003.[1] Article 2(1) of the UN-RGC Agreement "recognize[d]" that the ECCC had "personal jurisdiction over senior leaders of Democratic Kampuchea and those who were most responsible for the crimes referred to in Article 1 of the Agreement", namely "violations of Cambodian penal law, international humanitarian law and custom, and the international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979". More explicitly, Articles 5(3) and 6(3) of the UN-RGC Agreement provided that "[i]t is understood" that the Co-Investigating Judges' investigations and the Co-Prosecutors' prosecutions were "limited to senior leaders of Democratic Kampuchea and those who were most responsible". Similarly, the ECCC Law, the domestic legislation that established the ECCC, provided that its purpose was to "bring to trial senior leaders […] and those who were most responsible".[2]

These founding documents did not clearly define who the "senior leaders of Democratic Kampuchea" were or "those who were most responsible for the crimes". Questions therefore arose about the meaning of these two terms and whether the drafters of the legal framework intended the terms to constitute justiciable legal requirements of the ECCC's personal jurisdiction. While finding the "senior leaders" proved to be less contentious, the meaning of the term "most responsible" was litigated at length, with judicial officials differing in their views on the factors for making this determination.

1.1.1. Targets for prosecution

The exclusive targets for prosecution before the ECCC were "officials of the Khmer Rouge".[3] Thus, the term "senior leaders […] and those who were most responsible" excluded persons who were not Khmer Rouge officials from the ECCC's personal jurisdiction.[4]

The Supreme Court Chamber reviewed the negotiations establishing the ECCC to ascertain the

[1] UN-RGC Agreement.
[2] ECCC Law, article 1. The ECCC Law was adopted by the Cambodian National Assembly on 2 January 2001, with amendments passed in 2004 to bring it into conformity with the UN-RGC Agreement. For more on the negotiations, establishment, initial operations, and mandate of the ECCC, see *Guide to the ECCC (Volume I)*, chapters 2-3.
[3] Case 001, Appeal Judgment, paras 51-52. See also Case 002/01, Judgment, fn. 31.
[4] Case 001, Appeal Judgment, para. 52.

intended targets for prosecution.[5] In concluding that the term "reflects the intention of the United Nations and the Royal Government of Cambodia to focus finite resources on the criminal prosecution of certain surviving officials of the Khmer Rouge" (thus excluding persons who were not Khmer Rouge officials),[6] the Supreme Court Chamber considered:

i. The 21 June 1997 letter from the Co-Prime Ministers to the UN Secretary-General ("UNSG") requesting the UN's assistance to "bring […] to justice those persons responsible for the genocide and crimes against humanity during the rule of the Khmer Rouge from 1975 to 1979", and the UNSG's summary of that request as "[t]he initial Cambodian request for the United Nations assistance in bringing Khmer Rouge leaders to trial";[7]

ii. UN General Assembly Resolution 52/135 endorsing the UNSG Special Representative's suggestions and requesting the UNSG to explore possibility of appointing a Group of Experts "to evaluate the existing evidence of responsibility of the Khmer Rouge human rights violations and propose further measures";[8]

iii. The Group of Experts' mandate to "explore options for bringing Khmer Rouge leaders before an international or national jurisdiction" and own understanding that this mandate was "limited to the acts of the Khmer Rouge and not those of any other persons or, indeed, States that may have committed human rights in Cambodia;[9]

iv. The Group of Experts' recommendation that the UN "establish an *ad hoc* international tribunal to try Khmer Rouge officials for crimes against humanity and genocide committed from 17 April 1975 to 7 January 1979";[10] and

v. The Cambodian National Assembly's October 2004 debate on the approval of the UN-RGC Agreement and amendments to the 2001 ECCC Law, where Deputy Prime Minister Sok An explained that "senior leader" referred to "no more than 10 people" (without specifying that they be members of the Standing Committee), that there were "no specific amount of people to be indicted from the second group" of "those who

[5] Case 001, Appeal Judgment, paras 46-57. For more on the negotiations leading to the establishment of the ECCC, see *Guide to the ECCC (Volume I)*, chapter 2.
[6] Case 001, Appeal Judgment, para. 52.
[7] Ibid, para. 46.
[8] Ibid, para. 47.
[9] Ibid, paras 48-49.
[10] Ibid, para. 50.

were most responsible", and that the ECCC would be responsible for making these determinations.[11]

1.1.2. Two categories of individuals

The Co-Investigating Judges and Trial Chamber initially interpreted the word "and" in the term "senior leaders […] *and* those who were most responsible" disjunctively, finding that the term "refers to two separate categories of persons, namely, senior leaders or those most responsible".[12] The Co-Investigating Judges did not separately analyse the legal requirements of the ECCC's personal jurisdiction (or whether it referred to one or more categories) before concluding that Duch, while not a senior leader, "may be considered in the category of most responsible for crimes and serious violations".[13] Noting that neither the UN-RGC Agreement "expressly defines 'senior leaders of DK' *or* 'those who were most responsible'", the Trial Chamber similarly interpreted the ECCC's personal jurisdiction as referring to two categories of individuals in the Case 001 trial judgment.[14]

On appeal, the Supreme Court Chamber determined that the term "senior leaders […] and those who were most responsible" referred to two categories of Khmer Rouge officials, which were "not dichotomous" or free from overlap.[15] One category of persons subject to the ECCC's jurisdiction was "senior leaders of the Khmer Rouge who are among the most responsible"; the other category was "non-senior leaders of the Khmer Rouge who are among those most responsible".[16] Both categories of individuals had to be Khmer Rouge officials and among those most responsible.[17]

The Supreme Court Chamber rejected the submission that the term "senior leaders […] and

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[11] Ibid, para. 51.
[12] *See* Ibid, para. 45. See also Case 001, Closing Order, para. 129; Case 001, Judgment, paras 17-25.
[13] Case 001, Closing Order, para. 129. For more on the findings of the Co-Investigating Judges in the Closing Order indicting Duch, see *Guide to the ECCC (Volume I)*, section 5.1.3.4.
[14] Case 001, Judgment, para. 19 (emphasis added). For more on the Trial Chamber's findings on the ECCC's personal jurisdiction over Duch, see *Guide to the ECCC (Volume I)*, section 5.1.5.4.
[15] Case 001, Appeal Judgment, para. 57. See also Case 004/01, Dismissal Order, para. 6; Case 004/02, Closing Order (Indictment), para. 52; Case 004/02, Dismissal Order, para. 423; Case 003, Closing Order (Indictment), para. 36; Case 003, Dismissal Order, para. 364; Case 004, Closing Order (Indictment), para. 31; Case 004, Dismissal Order.
[16] Case 001 Appeal Judgment, para. 57. See also Case 004/01, Dismissal Order, para. 6; Case 004/02, Closing Order (Indictment), para. 52; Case 004/02, Dismissal Order, para. 423; Case 003, Closing Order (Indictment), para. 36; Case 003, Dismissal Order, para. 364; Case 004, Closing Order (Indictment), para. 31; Case 004, Dismissal Order, para. 601.
[17] Case 001 Appeal Judgment, para. 57. See also Case 004/01, Dismissal Order, para. 6; Case Case 004/02, Closing Order (Indictment), para. 52; Case 004/02, Dismissal Order, para. 423; Case 003, Closing Order (Indictment), para. 36; Case 003, Dismissal Order, para. 364; Case 004, Closing Order (Indictment), para. 31; Case 004, Dismissal Order, para. 601.

those who were most responsible" referred to only one category of persons, "namely, senior leaders *who are* most responsible".[18] In concluding that the term refers to two categories of Khmer Rouge officials that are "not dichotomous", the Supreme Court Chamber considered:

i. The Deputy Prime Minister's explanation during the debate on the UN-RGC Agreement and amendments to the 2001 ECCC Law that the ECCC's targets for prosecution were "senior leaders who are the most important targets of the [Extraordinary Chambers] and some others who might not be senior leaders but their actions were much more serious, and there is enough evidence to prove that they really committed much more serious crimes than others";[19]

ii. The Group of Experts' conclusion that the ECCC should focus on "senior leaders with responsibility over the abuses as well as those at lower levels who are directly implicated in the most serious atrocities";[20] and

iii. Professor David Scheffer's remark that at no point during the negotiations did the negotiators state that any suspect must be *both* a senior leader *and* most responsible to be prosecuted at the ECCC.[21]

The Co-Investigating Judges adopted the Supreme Court Chamber's classification of these two categories in their Closing Orders in Cases 003 and 004.[22]

1.1.3. Jurisdictional requirement or prosecutorial/investigatory policy?

The ECCC's personal jurisdiction covered "Khmer Rouge officials".[23] Whether someone was considered a Khmer Rouge official was a justiciable jurisdictional issue before the Trial Chamber.[24] Conversely, whether someone was considered a "senior leader" or "most responsible" was not a justiciable jurisdictional issue, but rather a matter of prosecutorial and investigatory policy for the Co-Prosecutors and Co-Investigating Judges, subject to narrow

[18] Case 001, Appeal Judgment, paras 45, 53-57. See also Case 001, Transcript, 28 March 2011, F1/2.1, pp. 56-67 (emphasis added).
[19] Case 001, Appeal Judgment, para. 53.
[20] Ibid, paras 54-55.
[21] Ibid, para. 56.
[22] Case 004/01, Dismissal Order, para. 6; Case 004/02, Closing Order (Indictment), para. 52; Case 004/02, Dismissal Order, para. 423; Case 003, Closing Order (Indictment), para. 36; Case 003, Dismissal Order, para. 364; Case 004, Closing Order (Indictment), para. 31; Case 004, Dismissal Order, para. 601.
[23] Case 001, Appeal Judgment, para. 61.
[24] Ibid.

appellate review for abuse of discretion.[25]

In evaluating whether the entire or part of the term "senior leaders […] and those who were most responsible" constituted a jurisdictional requirement of the ECCC, the Supreme Court Chamber held that Articles 31 and 32 of the Vienna Convention on the Law of Treaties was applicable,[26] and that it could also "seek guidance in international jurisprudence on comparable provisions in other jurisdictions" under Article 12(1) of the UN-RGC Agreement.[27] Noting that the words "personal jurisdiction" in Article 2(1) in the UN-RGC Agreement indicate that they operate as a jurisdictional requirement, the Supreme Court Chamber considered that it must also examine whether this interpretation was consistent with the object and purpose of the UN-RGC Agreement and whether it would lead to a "manifestly absurd or unreasonable" result.[28] It evaluated three categories of persons – (1) "Khmer Rouge officials", (2) "senior leaders", and (3) "most responsible" – to determine whether they can reasonably be interpreted as jurisdictional requirements.[29]

Khmer Rouge officials. The Supreme Court Chamber reasoned that the Trial Chamber is well suited to decide the factual issue of whether someone is a Khmer Rouge official since it "involves a question of historical fact that is intelligible, precise, and leaves little or no room for discretion".[30]

Senior leaders. The Supreme Court Chamber reasoned that the term "senior leaders" was not a jurisdictional requirement but rather prosecutorial and investigatory policy because it was "sufficiently flexible" and not necessarily limited to individuals in the Communist Party of Kampuchea ("CPK") Central Committee or Standing Committee, noting that debates in the Cambodian National Assembly confirm that the definition is not fixed.[31]

In Cases 003 and 004, the Co-Investigating Judges expressed their disagreement with the

[25] Ibid, paras 79-80.
[26] Ibid, para. 59.
[27] Ibid. Under Article 12(1) of the UN-RGC Agreement, guidance may be sought in procedural rules established at the international level "where Cambodian law does not deal with a particular matter, or where there is uncertainty regarding the interpretation or application of a relevant rule of Cambodian law, or where there is a question regarding the consistency of such a rule with international standards".
[28] Case 001, Appeal Judgment, para. 60.
[29] Ibid, paras 60-79.
[30] Ibid, para. 61.
[31] Ibid, paras 75-76. In Case 002/01, the Trial Chamber found that the Central Committee was intended by statute to be the "highest level of operational authority" whereas the Standing Committee was a smaller committee within the Central Committee that ultimately exercised effective control over the regime. See Case 002/01, Judgment, paras 202-203. For more on the administrative structures of Democratic Kampuchea, see *Guide to the ECCC (Volume I)*, chapter 1.

Supreme Court Chamber's "classification of 'personal jurisdiction' as a non-jurisdictional criterion" in their Closing Orders.[32] They explained that they considered the categories of "senior leaders" and "most responsible" to operate as genuine jurisdictional requirements, albeit subject to a wide margin of appreciation (as opposed to unfettered policy guidelines).[33] They reasoned that the Supreme Court Chamber's "reference to an abuse of discretion based on bad faith or unsound professional judgment presupposes that there are parameters against which the exercise of discretion can and must be measured", and that the Supreme Court Chamber could not have had a "free-wheeling selection policy approach" in mind.[34] They also disagreed with the Supreme Court Chamber's reasoning that there is no objective method to compare and rank the criminal responsibility of Khmer Rouge officials.[35]

On appeal of the Closing Orders in Cases 003 and 004, the Pre-Trial Chamber unanimously held that the Co-Investigating Judge's personal jurisdiction decisions were justiciable before it under the standard of review applicable to discretionary decisions.[36] The Pre-Trial Chamber considered that while flexibility of the terms "senior leaders" and "most responsible" requires some margin of appreciation on a part of the Co-Investigating Judges, this discretion is not unlimited and should be exercised "in accordance with well-settled legal principles".[37] These considerations have not been reviewed by a higher chamber.[38]

Most responsible. The Supreme Court Chamber reasoned that an "absurd" result would occur if the category of "most responsible" were interpreted as a jurisdictional requirement because:

i. "[T]here is no objective method for the Trial Chamber to decide on, compare, and then rank the criminal responsibility of all Khmer Rouge officials";[39]

ii. Determining a person's relative criminal liability would indirectly amount to "permitting a defence of superior orders and would frustrate" the purpose of Article

[32] Case 004/01, Dismissal Order, paras 9-10. The International Co-Investigating Judge explicitly repeated this disagreement in the Closing Orders in Cases 004/02, 003, and 004. See Case 004/02, Closing Order (Indictment), para. 54; Case 003, Closing Order (Indictment), para. 37; Case 004, Closing Order (Indictment), para. 32. The National Co-Investigating Judge repeated this disagreement in Cases 004/02 and 004, but not in Case 003. See Case 004/02, Dismissal Order, paras 430-432; Case 004, Dismissal Order, paras 604-605. *Cf.* Case 003, Dismissal Order, paras 360-407.
[33] Case 004/01, Dismissal Order, paras 9-10.
[34] Ibid, para. 9.
[35] Ibid.
[36] Case 004/01, Considerations on Closing Order Appeal, paras 20-22.
[37] Ibid, para. 20; Case 004/02, Considerations on Closing Order Appeals, para. 28; Case 003, Considerations on Closing Order Appeals, para. 46; Case 004, Considerations on Closing Order Appeals, para. 34.
[38] See Internal Rules, Rule 76(7). See also Case 002/01, Judgment, fn. 111.
[39] Case 001, Appeal Judgment, para. 62.

29 of the ECCC Law, which provides that "[t]he position or rank of any Suspect shall not relieve such person of criminal responsibility or mitigate punishment";[40]

iii. The determination of whether someone is "most responsible" requires wide discretion, in contrast to the ECCC's temporal and subject matter jurisdictions, which are expressed through "sharp-contoured definitions" and are verifiable because they "involve pure questions of law or fact that are eminently suitable for legal determination";[41]

iv. The ECCC framework vests the Co-Investigating Judges and Co-Prosecutors with independent discretion to determine whether a particular investigation or prosecution falls within the scope of the term "most responsible";[42]

v. The Pre-Trial Chamber's role in settling disagreements between the Co-Prosecutors and between the Co-Investigating Judges does not alter the conclusion that the category of "most responsible" is not jurisdictional since "the investigation shall proceed" should the Pre-Trial Chamber be unable to achieve a supermajority on a dispute between the Co-Investigating Judges over whether to issue an indictment or dismissal order for the reason that a Charged Person is or is not most responsible;[43]

vi. The Group of Experts recommended interpreting "most responsible" as "a matter of prosecutorial policy", and their report forms "an important part of the *travaux préparatoires* to the UN-RGC Agreement and the ECCC Law, and is consistent with the terms of these instruments";[44]

vii. The indictment review processes at the International Criminal Tribunal for the former Yugoslavia ("ICTY") and International Criminal Tribunal for Rwanda ("ICTR") operate as policy guidelines intended to assist in concentrating scarce resources on trying the most serious cases falling within their jurisdiction, militating

[40] Ibid.
[41] Ibid.
[42] Ibid, para. 64.
[43] Ibid, para. 65. The Supreme Court Chamber considered the possibility that the Co-Prosecutors and Co-Investigating Judges would disagree on whether a Suspect or a Charged Person is a "senior leader" or "most responsible": "[T]he Pre-Trial Chamber's role would be to settle the specific issue upon which the Co-Investigating Judges or Co-Prosecutors disagree. If, for example, the Pre-Trial Chamber decides that neither Co-Investigating Judge erred in proposing to issue an Indictment or Dismissal Order for the reason that a charged person is or is not most responsible, and if the Pre-Trial Chamber is unable to achieve a supermajority on the consequence of such a scenario, 'the investigation shall proceed'".
[44] Case 001, Appeal Judgment, paras 66-68.

in favour of treating the term "most responsible" in the ECCC framework as investigatory and prosecutorial policy;[45]

viii. The ICTY's referral mechanism suggests that the term "most responsible" operates as investigatory and prosecutorial policy, with the Referral Bench's criteria for determining whether someone should be tried before the ICTY or national courts, *i.e.*, "the gravity of the crimes charged and the level of responsibility of the accused", operating as prosecution policy rather than jurisdictional bars;[46] and

ix. The Special Court for Sierra Leone's ("SCSL") Appeals Chamber judgment in *Brima et al.* – which held that the term "persons who bear the greatest responsibility" in the SCSL Statute was not a jurisdictional requirement but rather a prosecutorial guide – supports this interpretation.[47]

1.1.4. Factors for determining "senior leaders"

ECCC jurisprudence had not conclusively settled the relevant factors for determining whether someone is a "senior leader". While the Supreme Court Chamber held in Case 001 that the term "senior leaders" was not necessarily limited to members of the CPK Central Committee or Standing Committee, it did not set out any relevant factors for determining whether someone is a senior leader.[48]

In Case 002, the Co-Investigating Judges found that Nuon Chea, Ieng Sary, Ieng Thirith and Khieu Samphan were senior leaders "due to their *de facto* and *de jure* hierarchical authority, in the respective positions set out in the "Roles of the Charged Persons section of [the] Closing Order".[49] The Co-Investigating Judges did not elaborate further on this reasoning. None of the Charged Persons challenged this determination before the Pre-Trial Chamber, and the Trial Chamber, citing the Supreme Court Chamber's jurisprudence concerning prosecutorial and investigatory policy, did not separately analyse whether Khieu Samphan or Nuon Chea were "senior leaders" or after confirming jurisdiction over them as "Khmer Rouge officials" in the Case 002/01 Trial Judgment.[50]

[45] Ibid, para. 69.
[46] Ibid, para. 71.
[47] Ibid, para. 73.
[48] Ibid, paras 75-76.
[49] Case 002, Closing Order, para. 1327.
[50] Case 002/01, Judgment, paras 17-19.

In his Dismissal Orders in Cases 003 and 004/02, the National Co-Investigating Judge disagreed with the Supreme Court Chamber and considered that "senior leaders" referred to members of the CPK Standing and Central Committees who "participated in the making of policies, their implementation and monitoring".[51] The National Co-Investigating Judge cited to the Case 002 Closing Order and an article analysing the negotiations establishing the ECCC.[52]

1.1.5. Factors for determining "most responsible"

Whereas the category of "most responsible" was discussed in several cases, ECCC jurisprudence had not reached a conclusive definition in this respect. After providing a brief overview of personal jurisdiction in each case, this section will set out the various factors reviewed by the Co-Investigating Judges and Chambers.

In Case 001, Duch did not challenge the ECCC's personal jurisdiction over him before the Office of the Co-Investigating Judges or the Pre-Trial Chamber. In their Closing Order indicting Duch, the Co-Investigating Judges found that while he was not a "senior leader", Duch "may be considered in the category of most responsible for crimes and serious violations committed between 17 April 1975 and 6 January 1979, due both to his formal and effective hierarchical authority and his personal participation as Deputy Secretary then Secretary of S-21", which was directly controlled by the Central Committee.[53] The Co-Investigating Judges did not separately analyse ECCC's personal jurisdiction to discern the meaning of the term "senior leaders […] and those who were most responsible" nor set out any criteria for determining whether someone falls in either of these categories. Neither Duch nor the Co-Prosecutors appealed the Co-Investigating Judges' personal jurisdiction determination to the Pre-Trial Chamber. At trial, the Trial Chamber applied two criteria from ICTY and International Criminal Court ("ICC") jurisprudence – the gravity of the crimes and the person's level of responsibility – in concluding that Duch fell within the ECCC's personal jurisdiction "as one of those most responsible for the crimes committed" during the Democratic Kampuchea period.[54] The Supreme Court Chamber held that whether someone is "most responsible" is not justiciable before the Trial Chamber without reviewing the Trial Chamber's

[51] Case 004/02, Dismissal Order, para. 424; Case 003, Dismissal Order, para. 365. See also Case 002, Closing Order, para. 1327.
[52] Case 004/02, Dismissal Order, para. 424.
[53] Case 001, Closing Order, para. 129.
[54] Case 001, Judgment, para. 25.

criteria.[55]

In Case 002, the Co-Investigating Judges found that Nuon Chea, Ieng Sary, Ieng Thirith and Khieu Samphan could alternatively be considered as falling in the category of "those who were most responsible" due to their "personal participation in the implementation of the CPK's common purpose through criminal means".[56] The Co-Investigating Judges did not elaborate on their reasoning. Because none of the Charged Persons challenged jurisdiction in their appeals from the Closing Order, the Pre-Trial Chamber did not discuss whether the Charged Persons were "most responsible".[57] In light of the Supreme Court Chamber's jurisprudence concerning prosecutorial and investigatory policy, the Trial Chamber in Case 002 did not separately analyse whether the Accused were "most responsible", after confirming jurisdiction over them as "Khmer Rouge officials" in the Case 002/01 Trial Judgment.[58] Neither Khieu Samphan nor Nuon Chea challenged the Trial Chamber's personal jurisdiction determination in their appeals against the Case 002/01 judgment. With personal jurisdiction having been conclusively settled in Case 002/01, the issue was not revisited in Case 002/02.

Personal jurisdiction was a contentious issue in Cases 003 and 004, with judicial officials differing in their interpretation of whether the Charged Persons fell under the ECCC's jurisdiction. At the outset of the preliminary investigations, the Co-Prosecutors disagreed over whether to open investigations into Cases 003 and 004.[59] Since the Pre-Trial Chamber was unable to attain the requisite supermajority of four votes on the Co-Prosecutors' disagreement, the Acting International Co-Prosecutor proceeded to file two new Introductory Submissions opening the judicial investigations into what became known as Cases 003 and 004.[60]

While the Co-Investigating Judges ultimately agreed to jointly dismiss the charges against Im Chaem, they registered several internal disagreements during their investigations over whether

[55] Case 001, Appeal Judgment, paras 45-46.
[56] Case 002, Closing Order, para. 1328.
[57] Case 002, Decision on Closing Order Appeal (Khieu Samphan); Case 002, Decision on Closing Order Appeals (Nuon Chea and Ieng Thirith); Case 002, Decision on Closing Order Appeal (Ieng Sary).
[58] Case 002/01, Judgment, paras 17-19.
[59] See Considerations of the Pre-Trial Chamber Regarding the Disagreement Between the Co-Prosecutors Pursuant to Internal Rule 71, 18 August 2009, D1/1.3.
[60] Considerations of the Pre-Trial Chamber Regarding the Disagreement Between the Co-Prosecutors Pursuant to Internal Rule 71, 18 August 2009, D1/1.3, para. 45. See also Internal Rules, Rule 71(4)(c). Case 004 was eventually severed into Case 004/01 concerning Im Chaem, Case 004/02 concerning Ao An, and Case 004 remained the case concerning Yim Tith. For more on Cases 003 and 004, see *Guide to the ECCC (Volume I)*, section 5.3.

Meas Muth, Ao An, and Yim Tith fall under the ECCC's personal jurisdiction.[61] As a result of their disagreements, the Co-Investigating Judges informed the parties in Cases 004/02, 003, and 004 that they considered separate and opposing closing orders based on a disagreement between them as permissible under the ECCC framework.[62] Subsequently, in all three cases, the National Co-Investigating Judge issued his Dismissal Orders[63] simultaneously with the International Co-Investigating Judge's Indictments.[64]

The Pre-Trial Chamber Judges also split in these cases and were unable to reach the requisite supermajority vote on the appeals of the opposing Closing Orders.[65] Despite unanimously declaring in each case that the Co-Investigating Judges acted illegally in issuing two Closing Orders, the Pre-Trial Chamber made no clear or definitive determination as to which Closing Order (Indictment or Dismissal), if any, stood.[66] Eventually, Cases 004/02, 003, and 004 progressed to the Supreme Court Chamber, which ordered the termination of all three cases for lack of "a definitive and enforceable indictment" in light of the Pre-Trial Chamber's considerations, which it considered to have voided or nullified the Closing Orders in effect.[67]

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[61] In Case 003, the Co-Investigating Judges filed disagreements on 7 February 2013, 22 February 2013, 17 July 2014, 16 January 2017, and 17 September 2018. See Case 003, Closing Order (Indictment), paras 5, 7, 15, 27. In Case 004/02, the Co-Investigating Judges filed disagreements on 22 February 2013, 4 April 2013, 16 January 2017, and 12 July 2018. See Case 004/02, Closing Order (Indictment), para. 1. In Case 004, the Co-Investigating Judges filed disagreements on 22 February 2013, 4 April 2013, 21 October 2015, 16 January 2017, and 21 January 2019. See Case 004, Closing Order (Indictment), paras 3, 7, 21. These disagreements were registered internally under Internal Rule 72(1) and remained confidential.

[62] Case 004/02, Decision on Ao An's Urgent Request for Disclosure of Documents Relating to Disagreements, 18 September 2017, D355/1, paras 13-16.

[63] Case 004/02, Dismissal Order; Case 003, Dismissal Order; Case 004, Dismissal Order.

[64] Case 004/02, Closing Order (Indictment), Case 003, Closing Order (Indictment); Case 004, Closing Order (Indictment).

[65] Case 004/02, Considerations on Closing Order Appeals; Case 003, Considerations on Closing Order Appeals; Case 004, Considerations on Closing Order Appeals.

[66] For different reasons, see Case 004/02, Considerations on Closing Order Appeals, paras 88-124 (unanimously finding that the Co-Investigating Judges acted illegally in simultaneously issuing two Closing Orders), 273-302 (the National Pre-Trial Chamber Judges upholding the Dismissal Order); 304-687 (the International Pre-Trial Chamber Judges upholding the indictment); Case 003, Considerations on Closing Order Appeals, paras 111-118 (the National Pre-Trial Chamber Judges finding that Case File 003 "should be held at the ECCC Archives") 119-358 (the International Pre-Trial Chamber Judges finding that Case 003 must progress to trial since the Dismissal Order is defective); Case 004, Considerations on Closing Order Appeals, paras 117-131 (the National Pre-Trial Chamber Judges finding that the only persons intended to be prosecuted before the ECCC were Duch, Khieu Samphan, Nuon Chea, Ieng Sary, and Ieng Thirith and that the International Co-Prosecutor acted secretively and illegally in filing the Introductory Submissions in Cases 003 and 004), 132-539 (finding that the indictment in Case 004 is valid and that the case should progress to trial).

[67] Case 004/02, Decision on International Co-Prosecutor's Immediate Appeal of the Trial Chamber's Effective Termination of Case 004/02, 10 August 2020, E004/2/1/1/2, paras 53, 67, 69. See also Case 003, Decision on International Co-Prosecutor's Appeal of the Pre-Trial Chamber's Failure to Send Case 003 to Trial as Required by the ECCC Legal Framework, 17 December 2021, 3/1/1/1, paras 42, 44; Case 004, Decision on International Co-Prosecutor's Appeal of the Pre-Trial Chamber's Failure to Send Case 004 to Trial as Required by the ECCC Legal Framework, 28 December 2021, 2/1/1/1, para. 31.

Below is a summary of the various factors used by the Co-Investigating Judges and Chambers in determining whether someone is "most responsible".

The Trial Chamber, International Pre-Trial Chamber Judges, and (Reserve) International Co-Investigating Judge had considered the following factors, which were developed in ICTY Referral Bench jurisprudence and the ICC's jurisprudence on arrest warrants, in determining whether someone is "most responsible":[68]

i. The gravity of the crimes charged,[69] including:

- The number of victims;
- The geographical and temporal scope of the crimes;
- The manner in which the crimes were allegedly committed; and
- The number of separate incidents; and

ii. The person's level of responsibility,[70] including:

- The level of participation in the crimes;
- The *de jure* and *de facto* hierarchical rank or position;
- The number of subordinates and hierarchical echelons above him or her; and
- The permanence of his position/period of time in authority.

In addition to these factors, the (Reserve) International Co-Investigating Judge had considered the following factors from ICTY jurisprudence to assess the level of responsibility of the Suspects in Case 003:[71]

[68] Case 001, Judgment, para. 22. See also Case 004/01, Considerations on Closing Order Appeal, para. 321; Case 004/02, Considerations on Closing Order Appeals, para. 352; Case 003, Considerations on Closing Order Appeals, para. 286; Case 003, Decision on Personal Jurisdiction and Investigative Policy Regarding Suspect, 2 May 2012, D48, para. 15 (vacated by the International Co-Investigating Judge in Case 003, Consolidated Decision on Meas Muth's Requests on Personal Jurisdiction, 1 February 2016, D181 without concluding that the Reserve International Co-Investigating Judge erred in relying on Supreme Court Chamber jurisprudence in making his findings); Case 003, Decision on Personal Jurisdiction and Investigative Policy Regarding Suspect, 2 May 2012, D49, para. 15.

[69] Case 001, Judgment, para. 22; Case 004/01, Considerations on Closing Order Appeal, para. 327; Case 003, Considerations on Closing Order Appeals, para. 287; Case 003, Decision on Personal Jurisdiction and Investigative Policy Regarding Suspect, 2 May 2012, D48, para. 16; Case 003, Decision on Personal Jurisdiction and Investigative Policy Regarding Suspect, 2 May 2012, D49, para. 16.

[70] Case 001, Judgment, para. 22; Case 004/01, Considerations on Closing Order Appeal, para. 332; Case 004/02, Considerations on Closing Order Appeals, para. 353; Case 003, Considerations on Closing Order Appeals, para. 300; Case 003, Decision on Personal Jurisdiction and Investigative Policy Regarding Suspect, 2 May 2012, D48, para. 24; Case 003, Decision on Personal Jurisdiction and Investigative Policy Regarding Suspect, 2 May 2012, D49, para. 21.

[71] Case 003, Decision on Personal Jurisdiction and Investigative Policy Regarding Suspect, 2 May 2012, D48, para. 24; Case 003, Decision on Personal Jurisdiction and Investigative Policy Regarding Suspect, 2 May 2012, D49, para. 21.

i. The procedure followed for appointment into position;

ii. Capacity to issue orders;

iii. Whether orders were in fact followed by subordinates;

iv. Actual knowledge that subordinates were committing crimes, "including the number, type and scope of the crimes, the time during which they were committed, their geographic location, as well as the eventual widespread nature of the acts";

v. Authority to negotiate, sign, or implement agreements;

vi. Control of access to territory;

vii. Actual role in the commission of crimes; and

viii. Whether those more senior in rank have already been convicted.

In their Closing Orders in Cases 003 and 004, the Co-Investigating Judges did not confine themselves to a strict application of the two criteria of gravity and level of responsibility to determine whether the Charged Persons were "most responsible". In jointly dismissing Case 004/01 against Im Chaem, the Co-Investigating Judges explained that they considered the following factors to be relevant:

i. The position of the ECCC within the Cambodian legal system – personal, temporal, and subject-matter jurisdictions;[72]

ii. The principles of *in dubio pro reo* and strict construction of criminal law;[73]

iii. The gravity of the crimes and level of responsibility of the Accused, subject to the drafter's knowledge of the overall death toll and large numbers of perpetrators;[74] and

iv. Decision-making within Democratic Kampuchea structures and the degree to which the Charged Person was able to contribute to or determine CPK policies and/or their interpretation.[75]

[72] Case 004/01, Dismissal Order, paras 11-25.
[73] Ibid, paras 26-36.
[74] Ibid, paras 37-39.
[75] Ibid, paras 40-41.

Position of the ECCC. The Co-Investigating Judges rejected a theoretical argument that they should exercise their discretion as broadly as possible in favour of finding personal jurisdiction in order to avoid an impunity gap,[76] concluding that an unqualified comparison to the ICTY's Referral Bench case law is "ultimately not helpful because the *negotiated context* in the case of the ECCC was knowingly different".[77] They reasoned that the drafters of the ECCC framework "wanted to restrict personal jurisdiction to those with the greatest responsibility under the DK [regime], fully aware that the death toll, for example, was in the region of a conservatively estimated 1.7 million people at the time".[78]

The principle of in dubio pro reo and strict construction of criminal law. The Co-Investigating Judges considered that the principle of *in dubio pro reo* "has a residual role in the interpretation of legal provisions, and its application is limited to doubts that remain after the application of the standard rules of interpretation".[79] They also referred to the principle of strict construction of criminal law in the 1956 Penal Code[80] and the Rome Statute,[81] considering that the "application of *in dubio pro reo* / strict construction is all the more critical in systems where the law is often not fully settled, as is the case in many of international(ised) criminal law".[82]

Gravity of the crimes. The Co-Investigating Judges considered that a valid point of reference is the relative gravity of the Charged Person's own actions and their effects, which is "not entirely dissimilar to those [considerations] one would use for sentencing purposes". However, they considered that this must be subject to the drafters' knowledge of the overall death toll and that there was a large number of potential perpetrators who each alone could have been responsible for hundreds or thousands of deaths.[83]

Level of responsibility. The Co-Investigating Judges considered that while an "obvious", but not exclusive, "initial filtering" is the formal position in the hierarchy, an important consideration in determining if someone is "most responsible" is the degree to which the Accused was able to contribute to or determine policies and/or their implementation.[84]

[76] Ibid, para. 12.
[77] Ibid, para. 18 (original emphasis).
[78] Ibid.
[79] Ibid, para. 26.
[80] Ibid, para. 26, fn. 23.
[81] Ibid, para. 26, fn. 24.
[82] Ibid, para. 27.
[83] Ibid, para. 38 (see also, para. 18).
[84] Ibid, paras 38-39.

Decision-making within Democratic Kampuchea structures. Considering the evidence on the case file, the Co-Investigating Judges concluded that whether someone developed or had to develop their own initiative was not in and of itself a criterion that would elevate them into the category of most responsible, as "[d]ecisions were made at the top and then implemented by the lower levels on pain of personal consequence at any level, but increasingly so the further down the chain of command one looks, if orders were not adhered to".[85]

The International Co-Investigating Judge incorporated this joint analysis of "most responsible" into all his subsequent Closing Orders in Cases 004/02, 003, and 004.[86]

While the National Co-Investigating Judge incorporated much of the Co-Investigating Judges' joint analysis of the law from Case 004/01 in his subsequent Closing Orders in Cases 004/02, 003, and 004, he took a different approach in interpreting the negotiations history. In Case 003, he explained that the phrase "those who were most responsible" was specifically included in the ECCC's jurisdiction in reference to Duch, and that the inclusion of Duch meant "that those who were most responsible played a key role in committing crimes, proximate to the commission, under their autonomy and de facto authority".[87] By the same reasoning, he concluded in Cases 004/02 and 004 that Duch was "the only most responsible person".[88]

In Cases 004/02 and 004, the National Pre-Trial Chamber Judges found that the intended targets for prosecution were no more than four to five individuals, namely, those charged in Cases 001 and 002: Nuon Chea, Khieu Samphan, Ieng Sary, and Ieng Thirith, and Duch.[89] In Case 004/02, they explained that (1) only seven persons were senior leaders, namely those in the CPK Standing or Central Committees (Pol Pot, Nuon Chea, Ieng Sary, Sao Phim, Ta Mok, Vorn Vet, and Son Sen);[90] (2) Duch, while not a senior leader, "definitely falls in the category of 'those most responsible' for the crimes";[91] (3) "clear evidence" was given during the National Assembly's October 2004 session that "only three to four persons would be brought to trial at the ECCC";[92] and (4) that none of the persons in the Second and Third Introductory

[85] Ibid, para. 40.
[86] Case 004/02, Closing Order (Indictment), paras 49-56, 698; Case 003, Closing Order (Indictment), paras 38-39; Case 004, Closing Order (Indictment), paras 32-34.
[87] Case 003, Dismissal Order, paras 396-397.
[88] Case 004/02, Dismissal Order, para. 542; Case 004, Dismissal Order, para. 638.
[89] Case 004/02, Considerations on Closing Order Appeals, para. 250; Case 004, Considerations on Closing Order Appeals, paras 128-129.
[90] Case 004/02, Considerations on Closing Order Appeals, paras 222-224.
[91] Ibid, para. 223.
[92] Ibid, para. 249.

Submissions in Cases 003 and 004 were senior leaders or most responsible.[93] In Case 004, the National Pre-Trial Chamber Judges additionally considered that the number of persons in Cases 001 and 002 is consistent with the Deputy Prime Minister's remarks at the October 2004 National Assembly debates.[94]

1.1.6. Standard of review for personal jurisdiction determinations

The Pre-Trial Chamber unanimously held that the Co-Investigating Judge's personal jurisdiction determinations are discretionary and can be reversed if they are: (1) based on an incorrect interpretation of the governing law invalidating the decision; (2) based on a patently incorrect conclusion of fact occasioning a miscarriage of justice; and/or (3) so unfair or unreasonable as to constitute an abuse of the Co-Investigating Judges' discretion and to force the conclusion that they failed to exercise their discretion judiciously.[95] The Pre-Trial Chamber explained that should it reverse the Co-Investigating Judge's decision, it "will normally remit the decision" for reconsideration, but may substitute its own decision in exceptional circumstances and issue a new or revised closing order.[96] These considerations were not reviewed further before the ECCC.[97]

1.2. Temporal jurisdiction

The ECCC's temporal jurisdiction was defined as the period between 17 April 1975 and 6 January 1979.[98] These dates coincided with the fall of Phnom Penh to the Khmer Rouge in 1975, and the advance of Vietnamese-backed forces on the capital in January 1979.[99]

According to these provisions, the ECCC had jurisdiction to decide on crimes that *were committed* during this period. In Cases 002/01 and 002/02, the Accused were held responsible for participating in a joint criminal enterprise ("JCE") comprising a (criminal) common purpose long before 17 April 1975, thereby requiring the chambers to interpret this

[93] Ibid, para. 225.
[94] Case 004, Considerations on Closing Order Appeals, paras 123, 125.
[95] Case 004/01, Considerations on Closing Order Appeal, para. 21; Case 004/02, Considerations on Closing Order Appeals, para. 29; Case 003, Considerations on Closing Order Appeals, para. 47; Case 004, Considerations on Closing Order Appeals, para. 35.
[96] Case 004/01, Considerations on Closing Order Appeal, para. 22; Case 004/02, Considerations on Closing Order Appeals, para. 30; Case 003, Considerations on Closing Order Appeals, para. 48; Case 004, Considerations on Closing Order Appeals, para. 36.
[97] See Internal Rules, Rule 76(7); Case 002/01, Judgment, fn. 111.
[98] UN-RGC Agreement, article 1; ECCC Law, articles 1, 2 (new).
[99] See *Guide to the ECCC (Volume I)*, chapter 1.

provision.[100] Furthermore, the establishment of the ECCC with a specific temporal and personal jurisdiction led to questions of whether the ECCC's jurisdiction was exclusive during this period or whether (and to what extent) the regular judiciary would continue to have jurisdiction,[101] and whether the chambers could rely on evidence regarding facts outside April 1975 – January 1979.[102]

1.2.1. *Ratione temporis*

Article 1 of the UN-RGC Agreement and Articles 1 and 2 (new) of the ECCC Law provided that the ECCC was established for certain acts "that were committed during the period from 17 April 1975 to 6 January 1979". Additionally, Articles 5(3) and 6(3) of the UN-RGC Agreement provided that the scope of investigation and prosecution (by the Co-Investigating Judges and the Co-Prosecutors, respectively) was limited to "crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979".

1.2.1.1. Interpreting the temporal jurisdiction

The ECCC lacked temporal jurisdiction where the *actus reus* of a crime was committed outside the period of 17 April 1975 to 6 January 1979.[103] Nevertheless, where the Accused did not carry out the *actus reus* personally, the ECCC had jurisdiction over the conduct *giving rise* to individual criminal responsibility based on participation in a JCE before 17 April 1975. The conduct must have "formed part of extended contributions to the implementation of a common purpose which continued after 16 April 1975". The Accused remained responsible for these acts outside the ECCC's temporal jurisdiction unless they distanced themselves from the JCE at the outset.[104]

In Case 002/01, the Supreme Court Chamber examined the ECCC's jurisdiction over conduct that predated its temporal jurisdiction but gave rise to individual criminal responsibility based on participation in a JCE. It held that: (1) when crimes are committed by several persons acting jointly with a common criminal purpose, the acts of those who devise the common criminal

[100] See section 1.2.1.1.
[101] See section 1.2.1.2.
[102] See section 1.2.1.3.
[103] Case 002/01, Appeal Judgment, para. 213.
[104] Case 002/02, Appeal Judgment, paras 1823-1824, 1834; Case 002/01, Appeal Judgment, para. 221.

purpose and those who contribute in a relevant manner to its implementation form a cluster of interrelated transactions with the acts of those who personally carry out the *actus rei*; and (2) all participants are considered co-perpetrators, and the central element is the agreement to further the common purpose.[105]

In reaching these holdings, the Supreme Court Chamber reasoned that from the perspective of the substantive law, it would be "unnatural to break up such a protracted and complex transaction as it is only intelligible if all of its components are considered together".[106] It considered that the temporal extent of such a cluster of interrelated transactions starts with the initial contribution to the common purpose as an expression of the shared criminal intent and ends with "either the cessation of any further criminal activity by the enterprise or, as far as individuals contributing to the implementation are concerned, withdrawal from the enterprise, the latter requiring cessation of any further contribution as well as abandonment of the shared criminal intent". The Supreme Court Chamber considered that this approach remained valid "notwithstanding any truncation in pronouncing on the responsibility for the crime as may be necessitated by limits on exercising jurisdiction, such as statute of limitation, age of the perpetrator, temporal limitations etc.".[107]

The Supreme Court Chamber further noted that the question of whether individuals who collaborate with a shared criminal intent, including those who devise the common criminal purpose and contribute to the planning, should all be regarded as co-perpetrators together with those who carry out the offence "apparently has never arisen" in an international legal context.[108] However, it found support in domestic jurisdictions "that employ modes of responsibility for participation in multi-actor criminal activity similar to joint criminal enterprise", namely, in England and Wales, and in the US:

i. According to English and Welsh case law, a JCE member is accountable for all group actions unless they formally withdraw from the JCE in a timely and unequivocal manner. The focus here is on continuing participation at the time of the commission of the *actus rei*, not on individual contributions. Similar to conspiracy law, the JCE emphasises continuous agreement, making jurisprudence on the temporal extent of conspiracy relevant. Although in England and Wales the crime of conspiracy is

[105] Case 002/01, Appeal Judgment, para. 215.
[106] Ibid.
[107] Ibid.
[108] Ibid, para. 216.

considered to be completed as soon as the agreement between conspirators has been made, it continues as long as it is being carried out.[109]

ii. In US law, conspiracy is regarded as a continuing offence, so that the statute of limitations does not begin to run until the criminal agreement has been completed, abandoned, or after the last overt act in furtherance of the agreement, regardless of individual involvement timing.[110]

Ultimately, the Supreme Court Chamber concluded that the offences in Case 002/01 "were committed" within the ECCC's temporal jurisdiction, considering that the Accused's contributions that occurred before 17 April 1975 were part of a cluster of transactions of a JCE which "continued over a period of time and brought to fruition the relevant *actus rei* committed within the jurisdictional period of the ECCC".[111] The Supreme Court Chamber reasoned that the charged conduct was not a single act (such as planning or incitement) completed outside the temporal scope of the ECCC's jurisdiction which eventually led to a criminal result within the temporal jurisdiction, but rather a part of extended contributions to the implementation of a common purpose, which continued after 17 April 1975. The Supreme Court Chamber emphasised that the Accused remained responsible because there was no indication that they distanced themselves from the common purpose at any time.[112]

In Case 002/02, the Supreme Court Chamber recalled its ruling in Case 002/01 that a trial chamber is not precluded from considering evidence of previous relevant and potentially probative acts or conduct "to establish whether any pattern relevant to the allegations at trial was discernible and, more importantly, whether it was followed during the temporal period of 17 April 1975 onwards in the context of the implementation of a common purpose".[113]

1.2.1.2. Exclusive jurisdiction over Khmer Rouge-era cases

The ECCC's jurisprudence is not settled on whether the Extraordinary Chambers had exclusive jurisdiction over offences within its temporal jurisdiction.

In Case 004/01, the Co-Investigating Judges considered that the ECCC had exclusive jurisdiction over cases within its scope, thus limiting the regular courts' jurisdiction over cases

[109] Ibid.
[110] Ibid.
[111] Ibid, para. 217.
[112] Ibid, paras 217, 221.
[113] Case 002/02, Appeal Judgment, para. 1823.

within the ECCC's personal and temporal jurisdiction.[114] When deciding to dismiss the charges against Im Chaem, the Co-Investigating Judges considered that if personal jurisdiction was denied, no Cambodian court had authority over these cases, due to the ECCC's unique lack of a referral process compared to other tribunals.[115] The Co-Investigating Judges reasoned that this selective approach and the "massive impunity gap" resulting from it would "appear unpalatable and indeed unfair to many", but was "a conscious political choice" and also "a common feature of any international(ised) jurisdiction set up to bring judicial closure to post-conflict scenarios".[116]

Conversely, the Pre-Trial Chamber held that the ECCC did *not* have exclusive jurisdiction over offences falling within its temporal jurisdiction.[117] It considered that cases of which the ECCC was seized could not be transferred to domestic courts, because the applicable law did not foresee any referral procedure,[118] and that Cambodian courts inherently have full jurisdiction over matters of criminal justice, which includes jurisdiction over all Khmer Rouge-era cases of which the ECCC was not seized.[119] The Pre-Trial Chamber highlighted that the ECCC's applicable law did not preclude jurisdiction by the regular courts, as nothing in the applicable law indicated that the ECCC would have exclusive jurisdiction over other Khmer Rouge-era cases.[120] It also concluded that the negotiations history would support the conclusion that the ECCC did not strip ordinary Cambodian courts of their jurisdiction.[121]

The exclusivity of the ECCC's jurisdiction over Khmer Rouge-era cases was not reviewed further before the Trial Chamber or Supreme Court Chamber.

[114] Case 004/01, Dismissal Order, para. 23.
[115] Ibid, paras 14-25. In their reasoning, the Co-Investigating Judges did not differentiate between cases of which the ECCC was seized and cases of which the ECCC was not seized.
[116] Case 004/01, Dismissal Order, paras 25, 32, 35.
[117] Case 004/02, Considerations on Closing Order Appeals, paras 55-59.
[118] Case 004/01, Considerations on Closing Order Appeal, para. 74; Case 004/02, Considerations on Closing Order Appeals, para. 56.
[119] Case 004/02, Considerations on Closing Order Appeals, para. 57.
[120] Case 004/01, Considerations on Closing Order Appeal, paras 72-80; Case 004/02, Considerations on Closing Order Appeals, paras 58-59.
[121] Case 004/02, Considerations on Closing Order Appeals, para. 58; Case 004/01, Considerations on Closing Order Appeal, para. 77.

1.2.1.3. Principles for the use of evidence

1.2.1.3.1. *Evidence or facts outside the temporal jurisdiction or scope of the case*

From early in proceedings, the Co-Investigating Judges and chambers accepted that they could rely on evidence falling outside the scope of the ECCC's temporal jurisdiction: "(1) to clarify a given context; (2) to establish by inference the elements […] of criminal conduct occurring during the material period; or (3) to demonstrate a deliberate pattern of conduct".[122] This evidence must have been of demonstrable relevance to matters within the ECCC's jurisdiction and the scope of the trial.[123] The Trial Chamber was required to weigh requests to admit evidence concerning events outside the temporal jurisdiction against its duty to safeguard the Accused's right to an expeditious trial.[124]

In Case 001, the Trial Chamber based its findings on the assumption that under certain circumstances, it could rely on evidence concerning pre-1975 or post-1979 acts.[125] No party appealed the Trial Chamber's rulings on the use of evidence concerning events outside the ECCC's temporal jurisdiction, and consequently it was not discussed in the Supreme Court Chamber's Judgment.

In Case 002, the Pre-Trial Chamber ruled that information that bore on contextual elements may explicitly also contain certain limited contextual elements that falls outside of the ECCC's temporal jurisdiction. It affirmed that the Co-Investigating Judges rightfully referred to the standards set forth by the ICTR *Nahimana* Appeals Judgment.[126]

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[122] Case 002/02, Appeal Judgment, para. 666. See also Case 002/01, Judgment, fn. 195; Case 002/01, Directive in Advance of Initial Hearing Concerning Proposed Witnesses, 3 June 2012, E93, p. 2; Case 002, Order on Requests, 12 January 2010, D300, paras 9-10.
[123] Case 002/01, Directive in Advance of Initial Hearing Concerning Proposed Witnesses, 3 June 2012, E93, p.2.
[124] Case 002, Decision on Nuon Chea Motions Regarding Fairness of Judicial Investigation, 9 September 2011, E116, para. 20. See also Case 002, First Consolidated Request for Additional Investigations, 18 May 2011, E88, para. 12.
[125] See Case 001, Judgment, para. 115. In the factual findings, the Trial Chamber elaborated on the Accused's role in the M-13 prison, and found that "[i]n July 1971, the Accused was tasked with directing M-13, a security centre for interrogating individuals suspected of being spies or enemies of the CPK". The Trial Chamber noted in footnote 192 to these factual findings: "Events relating to M-13 fall outside the temporal jurisdiction of the ECCC". See Article 2 (new) of the ECCC Law (limiting the jurisdiction of the ECCC to crimes committed 'during the period from 17 April 1975 to 6 January 1979'). Given that M-13 was in many ways a precursor to S-21, the Chamber nonetheless heard testimony regarding the functioning of M-13 and the Accused's role therein.
[126] Case 002, Order on Requests, 12 January 2010, D300, paras 9-10. See also Case 002, Decision on Reconsideration of 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, 27 September 2010, D365/2/17, para. 49, fn. 129.

During the preparation phase of the Case 002/01 trial, the Trial Chamber provided the parties "limited latitude to present evidence falling outside the ECCC temporal jurisdiction where it is relevant to establish background information or context".[127] The Trial Chamber later reaffirmed its position, holding that background contextual issues and events outside the ECCC's temporal jurisdiction could be considered "only when demonstrably relevant to matters within the ECCC's jurisdiction and the scope of the trial as determined by the Chamber".[128] The Trial Judgments in Case 002/01 and 002/02 adopted this approach and specifically referenced the standards set by the ICTR *Nahimana* Appeals Judgment.[129]

In Case 002/02, the Supreme Court Chamber affirmed that the Trial Chamber could validly rely on evidence falling outside the scope of the ECCC's temporal jurisdiction to: (1) clarify a given context; (2) establish by inference the elements of criminal conduct; or (3) demonstrate a deliberate pattern of conduct.[130] The Supreme Court Chamber ruled that the Trial Chamber correctly referred to the ICTR *Nahimana* Appeal Judgment when reassessing documentary evidence after severing a case, and properly applied the "out-of-scope but relevant evidence" principle.[131] In reaching this decision, the Supreme Court Chamber considered that pursuant to Rule 89 *quater* (3), evidence related to excluded facts could still be considered if relevant to the remaining facts.[132] The Supreme Court Chamber also noted that the Trial Chamber rightfully assured that out-of-scope evidence would only be considered when consistent with other evidence.[133] Consequently, the Supreme Court Chamber affirmed that the Trial Chamber could "properly rely on evidence outside the temporal or geographic scope of the case to establish by inference the elements of criminal conduct".[134]

[127] Case 002/01, Decision on Objections to Documents Proposed before the Chamber on the Co-Prosecutor's Annexes A1-A5 and to Documents Cited in Paragraphs of the Closing Order Relevant to the First Two Trial Segments of Case 002/01, 9 April 2012, E185, para. 29. See also Case 002/01, Directive in Advance of Initial Hearing Concerning Proposed Witnesses, 3 June 2012, E93, p. 2.
[128] Case 002, Decision on Nuon Chea Motions Regarding Fairness of Judicial Investigation, 9 September 2011, E116, para. 20.
[129] Case 002/01, Judgment, fn. 195; Case 002/02, Judgment, para. 1641.
[130] Case 002/02, Appeal Judgment, para. 666.
[131] Ibid, paras 665-668, 970, fns 2754, 1332, 1823; Case 002/02, Judgment, para. 60. The severance of proceedings in Case 002 led to the necessity of a reconsideration of the admissible documentary evidence in the case file. Therefore, the relevance of all documents was assessed by the Chamber following a set of Document Hearings where parties submitted their positions on relevance, probative value and admissibility of documents.
[132] Case 002/02, Appeal Judgment, para. 665.
[133] Ibid, para. 666; Case 002/02, Judgment, para. 60.
[134] Case 002/02, Appeal Judgment, para. 970.

1.2.1.3.2. *Evidence following the reduction of the scope of investigations*

In Cases 004/02, 003, and 004, the International Co-Investigating Judge held that after limiting the scope of investigations during the investigation phase, the evidence relating to the excluded facts could still be relied upon pursuant to Internal Rule 66 *bis* (5), insofar as it was relevant to the remaining facts.[135]

Additionally, the International Co-Investigating Judge considered that this provision applied *mutatis mutandis* to evidence underlying facts that may be subject to a partial dismissal pursuant to Internal Rule 67.[136] According to the International Co-Investigating Judge, in complex investigations it is more practical to avoid formal notifications and partial dismissals. Such actions would trigger unnecessary procedures and litigation, undermining efficiency. Instead, a pragmatic approach focusing on resource allocation for the rest of the investigation is preferrable.[137]

1.3. Bars to jurisdiction

Bars to jurisdiction refer to legal principles or circumstances that prevent a court from hearing a case or exercising its authority over a particular matter. For example, the principle of *ne bis in idem*, known to many legal systems, means that a person cannot be tried or punished twice for the same offence. Similarly, amnesties and pardons are legal mechanisms used to grant exceptions to or immunity from prosecution for certain offences.

The Co-Investigating Judges and chambers repeatedly dealt with the circumstances in which the principle of *ne bis in idem* applied at the ECCC and the extent to which a previously granted amnesty and pardon precluded jurisdiction when ruling on the effects of Ieng Sary's conviction in 1979 by the People's Revolutionary Tribunal's ("PRT") and the Royal Pardon and amnesty granted to him in 1996.

In Case 002, Ieng Sary argued that the ECCC's jurisdiction to prosecute him was barred by the *ne bis in idem* principle since he was tried and convicted *in absentia* for having committed

[135] Case 003, Decision to Reduce the Scope of Judicial Investigations Pursuant to Rule 66 *bis*, 10 January 2017, D226, para. 11; Case 004, Notice on Provisional Discontinuance Regarding Individual Allegations, 25 August 2016, D302/3, paras 10-11.
[136] Case 004, Notice on Provisional Discontinuance Regarding Individual Allegations, 25 August 2016, D302/3, para. 11.
[137] Ibid, para. 12.

genocide, and because of the royal decree granted to him, raising issues about the applicability of these bars to jurisdictions at the ECCC. These are discussed in the following sections.

1.3.1. The principle of *ne bis in idem*

The principle of *ne bis in idem* provides that no one should be prosecuted twice for the same criminal offence.[138] The principle derives from civil law, and is similar to the rule against double jeopardy, which is part of legal systems throughout the world.[139] It can be seen as narrowly related to the principle of *res judicata*, which provides that a court should not deal again with a case that has already been judged.[140] The principle of *ne bis in idem* was extensively discussed at the ECCC in Case 002/01 against Ieng Sary since he was "convicted" *in absentia* by the PRT in 1979.

1.3.1.1. ECCC framework

The UN-RGC Agreement, the ECCC Law, and the Internal Rules did not afford protection against double jeopardy, nor address the effect of a previous conviction on the proceedings before the ECCC, as none of these documents explicitly enshrined the *ne bis in idem* principle.[141] The Pre-Trial Chamber and Trial Chamber accordingly concluded that, pursuant to Article 12 of the UN-RGC Agreement and Article 33 new of the ECCC Law, they needed to seek guidance in Cambodian and international law.[142]

Regulations enshrining the *ne bis in idem* principle at national and international level feature slightly different views on the scope of this protection. The Pre-Trial Chamber noted that the principle of *ne bis in idem* is defined differently in Cambodian and international law, revolving around what constitutes the "same crime".[143] Under Cambodian law, the "same crime" equates to the "same act", while the International Covenant on Civil and Political Rights ("ICCPR")

[138] Case 002, Decision on Closing Order Appeal (Ieng Sary), fn. 29.
[139] Case 002, Decision on Appeal Against Provisional Detention Order of Ieng Sary, 17 October 2008, C22/I/74, para. 41; Case 002, Decision on Closing Order Appeal (Ieng Sary), fn. 29.
[140] Case 002, Decision on Appeal Against Provisional Detention Order of Ieng Sary, 17 October 2008, C22/I/74, para. 47.
[141] Case 002, Decision on Closing Order Appeal (Ieng Sary), para. 118; Case 002, Decision on Appeal against Provisional Detention Order of Ieng Sary, 17 October 2008, C22/I/74, para. 42.
[142] Case 002, Decision on Closing Order Appeal (Ieng Sary), paras 118 *ff*; Case 002, Decision on Appeal against Provisional Detention Order of Ieng Sary, 17 October 2008, C22/I/74, paras 41-47; Case 002, Decision on Ieng Sary's Rule 89 Preliminary Objections (*Ne bis in idem* and Amnesty and Pardon), 3 November 2011, E51/15, paras 23 *ff*.
[143] Case 002, Decision on Appeal against Provisional Detention Order of Ieng Sary, 17 October 2008, C22/I/74, para. 43.

prohibits successive trials for the "same offence".[144] Noting that Ieng Sary was not charged specifically with genocide, the Pre-Trial Chamber held that the Co-Investigating Judges' characterisation was too vague to allow a proper determination of whether the current prosecution was for the "same acts" as those upon which the 1979 charges were based. It concluded that the extent of the protection afforded by the *ne bis in idem* principle differed depending on the way it was applied.[145]

1.3.1.2. Cambodian law

The *ne bis in idem* principle is reflected in Cambodian law in the principle of *res judicata* in Articles 7 and 12 of the Code of Criminal Procedure ("CCP") and applied to all decisions, whether acquittals or convictions. The Trial Chamber considered that Article 12 of the CCP merely spells out an example of *res judicata*, and that Article 7 enlists "*res judicata*" as one of the "reasons for extinguishing a charge in a criminal action", with the consequence that "a criminal charge can no longer be pursued".[146] The Trial Chamber emphasised that this principle applies only when the first case resulted in a final judicial decision issued in respect of the same parties and facts, and that pursuant to Article 12 of the CCP, the principle applies to the *same conduct* rather than to the *same offence*.[147]

1.3.1.3. International Covenant on Civil and Political Rights

There is no international *ne bis in idem* protection under the ICCPR.[148] The Trial Chamber held that Article 14 ICCPR applies solely to proceedings within the domestic legal system and did "not apply to proceedings before the ECCC, an internationalized court".[149]

The Trial Chamber emphasised that the reasons for this limitation of the principle of *ne bis in*

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[144] Ibid, para. 43.
[145] See Case 002, Decision on Appeal against Provisional Detention Order of Ieng Sary, 17 October 2008, C22/I/74, para. 53.
[146] Case 002, Decision on Ieng Sary's Rule 89 Preliminary Objections (*Ne bis in idem* and Amnesty and Pardon), 3 November 2011, E51/15, para. 19, fn. 43. See Code of Criminal Procedure, article 7 ("The reasons for dropping a charge in a criminal action are as follows: […] 5. The *res judicata*. When a criminal action is extinguished a criminal charge can no longer be pursued or must be terminated").
[147] Code of Criminal Procedure, article 12 ("In applying the principle of *res judicata*, any person who has been finally acquitted by a court order cannot be accused once again for the same causes of action, including the case where such action is subject to different legal qualification"). See also Case 002, Decision on Ieng Sary's Rule 89 Preliminary Objections (*Ne bis in idem* and Amnesty and Pardon), 3 November 2011, E51/15, para. 27.
[148] Case 002, Decision on Ieng Sary's Rule 89 Preliminary Objections (*Ne bis in idem* and Amnesty and Pardon), 3 November 2011, E51/15, para. 32; Case 002, Decision on Closing Order Appeal (Ieng Sary), paras 128-131.
[149] Case 002, Decision on Ieng Sary's Rule 89 Preliminary Objections (*Ne bis in idem* and Amnesty and Pardon), 3 November 2011, E51/15, para. 32. See Case 002, Decision on Closing Order Appeal (Ieng Sary), paras 128-131.

idem stemmed from the "unique characteristics of the interaction between domestic and international proceedings in situations of this type".[150] It held that "[w]here an international tribunal has jurisdiction over offences previously tried by domestic proceedings with manifest shortcomings, the *ne bis in idem* principle has been balanced against the interest of the international community and victims in ensuring that those responsible for the prosecution of international crimes are properly prosecuted".[151]

1.3.1.4. Procedural rules established at the international level

Procedural rules established at the international level provided that international courts shall not exercise jurisdiction in respect of individuals that have already been tried for the same acts by national authorities "unless it is established that the national proceedings were not conducted independently and impartially with due regard to the process of law". Only fundamental defects in the national proceedings would have justified the ECCC exercising jurisdiction, while "the mere consideration that the investigation […] was 'incomplete and one-sided' or led to an 'erroneous' acquittal" were not sufficient.[152]

The Pre-Trial Chamber analysed the rationale behind the *ne bis in idem* principle, and assessed international laws and jurisprudence, scholars' opinions, and opinions expressed during the negotiations on the Rome Statute of the ICC. It considered that the principle of *ne bis in idem* was explicitly enshrined in Article 10(2)(b) of the Statute of the ICTY, which provided that a person who had been tried by a national court for international crimes could be tried by the tribunal only if "the national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted".[153]

The Pre-Trial Chamber further considered that equal or similar rules are contained in the Statutes of the ICTR, the SCSL, the Special Tribunal for Lebanon, and the Rome Statute.[154] It noted that while these provisions differ in some respects, they all indicate that international courts would refrain from exercising jurisdiction over a person who had already been convicted before a national court, provided that the national proceedings fulfil certain conditions. It found

[150] Case 002, Decision on Ieng Sary's Rule 89 Preliminary Objections (*Ne bis in idem* and Amnesty and Pardon), 3 November 2011, E51/15, para. 33.
[151] Ibid.
[152] Case 002, Decision on Closing Order Appeal (Ieng Sary), paras 157, 160.
[153] Ibid, paras 132, 148-153.
[154] Ibid, paras 133-134.

that though these exceptions are worded differently, all provisions contain two exceptions to the application of the *ne bis in idem* principle: (1) shielding of a person; or (2) the proceedings were not conducted independently or impartially.[155] It considered that the adoption of *ne bis in idem* provisions in international and *ad hoc* tribunal statutes aimed to balance the Accused's fair trial rights and legal certainty with the international community's interest in prosecuting perpetrators of international crimes and providing justice for victims.[156]

The Pre-Trial Chamber held that this understanding is also supported by the jurisprudence of several international human rights bodies.[157] For instance, the Inter-American Court of Human Rights' jurisprudence provides general guidance in cases where a conviction for serious international crimes did not result in punishment, whether due to acquittal or failure to carry out sentences.[158] The Pre-Trial Chamber concluded "that the protection against double jeopardy does not negate states' international obligations to promote accountability in relation to perpetrators of genocide, crimes against humanity and war crimes".[159]

The Trial Chamber found that international jurisprudence provided general guidance in cases "where a conviction for serious international crimes did not result in punishment, whether due to acquittal or failure to carry out sentences". It considered that in these cases, the *ne bis in idem* principle did not debar prosecution because it cannot "negate states' international obligations to promote accountability in relation to perpetrators of genocide, crimes against humanity and war crimes".[160]

1.3.1.5. Assessment of the 1979 "People's Revolutionary Tribunal"

The PRT in Phnom Penh was set up on 15 July 1979 to "try the acts of genocide committed by the Pol Pot-Ieng Sary clique", namely, planned massacres, expulsion of inhabitants of cities, forced hard labour, extinction of religion, and destroying political, cultural and social structures, and family and social relations.[161] Shortly after its establishment, from 15 to 19

[155] Ibid, para. 138.
[156] Ibid, paras 142 *ff*.
[157] Ibid, paras 154 *ff*.
[158] Ibid, paras 154-155. See also Case 002, Decision on Ieng Sary's Rule 89 Preliminary Objections (*Ne bis in idem* and Amnesty and Pardon), 3 November 2011, E51/15, para. 35.
[159] Case 002, Decision on Ieng Sary's Rule 89 Preliminary Objections (*Ne bis in idem* and Amnesty and Pardon), 3 November 2011, E51/15, para. 35. See also Case 002, Decision on Closing Order Appeal (Ieng Sary), para. 154.
[160] Case 002, Decision on Ieng Sary's Rule 89 Preliminary Objections (*Ne bis in idem* and Amnesty and Pardon, 3 November 2011, E51/15, para. 35.
[161] Case 002, Decision on Appeal against Provisional Detention Order of Ieng Sary, 17 October 2008, C22/I/74, para. 24. See also Decree Law No. 1: Establishment of People's Revolutionary Tribunal at Phnom Penh to Try the Pol Pot-Ieng Sary Clique for the Crime of Genocide, E9/9.3, article 1.

August 1979, the PRT held a trial *in absentia* against Pol Pot and Ieng Sary for their alleged participation in the crimes committed by the Khmer Rouge. On 19 August 1979, both Accused were found guilty of genocide and sentenced to death, and all their properties were confiscated.[162]

In Case 002, the Co-Investigating Judges and the chambers held that the deficiencies in the 1979 proceedings by the PRT against Ieng Sary were so significant that the conviction could not be considered as a "genuine judicial decision".[163] Accordingly, neither the prosecution, ostensible conviction, nor sentencing of Ieng Sary by the PRT barred the ECCC's jurisdiction over him.[164]

The Pre-Trial Chamber assessed the proceedings conducted by the PRT in depth and concluded that the "trial was not conducted by an impartial and independent tribunal with regard to due process requirements".[165] It based this conclusion on: (1) the questionable legal basis for the establishment of the PRT; (2) the insufficiency of guarantees to ensure that judges would be free from external pressure and interference; (3) the impartiality of the tribunal's members; (4) inappropriate defence and evidentiary safeguards; and (5) on the overall brevity of the proceedings and its work schedule, which "indicate[d] that the guilt of the accused was predetermined".[166]

The Trial Chamber widely adopted the Pre-Trial Chamber's findings concerning the deficiencies of the 1979 trial and limited its ruling to an analysis of the consequences of these deficiencies, concluding that the decision resulting from this "trial" could not be characterised as a genuine judicial decision.[167]

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[162] Case 002, Decision on Appeal against Provisional Detention Order of Ieng Sary, 17 October 2008, C22/I/74, para. 25. The PRT documents were admitted into evidence at trial as exhibit E3/2144.
[163] An assessment of the 1979 trial was first undertaken by the Case 002 Co-Investigation Judges and the Pre-Trial Chamber during the investigations against Ieng Sary. It was reaffirmed by the Pre-Trial Chamber and adopted by the Trial Chamber when deciding on preliminary objections during the main trial in Case 002/01. See Case 002, Decision on Ieng Sary's Rule 89 Preliminary Objections (*Ne bis in idem* and Amnesty and Pardon), 3 November 2011, E51/15, paras 23, 30; Case 002, Decision on Closing Order Appeal (Ieng Sary), paras 161-175; Case 002, Closing Order, paras 1332-1333.
[164] Case 002, Decision on Ieng Sary's Rule 89 Preliminary Objections (*Ne bis in idem* and Amnesty and Pardon), 3 November 2011, E51/15, para. 31; Case 002, Decision on Closing Order Appeal (Ieng Sary), para. 175.
[165] Case 002, Decision on Closing Order Appeal (Ieng Sary), paras 163-175.
[166] Ibid, paras 165-173.
[167] Case 002, Decision on Ieng Sary's Rule 89 Preliminary Objections (*Ne bis in idem* and Amnesty and Pardon), 3 November 2011, E51/15, paras 23, 30.

1.3.2. Pardon and amnesty under the 1996 Royal Decree

On 15 July 1994, following an alleged failure of the "'Democratic Kampuchea' group" to respect the 1991 Paris Agreement, which was meant to bring peace and national reconciliation to the country,[168] the National Assembly of the Royal Government of Cambodia passed the Law on the Outlawing of the Democratic Kampuchea Group.[169] On 14 September 1996, King Sihanouk issued a Royal Decree to Ieng Sary which consisted of two parts: (1) a pardon in relation to the PRT's 1979 proceedings, and (2) an amnesty under the 1994 Law on the Outlawing of the Democratic Kampuchea Group.[170] As a result, Ieng Sary and a large number of combatants were reintegrated into the Government and Cambodian society.[171]

Under Cambodian law, there are differences between a pardon granted by the King, and amnesties adopted by the National Assembly: a pardon granted by the King under Article 27 of the Constitution releases a convicted person from serving an enforceable sentence, while all other consequences of a criminal conviction remain.[172] Amnesties granted by the National Assembly in accordance with Article 90 of the Constitution terminate prosecution and create *de facto* impunity for offences committed before the amnesty entered into force.[173]

The Trial Chamber held that the assessment whether the King had the constitutional power to grant an amnesty by means of a decree was "first and foremost the prerogative of the Cambodian Constitutional Council".[174]

1.3.2.1. Pardon for the PRT "conviction"

In their Closing Order indicting Ieng Sary, the Co-Investigating Judges concluded that the effects of the pardon were limited to the annulment of the sentence handed down after the

[168] Case 002, Decision on Closing Order Appeal (Ieng Sary), para. 196.
[169] Ibid, para. 184; Law on the Outlawing of the Democratic Kampuchea Group, Royal Kram No. 01.NS.94 (1994); Case 002, Decision on Appeal against Provisional Detention Order of Ieng Sary, 17 October 2008, C22/I/74, para. 26.
[170] Royal Decree, No. NS/RKT/0996/72, 14 September 1996; Case 002, Decision on Appeal against Provisional Detention Order of Ieng Sary, 17 October 2008, C22/I/74, paras 27, 55. As differing unofficial translations of the Royal Decree existed, a new translation prepared by the ECCC's Interpretation and Translation Unit was presented at the Chamber's request. See Case 002, Decision on Ieng Sary's Rule 89 Preliminary Objections (*Ne bis in idem* and Amnesty and Pardon), 3 November 2011, E51/15, para. 11.
[171] Case 002, Decision on Ieng Sary's Rule 89 Preliminary Objections (*Ne bis in idem* and Amnesty and Pardon), 3 November 2011, E51/15, paras 2, 54.
[172] Ibid, para. 25.
[173] Ibid, para. 26.
[174] Ibid, para. 29.

"conviction" in 1979 "without having any effect on the Judgment convicting him, as such".[175]

The Trial Chamber considered that the 1996 Royal Decree did not debar the ECCC's jurisdiction against Ieng Sary because the 1979 trial was "incapable of producing valid legal effects". A pardon of a legally invalid sentence has no effect. The Trial Chamber held that the deficiencies affecting the PRT proceedings against Ieng Sary were so significant that the decision resulting from this trial could not be characterised as a "genuine, enforceable, and final judicial decision", and thus could not be subject to a pardon.[176]

1.3.2.2. Scope of the amnesty

There were several interpretive and legal ambiguities in the 1996 Royal Decree, including whether the amnesty under the 1994 law covered any or all of the charges in the Closing Order. The Pre-Trial Chamber and Trial Chamber both held that this second part of the 1996 Royal Decree did not debar the ECCC's prosecution of Ieng Sary, though with different reasoning regarding the scope and validity of the amnesty.[177]

The Pre-Trial Chamber ruled that the second part of the amnesty referred only to offences mentioned in the 1994 Law on the Outlawing of the Democratic Kampuchea Group, which were not within the ECCC's jurisdiction.[178] It reasoned that this law had created new offences and penalties taking into account the specific context of that time, while it was not meant to create an autonomous criminal law regime to prosecute members of the Democratic Kampuchea group for any criminal act under existing criminal law.[179] It considered that the crimes charged in the Closing Order were different from those criminalised under the 1994 Law on the Outlawing of the Democratic Kampuchea Group, so that the amnesty had no effect on jurisdiction. The Chamber highlighted that extending the amnesty beyond its grammatical scope would not only defy the Decree's language but also violate Cambodia's international obligations under the ICCPR to prosecute violators of human rights, considering that there was

[175] Case 002, Closing Order, paras 1329-1331 (reaffirming the assessment made in Case 002, Provisional Detention Order Against Ieng Sary, 14 November 2017, C22, para. 12).
[176] Case 002, Decision on Ieng Sary's Rule 89 Preliminary Objections (*Ne bis in idem* and Amnesty and Pardon), 3 November 2011, E51/15, para. 30.
[177] Ibid, paras 28 *ff*; Case 002, Decision on Closing Order Appeal (Ieng Sary), paras 195 *ff*.
[178] Case 002, Decision on Closing Order Appeal (Ieng Sary), paras 195 *ff*; Case 002, Decision on Appeal Against Provisional Detention Order of Ieng Sary, 17 October 2008, C22/I/74, para. 61. A similar position was taken by the Co-Investigating Judges in the Closing Order and in the proceedings on Ieng Sary's provisional detention. See Case 002, Closing Order, para. 1331; Case 002, Provisional Detention Order against Ieng Sary, 14 November 2017, C22, para. 12.
[179] Case 002, Decision on Closing Order Appeal (Ieng Sary), para. 197.

"no indication" that the King or others intended to do so.[180]

By contrast, the Trial Chamber considered that it could not exclude the possibility that the Royal Decree's purpose may have been to grant Ieng Sary "general immunity from enforcement of any sentence and from prosecution for any acts committed before 1996, including during the Democratic Kampuchea regime". The Trial Chamber therefore deemed it unnecessary to call any witnesses to clarify the purpose of the Royal Decree.[181]

1.3.2.3. Validity of the amnesty

The Trial Chamber held that Cambodia's treaty obligations with respect to the crimes of grave breaches of the Geneva Conventions, genocide, or torture, prohibited the ECCC to "construe the 1996 Royal Decree as granting immunity from prosecution for Accused".[182] The Trial Chamber considered that a number of treaties to which Cambodia is a party, such as the four Geneva Conventions of 1949, the Genocide Convention, and the Convention against Torture, impose an absolute duty to prosecute certain international crimes, and that "[i]nternational tribunals and treaty bodies have repeatedly considered amnesties for perpetrators of acts of torture incompatible with the duty to investigate and prosecute these acts", and therefore void.[183]

The Trial Chamber considered that while international law does not generally prohibit amnesties in relation to other international crimes, international courts have a retroactive right "to evaluate amnesties and to set them aside or limit their scope should they be deemed incompatible with international norms".[184] The Trial Chamber consulted *opinio juris* and state practice to ascertain whether a customary norm requires the prosecution of the remaining international crimes or prohibits the retroactive application of amnesties, because there is no international treaty expressly prohibiting them.[185] On the outset, it considered that early definitions of crimes against humanity impose individual criminal responsibility regardless of domestic law, as reaffirmed in the Rome Statute ratified by Cambodia.[186]

The Trial Chamber further noted that international and regional human rights bodies

[180] Ibid, paras 200-201.
[181] Case 002, Decision on Ieng Sary's Rule 89 Preliminary Objections (*Ne bis in idem* and Amnesty and Pardon), 3 November 2011, E51/15, para. 29.
[182] Ibid, para. 39.
[183] Ibid, para. 38.
[184] Ibid, paras 40, 53.
[185] Ibid, para. 40.
[186] Ibid, para. 41.

consistently hold against domestic amnesties for serious international crimes, referring to violations of the victims' rights to effective remedies.[187] The Inter-American Court of Human Rights explicitly found that crimes against humanity cannot be subject to amnesty, so that amnesty laws in several American countries were incompatible with the American Convention on Human Rights.[188] The European Court of Human Rights ruled that amnesties are impermissible for crimes such as murder and torture, and that third States are not bound by amnesty clauses violating the duty to prosecute *jus cogens* crimes.[189] Similarly, the African Commission on Human and Peoples' Rights has declared that amnesties absolving perpetrators of serious crimes violate victims' rights and states' duty to prosecute under the African Charter on Human and People's Rights.[190]

The Trial Chamber considered that jurisprudence of international tribunals such as the ICTY and the SCSL affirms states' obligation to prosecute *jus cogens* crimes, rejecting blanket amnesties.[191] It further analysed the adoption, scope, and application of amnesties in several conflict or post-conflict countries and ascertained an international trend toward limiting amnesty scope, demonstrated by examples from Suriname, Nicaragua, Colombia, the Philippines, the Democratic Republic of the Congo, Tunisia, and Poland, where amnesties now exclude certain serious international crimes.[192]

In light of this analysis, the Trial Chamber concluded that while amnesties have generally not been invalidated as a measure within a reconciliation process if they offer some level of accountability and opportunities for victims to uncover the truth, they are rather applied on a case-by-case basis, taking into account various factors such as the process by which the amnesty was implemented, its substance and scope, and whether it offers alternative avenues for accountability.[193]

When evaluating the amnesty granted to Ieng Sary according to these standards, the Trial Chamber found that it was not accompanied by any form of accountability or remedy for the victims, and accordingly "attribute[d] no weight to a grant of such amnesty which it considered

[187] Ibid, para. 42.
[188] Ibid, para. 43.
[189] Ibid, para. 44.
[190] Ibid, para. 45.
[191] Ibid, paras 46-47.
[192] Ibid, paras 49-51.
[193] Ibid, para. 52.

contrary to the direction in which customary international law is developing".[194]

1.3.2.4. Amnesty for domestic crimes

The Trial Chamber held that the question of the scope of the amnesty in relation to crimes under the under the 1956 Penal Code was moot, because it had not been validly seized of these offences.[195] The Trial Chamber previously ruled that due to defects in the Closing Order, the charges pertaining to offences in the 1956 Penal Code could not form the basis of trial proceedings before the ECCC.[196]

[194] Ibid, para. 54.
[195] Ibid, para. 37.
[196] Case 002, Decision on Defence Preliminary Objections (Statute of Limitations on Domestic Crimes), 22 September 2011, E122, para. 23.

2. Crimes

2.1. Crimes under the ECCC's jurisdiction

The ECCC's subject matter jurisdiction was set out in Articles 1, 2, and 9 of the UN-RGC Agreement and Articles 1-8 of the ECCC Law.[197] The crimes set out in these articles were:

i. homicide, torture, and religious persecution, as set forth in the 1956 Penal Code;

ii. the crime of genocide;

iii. crimes against humanity;[198]

iv. grave breaches of the Geneva Conventions;

v. destruction of cultural property under the Hague Convention for Protection of Cultural Property in the Event of Armed Conflict; and

vi. crimes against internationally protected persons under the Vienna Convention on Diplomatic Relations.

The last two categories of crimes were never litigated before the ECCC.

2.2. Crimes under the 1956 Penal Code

Article 3 (new) of the ECCC Law provided that:

> The Extraordinary Chambers shall have the power to bring to trial all Suspects who committed any of these crimes set forth in the 1956 Penal Code, and which were committed during the period from 17 April 1975 to 6 January 1979:
>
> • Homicide (Article 501, 503, 504, 505, 506, 507 and 508)
>
> • Torture (Article 500)
>
> • Religious Persecution (Articles 209 and 210)
>
> The statute of limitations set forth in the 1956 Penal Code shall be extended for an additional 30 years for the crimes enumerated above, which are within the jurisdiction of the Extraordinary Chambers.

[197] UN-RGC Agreement, articles 1-2, 10; ECCC Law, articles 1-8.
[198] While article 2 of the UN-RGC Agreement provides that the ECCC has subject matter jurisdiction consistent with that set forth in the ECCC Law, article 9 specifies that "crimes against humanity" are as defined in the 1998 Rome Statute of the International Criminal Court.

> The penalty under Articles 209, 500, 506 and 507 of the 1956 Penal Code shall be limited to a maximum of life imprisonment, in accordance with Article 32 of the Constitution of the Kingdom of Cambodia, and as further stipulated in Articles 38 and 39 of this Law.

2.2.1. Pre-Trial Chamber jurisprudence (Cases 001 and 002)

The Pre-Trial Chamber consistently held that crimes under the 1956 Penal Code were applicable at the ECCC.[199]

In Case 001, the Pre-Trial Chamber reviewed the distinction between torture and homicide under Cambodian and international law, comparing the crimes' constitutive elements under the two regimes. After assessing the definition of torture under the UN Declaration on Torture, the Convention Against Torture, and International Criminal Tribunal for the former Yugoslavia ("ICTY") jurisprudence, and the definition of murder under ICTY and International Criminal Tribunal for Rwanda ("ICTR") jurisprudence, the Chamber concluded that crimes under the 1956 Penal Code had constitutive elements which were not present in international crimes such that the former are not subsumed by the latter.[200]

In Case 002, the Pre-Trial Chamber examined whether: (1) the application of Article 3 (new) of the ECCC Law violated the principle of non-retroactivity; (2) the crimes in the 1956 Penal Code were time barred when the statute of limitations was extended in 2001 by the adoption of the ECCC Law; and (3) the application of Article 3 (new) violated the Charged Persons' right to be treated equally before the law.[201]

i. *Whether the application of Article 3 (new) of the ECCC Law violated the principle of non-retroactivity*. The Pre-Trial Chamber held that the extension of the statute of limitations in Article 3 (new) did not trigger any issue concerning the principle of legality, considering the extension of the statute of limitations before its expiry to be a "matter of State policy". It noted that Article 15(1) of the ICCPR does not refer directly to limitation periods or "unequivocally interpret the scope of international fair trial principles in relation to the retroactive consideration or repeal of statutes of limitations". It also considered European Court of Human Rights jurisprudence holding that the *reactivation* of a criminal action that became subject to limitation may infringe the principle of legality, but found that this was not the case with an

[199] Case 002, Decision on Closing Order Appeal (Ieng Sary), paras 287, 292.
[200] Case 001, Decision on Closing Order Appeal, paras 60-72, 73-84, 107.
[201] Case 002, Decision on Closing Order Appeal (Ieng Sary), paras 278-292.

extension of the limitation period *before* its expiry.[202]

ii. *Whether the crimes in the 1956 Penal Code were time barred*. The Pre-Trial Chamber held that the extension of the statute of limitations did not violate the principle of legality because the 10-year statute of limitations in the 1956 Penal Code, which started to run on 24 September 1993, had not expired in 2001.[203] It considered that from 1979 until 1982, the judicial system of Cambodia did not function at all, and that until the Kingdom of Cambodia was created on 24 September 1993, "a number of historical and contextual considerations significantly impeded domestic prosecutorial and investigative capacity".[204] In particular, it cited the civil war waged by the Khmer Rouge, who were occupying parts of the country and still considered as one of its representatives by the international community.[205] It added that the Accused cannot benefit from the passage of time "where he is alleged to be in part responsible for the incapacity of the judicial system and to conduct investigation and prosecution".

iii. *Whether the application of Article 3 (new) violated the Charged Persons' right to be treated equally before the law*. The Pre-Trial Chamber did not consider the Co-Investigating Judges' decision to confirm the ECCC's jurisdiction with respect to crimes charged under the 1956 Penal Code to violate the Charged Persons' right to equality of arms simply because Article 3 (new)'s extension of the statute of limitations only applied at the ECCC and not in Cambodian courts.[206] Rejecting an argument that this application of Article 3 (new) amounted to unequal treatment, the Pre-Trial Chamber noted that the Human Rights Committee did not find that "extraordinary" or "special" courts with selective jurisdiction would, by their nature, violate Article 14(1) of the ICCPR.[207] Rather, the Human Rights Committee stated that "objective and reasonable grounds must be provided to justify the distinction" when exceptional criminal procedures are applied to the determination of certain categories of cases. The Pre-Trial Chamber concluded that the decision

[202] Ibid, para. 282.
[203] Ibid, para. 286.
[204] Ibid (quoting Case 001, Decision on the Defence Preliminary Objection Concerning the Statute of Limitations of Domestic Crimes, 26 July 2010, E187, Opinion of Judges Nil Nonn, Ya Sokhan, and Thou Mony, paras 19-20).
[205] Ibid.
[206] Ibid, paras 288-289.
[207] Ibid, para. 290.

to limit the ECCC's jurisdiction was not made arbitrarily and that it was reasonable to set up a specially constituted court to try senior-level perpetrators for these types of crimes, where the domestic system lacked capacities, and also in light of the limited resources available.[208]

2.2.2. Trial Chamber jurisprudence (Cases 001 and 002)

In contrast to the Pre-Trial Chamber, due to its inability to attain an affirmative majority vote with respect to crimes under the 1956 Penal Code, the Trial Chamber concluded that prosecution of the Accused for domestic crimes was barred in Case 001.[209]

While the Trial Chamber Judges unanimously decided that there was no legal or judicial system in Cambodia and that no criminal investigations or prosecutions were possible between 1975 and 1979, they were unable to reach an agreement on whether the applicable limitation period was interrupted or suspended between 1979 and 1993, and thus whether this period was extinguished by the time Article 3 and Article 3 (new) of the ECCC Law were promulgated.[210]

i. *National Judges' opinion.* The National Judges considered that the limitation period started to run at the earliest on 24 September 1993, when the Kingdom of Cambodia was created.[211] They reasoned that "a number of historical and contextual considerations significantly impeded Cambodia's prosecutorial and investigative capacity", namely: (1) the ongoing civil war during which the Khmer Rouge controlled parts of the Country; (2) the international community's recognition of the Khmer Rouge and their Cambodian coalition partners as Cambodia's government; (3) Cambodian judicial system's weakness and lack of independence; and (4) the fact that the Accused continued to serve in the Democratic Kampuchea regime until he lost contact with his commanders in 1993.[212] The National Judges considered it unnecessary to determine whether the limitation was interrupted or suspended, "given that the legal effects of both alternatives lead to the same result: the limitation period started to run in 1993".[213]

[208] Ibid, para. 291.
[209] Case 001, Decision on the Defence Preliminary Objection Concerning the Statute of Limitations of Domestic Crimes, 26 July 2010, E187, paras 14, 56.
[210] Ibid, para. 14.
[211] Ibid, Opinion of Judges Nil Nonn, Ya Sokhan, and Thou Mony, para. 25.
[212] Ibid, Opinion of Judges Nil Nonn, Ya Sokhan, and Thou Mony, para. 20.
[213] Ibid, Opinion of Judges Nil Nonn, Ya Sokhan, and Thou Mony, para. 25.

ii. *International Judges' opinion.* The International Judges were unable to conclude that the limitation period was suspended between 1979 and 1993.[214] They considered that while evidence suggested a severely weakened and compromised judicial system, it did not show, as a matter of objective fact, that no prosecution or investigation would have been possible from 1979 until 1993. They noted that from 1979 onwards, laws and decrees were progressively enacted, *e.g.*, on organising the judiciary, establishing the Supreme Court, and relevant criminal law.[215] While noting that the civil war and the Khmer Rouge's effective control over certain areas of Cambodia presented genuine constraints in initiating prosecutions or judicial investigations, the International Judges concluded that prosecutions and investigations were not precluded in *all* parts of the country, noting that a large volume of material found at S-21 was collated and collected at S-21 and later by the Documentation Center of Cambodia, and thus was available for investigation and trial during this time.[216] Lastly, they considered that while the adoption of the 1993 Constitution was a significant turning-point for Cambodia, it did not restore objective capacity to investigate or prosecute, or eradicate weaknesses, many of which endured beyond 1993.[217]

The absence of a supermajority precluded the continuation of the prosecution of the Accused in Case 001 for crimes under the 1956 Penal Code (namely, homicide and torture), while the prosecution against him for the same acts constituting international crimes continued (as crimes against humanity).[218]

In light of the Trial Chamber's ruling in Case 001, the Co-Investigating Judges in Case 002 left it to the Trial Chamber to decide what procedural action to take regarding domestic crimes, having found themselves in a stalemate as to whether crimes under the 1956 Penal Code could be applied.[219] Nevertheless, the Co-Investigating Judges issued a Closing Order indicting the Charged Persons for the domestic crimes of murder, torture, and religious persecution.[220]

The Trial Chamber found that the portions of the Co-Investigating Judges' Closing Order

[214] Ibid, Opinion of Judges Silvia Cartwright and Jean-Marc Lavergne, para. 27.
[215] Ibid, Opinion of Judges Silvia Cartwright and Jean-Marc Lavergne, para. 32.
[216] Ibid, Opinion of Judges Silvia Cartwright and Jean-Marc Lavergne, para. 33.
[217] Ibid, para. 34.
[218] Ibid, para. 56.
[219] Case 002, Closing Order, para. 1574.
[220] Ibid, para. 1576.

concerning domestic crimes "contain[ed] neither a description of the material facts giving rise to these charges nor of the Accused's criminal responsibility alleged in relation to them".[221] Finding that neither the Closing Order nor the Pre-Trial Chamber explained how the Accused could be held responsible for these crimes as a member of a joint criminal enterprise or as a superior, the Trial Chamber considered that these defects were such that it was impossible for it to determine the content of these charges, their factual basis, and their legal characterisation.[222] Observing that that the ECCC framework did not permit the Trial Chamber to amend the Closing Order or remit the Closing Order to the Co-Investigating Judges, the Trial Chamber found that it had "no alternative but to declare itself to have been improperly seised of offences in the 1956 Penal Code as described in the Closing Order in Case 002".[223] It concluded by declaring that it was not "validly seised of the offences in the 1956 Penal Code" and determined "in consequence that the Trial Chamber ha[d] no basis to try the Accused for […] domestic crimes and trial in relation to these crimes [could not] proceed".[224]

2.2.3. Co-Investigating Judges' jurisprudence (Cases 003 and 004)

In Case 004/01, the Co-Investigating Judges recounted the Pre-Trial Chamber's jurisprudence on the elements of domestic crimes without expressly stating whether these crimes could be applied to Im Chaem. Nonetheless, they issued a Dismissal Order in her case, dismissing all charges against her.[225]

In Cases 004/02, 003, and 004 the National Co-Investigating Judge did not analyse the applicability of domestic crimes in his Dismissal Orders.[226] By contrast, in his Indictments in Cases 004/02, 003, and 004, the International Co-Investigating Judge considered that "the issue of the statute of limitations ha[d] been clearly and unanimously resolved by the [Pre-Trial Chamber] and there is accordingly no doubt that the national crimes" for which Ao An, Meas Muth, and Yim Tith had been charged were "not statute-barred".[227] He indicted Ao An, Meas Muth, and Yim Tith for premeditated murder under the 1956 Penal Code.[228] However, due to

[221] Case 002, Decision on Defence Preliminary Objections (Statute of Limitations on Domestic Crimes), 22 September 2011, E122, para. 15.
[222] Ibid, paras 21-22.
[223] Ibid, para. 22.
[224] Ibid, disposition.
[225] See Case 004/01, Dismissal Order.
[226] Case 004/02, Dismissal Order; Case 003, Dismissal Order; Case 004, Dismissal Order.
[227] Case 004/02, Closing Order (Indictment), para. 59; Case 003, Closing Order (Indictment), para. 91. See also Case 004, Closing Order (Indictment), para. 89.
[228] Case 004/02, Closing Order (Indictment), disposition (Count 3); Case 003, Closing Order (Indictment), disposition (count 4); Case 004, Closing Order (Indictment), disposition (count 4).

the lack of enforceable indictments, the Supreme Court Chamber terminated Cases 004/02, 003, and 004.[229]

As a result of the Trial Chamber Judges' disagreement in Case 001, the Trial Chamber's finding of a lack of specificity in the Case 002 Closing Order, and the Supreme Court Chamber's termination of Cases 004/02, 003, and 004, no crimes under the 1956 Penal Code were applied by the ECCC.[230]

2.2.4. Elements of crimes under the 1956 Penal Code

2.2.4.1. Homicide

Article 501 of the 1956 Penal Code provided that:

> Any person who causes the death of another person is guilty of homicide. Homicide is either voluntary or involuntary, depending on whether the acts were accomplished with or without the intent to cause death.[231]

There were two forms of homicide under the 1956 Penal Code: (1) homicide without the intent to kill; and (2) premeditated murder.[232]

Homicide without intent to kill. Article 503 of the 1956 Penal Code provided that:

> Where homicide results from voluntary acts accomplished or undertaken with the aim of harming persons but without the intent to cause death, it is qualified as homicide without the intent to kill. Convicted persons shall incur a criminal penalty of the first degree.[233]

i. *Actus reus.* The perpetrator must have caused the death of another person.[234]

ii. *Mens rea*. The perpetrator must have taken acts "with the aim of harming persons"

[229] Case 004/02, Decision on International Co-Prosecutor's Immediate Appeal of the Trial Chamber's Effective Termination of Case 004/02, 10 August 2020, E004/2/1/1/2, para. 71, disposition; Case 003, Decision on International Co-Prosecutor's Appeal of the Pre-Trial Chamber's Failure to Send Case 003 to Trial as Required by the ECCC Legal Framework, 17 December 2021, 3/1/1/1, para. 44; Case 004, Decision on International Co-Prosecutor's Appeal of the Pre-Trial Chamber's Failure to Send Case 004 to Trial as Required by the ECCC Legal Framework, 28 December 2021, 2/1/1/1, para. 32.
[230] See *Guide to the ECCC (Volume I)*, section 3.3.1.1.
[231] 1956 Penal Code, article 501. See also Case 001, Decision on Closing Order Appeal, para. 74.
[232] Case 004/01, Dismissal Order, para. 44; Case 004/02, Closing Order (Indictment), para. 60; Case 003, Closing Order (Indictment), para. 92; Case 004, Closing Order (Indictment), para. 90.
[233] 1956 Penal Code, article 503. See also Case 001, Decision on Closing Order Appeal, para. 75.
[234] Case 004/01, Dismissal Order, para. 45(a); Case 004/02, Closing Order (Indictment), para. 61(a)). See also Case 001, Decision on Closing Order Appeal, para. 74.

but not with "the intent to cause death".[235] If the conduct of an individual resulting in the victim's death was carried out without the intent to kill but with the intention to harm a person, this was sufficient under Article 503 of the 1956 Penal Code to be convicted of involuntary homicide.[236]

Premeditated murder. Article 506 of the 1956 Penal Code provided that:

> Where homicide results or could result from acts voluntarily accomplished or attempted, with premeditation, with the intent to cause death, it is qualified as premediated murder or attempted premeditated murder. Convicted persons shall incur a criminal penalty of the third degree.[237]

i. *Actus reus*. The perpetrator must have caused the death of another person.[238]

ii. *Mens rea*. The perpetrator must have acted "with premeditation" and "with the intent to cause death".[239] Premeditation was defined as "the decision to act before the action is actually undertaken, whereby the amount of time after this decision must be long enough for the author to perform preparatory acts".[240]

The Pre-Trial Chamber held that homicide without intent to kill was subsumed by the international crime of murder as a crime against humanity because the domestic definition of the crime required a mental element constituting a lesser form of intent than the international crime.[241] By contrast, it held that premediated murder was not subsumed under the international crime of murder because it required a specific element of premeditation that was not required under the international crime. It considered that premeditated murder required "an intent to kill" while an intent to "cause grievous bodily harm or inflict serious injury in the reasonable knowledge that the attack was likely to result in death" was sufficient under the international crime of murder.[242] It concluded that it was thus unnecessary to add the crime of homicide

[235] Case 004/01, Dismissal Order, para. 45(b)(i); Case 004/02, Closing Order (Indictment), para. 61(b)(i). See also Case 001, Decision on Closing Order Appeal, para. 75.
[236] Case 001, Decision on Closing Order Appeal, para. 83.
[237] 1956 Penal Code, article 506. See also Case 001, Decision on Closing Order Appeal, para. 76.
[238] Case 004/01, Dismissal Order, para. 45(a); Case 004/02, Closing Order (Indictment), para. 61(a); Case 003, Closing Order (Indictment), para. 92(a); Case 004, Closing Order (Indictment), para. 90(a). See also Case 001, Decision on Closing Order Appeal, para. 74.
[239] Case 004/01, Dismissal Order, para. 45(b)(ii); Case 004/02, Closing Order (Indictment), para. 61(b)(ii); Case 003, Closing Order (Indictment), para. 92(b); Case 004, Closing Order (Indictment), para. 90(b). See also Case 001, Decision on Closing Order Appeal, para. 76.
[240] Case 004/01, Dismissal Order, para. 45(b)(ii); Case 004/02, Closing Order (Indictment), para. 61(b)(ii); Case 003, Closing Order (Indictment), para. 92(b); Case 004, Closing Order (Indictment), para. 90(b). See also Case 001, Decision on Closing Order Appeal, para. 78.
[241] Case 001, Decision on Closing Order Appeal, para. 83.
[242] Ibid, para. 84.

without the intent to kill as codified in Article 503.[243]

In Cases 003 and 004, the International Co-Investigating Judge recalled the Pre-Trial Chamber's jurisprudence that premeditated murder is not subsumed by the international definition of the crime of murder, as it requires a higher *mens rea*, *i.e.*, the intent to kill rather than the lesser intent to cause serious bodily harm.[244] The National Co-Investigating Judge did not analyse the elements of national crimes in his Dismissal Orders.[245]

2.2.4.2. Torture

Article 500 of the 1956 Penal Code provided that:

> Any person who inflicts acts of torture on other persons either to obtain, under pain, information useful for the commission of a felony or a misdemeanour, or out of reprisal or barbarity, shall incur a criminal penalty of the third degree.[246]

i. *Actus reus*. The perpetrator must have committed "acts of torture on another person".[247] While the 1956 Penal Code did not specifically indicate what constituted "acts of torture",[248] the Pre-Trial Chamber in Case 001 held that there was no indication that the *actus reus* differed from the international crime of torture.[249]

ii. *Mens rea*. The perpetrator must have committed such acts: (1) for the purpose of obtaining information "useful for the commission of a felony or a misdemeanour"; (2) "out of reprisal"; or (3) "out of barbarity".[250]

In Case 002, the Pre-Trial Chamber compared the three alternative *mens rea* forms under Article 500 of the 1956 Penal Code to the international definition of the crime of torture to determine whether any of them were subsumed by international crimes. It concluded that two alternative mental elements were not included in the international definition – namely the purposes of "inflict[ing] acts of torture to obtain, under pain, information for the commission

[243] Ibid, para. 83.
[244] Case 004/01, Dismissal Order, para. 46; Case 004/02, Closing Order (Indictment), para. 62; Case 003, Closing Order (Indictment), para. 93; Case 004, Closing Order (Indictment), para. 91.
[245] Case 004/02, Dismissal Order; Case 003, Dismissal Order; Case 004, Dismissal Order.
[246] 1956 Penal Code, article 500. See also Case 001, Decision on Closing Order Appeal, para. 61.
[247] Case 004/01, Dismissal Order, para. 47(a). See also Case 001, Decision on Closing Order Appeal, paras 61-62.
[248] Case 001, Decision on Closing Order Appeal, para. 68; Case 004/01, Dismissal Order, para. 48.
[249] Case 001, Decision on Closing Order Appeal, para. 68.
[250] Case 001, Decision on Closing Order Appeal, para. 62; Case 004/01, Dismissal Order, para. 47(b).

of a felony or misdemeanour" and "inflict[ing] acts of torture out of barbarity".[251] It reasoned that:

i. "'Inflict[ing] acts of torture to obtain, under pain, information for the commission of a felony or misdemeanour' – is different than the international definition [of torture] as it requires that torture be perpetrated not only to obtain information but also that this information may be useful for the commission of a crime." It would be insufficient for a conviction under Article 500 of the 1956 Penal Code to prove that the Accused "committed acts of torture for the purpose of obtaining a confession, which is the criterion mentioned in the international definition".[252]

ii. "Inflict[ing] acts of torture out of reprisal" is analogous to the purpose of "punishing" in the international definition of torture. If only this specific purpose was considered, the elements of the domestic and international definitions are the same.[253]

iii. "Inflict[ing] acts of torture out of barbarity" does not have any equivalent in the international definition, with this element appearing to be broader than those contained in the international definition.[254] While the Pre-Trial Chamber did not specifically examine the meaning of "out of barbarity", it concluded that there was insufficient evidence in the Case 001 Closing Order to prove that the acts of torture at S-21 were perpetrated out of barbarity.[255]

In Case 004/01, the Co-Investigating Judges recalled the Pre-Trial Chamber's jurisprudence that the second form of *mens rea* (reprisal) "is subsumed by the international crime of torture, while the first (obtaining information useful for the commission of a crime) and the third (barbarity) are not".[256] Thus, they did not consider the crime of torture set forth in Article 500 of the 1956 Penal Code "to be subsumed under torture as a crime against humanity".[257] The domestic crime of torture was not charged in Cases 004/02, 003, or 004 and was thus not

[251] Case 001, Decision on Closing Order Appeal, para. 72.
[252] Ibid, para. 69.
[253] Ibid, para. 70.
[254] Ibid, para. 71.
[255] Ibid, paras 60-72, 101. See also Case 004/01, Dismissal Order, para. 50.
[256] Case 004/01, Dismissal Order, para. 49.
[257] Ibid.

analysed by the Co-Investigating Judges in their Closing Orders.[258]

2.2.4.3. Religious persecution

Article 209 of the 1956 Penal Code provided that:

> The attack on the life of a minister of a religion recognised by the Cambodian Government, while performing, or in the context of performing his or her ministry, is punishable by criminal penalty of the third degree.[259]

Additionally, Article 10 of the 1956 Penal Code provided that:

> The attack on the person of a minister of a religion recognised by the Cambodian Government, while performing, or in the context of performing his or her ministry, is punishable by criminal penalty of the second degree.[260]

i. *Actus reus*. The perpetrator must have committed attacks against the life or the person of a "minister practicing a religion recognised by the Cambodian government, while performing, or in the context of performing his or her ministry".[261]

ii. *Mens rea*. While the 1956 Penal Code does not specifically address the requisite *mens rea*, "general principles of Cambodian law dictate that the perpetrator must have intentionally committed the *actus reus*".[262]

In Case 004/01, the Co-Investigating Judges held that religious persecution under the 1956 Penal Code is limited to Buddhist monks. They reasoned that the Penal Code specified that "Buddhism is the State religion", and observed that the notes that follow Articles 209 and 210 refer the reader to Articles 495 (attacks on the person) and 501 (homicide) for attacks on the life or person of a non-Buddhist religious practitioner.[263] The domestic crime of religious persecution was not charged in Cases 004/02, 003, or 004 and was thus not analysed by the

[258] See Case 004/02, Closing Order (Indictment), para. 4; Case 003, Written Record of Initial Appearance, 14 December 2015, D174; Case 003, Closing Order (Indictment), paras 9-11; Case 004, Closing Order (Indictment), para. 4.
[259] 1956 Penal Code, article 209. See also Case 004/01, Dismissal Order, para. 52.
[260] 1956 Penal Code, article 210. See also Case 004/01, Dismissal Order, para. 54.
[261] Case 004/01, Dismissal Order, para. 55(a).
[262] Ibid, para. 55(b).
[263] Ibid, para. 56.

Co-Investigating Judges in their Closing Orders.[264]

2.3. Genocide

Article 4 of the ECCC Law defined the crime of genocide as "any acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, such as":

i. killing members of the group;

ii. causing serious bodily or mental harm to members of the group;

iii. deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

iv. imposing measures intended to prevent births within the group;

v. forcibly transferring children from one group to another group.

In addition to the commission of genocide, Article 4 also punished "attempts to commit acts of genocide", "conspiracy to commit acts of genocide", and "participation in acts of genocide". The definition of the crime of genocide in Article 4 closely mirrored the definition under the 1948 Convention on the Prevention and Punishment of the Crime of Genocide ("Genocide Convention"), save for a few differences (see section 2.3.2.1.4).

2.3.1. Applicability at the ECCC

The Co-Investigating Judges and chambers consistently held that genocide was established as a crime under customary international law by 1975.[265]

The Pre-Trial Chamber rejected the argument that the lack of implementation of the Genocide Convention into domestic law meant that the criminal nature of the conduct was neither foreseeable nor accessible to the Charged Persons. The Pre-Trial Chamber considered that this argument "ignores the fact that although the criminal nature of the alleged acts would not have been accessible to [them] in their domestic statutes, even in 1975, the knowledge would still have been accessible to them by virtue of the treaties which Cambodia had signed".[266] It further

[264] See Case 004/02, Closing Order (Indictment), para. 4; Case 003, Closing Order (Indictment), paras 9-11; Case 003, Written Record of Initial Appearance, 14 December 2015, D174; Case 004, Closing Order (Indictment), para. 4.
[265] Case 002/02, Judgment, para. 788; Case 004/02, Closing Order (Indictment), para. 85; Case 003, Closing Order (Indictment), para. 63; Case 004, Closing Order (Indictment), para. 59.
[266] Case 002, Decision on Closing Order Appeals (Nuon Chea and Ieng Thirith), paras 108-110.

reasoned that although the express language of these treaties would suggest that prohibitions in the Genocide Conventions apply to States rather than individuals, the Genocide Convention clearly states that "[p]ersons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals". Thus, treaty law "clearly indicate[d] that individuals may incur criminal liability for committing genocide".[267]

The Supreme Court Chamber also rejected the argument that Cambodia's dualist legal system prevented international norms from being directly applicable to domestic law, and thus, a Cambodian citizen in 1970 could only expect to have the 1956 Penal Code applied, which did not include provisions for genocide.[268] The Chamber reasoned that Cambodia's accession to the 1948 Genocide Convention on 14 October 1950 "render[ed] the prohibition of genocide applicable to and binding on Cambodia".[269] It also cited the Case 001 Trial Judgment and case law from the Kosovo Specialist Chambers on the principle of legality in considering that the "'law' comprises both national and international law and extends to written and unwritten law".[270] It similarly relied on ICTY case law that customary law provides sufficient guidance to the individual as to the standard of the violation which would entail criminal liability, especially when the charged crime is appalling. Thus, the Chamber concluded that the crime of genocide and its elements were sufficiently foreseeable and accessible to the Accused, as a member of Cambodia's governing authority, from 1975 onwards.[271]

Genocide was established as a crime under customary international law, and was foreseeable and accessible to the Accused, by 1975. In concluding that "customary status and gravity of the crime, the fact that Cambodia acceded to the Genocide Convention without reservation in 1950 and the positions held by the Accused as members of Cambodia's governing authority",[272] the Trial Chamber considered that:

i. In 1946, the UN General Assembly unanimously adopted a resolution affirming that "genocide is a crime under international law".[273]

ii. Cambodia acceded without reservation to the Genocide Convention in 1950, which

[267] Ibid, para. 111.
[268] Case 002/02, Appeal Judgment, paras 88, 92-93.
[269] Ibid, para. 93.
[270] Ibid, para. 92; Case 001, Judgment, para. 31.
[271] Case 002/02, Appeal Judgment, para. 92-93.
[272] Case 002/02, Judgment, para. 789.
[273] Ibid, para. 785.

entered into force in 1951, and as such recognised that "genocide, whether committed in time of peace or time of war, is a crime under international law".[274]

iii. The Genocide Convention requires contracting parties to pass laws to give it effect and establish strong penalties for those found guilty of genocide. Consequently, before 17 April 1975, "there was extensive state practice recognising genocide as an international crime, based almost uniformly on the Genocide Convention definition".[275]

iv. In 1951, the International Court of Justice ("ICJ") held that the UN intended to condemn and punish genocide as a crime under international criminal law "involving a denial of the right of existence of entire human groups".[276] The ICJ accordingly held that the Genocide Convention is intended to be "definitely universal in scope" and that its principles are "recognized by civilized nations as binding on States, even without any conventional obligation".[277]

v. Subsequently, in 1970 the ICJ clarified that "the *erga omnes* obligation of States to protect against genocide had 'entered into the body of general international law'".[278]

vi. In 1968, the UN General Assembly adopted the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, which provides that that no statute of limitations shall apply to the crime of genocide "even if such acts do not constitute a violation of the domestic law of the country in which they were committed".[279]

In Cases 004/02, 003, and 004, the International Co-Investigating Judge indicted the Charged Persons for genocide, citing the Pre-Trial Chamber's holding that genocide was "part of customary international law between 1975 and 1979".[280]

[274] Ibid.
[275] Ibid, para. 786.
[276] Ibid, paras 787-788.
[277] Ibid. para. 788.
[278] Ibid.
[279] Ibid.
[280] Case 004/02, Closing Order (Indictment), para. 85; Case 003, Closing Order (Indictment), para. 63; Case 004, Closing Order (Indictment), para. 59. See also Case 002, Decision on Closing Order Appeals (Nuon Chea and Ieng Thirith), para. 108.

2.3.2. Elements of genocide

Article 4 of the ECCC Law set out the elements of genocide as requiring:

i. Genocidal intent requirement (*mens rea*), which consists of "the intent to":
   - Destroy;
   - In whole or part;
   - A national, ethnical, racial, or religious group;
   - "As such";[281] and

ii. Underlying acts of genocide (*actus reus*), enumerated exhaustively:
   - Killing members of the group;
   - Causing serious bodily or mental harm to members of the group;
   - Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
   - Imposing measures intended to prevent births within the group; or
   - Forcibly transferring children of the group to another group.

The Trial Chamber outlined the constitutive elements of genocide in Case 002/02.[282] The International Co-Investigating Judge adopted the same elements in Cases 004/02, 003, and 004, underlining that in contrast to other international crimes, there is no requirement: (1) that the alleged conduct took place in the context of a manifest pattern of similar conduct; (2) that the alleged conduct formed part of a widespread or systematic attack on a civilian population; or (3) of a state policy or plan.[283]

2.3.2.1. Genocidal intent

The *mens rea* of genocide is the "intent to destroy, in whole or in part, a national, ethnical,

[281] For the interpretation of this element and differences between the English, French, and Khmer versions of Article 4 of the ECCC Law, see section 2.3.2.1.4.
[282] Case 002/02, Judgment, paras 790-804.
[283] Case 004/02, Closing Order (Indictment), paras 86-98; Case 003, Closing Order (Indictment), paras 64-74; Case 004, Closing Order (Indictment), paras 60-72.

racial or religious group, as such".[284] Genocide "requires not only proof of the intent to commit the underlying act, but also proof of the specific intent to destroy the group, in whole or in part". ECCC jurisprudence referred to this *mens rea* requirement as "genocidal intent", "*dolus specialis*", "special intent" or "specific intent".[285]

To infer specific genocidal intent, a chamber must consider "whether all of the evidence, taken together, demonstrated a genocidal mental state". Where an inference of specific intent is drawn, it must be the only reasonable inference available on the evidence. Relevant factors include the general context, the perpetration of other culpable acts systematically directed at the same group, the scale of atrocities committed, the systematic targeting of victims on account of their membership in a particular group, or the repetition of destructive and discriminatory acts. In addition, a chamber may also consider speeches made in public or in meetings to support a finding of specific intent. The existence of a plan or policy, while not a requirement of the crime of genocide, may support the interference that the perpetrator has the requisite specific intent.[286]

The Supreme Court Chamber held that the specific intent requirement is consistent with the Genocide Convention's definition, which provides that a perpetrator must have intended to destroy a protected group "as such".[287] In Cases 004/02, 003 and 004, the International Co-Investigating Judge similarly determined that the perpetrator must possess the specific intent to destroy, in whole or in part, the relevant protected group, as such – in addition to possessing the *mens rea* required in relation to the relevant underlying act.[288]

Physical perpetrators need not possess specific intent for the crime of genocide to sustain a conviction for other members of a joint criminal enterprise. The Trial Chamber observed that the ICTY *Karadžić* Appeals Chamber clarified that the focus is on the *Accused's* mental state and other alleged joint criminal enterprise members and held that it is not the intent of the

[284] Case 002/02, Appeal Judgment, para. 1610; Case 002/02, Judgment, para. 797; Case 004/02, Closing Order (Indictment), para. 94; Case 003, Closing Order (Indictment), para. 70; Case 004, Closing Order (Indictment), para. 68.
[285] Case 002/02, Appeal Judgment, para. 1607; Case 002/02, Judgment, para. 797; Case 004/02, Closing Order (Indictment), para. 94; Case 003, Closing Order (Indictment), para. 70; Case 004, Closing Order (Indictment), para. 68.
[286] Case 002/02, Judgment, paras 803, 3344-3347. See also Case 004/02, Closing Order (Indictment), para. 86; Case 003, Closing Order (Indictment), para. 64; Case 004, Closing Order (Indictment), para. 60.
[287] Case 002/02, Appeal Judgment, para. 1607.
[288] Case 004/02, Closing Order (Indictment), para. 94; Case 003, Closing Order (Indictment), para. 70; Case 004, Closing Order (Indictment), para. 68.

"physical perpetrators of the underlying alleged genocidal acts, that is determinative".[289]

2.3.2.1.1. *"To destroy"*

Genocide only encompasses acts intended to amount to biological or physical destruction of a protected group, in whole or part.[290] Even when underlying acts of genocide do not "directly concern the physical or biological destruction of members of the group", those acts must be carried out "with the intent of achieving the physical or biological destruction of the group, in whole, or in part". Accordingly, acts that attack only the cultural or sociological characteristics of a protected group to deny that group its own identity (for example the destruction of religious buildings or houses belonging to members of the group) do not fall within the definition of genocide. "Such acts may however be evidence from which the intention to physically or biologically destroy can be inferred".[291]

Concurring with ICTY jurisprudence, the Trial Chamber held "that the physical or biological destruction of a group is not necessarily the death of the group members" and "that the physical or biological destruction of the group is the likely outcome of a forcible transfer of the population when this transfer is conducted in such a way that the group can no longer reconstitute itself", especially when it involves separating its members. The Chamber reasoned that "the forcible transfer of individuals could lead to the material destruction of the group, since the group ceases to exist as a group, or at least as the group it was".[292]

The International Co-Investigating Judge considered that acts targeting only the cultural or sociological characteristics of a protected group could be used to infer an intention to physically or biologically destroy that group.[293]

2.3.2.1.2. *"In whole or in part"*

The expression "in whole or in part" refers to the intention to destroy *the entirety or part of* a protected group: the destruction of a part of a group need not be accompanied by the intention

[289] Case 002/02, Judgment, para. 804.
[290] Ibid, para. 800; Case 004/02, Closing Order (Indictment), para. 95; Case 003, Closing Order (Indictment), para. 71; Case 004, Closing Order (Indictment), para. 69.
[291] Case 002/02, Judgment, para. 800; Case 004/02, Closing Order (Indictment), para. 95; Case 003, Closing Order (Indictment), para. 71; Case 004, Closing Order (Indictment), para. 69.
[292] Case 002/02, Judgment, para. 801.
[293] Case 004/02, Closing Order (Indictment), para. 95; Case 003, Closing Order (Indictment), para. 71; Case 004, Closing Order (Indictment), para. 69.

to destroy the whole group.[294] The Genocide Convention does not set a numerical threshold to reach for substantiating the formula.[295] Where a conviction for genocide relies on the intent to destroy a protected group "in part", there must be a "substantial part of the protected group, and the part targeted must be significant enough to have an impact on the group as a whole".[296]

The destruction of a group is not required for an offence to qualify as genocide. The Supreme Court Chamber clarified that in assessing the *mens rea* for genocide, the phrase "in whole or in part" refers to the perpetrator's intent to destroy a group, not to the actual outcome of their actions. The Chamber was unpersuaded by the argument that the total number of Vietnamese killed in Cambodia was insufficient to establish that "a substantial part of the group of ethnic Vietnamese was targeted". Rather, it considered that a large number of victims can demonstrate the requisite intent, although no numerical threshold must be met.[297]

"In part" means a "substantial part of the protected group", which "must be significant enough to have an impact on the group as a whole".[298]

In Cases 004/02, 003, and 004, the International Co-Investigating Judge referred to jurisprudence of the *ad hoc* tribunals which, "[i]n the absence of guidance in the Genocide Convention […] formulated the intention to destroy a group in part as the intended destruction of at least a 'substantial' part of the group, significant enough to have an impact on the group as a whole, bearing in mind the context in which the alleged conduct occurs".[299]

2.3.2.1.3. *"A national, ethnical, racial or religious group"*

The ECCC had jurisdiction with respect to genocide directed against national, ethnic, racial, and religious groups.[300] Only the four explicitly listed groups enjoyed protection.[301] A group must have a particular distinct identity and be defined "as such" by its common positive

[294] Case 002/02, Appeal Judgment, para. 1636. See also Case 004/02, Closing Order (Indictment), para. 96; Case 003, Closing Order (Indictment), para. 72; Case 004, Closing Order (Indictment), para. 70.
[295] Case 002/02, Appeal Judgment, para. 1636.
[296] Case 002/02, Judgment, para. 802. See also Case 004/02, Closing Order (Indictment), para. 96; Case 003, Closing Order (Indictment), para. 72; Case 004, Closing Order (Indictment), para. 70.
[297] Case 002/02, Appeal Judgment, para. 1636.
[298] Case 002/02, Judgment, para. 802.
[299] Case 004/02, Closing Order (Indictment), para. 96; Case 003, Closing Order (Indictment), para. 72; Case 004, Closing Order (Indictment), para. 70.
[300] ECCC Law, article 4; Case 002/02, Judgment, para. 790; Case 004/02, Closing Order (Indictment), para. 87; Case 003, Closing Order (Indictment), para. 65; Case 004, Closing Order (Indictment), para. 61.
[301] Case 004/02, Closing Order (Indictment), para. 87; Case 003, Closing Order (Indictment), para. 65; Case 004, Closing Order (Indictment), para. 61. *Cf.* Case 002/02, Judgment, Judge You Ottara's Separate Opinion on Genocide. See section 2.3.2.2.

characteristics.[302] However, the 1948 Genocide Convention does not specifically define the four protected groups.[303]

In the absence of generally accepted and precise definitions, a case-by-case assessment of whether a specific group is protected must be conducted in the light of the particular political, social, and cultural context.[304] Relying *ad hoc* tribunal jurisprudence, the Trial Chamber held that this approach accords with the object and purpose of the Genocide Convention, which concerns "the destruction of a race, tribe, nation, or other group with a particular positive identity" and the "denial of the right of existence of entire human groups".[305]

Subjective factors alone are insufficient to define the group. Objective criteria must also be considered, consistently with the purpose of the Genocide Convention to protect relatively stable and permanent groups.[306] The Trial Chamber noted that, in determining what constitutes a protected group, the *ad hoc* tribunals considered subjective factors including how the perpetrator stigmatises the victims or how the victims perceive themselves.[307] While it held that this approach accords with the object and purpose of the Genocide Convention, it considered that "the subjective element alone is insufficient to establish membership of the protected group".[308]

The Trial Chamber recognised the Vietnamese in Cambodia as a racial, national, and ethnic group, based on the existence of a Vietnamese language, cuisine, cultural practices, traditional dresses, and distinct historical heritage. In addition, Vietnamese living in Cambodia "were identified and identified themselves as such because one or several elder relatives in their families were Vietnamese".[309] The Chamber also recognised the Cham as a distinct religious and ethnic group within Cambodia because they shared a common language and culture, practised a Hinduised form of Islam, and had traditions differing from those of the Khmer majority.[310]

The fact that only members of the protected group located in a particular area or country were

[302] Case 002/02, Judgment, para. 793; Case 004/02, Closing Order (Indictment), para. 89; Case 003, Closing Order (Indictment), para. 67; Case 004, Closing Order (Indictment), para. 63.
[303] Case 002/02, Judgment, para. 792; Case 004/02, Closing Order (Indictment), para. 88; Case 003, Closing Order (Indictment), para. 66; Case 004, Closing Order (Indictment), para. 62.
[304] Case 002/02, Judgment, para. 792.
[305] Ibid, para. 792.
[306] Ibid, para. 795.
[307] Ibid.
[308] Ibid.
[309] Ibid, para. 3419.
[310] Ibid, paras 3203-3204.

targeted does not limit the scope of the protected group itself, but may impact on whether a perpetrator intended to destroy the group "in whole or in part".[311] For instance, the Supreme Court Chamber confirmed that the protected group included all Vietnamese *regardless of [their] residency*.[312] It rejected the argument that Vietnamese who were executed in Cambodia, but resided in Vietnam, did not belong to the protected group because the Trial Chamber had defined the protected group as "Vietnamese living in Cambodia".[313] The Supreme Court Chamber considered that the Trial Chamber's statement that Vietnamese "living in Cambodia" were in the protected group did not *ipso facto* limit the scope of the protected group. Rather, it considered that it was implicit in the Trial Chamber's findings that it considered all Vietnamese *located in Cambodia*, regardless of residency, to be members of the protected group, based on their shared racial, national, and ethnic characteristics. The Supreme Court Chamber further reasoned that the fact the protected group is defined by the shared racial, national, and ethnic characteristics of its members is "consequential, because it signifie[d] that the protected group comprises all Vietnamese, including those living outside Cambodia".[314]

In Cases 004/02, 003, and 004, the International Co-Investigating relied on *ad hoc* tribunal jurisprudence in holding that both subjective and objective factors should be considered in identifying the protected group.[315] This jurisprudence established "a hybrid, case-by-case test" to determine whether a victim (or targeted group) falls within one of the protected groups. Under this test: (1) "there should be reference to the objective particulars of the relevant political, social, historical, and cultural context"; (2) "the subjective perceptions of the victim and the perpetrator(s) […] should also be considered", since the group may not have defined boundaries or may be characterised by the perpetrators in a manner which differs from the conceptions of the groups shared generally.[316]

The International Co-Investigating Judge also held in these three cases that the targeted group must have a particular positive identity and therefore cannot be defined negatively. If more than one group is targeted for destruction, the elements of genocide must be satisfied

[311] Case 002/02, Appeal Judgment, para. 1597; Case 002/02, Judgment, para. 3416.
[312] Case 002/02, Appeal Judgment, para. 1616.
[313] Ibid, para. 1596.
[314] Ibid, para. 1597.
[315] Case 004/02, Closing Order (Indictment), para. 88; Case 003, Closing Order (Indictment), para. 66; Case 004, Closing Order (Indictment), para. 62.
[316] Case 004/02, Closing Order (Indictment), para. 88; Case 003, Closing Order (Indictment), para. 66; Case 004, Closing Order (Indictment), para. 62.

concerning each group.[317] The International Co-Investigating Judge further considered that the targeted group may include military personnel, provided that those individuals were targeted because of their membership in a protected group.[318]

2.3.2.1.4. *"As such"*

The Genocide Convention's definition of the crime of genocide requires that the perpetrator had the intent to destroy a protected group "as such".[319] The text of the ECCC Law appeared to lower this *mens rea* for genocide because Article 4 of the English version provided that genocide means any "acts […] committed with the intent to destroy, in whole or part, a national, ethnical, racial or religious group, *such as*", *i.e.*, indicating a list of acts that is not exhaustive.[320] By contrast, the Genocide Convention provides more restrictive wording: "*as such*". Nonetheless, the Co-Investigating Judges and chambers consistently applied the definition in the Genocide Convention, emphasising that "the victim of [the] crime of genocide is not merely the person but the group itself".[321] The Trial Chamber interpreted the phrase "as such" to require that the group be destroyed as a separate and distinct entity and that while some individuals may live on, the "group identity" is destroyed.[322] It held that this interpretation was consistent with the object and purpose of the Genocide Convention, where the phrase "as such" emphasises that the victim of the crime of genocide is not merely the person but the group itself, and subsequent jurisprudence stating that the relevant intent is "to destroy a collection of people who have a particular group identity".[323] The Supreme Court Chamber confirmed that although genocide can be defined as the intent to destroy a protected group either in whole or in part, the common element is that the destructive intent must be directed toward the group "as such".[324]

In Cases 004/02, 003, and 004, the International Co-Investigating Judge remarked that the

[317] Case 004/02, Closing Order (Indictment), para. 89; Case 003, Closing Order (Indictment), para. 67; Case 004, Closing Order (Indictment), para. 63.
[318] Case 004/02, Closing Order (Indictment), para. 97; Case 003, Closing Order (Indictment), para. 73; Case 004, Closing Order (Indictment), para. 71.
[319] Case 002/02, Appeal Judgment, para. 1607; Case 002/02, Judgment, para. 798; Case 004/02, Closing Order (Indictment), para. 98; Case 003, Closing Order (Indictment), para. 74; Case 004, Closing Order (Indictment), para. 72.
[320] See Case 004/02, Closing Order (Indictment), para. 85, fn. 187; Case 003, Closing Order (Indictment), para. 63, fn. 123; Case 004, Closing Order (Indictment), para. 59, fn. 143.
[321] Case 002/02, Appeal Judgment, para. 1607; Case 002/02, Judgment, paras 784-789; Case 004/02, Closing Order (Indictment), paras 85, 98; Case 003, Closing Order (Indictment), paras 63, 74; Case 004, Closing Order (Indictment), paras 59, 72.
[322] Case 002/02, Judgment, para. 798.
[323] Ibid.
[324] Case 002/02, Appeal Judgment, para. 1609.

English version of Article 4 of the ECCC Law could be interpreted as having an open-ended list of constitutive acts of genocide. The International Co-Investigating Judge considered that while the phrase "as such" is more definitive – underscoring the intent to destroy must target the group specifically because of its identity as a national, ethnical, racial, or religious group – the phrase "such as" indicates a list of acts that is not exhaustive, opening the definition to a broader range of actions. However, noting that Article 9 of the UN-RGC Agreement provided the ECCC with jurisdiction over the crime of genocide "as defined" in the Genocide Convention, he decided to apply the Genocide Convention's more definitive definition in his Closing Orders.[325]

The International Co-Investigating Judge also considered that the underlying acts of genocide must be committed with the intent of destroying the targeted group as a separate and distinct entity from the individual victims: the ultimate victim of the crime is the group. He reasoned that individual victims must be targeted because they are members of the group (but not necessarily solely because of such membership) and therefore knowledge of such membership alone is insufficient.[326]

2.3.2.2. A broader definition of genocide

In Case 002/02, Judge You Ottara appended a separate opinion on genocide, stating that the Trial Chamber and the Co-Investigating Judges adopted a "narrow" approach to the definition of genocide.[327] He considered that interpreting the definition of genocide under Article 2 of the Genocide Convention differently would have provided solid grounds to scrutinise the broader circumstances in Cambodia from 1975 to 1979, specifically to determine if there was an intent to destroy a significant portion of the Cambodian national group as it existed at the time.[328] He developed a different and broader interpretation of the definition of genocide, particularly concerning the *mens rea*, according to which:

i. there is no requirement that perpetrators and victims of genocide must be from entirely distinct groups – to hold otherwise is to read into Article 2 a restriction that is not there;

[325] Case 004/02, Closing Order (Indictment), para. 85, fn. 187; Case 003, Closing Order (Indictment), para. 63, fn. 123; Case 004, Closing Order (Indictment), para. 59, fn. 143.
[326] Case 004/02, Closing Order (Indictment), para. 98; Case 003, Closing Order (Indictment), para. 74; Case 004, Closing Order (Indictment), para. 72.
[327] Case 002/02, Judgment, paras 4468-4469.
[328] Ibid, para. 4517.

ii. there are only four protected groups, but their identification depends on various (objective and subjective) factors, and consideration should be given to the political, social and cultural context;

iii. acts which, on their own, would not be prohibited by the Genocide Convention may nevertheless be relevant to the assessment of the intention to destroy a protected group, in whole or in part;

iv. it is unnecessary to prove an intention to destroy the entire protected group;

v. the intention can be directed towards a part of a group, provided that part is substantial, and the assessment of this involves both quantitative and qualitative factors; and

vi. the overall target must be shown to be the group, in whole or in part, as opposed to individual persons.[329]

In proposing such an interpretation, Judge Ottara reasoned that:

i. Requiring that perpetrators and victims of genocide must be from entirely distinct groups would be an "artificial restriction". To interpret Article 2 of the Genocide Convention as only applying to the genocide of one hermetically sealed group committed by another would ignore humanity's complexities. It would also ignore the possibility that perpetrators may hold erroneous or prejudicial beliefs as to the purity of their own group affiliation(s) versus that of their victim(s).[330]

ii. The Trial Chamber was correct to look at both subjective and objective factors in defining the group. Although Article 2 of the Genocide Convention does not protect entirely transient groups, looking at both objective and subjective features – as well as at the particular political, social, and cultural context when identifying protected groups – accords with the object and purpose of the Convention and avoids a too rigid or narrow approach.[331]

iii. It would be unnecessary and unwise to seek out a predetermined list of conduct relevant to determining "proof of an intention to physically destroy the protected

[329] Ibid, para. 4516.
[330] Ibid, para. 4478.
[331] Ibid, paras 4479-4482.

group". When evaluating genocidal intent, consideration ought to be given to the broader circumstances, including conducts which do not necessarily entail the physical or biological destruction of individuals.[332]

iv. While the numbers involved are a highly relevant fact when assessing genocidal intent, the majority's approach to assessing only quantitative factors read an unjustified restriction into the meaning of "in part".[333] Under ICTY and European Court of Human Rights ("ECtHR") jurisprudence, Article 2 of the Genocide Convention does not exclude qualitative factors for assessing the meaning of "in part".[334]

v. The majority correctly interpreted the phrase "*as such*" as emphasising that the victim of the crime of genocide is not merely the individual, but the group itself. Although a part of the group is to be destroyed "as such", and various other motives might exist alongside such genocidal intent, it remains the case that it is the group which is thereby victimised. In the present context, the victimised group would include (a substantial part of) the Cambodian national group, "targeted for myriad reasons in order to purify what remained of that group".[335]

In addition, Judge Ottara agreed with the ECCC, ICTY, and ICJ jurisprudence that targeted groups must be defined on some positive basis. Nevertheless, he found that Judge Shahabuddeen's dissenting opinion in the ICTY's *Stakić* Appeal Judgment was more coherent and realistic, insofar as it held that a protected group can also be identified based on their characteristics negatively defined.[336]

2.3.2.3. Underlying acts of genocide

Article 4 of the ECCC Law set out the underlying acts of genocide in respect of which both the *actus reus* and *mens rea* must be established (in addition to the specific intent for genocide),[337] which were:

[332] Ibid, para. 4491.
[333] Ibid, para. 4504.
[334] Ibid, paras 4492-4503.
[335] Ibid, para. 4512.
[336] Ibid, paras 4513-4515.
[337] Case 004/02, Closing Order (Indictment), para. 90; Case 003, Closing Order (Indictment), para. 68; Case 004, Closing Order (Indictment), para. 64.

i. killing members of the group;

ii. causing serious bodily or mental harm to members of the group;

iii. deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

iv. imposing measures intended to prevent births within the group; and

v. forcibly transferring children from one group to another group.

2.3.2.3.1. *Killing members of the group*

ECCC jurisprudence held that the elements of the underlying act of killing members of the group are the same as that of murder as a crime against humanity:[338]

i. *Actus reus.* The perpetrator must have caused the death of the victim by an unlawful act or omission, i.e., by "contributing substantially to the death of the victim".[339] The discovery of a victim's body is not necessary to prove the elements of killing; the victim's death can be inferred circumstantially from the evidence presented.[340] All that is required to be established "is that the only reasonable inference is that the victim is dead as a result of acts or omissions of the accused or of one or more persons for whom the accused is criminally responsible".[341] There is no "numeric threshold" for the number of people killed to satisfy the *actus reus*.[342] However, it must in fact target a member or members of a group on the basis of their group membership.[343]

ii. *Mens rea.* The perpetrator must have intended "to either kill or cause serious bodily harm in the reasonable knowledge that the act or omission would likely lead to death".[344]

[338] Case 002/02, Judgment, para. 796; Case 004/02, Closing Order (Indictment), para. 91; Case 003, Closing Order (Indictment), para. 69; Case 004, Closing Order (Indictment), para. 65.
[339] Case 002/02, Judgment, para. 627; Case 003, Closing Order (Indictment), para. 51(a); Case 004/02, Closing Order (Indictment), para. 73(a); Case 004, Closing Order (Indictment), para. 46(a).
[340] Case 002/02, Judgment, para. 628; Case 003, Closing Order (Indictment), para. 69; Case 004/02, Closing Order (Indictment), para. 91; Case 004, Closing Order (Indictment), para. 65.
[341] Case 002/02, Judgment, para. 628.
[342] Case 002/02, Judgment, para. 796. See Case 003, Closing Order (Indictment), para. 69; Case 004/02, Closing Order (Indictment), para. 91; Case 004, Closing Order (Indictment), para. 65.
[343] Case 002/02, Judgment, para. 796; Case 004/02, Closing Order (Indictment), para. 98; Case 003, Closing Order (Indictment), para. 74; Case 004, Closing Order (Indictment), para. 72.
[344] Case 002/02, Judgment, para. 630.

The Supreme Court Chamber held that the Trial Chamber correctly found that the evidence was sufficient to support its finding that the members of the Vietnamese protected group were killed in the context of the genocide charge.[345] It dismissed the argument that the Trial Chamber wrongly found the *actus reus* of genocide was established because it defined the protected group as "Vietnamese living in Cambodia" but considered the deaths of Vietnamese who lived in Vietnam. It considered that the Trial Chamber's statement that Vietnamese "living in Cambodia" were the protected group did not *ipso facto* limit the scope of the protected group.[346]

The International Co-Investigating Judge in Cases 004/02, 003, and Case 004 held that the death of a victim can be established by circumstantial evidence provided the only reasonable inference that can be drawn from such evidence is that the victim is dead.[347]

2.3.2.3.2. *Causing serious bodily or mental harm*

The International Co-Investigating Judge interpreted the underlying act of causing serious bodily or mental harm in Cases 004/02 and 004 as:

i. *Actus reus.* The perpetrator must have inflicted injuries that go beyond minor or temporary mental or physical faculty impairment and result in a grave and long-term disadvantage to a member of the protected group's ability to lead a normal and constructive life. This is assessed on a case-by-case basis concerning the circumstances. Proof of a result is required. The serious harm need not be permanent or irremediable but must go beyond minor or temporary mental or physical faculty impairment and result in a grave and long-term disadvantage to a person's ability to lead a normal and constructive life. There is no requirement that the harm inflicted be sufficiently serious to threaten the destruction in whole or in part of the protected group, however, the degree of threat to a group's destruction may be considered a measure of the seriousness of harm inflicted. Inhuman or degrading treatment, mental or physical torture, rape, sexual abuse, deportation, interrogations combined with beatings and/or death threats, non-fatal physical violence that damages health or causes disfigurement or serious injury to members of the protected group and persecution are acts that may cause serious bodily or mental

[345] Case 002/02, Appeal Judgment, paras 1603-1605.
[346] Ibid, para. 1597.
[347] Case 004/02, Closing Order (Indictment), para. 91; Case 003, Closing Order (Indictment), para. 69; Case 004, Closing Order (Indictment), para. 65.

harm. Trauma and wounds suffered by survivors of mass executions constitute serious mental (as well as physical) harm. Forcible transfer does not itself constitute a genocidal act. However, it can be an underlying act causing serious bodily or mental harm, especially if the circumstances of the operation lead to the death of the whole or part of the displaced population.[348] The *actus reus* of causing serious bodily harm requires that the individual victims survive and cannot be cumulatively applied when the victims are killed.[349]

iii. *Mens rea.* The perpetrator must have intentionally committed the act or omission with the intent to cause serious physical or mental harm.[350]

The International Co-Investigating Judge further considered that the act of causing serious bodily harm is not a lesser included offence to "killing members of the group". He noted that the *ad hoc* tribunals interpreted the underlying act of causing serious bodily harm as a grave and long-term disadvantage to a survived person's ability to lead a normal and constructive life. He considered that this did not comport with cases where the intended and achieved outcome is the expeditious killing of the members of the protected group, notwithstanding that they may have suffered physical and mental abuse before the act of killing occurred. Since attempted genocide was not charged in these cases, he found no reason to discuss the relationship between this act of genocide and attempted genocide.[351]

2.3.2.3.3. *Deliberately inflicting conditions of life calculated to bring about its physical destruction*

The International Co-Investigating Judge interpreted the underlying act of deliberately inflicting conditions of life calculated to bring about its physical destruction as follows:

i. *Actus reus*. The perpetrator must have engaged in conduct that does not immediately kill members of a protected group, but ultimately seeks their physical destruction. No proof of a result is required. Examples include rape, the denial of medical services, the imposition of a subsistence diet, the creation of circumstances leading to a slow death, such as a lack of proper food, water, housing, clothing, sanitation or hygiene, subjecting persons to excessive work or physical exertion, and the

[348] Case 004/02, Closing Order (Indictment), para. 92(a); Case 004, Closing Order (Indictment), para. 66(a).
[349] Ibid.
[350] Case 004/02, Closing Order (Indictment), para. 92(b); Case 004, Closing Order (Indictment), para. 66(b).
[351] Case 004/02, Closing Order (Indictment), para. 92; Case 004, Closing Order (Indictment), para. 66.

systematic expulsion of persons from their homes. Conditions must be calculated to physically destroy the group, in whole or in part, as opposed to being designed to result in the dissolution of the group. Absent direct evidence that the conditions were calculated to destroy the group physically, the focus turns to the "objective probability" of such conditions leading to the group's physical destruction, with relevant factors including the nature of the conditions, the length of time a person was subjected to them, and characteristics of the members of the targeted group, for example, their vulnerability. Conditions that are inadequate by any number of standards but are still adequate for the survival of the group and therefore do not contribute to the destruction of the group do not satisfy the *actus reus* requirement.[352]

ii. *Mens rea.* The perpetrator must have inflicted such conditions with the intent to bring about the group's physical destruction, in whole or in part.[353]

2.3.2.3.4. *Imposing measures intended to prevent births within the group*

The imposition of measures intended to prevent births within the group was not charged in any case before the ECCC. Consequently, the Co-Investigating Judges and chambers did not analyse this underlying act of genocide.

2.3.2.3.5. *Forcibly transferring children of the group to another group*

The forcible transfer of children of the group to another group was not charged in any cases before the ECCC. Consequently, the Co-Investigating Judges and chambers did not analyse this underlying act of genocide.

2.4. Crimes against humanity

Crimes against humanity were defined in Article 5 of the ECCC Law as "any acts committed as part of a widespread or systematic attack directed against any civilian population, on national, political, ethnical, racial or religious grounds, such as: murder; extermination; enslavement; deportation; imprisonment; torture; rape; persecution on political, racial, and

[352] Case 004/02, Closing Order (Indictment), para. 93(a); Case 004, Closing Order (Indictment), para. 67(a).
[353] Case 004/02, Closing Order (Indictment), para. 93(b); Case 004, Closing Order (Indictment), para. 67(b).

religious grounds; [and] other inhumane acts".[354]

While Article 2 of the UN-RGC Agreement stated that the ECCC's subject matter jurisdiction was consistent with the ECCC Law,[355] there were material differences between the definitions of crimes against humanity in the UN-RGC Agreement and the ECCC Law. Notably, while Article 9 of the UN-RGC Agreement defined crimes against humanity by reference to the Rome Statute of the International Criminal Court ("ICC"), Article 5 of the ECCC Law did not make such a reference. The divergence between Article 5 of the ECCC Law and Article 9 of the UN-RGC Agreement persisted even after amendments in 2004. The *chapeau* element of crimes against humanity in Article 5 of the ECCC Law was also more restrictive than Article 7 of the Rome Statute, requiring that the widespread or systematic attack be directed against a civilian population "on national, political, ethnical, racial, or religious grounds".[356]

In addition to the *chapeau* elements, the Rome Statute contains underlying acts which were not included in the ECCC Law – notably, forcible transfer of population, severe deprivation of physical liberty in violation of fundamental rules of international law, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, or any other form of sexual violence of comparable gravity, enforced disappearance of persons, and the crime of apartheid.[357] However, the Supreme Court Chamber held that the ECCC's jurisdiction over crimes against humanity was limited by the definition of the crimes as it stood under customary international law at the time of the alleged conduct.[358]

2.4.1. Applicability at the ECCC

The Co-Investigating Judges and chambers consistently held that crimes against humanity were established international crimes applicable in Cambodia between 17 April 1975 to 6 January 1979.[359]

In Case 001, the Trial Chamber assessed the question of applicability, holding that crimes against humanity had consistently formed part of customary international law since the 1945

[354] ECCC Law, article 5.
[355] UN-RGC Agreement, article 2.
[356] Case 001, Appeal Judgment, para. 106; Case 002, Closing Order, para. 1315.
[357] Rome Statute, article 7.
[358] Case 001, Appeal Judgment, paras 99-100; Case 002/01, Judgment, para. 19.
[359] Case 001, Appeal Judgment, paras 98-113; Case 002/02, Judgment, para. 300; Case 002/01, Judgment, para. 176; Case 001, Judgment, paras 283, 296. See also Case 004, Closing Order (Indictment), paras 37-38; Case 002, Closing Order, para. 1313.

Nuremberg Charter.[360] Noting that Cambodia was not party to any treaties on the prevention of crimes against humanity between 1975 and 1979 and that there were no provisions in Cambodian domestic law addressing these offences, the Trial Chamber had to decide whether crimes against humanity fell within the scope of customary international law during this period.[361] In concluding that crimes against humanity formed part of customary international law by 1945, and that the legal elements had been refined since that time, the Trial Chamber reviewed the historical development of the juridical concept of crimes against humanity through:

i. The 1945 Nuremberg Charter;

ii. The 1946 Tokyo Charter;

iii. The 1946 Affirmation of the General Assembly;

iv. The 1948 Genocide Convention;

v. International Law Commission's ("ILC") 1950 Nuremberg Principles;

vi. The 1973 Apartheid Convention;

vii. Domestic criminal prosecutions for crimes against humanity; and

viii. The Statutes of the ICTY, the ICTR, the Special Court for Sierra Leone ("SCSL"), and ICC.[362]

On appeal in Case 001, the Supreme Court Chamber analysed the applicability of crimes against humanity at the ECCC with reference to the principle of legality, confirming that crimes against humanity were established crimes in customary international law between 1975 and 1979.[363] The Supreme Court Chamber considered that even though crimes against humanity were listed in Article 5 of the ECCC Law, conferring *a priori* jurisdiction on the ECCC, this was insufficient to enter a conviction.[364] It held that it was necessary to determine the applicable definition of crimes against humanity "at the time of the alleged criminal conduct", reasoning

[360] Case 001, Judgment, paras 283-296 (especially para. 290).
[361] Ibid, para. 284.
[362] Case 001, Judgment, paras 285-289.
[363] Case 001, Appeal Judgment, paras 98-116. The crimes against humanity were sufficiently foreseeable and accessible to the Accused that they could be prosecuted for such crimes. See Case 002, Decision on Closing Order Appeals (Nuon Chea and Ieng Thirith), paras 131-133.
[364] Case 001, Appeal Judgment, para. 99.

that the ECCC's *a priori* jurisdiction may not be interpreted as a retroactive amendment to the definition in Article 5 of the ECCC law.[365] Adding to the authorities considered by the Trial Chamber, the Supreme Court Chamber in Case 001 considered:

i. Sources concerning the 1868 St. Petersburg Declaration;

ii. Writings of Hugo Grotius;

iii. The 1899 and 1907 Hague Conventions;

iv. The 1915 French, British and Russian Declaration regarding the massacres of Armenians;

v. The 1919 Commission on the Responsibilities of the Authors of the War and the Enforcement of Penalties;

vi. Cases of the Nuremberg Military Tribunals established under Control Council Law No. 10;

vii. Post-World War II ("WWII") peace treaties; and

viii. A further selection of convictions for crimes against humanity in national courts.[366]

In Case 002, the Pre-Trial Chamber held that held that crimes against humanity were established international crimes applicable in Cambodia during the relevant period; it was sufficiently foreseeable and accessible to the Accused that they could be prosecuted for such crimes.[367] For the purposes of foreseeability and accessibility, Pre-Trial Chamber held that the definition of crimes against humanity contained in the Nuremburg Principles was sufficiently specific in the period 1975-1979 under customary international law.[368] In deciding on appeals in Case 002, the Pre-Trial Chamber recognised that the ILC had been unable to adopt an agreed definition of crimes against humanity during the period from 1954 to 1996.[369] This did not mean, however, that a definition of crimes against humanity did not already exist under customary international law at the relevant time.[370] The Pre-Trial Chamber considered that although the *ad hoc* tribunal jurisprudence "certainly played a role in fleshing out the contours

[365] Ibid, para. 100.
[366] Ibid, paras 101-103.
[367] Case 002, Decision on Closing Order Appeals (Nuon Chea and Ieng Thirith), paras 125-133.
[368] Ibid, para. 133.
[369] Ibid, para. 131.
[370] Ibid, paras 131-132.

of the elements of crimes against humanity as articulated in the Nuremberg Principles", this did not mean that the definition post-WWII was insufficiently clear.[371]

In Case 002, the Co-Investigating Judges paid particular regard to the post-WWII trials held in Nuremberg and Tokyo in their holding with respect to crimes against humanity, that their prohibition under customary international law was sufficiently accessible to the Charged Persons.[372]

In Case 004/01, both Co-Investigating Judges held that crimes against humanity, with the exception of rape, were part of customary international law between 1975 and 1979. The Co-Investigating Judges noted that although the *ad hoc* tribunals' jurisprudence established since the 1990s was not binding in ECCC proceedings, the Supreme Court Chamber accepted reliance on those decisions insofar as their holdings on elements of crimes and modes of liability reflected the law as it existed during the ECCC's temporal jurisdiction.[373] The International Co-Investigating Judge adopted the same reasoning in Cases 004/02, 003, and 004.[374] The National Co-Investigating Judge did not address the applicability or elements of crimes against humanity in his Dismissal Orders in these three cases.[375]

2.4.2. *Chapeau* elements

The contextual or "*chapeau*" elements of crimes against humanity were established in a range of post-WWII international and domestic legal instruments, such that by 1975 they formed part of customary international law.[376] In order to constitute one of the offences set out in Article 5 of the ECCC Law, the following *chapeau* elements had to be established:

i. a widespread or systematic attack;

ii. directed against a civilian population;

iii. on national, political, ethnical, racial or religious grounds;

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[371] Ibid, paras 132-133.
[372] Case 002, Closing Order, para. 1306.
[373] Case 004/01, Dismissal Order, para. 57.
[374] Case 004/02, Closing Order (Indictment), para. 65; Case 003, Closing Order (Indictment), para. 43; Case 004, Closing Order (Indictment), para. 38.
[375] For more on the National Co-Investigating Judges' Dismissal Orders in Cases 004/02, 003, and 004, see *Guide to the ECCC (Volume I)*, sections 5.3.2.7, 5.3.3.6.2, 5.3.3.7.3.
[376] Case 002/02, Appeal Judgment, para. 93; Case 002/01, Appeal Judgment, para. 764; Case 001, Appeal Judgment, para. 104; Case 002/01, Judgment, paras 176-192; Case 001, Judgment, paras 281-319.

iv. a nexus between the acts of the Accused and the attack; and

v. requisite knowledge of the Accused in relation to the *chapeau* elements.[377]

At the ECCC, there was no *chapeau* requirement to prove a state or organisational "plan or policy".[378] The ECCC jurisprudence consistently held that no such element crystallised in customary international law by 1975.[379] The existence of such a plan or policy may nonetheless be relevant to establishing the widespread or systematic nature of the attack.[380]

2.4.2.1. "Widespread or systematic attack"

ECCC jurisprudence interpreted the "attack" element to mean a "course of conduct" that involves the commission of a series of acts of violence.[381] While the use of armed force could demonstrate the existence of a qualifying attack, other forms of mistreatment of the civilian population could suffice, including conduct that is reflected in the underlying offences in Article 5 of the ECCC Law.[382]

It is the *attack* that must have been widespread or systematic (rather than the individual acts for which the Accused is responsible).[383] Widespread or systematic was a disjunctive requirement at the ECCC: the attack must have been either widespread *or* systematic.[384] In principle, a single act could qualify as a crime against humanity.[385]

An attack may be considered "widespread" based on its large-scale nature and the number of victims.[386] A widespread attack may refer either to the "cumulative effect of a series of inhumane acts or the singular effect of an inhumane act of extraordinary magnitude".[387] A "systematic" attack is characterised by the organised nature of the acts of violence and the

[377] Case 001, Appeal Judgment, para. 106; Case 002/02, Judgment, para. 301; Case 002/01, Judgment, para. 177. See also Case 004/01, Dismissal Order, paras 60-66; Case 004/02, Closing Order (Indictment), paras 66-72; Case 003, Closing Order (Indictment), paras 44-50; Case 004, Closing Order (Indictment), paras 39-45.
[378] Case 002/01, Appeal Judgment, para. 732.
[379] Ibid; Case 002/02, Judgment, para. 304; Case 002/01 Judgment, para. 181; Case 001, Judgment, para. 301. See also Case 004/01, Dismissal Order, paras 60-66; Case 004/02, Closing Order (Indictment), paras 66-72; Case 003, Closing Order (Indictment), paras 44-50; Case 004, Closing Order (Indictment), paras 39-45.
[380] Case 002/01, Appeal Judgment, para. 732.
[381] Case 002/02, Judgment, para. 302; Case 002/01, Judgment, para. 178; Case 001, Judgment, para. 298. See also Case 004, Closing Order (Indictment), para. 39.
[382] Case 002/02, Judgment, para. 302; Case 002/01, Judgment, para. 178; Case 001, Judgment, para. 298.
[383] Case 002/01, Judgment, para. 179; Case 001, Judgment, para. 301. See also Case 004/01, Dismissal Order, para. 61; Case 004/02, Closing Order (Indictment), para. 67; Case 003, Closing Order (Indictment), para. 45; Case 004, Closing Order (Indictment), para. 40.
[384] Case 002/02, Judgment, para. 303; Case 002/01, Judgment, para. 179; Case 001, Judgment, para. 300.
[385] Case 002/02, Judgment, para. 303; Case 002/01, Judgment, para. 179.
[386] Case 002/02, Judgment, para. 303; Case 002/01, Judgment, para. 179; Case 001, Judgment, para. 300.
[387] Ibid.

improbability of their random or accidental occurrence.[388]

The concept of an "attack on a civilian population" for the purpose of crimes against humanity must be distinguished from the separate concept of an armed conflict.[389] An "attack" against a civilian population "may precede, outlast or continue through an armed conflict, without necessarily being part of it".[390]

2.4.2.2. "Directed against a civilian population"

The requirement that the attack is directed against a civilian population means that the population must have been the primary, as opposed to incidental, target of the attack.[391] It is not necessary for the entire population of the relevant geographical entity to be subjected to the attack.[392] It is sufficient that, rather than a limited and randomly selected number of individuals, "enough individuals" are targeted, or individuals are targeted in such a way that the attack is in fact directed against a "population".[393] The victims need not be linked to a particular group.[394]

The "civilian population" in this context includes all persons who were not members of the armed forces or otherwise recognised as combatants.[395] Soldiers *hors de combat* do not qualify as "civilians" for the purposes of Article 5 of the ECCC Law.[396] While there is a *chapeau* requirement to prove that *the attack* is against a "civilian population", this requirement does not require proof that each of the victims of the underlying crime is a civilian.[397] For this reason, soldiers *hors de combat* may be legitimate victims of an act that may amount to a crime against humanity.[398]

The Trial Chamber held that as of 1975, an attack by a state or organisation against its own armed forces could not amount to "an attack against a civilian population" under customary international law. The Chamber reasoned that a member of an armed organisation is not

[388] Ibid.
[389] Case 002/02, Judgment, para. 302; Case 002/01, Judgment, para. 178; Case 001, Judgment, para. 299.
[390] Ibid.
[391] Case 002/01, Judgment, para. 182; Case 001, Judgment, paras 305-311. See also Case 004/01, Dismissal Order, para. 62; Case 004/02, Closing Order (Indictment), para. 68; Case 003, Closing Order (Indictment), para. 46; Case 004, Closing Order (Indictment), para. 41.
[392] Case 002/01, Judgment, para. 182; Case 001, Judgment, para. 303.
[393] Case 002/01, Judgment, para. 182.
[394] Ibid, para. 187; Case 001, Judgment, para. 312.
[395] Case 002/02, Judgment, para. 307.
[396] Case 002/01, Appeal Judgment, para. 738; Case 002/02, Judgment, para. 307; Case 001, Judgment, para. 304.
[397] Case 002/01, Appeal Judgment, para. 740; Case 002/02, Judgment, para. 312; Case 002/01, Judgment, para. 187; Case 001, Judgment, para. 311.
[398] Case 002/01, Judgment, para. 187; Case 001, Judgment, para. 311.

accorded civilian status by reason of the fact that they are "not armed or in combat at the time of the commission of the crimes". It rejected the argument that the protections afforded by crimes against humanity extended to domestic armed forces. Although such an interpretation "may be considered desirable", the Chamber concluded that it was not supported by customary international law in 1975.[399]

In Case 003, however, the International Co-Investigating Judge held that between 1975 and 1979, an attack by a state or organisation against its own armed forces amounts to an attack against a civilian population where those forces were not in fact allied with or otherwise providing militarily-relevant support to the opposing side.[400] He considered that the purpose of the law of crimes against humanity could be characterised as the protection against human rights violations perpetrated on a large scale against individuals including a state's own nationals, who were not otherwise protected by the existing laws and customs of war.[401] Therefore, he considered that "civilian population" in the *chapeau* requirement of Article 5 of the ECCC Law must be defined as the entire population of a certain country.[402]

As such, the International Co-Investigating Judge reasoned, it was sufficiently foreseeable by 1975 that the perpetration of massive human rights violations by a state against its own armed forces would incur criminal responsibility.[403] The exclusion of a state's own armed forces from the protection against crimes against humanity would frustrate the purpose of the law and lead to absurd results.[404] Furthermore, the principles of *in dubio pro reo* and strict construction did not prevent the interpretation that an attack by a state or organisation against its own armed forces amounts to an attack against a civilian population where those forces were not in fact allied with or otherwise providing militarily-relevant support to the opposing side.[405]

2.4.2.3. "On national, political, ethnical, racial or religious grounds"

The attack must have been founded on a national, political, ethnical, racial or religious basis, but not necessarily on discriminatory grounds.[406] The Supreme Court Chamber held that

[399] Case 002/02, Judgment, para. 309.
[400] Case 003, Notification on the Interpretation of 'Attack against the Civilian Population' in the Context of Crimes Against Humanity with Regard to a State's or Regime's own Armed Forces, 7 February 2017, D191/18, para. 69.
[401] Ibid, para. 55.
[402] Ibid, paras 55-56, 59.
[403] Ibid, paras 60-62.
[404] Ibid, para. 63.
[405] Ibid, paras 67-68.
[406] Case 002/01, Appeal Judgment, paras 744-745; Case 002/01, Judgment, para. 188; Case 001, Judgment, paras 313-314. See also Case 004/01, Dismissal Order, para. 63; Case 004/02, Closing Order (Indictment), para. 69; Case 003, Closing Order (Indictment), para. 47; Case 004, Closing Order (Indictment), para. 42.

although the attack must have been founded on one or more of the enumerated grounds, this element is not necessarily "discriminatory" in nature.[407] The "national, political, ethnical, racial or religious grounds" *chapeau* requirement of crimes against humanity is not equivalent to the same terms used to define the requirement of discrimination in the definition of the crime of persecution.[408] The required national, political, ethnical, racial or religious grounds are part of the *chapeau* elements of crimes against humanity and are not required for each of the underlying crimes.[409]

An act is considered discriminatory when a victim is targeted because of their membership, or imputed membership, in a political, racial or religious group defined by the perpetrator.[410] The Supreme Court Chamber clarified that the targeted group "may be defined broadly by the perpetrator such that they are characterised in negative terms and include close affiliates or sympathisers".[411] The Trial Chamber held that the Supreme Court Chamber's approach to defining the targeted group was "equally applicable to defining a discernible group targeted by an attack".[412]

In Case 004/01, the Co-Investigating Judges followed the Supreme Court Chamber's reasoning, holding that it is not necessary to prove discriminatory intent for all the underlying crimes against humanity; such intent is only a requirement in relation to the underlying crime of persecution.[413] The International Co-Investigating Judge continued to apply this reasoning in Cases 004/02, 003, and 004.[414]

2.4.2.4. Nexus between the acts of the Accused and the attack

A nexus between the Accused's acts and the widespread or systematic attack against the civilian population is required.[415] The direct perpetrator's acts must have been part of the attack, meaning that the acts in question must have been, by their very nature or consequences,

[407] Case 002/01, Appeal Judgment, paras 744-749.
[408] Ibid, para. 744. See also Case 002/01, Judgment, para. 188.
[409] Case 002/02, Judgment, para. 313; Case 002/01, Judgment, para. 188. See also Case 004, Closing Order (Indictment), para. 42.
[410] Case 002/01, Judgment, para. 189; Case 001, Judgment, paras 316-317.
[411] Case 001, Appeal Judgment, para. 272.
[412] Case 002/01, Judgment, para. 189.
[413] Case 004/01, Dismissal Order, para. 63.
[414] Case 004/02, Closing Order (Indictment), para. 69; Case 003, Closing Order (Indictment), para. 47; Case 004, Closing Order (Indictment), para. 42.
[415] Case 002/01, Appeal Judgment, paras 753-754; Case 002/02, Judgment, para. 315; Case 002/01, Judgment, paras 190, 197; Case 001, Judgment, para. 318. See also Case 004/01, Dismissal Order, para. 64; Case 004/02, Closing Order (Indictment), para. 70; Case 003, Closing Order (Indictment), para. 48; Case 004, Closing Order (Indictment), para. 43.

objectively part of the attack.[416] In addition, where the Accused is not a direct perpetrator, their acts must have also formed part of the attack.[417]

Even a crime that is committed before, after, or at a distance from the main attack on the civilian population may still, if sufficiently connected, be considered sufficient to establish this element.[418] The crime must not, however, be an isolated act. It cannot be "so far removed from the attack that, having considered the context and circumstances in which it was committed, the acts cannot be said to have been part of the attack".[419]

2.4.2.5. Requisite knowledge in relation to the *chapeau* elements

Knowledge is required by the Accused that there is an attack on the civilian population and that their acts formed part of the attack.[420] The knowledge requirement focuses on the knowledge of the Accused, even in circumstances where they are not the direct perpetrator.[421]

The Accused need not have known the details of the attack or have shared the purpose or goals of the attack.[422] Evidence of knowledge depends on the facts of a particular case. The manner in which the knowledge requirement may be proved may vary according to the circumstances.[423]

2.4.2.6. Nexus to an armed conflict

The Supreme Court Chamber, Trial Chamber, and Co-Investigating Judges consistently held that the definition of crimes against humanity under customary international law between 1975 and 1979 did not require a nexus to an armed conflict.[424] In Case 001, the Trial Chamber held that a link between crimes against humanity and armed conflict was not required (although the

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[416] Case 002/01, Appeal Judgment, para. 753; Case 002/02, Judgment, para. 315; Case 002/01, Judgment, para. 190; Case 001, Judgment, para. 318. See also Case 004, Closing Order (Indictment), para. 43.
[417] Case 002/01, Appeal Judgment, para. 754.
[418] Case 002/02, Judgment, para. 315.
[419] Case 002/01, Judgment, para. 190; Case 001, Judgment, para. 318.
[420] Case 002/01, Judgment, para. 191; Case 001, Judgment, para. 319. See also Case 004/01, Dismissal Order, para. 65; Case 004/02, Closing Order (Indictment), para. 71; Case 003, Closing Order (Indictment), para. 49; Case 004, Closing Order (Indictment), para. 44.
[421] Case 002/02, Judgment, para. 316, fn. 858. See also Case 004, Closing Order (Indictment), para. 44.
[422] Case 002/01, Judgment, para. 191; Case 001, Judgment, para. 319.
[423] Case 002/02, Judgment, para. 316; Case 002/01, Judgment, para. 191; Case 001, Judgment, para. 319.
[424] Case 002/01, Appeal Judgment, para. 721; Case 002/02, Judgment, para. 301; Case 002/01 Judgment, para. 177; Case 001, Judgment, para. 292; Case 002, Decision on Co-Prosecutors' Request to Exclude Armed Conflict Nexus Requirement from the Definition of Crimes Against Humanity, 26 October 2011, E95/8, para. 33. See also Case 004/01, Dismissal Order, para. 66; Case 004/02, Closing Order (Indictment), para. 72; Case 003, Closing Order (Indictment), para. 50; Case 004, Closing Order (Indictment), para. 45. See also Case 003, Decision on Meas Muth's Request for Clarification Concerning Crimes Against Humanity and the Nexus with Armed Conflict, 5 April 2016, D87/2/1.7/1, para. 78.

Nuremberg Charter of 1945 required it).[425] The Chamber recognised that the ICTY found that the notion of crimes against humanity existed independently from that of armed conflict under customary international law prior to 1975 and the Statutes of the ICTY, ICTR, SCSL, and the ICC did not require the nexus.[426] Furthermore, the conclusions of the ECtHR and the Group of Experts for Cambodia showed that there was no nexus requirement by 1975.[427] In Case 002/01, the Supreme Court Chamber affirmed the Trial Chamber's holding that by 1975, the definition of crimes against humanity no longer included a nexus requirement to a war crime or crime against peace.[428]

The Pre-Trial Chamber, however, adopted a contrary position, finding that such a nexus was required at the ECCC. The Pre-Trial Chamber analysed evidence of state practice before, during and after the period of the ECCC's temporal jurisdiction, *opinio juris,* ICTY jurisprudence, and the ILC's recommendations on the matter, and sources in relation to the origins of crimes against humanity in war crimes.[429]

The Pre-Trial Chamber first analysed the predecessors to crimes against humanity – the preamble of the 1868 St. Petersburg Declaration and the Martens Clause in the 1899 and 1907 Hague Conventions, "invoking the 'laws of humanity' as residual protection against acts not explicitly prohibited in the text of each convention, were firmly based in the laws and customs of war".[430]

In Pre-Trial Chamber's analysis, the drafters of the Charter of the International Military Tribunal ("IMT") "ensured a connection to an armed conflict in order to avoid allegations that the resulting convictions went beyond that provided for under international customary and conventional law. Thus, at the time of its genesis, crimes against humanity required a nexus to armed conflict".[431] The Control Council Law omitted the nexus requirement. However, "some of the subsequent cases heard and decided under the Council Control Law from October 1946-April 1949 before the Nuremberg Military Tribunals […] jurisprudence continued to apply it".[432]

[425] Case 001, Judgment, para. 291.
[426] Ibid, para. 292.
[427] Ibid.
[428] Case 002/01, Appeal Judgment, para. 721.
[429] Case 002, Decision on Closing Order Appeal (Ieng Sary), paras 135-143, 303, 306.
[430] Ibid, para. 139.
[431] Ibid.
[432] Ibid, para. 140.

The Pre-Trial Chamber noted that although the UN General Assembly unanimously adopted the 1948 Genocide Convention, the definition of genocide contained therein, which does not include the armed conflict nexus requirement, "unequivocally departs from genocide's crimes against humanity origins by requiring a very specific intent that was not articulated in the IMT Charter".[433] The ILC's draft definition of crimes against humanity without an armed conflict nexus requirement in the 1954 Draft Code of Offences Against the Peace and Security of Mankind was never accepted by the UN General Assembly.[434]

The Pre-Trial Chamber found that the 1968 Statute of Limitations Convention did not pass a threshold level of acceptance in order to qualify as general practice. Furthermore, in 1968, "the representatives to the Convention on Statutes of Limitation were almost equally divided among those in favour of removing the armed conflict nexus and those who opposed such a step". The 1968 Statute of Limitations Convention, which did not reference a conflict nexus requirement, was signed, ratified, or acceded to by only 18 of 134 UN Member States by 17 April 1975, and by only one more State during the ECCC's temporal jurisdiction for a total of 19 of 148 Member States.[435]

The Pre-Trial Chamber further noted that the 1974 Apartheid Convention defines the crime against humanity of apartheid without an armed conflict nexus requirement. It was signed, ratified or acceded to by only 25 of 134 UN Member States by 17 April 1975, and by 57 of 148 UN Member States by the close of the ECCC's temporal jurisdiction. As far as the Pre-Trial Chamber could ascertain, "there [were] few examples of national legislation defining crimes against humanity without this nexus requirement".[436] The Pre-Trial Chamber found that when, in 1984, the ILC again recommended adopting a definition of crimes against humanity without the armed conflict nexus requirement, "the debates among State representatives evince that it was likely that the mainstream of State opinion was to remove the nexus requirement". However, the UN General Assembly did not adopt this draft definition.[437]

The Pre-Trial Chamber found that although the UN Security Council omitted the armed conflict nexus requirement in the 1994 ICTR Statute, "it included it in the first definition of crimes against humanity codified as a matter of international law since the 1950 Nuremberg Principles

[433] Ibid.
[434] Ibid, para. 141.
[435] Ibid.
[436] Ibid, para. 142.
[437] Ibid, para. 143.

in the 1993 ICTY Statute". Disagreement regarding the armed conflict nexus requirement persisted until the conference for the establishment of the ICC in 1998.[438]

The Pre-Trial Chamber was "unable to identify the crucial tipping point between 1968 and 1984 when the transition [removing the nexus requirement] occurred". It concluded that, according to the principle of *in dubio pro reo*, this ambiguity must be resolved in favour of the Accused.[439] The Pre-Trial Chamber therefore held that there was a nexus requirement.

The International Co-Investigating Judge concluded that he was not bound by the Pre-Trial Chamber's case law on this point after conducting an independent analysis of customary international law.[440]

Despite its hitherto position, the Pre-Trial Chamber later adopted the view that no nexus was required.[441] The Pre-Trial Chamber endorsed the Supreme Court Chamber's holding that the jurisprudence of the ECtHR, as well as national legislation enacted prior to 1975, and a number of national court decisions, defined crimes against humanity with respect to conduct occurring prior to 1975 absent a nexus.[442] In its reasoning, the Pre-Trial Chamber cited the Supreme Court Chamber's finding that the removal of the nexus requirement after 1945 "accords with the evolving view that the prohibition of crimes against humanity aims to protect humanity from the commission of atrocities".[443]

The Co-Investigating Judges in Case 004/01 deferred to the Supreme Court Chamber's reasoning that the definition of crimes against humanity under customary international law between 1975 and 1979 did not require a nexus to an armed conflict.[444] The International Co-Investigating Judge continued to apply this reasoning in his Indictments in Cases 004/02, 003, and 004.[445]

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[438] Ibid.
[439] Case 002, Decision on Closing Order Appeal (Ieng Sary), para. 310.
[440] Case 003, Decision on Meas Muth's Request for Clarification Concerning Crimes Against Humanity and the Nexus with Armed Conflict, 5 April 2016, D87/2/1.7/1, para. 78.
[441] Case 003, Decision on Meas Muth's Appeal against the International Co-Investigating Judge's Decision on Meas Muth's Request for Clarification Concerning Crimes Against Humanity and the Nexus with Armed Conflict, 10 April 2017, D87/2/1.7/1/1/7, paras 63-65.
[442] Ibid, para. 58.
[443] Ibid, para. 65.
[444] Case 004/01, Dismissal Order, para. 66.
[445] Case 004/02, Closing Order (Indictment), para. 72; Case 003, Closing Order (Indictment), para. 50; Case 004, Closing Order (Indictment), para. 45.

2.4.3. Elements of underlying crimes against humanity

A crime against humanity under Article 5 of the ECCC Law required an underlying "act" that is committed in the context of the attack against the civilian population.[446] Each of these underlying acts is made up of an *actus reus* and *mens rea*, and these elements have been interpreted and applied by the Co-Investigating Judges and chambers. The following sections set out the settled definitions of the legal elements of each distinct crime against humanity.

2.4.3.1. Murder

Murder was an applicable underlying crime against humanity at the ECCC,[447] defined as follows:

i. *Actus reus.* The perpetrator must have caused the death of the victim by positive act or omission. The act or omission must have been committed by the Accused, or by one or more persons for whose acts or omissions the Accused is criminally responsible.[448] In addition, this contribution must have been substantial.[449] There is no requirement to recover the body of the victim to prove murder.[450] Chambers may rely on circumstantial evidence to make findings if the only reasonable inference is that the victim's death was caused by acts or omissions of the Accused or individual(s) for whom the Accused is criminally responsible.[451] While it is not necessary to establish with precision the total number of deaths or identify the direct perpetrators and their victims for each killing, specific instances of killing must be proven beyond reasonable doubt.[452]

ii. *Mens rea.* The perpetrator must have intended either to kill, or to cause serious bodily harm in the reasonable knowledge that their act or omission would likely lead to death.[453] The *mens rea* for murder can be met by showing the intention of

[446] ECCC Law, article 5.
[447] Case 001, Judgment, para. 293.
[448] Case 002/02, Judgment, para. 627.
[449] Ibid.
[450] Case 002/01, Appeal Judgment, para. 420; Case 002/02, Judgment, para. 628.
[451] Ibid.
[452] Case 002/01, Appeal Judgment, paras 420-421; Case 002/02, Judgment, para. 628.
[453] Case 002/02, Appeal Judgment, paras 687-688, 718; Case 002/01, Appeal Judgment, para. 765; Case 002/02, Judgment, paras 626-627; Case 002/01, Judgment, para. 411-412; Case 001, Judgment, para. 333; Case 001, Decision on Closing Order Appeal, para. 81; Case 004/01, Dismissal Order, para. 67; Case 004/02, Closing Order (Indictment), para. 73; Case 003, Closing Order (Indictment), para. 51; Case 004, Closing Order (Indictment), para. 46.

> the Accused (or of the individuals for whom they are criminal liable) to kill, or intention to cause serious bodily harm in the reasonable knowledge that the act of omission would likely lead to death (*dolus eventualis*).[454] Premeditation is not required.[455]

The commission of murder as a crime against humanity *by omission* was part of customary international law in 1975.[456] The Trial Chamber held that this was based on the application of the general principle that criminalises omission where there is a duty to act.[457] The Trial Chamber extended the application of this general principle from individual criminal responsibility to the *actus reus* of murder stating that this principle applies to all culpable omissions.[458]

The Supreme Court Chamber conducted its own assessment of the state of customary international law in 1975 and concluded that it included the notion of *dolus eventualis* for murder.[459] The Supreme Court Chamber relied on the ICTY *Stakić* Trial Chamber's definition of *dolus eventualis* as follows:

> if the actor engages in life-endangering behaviour, his killing becomes intentional if he "reconciles himself" or "makes peace" with the likelihood of death. Thus, if the killing is committed with "manifest indifference to the value of human life", even conduct of minimal risk can qualify as intentional homicide. Large scale killings that would be classified as reckless murder in the United States would meet the continental criteria of *dolus eventualis*. The Trial Chamber emphasises that the concept of *dolus eventualis* does not include a standard of negligence or gross negligence.[460]

In Case 002/01, the Supreme Court Chamber distinguished the doctrine of *dolus eventualis*, which includes concepts of "manifestation of indifference", from the doctrine of recklessness that is concerned with "inference of intent".[461] The Supreme Court Chamber nonetheless conceded that the evidentiary criteria for both doctrines would likely be the same.[462] The Chamber proceeded to consider a wide range of approaches to *dolus eventualis* in different jurisdictions before concluding that the *mens rea* of murder as a crime against humanity as it

[454] Case 002/01, Appeal Judgment, para. 410; Case 002/02, Judgment, para. 630.
[455] Case 002/01, Appeal Judgment, paras 420-421; Case 002/02, Judgment, para. 630.
[456] Case 002/02, Judgment, para. 627; Case 002/01, Judgment, para. 693, fn. 2159.
[457] Case 002/02, Judgment, para. 627. See also Case 002/01, Judgment, para. 693, fn. 2159.
[458] Case 002/02, Judgment, para. 627.
[459] Case 002/01, Appeal Judgment, paras 387-410. See also Case 002/02, Judgment, paras 635-650.
[460] Case 002/01, Appeal Judgment, para. 390.
[461] Ibid, para. 391.
[462] Ibid.

stood in 1975 must be defined in a wide sense so as to encompass *dolus eventualis*.[463]

In Case 002/02, the Supreme Court Chamber confirmed this jurisprudence.[464] The Chamber rejected the Rome Statute's *mens rea* definition for murder as a crime against humanity (under which "knowledge" means "awareness that a circumstance exists or a consequence will occur in the ordinary course of events"). It considered that the Rome Statute was not binding law at the ECCC, and thus, the principle of *lex mitior* was inapplicable for the Accused to benefit from application of the Rome Statute.[465] The Chamber held that the standard was met when the authorities imposed living and working conditions in a work site "with the knowledge that they would likely lead to deaths *or* in the acceptance of the possibility of this fatal consequence".[466]

2.4.3.2. Extermination

Extermination was an applicable underlying crime against humanity at the ECCC,[467] defined as follows:

i. *Actus reus.* The perpetrator must have caused the death of persons on a massive scale, by an act, omission, or combination.[468] No minimum number of victims is required, and several factors are relevant to establish the scale requirement including the time, the place of the killings and the selection of victims.[469] In addition, killings in separate incidents can be adduced to meet the scale element but they need to be part of the same operation.[470]

ii. *Mens rea.* The perpetrator must have intended to kill on a large scale.[471] The *mens rea* consists of a direct intent to kill on a large scale.[472] As opposed to the crime of murder, the notion of *dolus eventualis* does not satisfy the *mens rea* for this crime.[473] The intention of creating conditions of life in order to kill on a large scale suffice,

[463] Ibid, paras 392-410.
[464] Ibid, paras 687-688.
[465] Ibid, paras 689-690.
[466] Ibid, para. 718; Case 002/02, Judgment, para. 1145.
[467] Case 002/01, Appeal Judgment, para. 765; Case 002/02, Judgment, para. 654; Case 002/01, Judgment, para. 415; Case 001, Judgment, para. 334.
[468] Case 002/02, Judgment, para. 655.
[469] Case 002/02, Appeal Judgment, para. 777; Case 002/02, Judgment, para. 655.
[470] Case 002/02, Judgment, para. 656.
[471] Case 002/02, Appeal Judgment, paras 777-778; Case 002/01, Appeal Judgment, para. 522; Case 002/02, Judgment, para. 657; Case 001, Judgment, para. 338. See also Case 004/01, Dismissal Order, para. 68; Case 004/02, Closing Order (Indictment), para. 74; Case 003, Closing Order (Indictment), para. 52; Case 004, Closing Order (Indictment), para. 47.
[472] Case 002/02, Judgment, para. 657.
[473] Case 002/01, Appeal Judgment, para. 520; Case 002/02, Judgment, para. 657.

there is no requirement to show that these conditions would *inevitably* lead to the death of all people.[474]

2.4.3.3. Enslavement

Enslavement was an applicable underlying crime against humanity at the ECCC,[475] defined as follows:

i. *Actus reus.* The perpetrator must have exercised any or all powers attaching to the right of ownership over a person.[476] Objective evidence to demonstrate the absence of choice and consent is required.[477]

ii. *Mens rea.* The perpetrator must have intentionally exercised that power over the person.[478]

Although there are limited situations of emergency or calamity in which people can be forced to work, according to the Trial Chamber, "if the conditions are such that this goes beyond lawfully required labour and encompasses the exercise over a person of any or all powers attaching to ownership, such conduct amounts to enslavement and is therefore not justifiable under any circumstance".[479]

2.4.3.4. Deportation

Deportation was an applicable underlying crime against humanity at the ECCC,[480] defined as follows:

i. *Actus reus.* There are four requirements:

- The forced displacement of persons by expulsion or other coercive acts;
- From the area where they are lawfully present;
- Across a border; and

[474] Case 002/01, Appeal Judgment, para. 520; Case 002/02, Judgment, para. 658.
[475] Case 001, Appeal Judgment, paras 161-162; Case 002/02, Judgment, para. 661.
[476] Case 001, Appeal Judgment, paras 152-153; Case 002/02, Judgment, para. 662.
[477] Case 002/02, Judgment, para. 666.
[478] Case 001, Appeal Judgment, paras 152; Case 002/02, Judgment, para. 670; Case 001, Judgment, para. 345. See also Case 004/01, Dismissal Order, para. 69; Case 004/02, Closing Order (Indictment), para. 75; Case 003, Closing Order (Indictment), para. 53; Case 004, Closing Order (Indictment), para. 48.
[479] Case 002/02, Judgment, para. 669.
[480] Ibid, para. 672.

- Without grounds allowed under international law.[481]

ii. *Mens rea.* The perpetrator must have intended to forcibly displace the victim across a national border.[482] The intention to displace individuals across the border does not need to be permanent.[483] Evidence of an intent to deport individuals of a certain group nationally can demonstrate intent to deport individuals from this group locally.[484]

There are limited circumstances under international law that would permit the involuntary removal of persons, such as removal for the individuals' own security or for imperative military reasons.[485] There is no requirement to demonstrate the legal status of the victims.[486] A showing of the absence of genuine choice can be made by proving the use of physical force, threats, fear of violence, duress, detention and psychological oppression.[487] There is no numerical threshold to satisfy the elements of deportation.[488]

The displacement must occur across a *national* border.[489] As to the distinction between the two types of forced displacement – namely, deportation and forced transfer – the ECCC followed the predominant definition of deportation at the international(ised) criminal tribunals as the forced transfer of protected persons from a place they are lawfully residing across *de jure* or *de facto* international boundaries.[490]

2.4.3.5. Imprisonment

Imprisonment was an applicable underlying crime against humanity at the ECCC,[491] defined as follows:

i. *Actus reus.* The perpetrator must have arbitrarily deprived an individual of liberty without due process of law.[492] If an initial deprivation of liberty is justified by a

[481] Ibid, para. 674.
[482] Ibid, para. 686. See also Case 004, Closing Order (Indictment), para. 49.
[483] Case 002/02, Judgment, para. 686.
[484] Case 002/02, Appeal Judgment, para. 861.
[485] Case 002/02, Judgment, para. 683.
[486] Ibid, para. 677.
[487] Case 002/01, Appeal Judgment, para. 595; Case 002/02, Judgment, para. 682.
[488] Case 002/02, Appeal Judgment, para. 852.
[489] Case 002/02, Judgment, para. 681.
[490] Ibid.
[491] Ibid, para. 688; Case 001, Judgment, paras 293-296, 347.
[492] Case 002/02, Judgment, para. 689; Case 001, Judgment, para. 348.

legal basis, it can become arbitrary if the lawful basis ceases to exist.[493]

ii. *Mens rea.* The perpetrator must have intended to arbitrarily deprive the individual of liberty, or must have acted in the reasonable knowledge that their actions were likely to cause the arbitrary deprivation of physical liberty.[494]

2.4.3.6. Torture

Torture was an applicable underlying crime against humanity at the ECCC,[495] defined as follows:

i. *Actus reus.* The perpetrator must have caused severe pain or suffering, whether physical or mental, by or at the instigation of a public official, for such purposes as obtaining information or a confession, punishment or intimidation. The *actus reus* element of causing severe pain or suffering is established by objective criteria including the severity of the harm inflicted, the nature and purpose of the acts committed and by subjective criteria taking into consideration the physical and mental condition of the victim and the effect of the acts.[496] Although some crimes against humanity treatment involve *serious* mental and physical suffering, the offence of torture requires *severe* mental and physical suffering.[497] The *actus reus* can be established by omission.[498]

ii. *Mens rea.* The perpetrator must have intended to inflict the act upon the person.[499]

The Supreme Court Chamber held that the definition of torture found in the 1975 Declaration on Torture was declaratory of customary international law from 1975 to 1979.[500] In addition, the Pre-Trial Chamber considered that there was no indication that the *actus reus* of the international crime of torture differed from the Cambodian domestic law in the 1956 Penal

[493] Case 002/02, Judgment, paras 674 *ff*.
[494] Ibid, para. 697; Case 001, Judgment, para. 350; Case 004/01, Dismissal Order, para. 70; Case 004/02, Closing Order (Indictment), para. 76; Case 003, Closing Order (Indictment), para. 54; Case 004, Closing Order (Indictment), para. 50.
[495] Case 002/02, Judgment, para. 700. See also Case 001, Decision on Closing Order Appeal, paras 63-67.
[496] Case 002/02, Judgment, para. 703.
[497] Ibid, para. 705.
[498] Ibid, para. 708.
[499] Case 001, Appeal Judgment, paras 203-205; Case 002/02, Judgment, para. 701; Case 004/01, Dismissal Order, para. 71; Case 004/02, Closing Order (Indictment), para. 77; Case 003, Closing Order (Indictment), paras 55-56; Case 004, Closing Order (Indictment), para. 51.
[500] Case 001, Appeal Judgment, para. 205.

Code.[501]

The requirement that torture is committed "by or at the instigation of a public official" remained part of customary international law between 1975 and 1979. The Supreme Court Chamber and Trial Chamber confirmed even though the ICTY and ICTR rejected this element for crimes taking place in the 1990s, it had been customary international law during the period 1975-1979.[502]

Even though the 1975 Declaration on Torture does not expressly encompass "omissions" which cause severe pain and suffering, the Trial Chamber accepted the "general principle consistently applied by the *ad hoc* tribunals that 'a crime may be committed by culpable omission where there is a duty to act'".[503]

2.4.3.7. Rape

Rape was not an applicable underlying crime against humanity at the ECCC.[504] The ECCC had jurisdiction over rape as an act of torture, when all the other elements of torture were satisfied.[505]

The Trial Chamber initially held that rape was an independent crime against humanity within the jurisdiction of the ECCC, noting that it was explicitly included in Control Council Law No. 10.[506] In the Trial Chamber's assessment, the *actus reus* was the sexual penetration, however slight of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or the mouth of the victim by the penis of the perpetrator, where such sexual penetration occurs without the consent of the victim.[507] The Trial Chamber considered the *mens rea* for rape to be that the perpetrator acted with the intent to effect the sexual penetration, and the knowledge that it occurs without the consent of the victim.[508]

The Supreme Court Chamber rejected the Trial Chamber's interpretation and held that rape was not a distinct crime against humanity under customary international law between 1975 and

[501] Case 001, Decision on Closing Order Appeal, para. 68.
[502] Case 001, Appeal Judgment, paras 195-201; Case 002/02, Judgment, para. 709.
[503] Case 002/02, Judgment, para. 708; Case 002/01, Judgment, para. 693, fn. 2159.
[504] Case 001, Appeal Judgment, paras 180-183; Case 002, Decision on Closing Order Appeal (Ieng Sary), paras 371-372; Case 002, Decision on Closing Order Appeals (Nuon Chea and Ieng Thirith), para. 154. See also Case 004/01, Dismissal Order, para. 72; Case 004/02, Closing Order (Indictment), para. 78; Case 003, Closing Order (Indictment), para. 56; Case 004, Closing Order (Indictment), para. 52.
[505] Case 001, Appeal Judgment, paras 207-208, 213. See also Case 004, Closing Order (Indictment), paras 38, 52.
[506] Case 001, Judgment, paras 293, 361-366.
[507] Ibid, para. 362.
[508] Ibid, para. 365.

1979.[509] In reaching this conclusion, the Supreme Court Chamber analysed customary international law and treaty law before and during the ECCC's temporal jurisdiction.[510] The Chamber held that proscriptions against rape in national laws were insufficient to show the emergence of rape as a category of crimes against humanity under customary international law.[511] The Pre-Trial Chamber also adopted the view that rape did not constitute a separate crime against humanity during the relevant period.[512]

2.4.3.8. Persecution

Persecution was an applicable underlying crime against humanity at the ECCC,[513] defined as follows:

i. *Actus reus.* The perpetrator must have carried out an act or omission which discriminates in fact, and which denies or infringes upon a fundamental right laid down in international customary or treaty law. The requirement for actual discrimination ("in fact") means that it must be shown that the victim is targeted *because* of the victim's membership of a group that is defined, by the perpetrator, on specific grounds (namely, political, racial or religious grounds). Although it is the perpetrator who defines the group, the victim must objectively belong to a "sufficiently discernible" political, racial or religious group, such that the requisite persecutory consequences occur for the group.[514] Importantly, the particular acts amounting to persecution must be expressly charged. Hence, it is not sufficient for a charge to define the crime solely as "persecution".[515] Persecutory acts may include the other underlying offences of crimes against humanity, for instance murder, extermination, enslavement, imprisonment and torture, or they may include "other acts which rise to the same level of gravity or seriousness, including acts which are

[509] Case 001, Appeal Judgment, para. 180.
[510] Ibid, paras 174-180.
[511] Ibid, para. 182.
[512] Case 002, Decision on Closing Order Appeal (Ieng Sary), para. 371; Case 002, Decision on Closing Order Appeals (Nuon Chea and Ieng Thirith), para. 154.
[513] Case 002/02, Judgment, para. 712; Case 002/01, Judgment, para. 426; Case 001, Judgment, para. 374-376. See also Case 002/01, Appeal Judgment, para. 694; Case 001, Appeal Judgment, para. 257.
[514] Case 002/01, Appeal Judgment, para. 667; Case 001, Appeal Judgment, para. 272, 274; Case 002/02, Judgment, paras 713-714. See also Case 002/01, Judgment, para. 428; Case 001, Judgment, para. 377. By contrast, the national crime of religious persecution under the 1956 Penal Code had a more restricted *actus reus* of attacks against the life or the person of a "minister practicing a religion recognised by the Cambodian government". See Case 004/01, Dismissal Order, para. 55.
[515] Case 002/02, Judgment, para. 716; Case 002/01, Judgment, para. 431.

not necessarily crimes in and of themselves".[516]

ii. *Mens rea.* The perpetrator must have the specific intent to discriminate on political, racial, or religious grounds, and must deliberately commit the act or omission constituting the crime against humanity of persecution.[517] It must be shown that the Accused themselves possessed the specific discriminatory intent, with the exception of charges of aiding and abetting and superior responsibility where the Accused need not share the specific intent.[518] The specific intent requirement of *mens rea* may not be inferred merely by reference to the general discriminatory nature of an attack.[519] Specific intent may, however, be inferred from the context in which the crimes take place, taking into account circumstances such as the systematic nature of the crimes committed against a group or the general attitude of the alleged perpetrator as demonstrated by his behaviour.[520] Behaviour shortly before and after the conduct in question may be taken into account as indicative of the perpetrator's state of mind at the time of the facts.[521]

The Trial Chamber assessed the foreseeability and accessibility of persecution as a crime against humanity, considering the customary status and gravity of the crime and the positions held by the Accused as members of Cambodia's governing authority.[522] Having weighed these factors objectively, the Chamber concluded "that it was both foreseeable and accessible in general that persecution was punishable as a crime against humanity by 1975".[523]

2.4.3.9. Other inhumane acts

The residual category of crimes against humanity – "other inhumane acts" – was part of customary international law by 1975.[524] The category is residual in the sense that the conduct in question does not fall under one of the other underlying offences, but nonetheless fulfils the criteria of crimes against humanity.[525] ECCC jurisprudence defined the requirements of *actus*

[516] Case 002/02, Judgment, para. 716. See also Case 001, Appeal Judgment, paras 256-259, 261.
[517] Case 001, Appeal Judgment, paras 236; Case 002/02, Judgment, para. 713; Case 001, Judgment, para. 379. See also Case 002/01, Appeal Judgment, paras 694-695; Case 002/01, Judgment, para. 427.
[518] Case 002/02, Judgment, para. 715.
[519] Ibid.
[520] Ibid; Case 002/01, Judgment, para. 429; Case 001, Judgment, para. 380.
[521] Case 002/01, Appeal Judgment, para. 694; Case 002/02, Judgment, para. 715.
[522] Case 002/02, Judgment, para. 712.
[523] Ibid.
[524] Case 002/01, Appeal Judgment, paras 576; Case 002/01, Judgment, para. 435; Case 001, Judgment, para. 367.
[525] Case 002/01, Appeal Judgment, paras 576-578; Case 002/02, Judgment, para. 724; Case 002/01, Judgment, para. 437.

reus and *mens rea* in relation to the general category of "other inhumane acts", and these elements have then been applied to particular forms of inhumane acts (such as forced transfer, forced marriage, forced sexual intercourse in the context of marriage, etc):[526]

i. *Actus reus*. The perpetrator must carry out an act or omission that causes serious mental or physical suffering or injury, or constitutes a serious attack on human dignity.

ii. *Mens rea*. The perpetrator must carry out the act or omission intentionally.[527]

In order to comply with the requirements of legal certainty, the conduct must be of a nature and gravity similar to the enumerated crimes against humanity, requiring a case-specific analysis of the impact on the victims and a determination whether the conduct is comparable to the enumerated crimes against humanity.[528] In assessing whether the conduct is of a similar gravity to the enumerated crimes against humanity, the Chamber may consider whether the conduct infringes "basic rights appertaining to human beings, as identified under international legal instruments", which is also a way of introducing a requirement of formal international unlawfulness.[529] There is no requirement for the underlying conduct itself to be criminalised under international law.[530]

2.4.3.9.1. *Forced transfer and deportation*

The elements of deportation and forced transfer as "other inhumane act[s]" are substantially similar – both require the forced displacement of persons by expulsion or other forms of coercion, from an area in which they are lawfully present, without grounds permitted under international law.[531] Both forced transfer and deportation may be characterised as "other inhumane acts", but only deportation is also a separate standalone crime against humanity.[532]

The only distinction between the two is that forced transfer may take place within national

[526] See Case 002/02, Judgment, paras 722-727; Case 002/02, Appeal Judgment, para. 1246.
[527] Case 002/01, Appeal Judgment, para. 580; Case 002/02, Judgment, para. 724; Case 002/01, Judgment, para. 437; Case 001, Judgment, paras 368, 371. See also Case 004/01, Dismissal Order, paras 74-75; Case 004/02, Closing Order (Indictment), para. 80; Case 003, Closing Order (Indictment), para. 58; Case 004, Closing Order (Indictment), para. 54.
[528] Case 002/01, Appeal Judgment, para. 586; Case 002/02, Judgment, para. 725; Case 002/01, Judgment, para. 438; Case 001, Judgment, paras 367, 369.
[529] Case 002/01, Appeal Judgment, paras 584.
[530] Ibid; Case 002/02, Judgment, para. 725; Case 002/01, Judgment, para. 436.
[531] Case 002/02, Judgment, para. 751.
[532] Case 002/01, Appeal Judgment, para. 589; Case 002/02, Judgment, para. 751.

territory without a requirement to cross an international boundary.[533] In the factual assessment of charges brought before the ECCC of conduct amounting to forced transfer and deportation, the conduct was deemed sufficiently serious to constitute a crime against humanity of other inhumane acts. The Case 002 Closing Order characterised movements of population within Democratic Kampuchea as other inhumane acts through forced transfer.[534]

2.4.3.9.2. *Enforced disappearances*

Enforced disappearances may constitute "other inhumane acts" but the underlying acts had not crystallised into a separate category of crimes against humanity by 1975.[535] The Supreme Court Chamber considered it "anachronistic and legally incorrect" to stipulate elements of enforced disappearance as constituting a separate category.[536]

The Supreme Court Chamber rejected the specific elements of conduct recognised as enforced disappearance that had been applied by the Trial Chamber, namely: (1) a deprivation of liberty; (2) a refusal to disclose information regarding the fate or whereabouts of the person concerned, or to acknowledge the deprivation of liberty, and thereby deny the individual recourse to the applicable legal remedies and procedural guarantees, and (3) the above two elements are carried out by state agents, or with the authorisation, support or acquiescence of a state or political organisation.[537] In Case 004/01, the International Pre-Trial Chamber Judges followed the Supreme Court Chamber's approach, opining that the underlying offence of enforced disappearance did not have any specific elements and that it was proved by the general requirements of other inhumane acts.[538]

2.4.3.9.3. *Attacks against human dignity*

Other inhumane acts may include attacks against human dignity that result from depriving the civilian population of adequate food, shelter, medical assistance, and minimum sanitary conditions.[539] In order to determine whether such deprivations amount to inhumane acts, it is necessary to assess whether they are of similar gravity to the enumerated crimes against

[533] Case 002/02, Judgment, para. 751.
[534] Case 002, Closing Order, paras 1448–1469.
[535] Case 002/01, Appeal Judgment, paras 589, 647-653; Case 002/02, Judgment, para. 753-755.
[536] Case 002/01, Appeal Judgment, para. 589.
[537] Case 002/02, Judgment, para. 754; Case 002/01, Judgment, para. 448. See also Case 002/01, Appeal Judgment, paras 588-589.
[538] Case 004/01, Considerations on Closing Order Appeal, paras 272-274.
[539] Case 002/02, Judgment, para. 734; Case 002/01, Judgment, paras 457-458; Case 002, Closing Order, para. 1435.

humanity, whether the deprivations caused a serious attack on human dignity, and whether the deprivations were performed intentionally.[540]

In relation to other inhumane acts arising from detention conditions, the Trial Chamber concluded, after evaluating the ICTY case law, that there is a minimum standard of treatment of detained persons which should be guaranteed in any circumstance.[541] The Trial Chamber found that even when circumstances are "difficult due to shortages of resources", it was necessary to provide detainees with those resources that are available, and to take counter-measures to mitigate the impact of the circumstances on the detainees.[542]

2.4.3.9.4. *Forced marriage and forced pregnancy*

Forced marriage and forced pregnancy are forms of underlying conduct that may constitute a crime against humanity of other inhumane acts.[543] The Trial Chamber held that there is no requirement that forced marriage was recognised as a specific category of crime against humanity or even as a specific kind of underlying conduct.[544] The Chamber held that there was no common understanding of the term forced marriage in international jurisprudence, such that a case-by-case factual assessment was required.[545]

In Case 004, the International Co-Investigating Judge was unable to find that forced pregnancy constituted a crime against humanity of an "other inhumane act" from 1975 to 1979. He considered that "there must be a customarily accepted standard, tied to the appropriate human right, by which the 'inhumanity' of the act is judged".[546] The International Co-Investigating Judge followed the Pre-Trial Chamber and Trial Chamber in taking a cautious approach in assessing other inhumane acts to ensure the principle of legality was not violated.[547]

2.5. Grave breaches of the Geneva Conventions of 1949

Article 6 of the ECCC Law provided the ECCC jurisdiction over grave breaches of the Geneva Conventions of 12 August 1949 ("Geneva Conventions") "such as the following acts against

[540] Case 002/02, Judgment, para. 734. See also Case 002/01, Judgment, paras 457-458; Case 002, Closing Order, paras 1435, 1439.
[541] Case 002/02, Judgment, para. 739.
[542] Ibid.
[543] Case 002/02, Appeal Judgment, para. 1138; Case 002/02, Judgment, para. 741.
[544] Case 002/02, Judgment, para. 741.
[545] Ibid, paras 743, 749. See also Case 002/02, Appeal Judgment, section VII(G)(3)(a)(i).
[546] Case 004, Consolidated Decision on the Requests for Investigative Action Concerning the Crime of Forced Pregnancy and Forced Impregnation, 13 June 2016, D301/5, para. 64.
[547] Ibid, paras 57-65.

persons or property protected under provisions of these Conventions, and which were committed during the period 17 April 1975 to 6 January 1979":

i. wilful killing;

ii. torture or inhumane treatment;

iii. wilfully causing great suffering or serious injury to body or health;

iv. destruction and serious damage to property, not justified by military necessity and carried out unlawfully and wantonly;

v. compelling a prisoner of war or civilian to serve in the forces of a hostile power;

vi. wilfully depriving a prisoner of war or a civilian the rights of fair and regular trial;

vii. unlawful deportation or transfer or unlawful confinement of a civilian; and

viii. taking civilians as hostages.[548]

Article 6 of the ECCC Law essentially mirrored the grave breaches provisions of the Geneva Conventions with two exceptions, as the Geneva Convention provisions: (1) "explicitly include 'biological experiments' as a form of torture or inhuman treatment"; and (2) "require that the destruction and appropriateness of property be 'extensive'".[549] Since Cambodia had ratified the four Geneva Conventions in 1958, the grave breaches provisions as well as the individual criminal responsibility thereto were also binding on Cambodia.[550] The Co-Investigating Judges and chambers have consistently held that grave breaches were part of customary international law between 17 April 1975 and 6 January 1979.[551]

Offences listed in Article 6 of the ECCC Law constituted grave breaches only if the following *chapeau* elements were established: (1) the existence of an armed conflict; (2) the international character of the armed conflict; (3) a nexus between the Accused's acts and the armed conflict; (4) the "protected status" of the victims under the Geneva Conventions; and (5) sufficient knowledge by the Accused that the armed conflict was international in character and that the

[548] See Case 002/02, Judgment, para. 325; Case 001, Judgment, para. 400.
[549] Case 001, Judgment, para. 400, fn. 732.
[550] Case 002/02, Judgment, para. 325; Case 001, Judgment, para. 405.
[551] Ibid; Case 002, Decision on Closing Order Appeal (Ieng Sary), paras 256-258; Case 002, Case 002, Decision on Closing Order Appeals (Nuon Chea and Ieng Thirith), paras 117-118; Case 002, Case 002, Closing Order, para. 1316; Case 003, Closing Order (Indictment), para. 76; Case 004, Closing Order (Indictment), para. 74.

victims had protected status under the Geneva Conventions.[552]

2.5.1. Applicability at the ECCC

The Co-Investigating Judges and chambers held that grave breaches of the Geneva Conventions were established international crimes binding on Cambodia between 17 April 1975 and 6 January 1979.[553] The grave breaches provisions were binding on Cambodia because Cambodia ratified the four Geneva Conventions of 1949 on 8 December 1958.[554] Further, these provisions codified core principles of customary international law. Accordingly, the determination of any applicable limitation period and the definition of the grave breaches of the Geneva Conventions are based exclusively on international law.[555]

In Case 001, the Trial Chamber analysed the applicability of grave breaches on its own motion, holding that the ECCC has subject matter jurisdiction over grave breaches of the Geneva Conventions pursuant to Article 6 of the ECCC Law.[556] It reasoned that Cambodia had ratified all four Geneva Conventions on 8 December 1958 and that the Geneva Conventions codified core principles of customary international law.[557] The Trial Chamber also found that it was foreseeable at the relevant time that the Accused could be held liable for acts listed as grave breaches, considering its international conventional and customary basis.[558] It also considered that the "appalling nature of the offences constituting grave breaches […] helps to refute any claim that the Accused would have been unaware of their criminal nature".[559]

In Case 002, the Pre-Trial Chamber also addressed the applicability of grave breaches when ruling on the Charged Persons' appeals against the Closing Orders. While the Pre-Trial Chamber rejected Ieng Sary's challenge based on the domestic statutory limitation period, it examined the Co-Investigating Judges' sources to support their conclusions and found that

[552] Case 002/02, Judgment, para. 327; Case 001, Judgment, para. 410. See also Case 002, Closing Order, paras 1480-1490; Case 003, Closing Order (Indictment), paras 78-84; Case 004, Closing Order (Indictment), paras 77-83.
[553] Case 002/02, Judgment, para. 325; Case 001, Judgment, para. 403; Case 002, Decision on Closing Order Appeal (Ieng Sary), paras 256-258. See also Case 002, Closing Order, para. 1316; Case 002, Decision on Closing Order Appeals (Nuon Chea and Ieng Thirith), paras 117-118; Case 003, Closing Order (Indictment), para. 76; Case 004, Closing Order (Indictment), para. 74.
[554] Case 002/02, Judgment, para. 325; Case 001, Judgment, para. 403. See also Case 003, Closing Order (Indictment), para. 76; Case 004, Closing Order (Indictment), para. 74.
[555] Case 002, Decision on Defence Preliminary Objection Regarding a Statute of Limitation for Grave Breaches of the Geneva Conventions of 12 August 1949, 31 October 2014, E306/6, para. 8.
[556] Case 001, Judgment, para. 400.
[557] Ibid, paras 403-405.
[558] Ibid, para. 406.
[559] Ibid, para. 407.

grave breaches existed in customary international law at the time of the indictment.[560] It considered that the Geneva Conventions were "unquestionably binding on Cambodia" and that all four of them contain a provision explicitly providing that grave breaches of the Conventions merit universal, mandatory criminal jurisdiction among contracting states. Further, it considered that the *jus cogens* nature of the crimes of grave breaches of the Geneva Conventions alleged in the Closing Order was sufficient to justify prosecution, regardless of the specific provisions in Cambodia's domestic law.[561] Similarly, in ruling on Ieng Thirith's and Nuon Chea's challenges to the application of grave breaches, the Pre-Trial Chamber established that liability under grave breaches of the Geneva Conventions was foreseeable and accessible to the Charged Persons "because of the treaties to which Cambodia was a party, the pre-existing customary nature of the law which those treaties codified, and the nature of the individual rights allegedly infringed".[562]

The Trial Chamber examined the applicability of grave breaches in Case 002 when ruling on the Accused's preliminary objections that the application of grave breaches was barred by the statute of limitations in the 1956 Penal Code and would violate the principle of *nullum crimen sine lege*.[563] The Trial Chamber held that no statute of limitations is applicable to the grave breaches provision under the ECCC Law.[564] It reasoned that Article 6 of the ECCC Law did not establish a new crime but simply conferred jurisdiction over this existing international crime to the ECCC.[565] Recalling that the ECCC could only apply the provisions of the 1956 Penal Code that are specifically listed in the ECCC Law, the Trial Chamber considered that the sole reference to the Penal Code contained in Article 3 (new) of the ECCC Law did not provide for direct application of the entire Penal Code but simply incorporated certain national crimes into the ECCC framework. According to the Trial Chamber, the Penal Code "does not limit or purport to limit" the prosecution of grave breaches of the Geneva Conventions of 1949.[566]

The Trial Chamber incorporated much of this analysis into the Case 002/02 Trial Judgment.[567] Since the parties did not appeal the Trial Chamber's holding that grave breaches are applicable

[560] Case 002, Decision on Closing Order Appeal (Ieng Sary), paras 73, 256.
[561] Ibid, para. 256.
[562] Case 002, Decision on Closing Order Appeals (Nuon Chea and Ieng Thirith), paras 109-111.
[563] Case 002, Decision on Defence Preliminary Objection Regarding a Statute of Limitation for Grave Breaches of the Geneva Conventions of 12 August 1949, 31 October 2014, E306/6, para. 1.
[564] Ibid, para. 12.
[565] Ibid, para. 7.
[566] Ibid, para. 8.
[567] Case 002/02, Judgment, paras 325-326.

before the ECCC, the Supreme Court Chamber did not review or discuss the issue further.

In Cases 003 and 004, the International Co-Investigating Judge cited the Trial Chamber's and Pre-Trial Chamber's jurisprudence in holding that "grave breaches of the Geneva Conventions formed part of customary international law between 1975 and 1979".[568] Grave breaches of the Geneva Conventions were not charged in Cases 002/01, 004/01 or 004/02.

2.5.2. Chapeau elements of grave breaches

Article 6 of the ECCC Law incorporated the conditions of applicability contained in the Geneva Conventions. Offences listed in Article 6 of the ECCC Law constituted grave breaches only if the following *chapeau* requirements are established:

i. the existence of an armed conflict;[569]

ii. the international character of the armed conflict;[570]

iii. a nexus between the Accused's acts and the armed conflict;[571]

iv. the "protected persons" status of the victims under the Geneva Conventions;[572]

v. sufficient knowledge by the Accused of the international character of the armed conflict and of the protected status of the victims under the Geneva Conventions.[573]

In establishing the elements of grave breaches, the Trial Chamber relied on the five-part test applied by the ICTY, "whose Statute similarly confer[red] jurisdiction over grave breaches of the Geneva Conventions".[574] The Chamber remarked that the ICTY's jurisprudence was "more extensive than that of the other *ad hoc* international tribunals on the issue as the Statutes of the ICTR and SCSL [did] not confer upon those Tribunals jurisdiction over offences as grave breaches of the Geneva Conventions given the non-international character of the conflicts that

[568] Case 003, Closing Order (Indictment), para. 76; Case 004, Closing Order (Indictment), para. 74.
[569] Case 002/02, Judgment, para. 328; Case 001, Judgment, paras 411-412; Case 003, Closing Order (Indictment), para. 78; Case 004, Closing Order (Indictment), para. 77.
[570] Case 002/02, Judgment, para. 329; Case 001, Judgment, paras 413-415; Case 003, Closing Order (Indictment), para. 78; Case 004, Closing Order (Indictment), para. 77.
[571] Case 002/02, Judgment, para. 330; Case 001, Judgment, para. 416; Case 003, Closing Order (Indictment), para. 80; Case 004, Closing Order (Indictment), para. 79.
[572] Case 002/02, Judgment, para. 331; Case 001, Judgment, para. 417; Case 003, Closing Order (Indictment), para. 81; Case 004, Closing Order (Indictment), para. 80.
[573] Case 002/02, Judgment, para. 335; Case 001, Judgment, paras 421-422; Case 003, Closing Order (Indictment), para. 84; Case 004, Closing Order (Indictment), para. 83.
[574] Case 001, Judgment, para. 410.

concern them".[575]

2.5.2.1. Existence of an armed conflict

Common Article 2 of the Geneva Conventions provides that the Conventions' provisions (including the grave breaches provisions), apply to "all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them".[576] An armed conflict exists whenever there is:

i. a resort to armed force between states (where the armed conflict is of an international nature); or

ii. protracted armed violence between governmental authorities and organised armed groups or between such groups within a state (when it is of an internal nature).[577]

2.5.2.2. International character of the armed conflict

Article 6 of the ECCC Law only applied to armed conflicts of an international character. An armed conflict is of international character if it takes place between two or more states.[578] An official recognition of a state of war is not required for the grave breaches of the Geneva Conventions to apply.[579] *De facto* hostilities between states may be sufficient to satisfy the internationality requirement, where these are conducted through the states' respective armed forces. The provisions of the Geneva Conventions apply to the whole territory of the relevant states, whether or not actual hostilities take place there, and continue to apply beyond the cessation of hostilities until a general conclusion of peace is achieved.[580]

2.5.2.3. Nexus between the Accused's acts and the conflict

A sufficient nexus must exist between the Accused's acts and the armed conflict giving rise to the applicability of the grave breaches of the Geneva Conventions.[581] To satisfy this nexus, the

[575] Ibid, fn. 748.
[576] Case 002/02, Judgment, para. 328.
[577] Ibid; Case 001, Judgment, para. 412; See also Case 003, Closing Order (Indictment), para. 78; Case 004, Closing Order (Indictment), para. 77.
[578] Case 002/02, Judgment, para. 329; Case 001, Judgment, para. 414; Case 003, Closing Order (Indictment), para. 78; Case 004, Closing Order (Indictment), para. 77.
[579] Case 002/02, Judgment, para. 329; Case 001, Judgment, para. 414.
[580] Case 002/02, Judgment, para. 329; Case 001, Judgment, para. 415; Case 003, Closing Order (Indictment), para. 79; Case 004, Closing Order (Indictment), para. 78.
[581] Case 001, Judgment, para. 416; Case 002/02, Judgment, para. 330. See also Case 003, Closing Order (Indictment), para. 80; Case 004, Closing Order (Indictment), para. 79.

Accused's acts must be "closely related" to the armed conflict as a whole.[582] "The crimes can be 'temporarily and geographically remote from the actual fighting' and it would be sufficient if the crimes are closely related to hostilities occurring in other parts of the territories controlled by the parties to the conflict".[583] While the nexus need not be a causal link, the existence of an armed conflict must at a minimum be a substantial part in the perpetrator's ability to commit the crime, their decision to commit it, the manner in which it was committed, or the purpose for which it was committed. It is not necessary to establish that there were actual combat activities in the area where the acts are alleged to have occurred or that they were part of a policy or practice tolerated by one of the parties to the armed conflict.[584] Where acts occurred in a prisoner camp with the connivance or permission of the authorities running these camps and as part of an accepted policy towards prisoners, "those acts will clearly be 'closely related' to the armed conflict".[585]

2.5.2.4. Protected persons

"Protected persons" are defined according to Articles 4 of Geneva Convention III (related to prisoners of war) and Geneva Convention IV (related to civilians):

i. prisoners of war (*i.e.*, "members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces", who have "fallen into the power of the enemy"); and

ii. civilians who find themselves "in the hands of a Party to the conflict or Occupying Power of which they are not nationals".[586]

Civilians may be considered as "protected persons" for the purpose of Geneva Convention IV where they are viewed by the state whose hands they are in "as belonging to the opposing party in an armed conflict and as posing a threat to [that] State".[587] Adopting the ICTY's "flexible interpretation" of the nationality requirement expressed in Article 4 of Geneva Convention IV, the Trial Chamber considered that a person may be accorded protected status notwithstanding the fact that they are of the same nationality as a party to the conflict. Under this approach, the

[582] Case 002/02, Judgment, para. 330; Case 001, Judgment, para. 416.
[583] Case 002/02, Judgment, para. 330.
[584] Case 001, Judgment, para. 416.
[585] Ibid.
[586] Case 002/02, Judgment, para. 331; Case 001, Judgment, para. 418. See also Case 003, Closing Order (Indictment), para. 81-83; Case 004, Closing Order (Indictment), para. 80-82.
[587] Case 001, Judgment, para. 419.

"crucial consideration" is the allegiance or lack of it that a person has to a party to the conflict.[588]

The Trial Chamber rejected the argument that protected persons do not include spies, *i.e.*, members of the armed forces of a party to the conflict who fall into the power of an adversary while engaging in espionage.[589] The Chamber reasoned that Additional Protocol I does not exclude spies from the protections of the Geneva Conventions. A person engaging in espionage, who loses their prisoner of war status, would still enjoy the fundamental guarantees set out in Article 75 of the Additional Protocol I. In this respect, the ICRC's Commentary to the Additional Protocol I notes that the "deprivation of prisoner-of-war status already constitutes a punishment in itself and can therefore only take place following the tribunal's decision" and that the "presumption of prisoner-of-war status should prevail, at any rate whenever the person concerned has not been charged on the basis of prima facie evidence".[590]

The Trial Chamber further rejected the contention that the definition of protected persons encompassed ethnic Vietnamese who were Cambodian nationals but viewed as enemies allied with Vietnam. The Trial Chamber reasoned that the Closing Order expressly limited the categories of protected persons to members of the armed forces of the Socialist Republic of Vietnam and civilians who were nationals of the Socialist Republic of Vietnam who had fallen into the power of the forces of Democratic Kampuchea. According to the Trial Chamber, there was "no room to consider whether Vietnamese who were Cambodian nationals but owed allegiance to Vietnam could be considered protected persons".[591]

2.5.2.5. Knowledge requirement

The Accused must have sufficient knowledge of the international character of the armed conflict and of the protected status of the victims under the Geneva Conventions.[592] Awareness by the Accused that a foreign state was involved in the armed conflict and that a victim belonged to an adverse party to that armed conflict will suffice to establish that knowledge.[593] Both prongs are distilled from the field of application of the grave breaches provisions of the Geneva Conventions and are thus equally applicable to the period 17 April 1975-6 January

[588] Ibid.
[589] Case 002/02, Judgment, paras 333-334.
[590] Ibid, para. 334 (italics omitted).
[591] Ibid, para. 332.
[592] Ibid, para. 335; Case 001, Judgment, paras 420-422. See also Case 004, Closing Order (Indictment), para. 83.
[593] Case 002/02, Judgment, para. 335; Case 001, Judgment, paras 420-422.

1979.[594] The existence of an international armed conflict is not merely a jurisdictional pre-requisite but also a substantive element of the offences charged.[595] The Accused therefore must know that their conduct had a nexus to an international armed conflict, or at least have "knowledge of the factual circumstances later bringing the Judges to the conclusion that the armed conflict was an international one".[596]

2.5.3. Elements of underlying grave breaches

2.5.3.1. Wilful killing

The elements of the grave breach of wilful killing are "the same as those of murder as a crime against humanity":

i. *Actus reus*. The perpetrator must have caused the death of the victim by an unlawful act or omission.

ii. *Mens rea*. The perpetrator must have intended "to kill or to cause serious bodily harm in the reasonable knowledge that the act or omission would likely lead to death".[597]

The fact of death can be inferred circumstantially, including from proof of the following:

i. incidents of mistreatment directed against the victim;

ii. patterns of mistreatment and disappearances of other individuals;

iii. a general climate of lawlessness at the place where the acts were allegedly committed;

iv. the length of time that elapsed since the person disappeared; and

v. the fact that the victim failed to contact other persons that he or she might have been expected to contact, such as family members.[598]

The victim's death caused by the perpetrator's act or omission must be the only reasonable

[594] Case 001, Judgment, para. 421.
[595] Ibid, para. 420.
[596] Case 002/02, Judgment, para. 335. See also Case 001, Judgment, para. 420; Case 004, Closing Order (Indictment), para. 83.
[597] Case 002/02, Judgment, para. 757 and section 9.1.1; Case 001, Judgment, para. 431; Case 003, Closing Order (Indictment), para. 86; Case 004, Closing Order (Indictment), para. 85.
[598] Case 002/02, Judgment, paras 628, 757; Case 001, Judgment, para. 431.

inference that can be drawn from the evidence.[599]

2.5.3.2. Torture or other inhumane treatment

2.5.3.2.1. *Torture*

The elements of the grave breach of torture are "the same as those of torture as a crime against humanity":

i. *Actus reus*. The perpetrator must have taken an "act causing severe pain or suffering, whether physical or mental".

ii. *Mens rea*. The perpetrator must have acted "intentionally" or "by or at the instigation of a public official for such purposes as obtaining information or a confession, punishment or intimidation".[600]

In assessing pain or suffering, the Trial Chamber considered objective and subjective factors. Objective factors included the severity of the harm inflicted, the nature, purpose and consistency of the acts committed. Subjective factors included the physical or mental condition of the victim, the effect of the treatment and, in some cases, factors such as the victim's age, sex, state of health and position of inferiority.[601] The Trial Chamber also considered the nature and context of the infliction of pain, the premeditation and institutionalisation of the ill-treatment, the physical condition of the victim, the manner and method used, and the position of inferiority of the victim.[602]

2.5.3.2.2. *Inhumane treatment*

Inhumane treatment constitutes a separate offence from torture:[603]

i. *Actus reus*. The perpetrator must have taken an "intentional act or omission against a person protected under the Geneva Conventions, which causes serious mental harm or physical suffering or injury, or constitutes a serious attack on human dignity".[604]

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[599] Ibid.
[600] Case 002/02, Judgment, para. 759; Case 001, Judgment, para. 439. See also Case 003, Closing Order (Indictment), para. 87.
[601] Case 002/02, Judgment, para. 703; Case 001, Judgment, para. 355.
[602] Case 001, Judgment, para. 355.
[603] Case 002/02, Judgment, para. 764-768; Case 001, Judgment, para. 438.
[604] Case 002/02, Judgment, para. 766; Case 001, Judgment, para. 440.

ii. *Mens rea.* The perpetrator must have intended "to perform the act or omission which causes serious mental harm or physical suffering, or results in a serious attack on the human dignity of the victim".[605]

Inhumane treatment differs from torture in that it need not be undertaken for any particular purpose and does not reach the threshold of severity required for the offence of torture.[606] In Case 001, the Trial Chamber found that the International Committee of the Red Cross's ("ICRC") Commentary to Geneva Convention IV assists in interpreting this offence:

> [Inhuman treatment] could not mean, it seems, solely treatment constituting an attack on physical integrity or health; the aim of the Convention is certainly to grant civilians in enemy hands a protection which will preserve their human dignity and prevent them from being brought down to the level of animals. That leads to the conclusion that by 'inhuman treatment' the Convention does not mean only physical injury or injury to health. Certain measures, for example, which might cut the civilians internees off completely from the outside world and in particular from their families, or which caused great injury to their human dignity, could conceivably be considered as inhuman treatment.[607]

Acts which constitute torture or wilfully causing great suffering or serious injury to body or health will simultaneously constitute inhumane treatment.[608] The offence also extends to encompass other acts which violate the principle of humane treatment, in particular the respect for human dignity. This assessment is a question of fact which must consider all of the circumstances of the individual case. "Acts such as mutilation and other types of severe bodily harm, beatings and other acts of violence, and serious physical and mental injury have been considered as inhumane".[609]

2.5.3.3. Wilfully causing great suffering or serious injury to body or health

Wilfully causing great suffering or serious injury to body or health focuses on the seriousness of the suffering or injury and does not include acts where the resultant harm relates solely to an individual's human dignity:[610]

[605] Case 002/02, Judgment, para. 768; Case 001, Judgment, para. 444.
[606] Case 002/02, Judgment, para. 766; Case 001, Judgment, para. 443.
[607] Case 001, Judgment, para. 441.
[608] Case 002/02, Judgment, para. 767; Case 001, Judgment, para. 442.
[609] Case 001, Judgment, para. 442.
[610] Case 002/02, Judgment, para. 761; Case 001, Judgment, para. 453.

i. *Actus reus*. The perpetrator must have performed an "intentional act or omission causing great suffering or serious injury to body or health, including mental health".[611]

ii. *Mens rea*. The perpetrator must have acted either with "intent to perform the act or omission" or "recklessness".[612]

The Trial Chamber adopted the analysis of the ICRC's Commentary to Geneva Convention IV in interpreting this offence:

> Wilfully causing great suffering – this refers to suffering inflicted without the ends in view for which torture is inflicted or biological experiments carried out. It would therefore be inflicted as a punishment, in revenge or for some other motive, perhaps out of pure sadism. In view of the fact that suffering in this case does not seem, to judge by the phrase which follows, to imply injury to body or health, it may be wondered if this is not a special offence not dealt with by national legislation. Since the Conventions do not specify that only physical suffering is meant, it can quite legitimately be held to cover moral suffering also. Serious injury to body or health – this is a concept quite normally encountered in penal codes, which usually use as a criterion of seriousness the length of time the victim is incapacitated for work.[613]

Wilfully causing great suffering or serious injury to body or health differs from torture because the alleged act or omission need not be committed for any particular reason.[614] It also differs from inhumane treatment as requiring serious mental or physical injury. The harm caused to the victim of wilfully causing great suffering or serious injury to body or health need not be irremediable or permanent, but must go beyond temporary unhappiness, embarrassment or humiliation and must result in a grave and long-term disadvantage to a person's ability to lead a normal and constructive life.[615]

2.5.3.4. Wilfully depriving a prisoner of war or civilian of the right to fair and regular trial

The elements of the grave breach of wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial are:

i. *Actus reus.* The perpetrator by act or omission "must have deprived one or more

[611] Case 002/02, Judgment, para. 761. See also Case 001, Judgment, para. 451.
[612] Case 002/02, Judgment, paras 762-763. See also Case 001, Judgment, para. 455; Case 003, Closing Order (Indictment), para. 88.
[613] Case 001, Judgment, para. 452 (italics omitted).
[614] Ibid, para. 453. See also Case 003, Closing Order (Indictment), para. 88(c).
[615] Case 002/02, Judgment, para. 761; Case 001, Judgment, para. 454.

persons of a fair and regular trial by denying judicial guarantees as defined, in particular, in Geneva Convention IV and Geneva Convention III",[616] which include the rights:[617]

- be judged by an independent and impartial court;
- be promptly informed of the charges;
- the protection against collective penalty;
- the protection under the principle of legality;
- not be punished more than once for the same act or on the same count;
- be informed of the right to appeal; and
- not be sentenced or executed without a previous judgment pronounced by a regularly constituted court.

ii. *Mens rea.* The perpetrator must have acted with either "intent to perform the act or omission" or "recklessness".[618]

Although States in certain circumstances, such as in times of public emergency, may derogate from some fair trial obligations, the relevant provisions of the Geneva Convention IV clarify that deprivation of liberty is permissible only where there are reasonable grounds to believe that the security of the state is at risk. The Trial Chamber used this criterion when assessing whether, on the facts of the case, any derogation with respect to the rights to a fair and regular trial was lawful and consistent with obligations under the international law during the relevant period.[619]

2.5.3.5. Unlawful deportation of a civilian

The elements of the grave breach of deportation are "largely the same as deportation as a crime against humanity":

i. *Actus reus*. The perpetrator must have forcibly displaced persons "by expulsion or

[616] Case 001, Judgment, para. 459. See Case 002/02, Judgment, para. 770. For more on fair trial rights of the Accused, see chapter 4.
[617] Case 002/02, Judgment, para. 770; Case 001, Judgment, para. 459.
[618] Case 002/02, Judgment, para. 771; Case 001, Judgment, para. 460.
[619] Case 002/02, Judgment, para. 772.

other coercive acts from the area in which they are lawfully present, across a border, without grounds permitted under international law".

ii. *Mens rea.* The perpetrator must have intended "to forcibly displace the victim across a national border".[620]

The only distinction with deportation as a crime against humanity is that the provisions of Geneva Convention IV and specifically Article 49(1) refer to "deportations of protected persons *from occupied territory* to the territory of the Occupying Power or to that of any other country".[621] While the Geneva Conventions do not define "occupied territory", Article 42 of the Hague Regulations provides that "territory is considered occupied when it is actually placed under the authority of the hostile enemy. The occupation extends only to the territory where such authority has been established and can be exercised".[622]

The Trial Chamber agreed with the approach taken by the *Naletilić and Martinović* Trial Chamber at the ICTY, which found that "the application of the law of occupation as it [a]ffects 'individuals' as civilians protected under Geneva Convention IV does not require that the occupying power have actual authority". When dealing with crimes that affect civilians, such conduct is "prohibited from the moment that they f[a]ll into the hands of the opposing power, regardless of the stage of hostilities".[623] Accordingly, the Trial Chamber held that there is no further need to establish that an actual state of occupation as defined under Article 42 of the Hague Regulations existed.

2.5.3.6. Unlawful confinement of a civilian

The elements of the grave breach of unlawful confinement of a civilian are "the same as those of imprisonment as a crime against humanity":

i. *Actus reus*. The perpetrator must have arbitrary deprived an individual of their liberty without due process of law.

ii. *Mens rea.* The perpetrator must have "intended to arbitrarily deprive the individual of liberty" or "acted in the reasonable knowledge that his or her actions were likely

[620] Ibid, para. 775.
[621] Ibid, para. 775 (italics in original).
[622] Ibid, para. 776.
[623] Ibid, para. 777.

to cause the arbitrary deprivation of physical liberty".[624]

Deprivation of liberty is arbitrary if no legal basis exists to justify it.[625] National law purporting to justify deprivation of liberty must not violate international law. If the legal basis for an initial deprivation exists, it must remain throughout the entire period of unlawful confinement. If the legal basis no longer exists, the confinement is considered unlawful. An initially lawful confinement becomes unlawful if the detaining party fails to respect the detainee's basic procedural rights or to establish an appropriate court or administrative board as prescribed in Article 43 of Geneva Convention IV.[626]

Although the unlawful confinement of civilians in an armed conflict may be permissible in limited cases, the relevant provisions of the Geneva Convention IV clarify that deprivation of liberty is permissible only where there are reasonable grounds to believe that the security of the state is at risk.[627]

[624] Ibid, paras 780-781; Case 001, Judgment, para. 347-350; Case 003, Closing Order (Indictment), para. 89.
[625] Case 002/02, Judgment, para. 781; Case 001, Judgment, para. 348.
[626] Case 001, Judgment, para. 465. See also Case 002/02, Judgment, para. 781.
[627] Case 002/02, Judgment, para. 781.

3. Individual criminal responsibility

3.1. Modes of liability under the ECCC Law

Article 29 (new) of the ECCC Law outlined the modes of responsibility under which Accused persons could be held individually criminally responsible for crimes within the ECCC's jurisdiction. Article 29 (new) was based on the responsibility provisions of the *ad hoc* international criminal tribunals and was rooted in international law principles. It provided that:

> Any Suspect who planned, instigated, ordered, aided and abetted, or committed the crimes referred to in article 3 new, 4, 5, 6, 7 and 8 of this law shall be individually responsible for the crime.
>
> The position or rank of any Suspect shall not relieve such person of criminal responsibility or mitigate punishment.
>
> The fact that any of the acts referred to in Articles 3 new, 4, 5, 6, 7 and 8 of this law were committed by a subordinate does not relieve the superior of personal criminal responsibility if the superior had effective command and control or authority and control over the subordinate, and the superior knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators.
>
> The fact that a Suspect acted pursuant to an order of the Government of Democratic Kampuchea or of a superior shall not relieve the Suspect of individual criminal responsibility.

In keeping with the principle of legality, the Trial Chamber in Case 001 examined whether the modes of liability charged were recognised under national or international law between 17 April 1975 and 6 January 1979.[628] It held that the modes of liability in Article 29 (new) of the ECCC Law were based in both Cambodian and customary international law by 1975.[629]

In reaching this conclusion, the Trial Chamber first found that the modes of liability in Article 29 (new) "were known under the 1956 Penal Code [of Cambodia] at the relevant time, except for planning and superior responsibility".[630] It noted, however, that planning was criminalised by Articles 223, 239 and 290 of the 1956 Penal Code, thus making the criminalisation of such conduct foreseeable, whether as a mode of liability or as a crime. It went on to hold that the modes of liability in Article 29 (new) of the ECCC Law were also based in customary international law between 1975 and 1979. It considered that: (1) post-world War II ("WWII") judgments confirmed that individual criminal responsibility extended beyond those who

[628] Case 001, Judgment, para. 473.
[629] Ibid, paras 474, 478.
[630] Ibid, para. 474.

physically perpetrated crimes, including those who ordered or assisted in their commission; and (2) subsequent jurisprudence and codifications at the international level "reaffirmed the customary nature" of each of the modes of liability in Article 29 (new), "as well as their applicability to a wide range of international crimes", including war crimes and crimes against humanity.[631]

The Case 002/01 Trial Chamber reaffirmed that all modes of liability listed in Article 29 (new) of the ECCC Law were based in customary international law between 1975 and 1979.[632] The Chambers and Co-Investigating Judges also confirmed that participation in a joint criminal enterprise is a form of "commission" under Article 29 (new),[633] discussed below in section 3.4.

3.2. Commission, planning, instigating, ordering, aiding and abetting

The elements of the modes of liability of commission, planning, instigating, ordering, aiding and abetting were first set out by the Trial Chamber in Case 001, later reaffirmed by the Trial Chamber in Cases 002/01 and 002/02. The Supreme Court Chamber did not examine the elements of these modes of liability. Both Co-Investigating Judges in Case 004/01, and the International Co-Investigating Judge in Cases 004/02, 003, and 004 followed the Trial Chamber's jurisprudence. The Pre-Trial Chamber did not examine these modes of liability.

3.2.1. Commission through physical perpetrationor culpable omission

Commission encompasses the physical perpetration or culpable omission of an act. The Accused must have intended, or have been aware of a substantial likelihood of, the commission of a crime as a consequence of the alleged conduct.[634] Commission also encompasses participation in a joint criminal enterprise, discussed below in section 3.4.

3.2.2. Planning

Customary international law recognised planning as a mode of liability by 1975.[635] Various international instruments codified planning liability, including: (1) Article 6 of the Nuremberg

[631] Ibid, paras 475-478.
[632] Case 002/01, Judgment, paras 697, 699, 701, 703, 714.
[633] Ibid, para. 690; Case 001, Judgment, para. 511. See also Case 002, Closing Order, para. 1521; Case 004/01, Dismissal Order, para. 79; Case 004/02, Closing Order (Indictment), para. 100; Case 003, Closing Order (Indictment), para. 95; Case 004, Closing Order (Indictment), para. 93.
[634] Case 001, Judgment, paras 479-481. See also Case 004/02, Closing Order (Indictment), para. 100; Case 003, Closing Order (Indictment), para. 95; Case 004, Closing Order (Indictment), para. 93.
[635] Case 002/01, Judgment, para. 697; Case 001, Judgment, paras 475, 478.

Charter; (2) Article 5 of the Tokyo Charter; (3) Article II(2)(d) of Control Council Law No. 10; (4) Principle VI of the Nuremberg Principles; and (5) Article 4(a) of the International Convention against the taking of hostages ("Hostages Convention").[636] Post-WWII courts entered convictions against Accused found to have planned international crimes.[637] Planning was also criminalised as an offence under Articles 223, 239, and 290 of the 1956 Penal Code.[638]

For planning liability, one or more persons must have designed the criminal conduct that constitutes one or more crimes that are later perpetrated. The planning must precede and substantially contribute to the criminal conduct.[639]

The Accused must have intended, or have been aware of a substantial likelihood of, the commission of a crime upon the execution of the plan.[640] For specific intent crimes such as persecution and genocide, the Accused must have the requisite special intent.[641]

In Case 002/01, the Trial Chamber held that planning as a mode of liability was foreseeable to the Accused given their senior positions and that planning was recognised as a mode of liability in both Cambodian and customary international law by 1975.[642]

In Case 002/02, the Trial Chamber held that planning is a mode of liability which requires a positive act to materialise.[643] Thus, liability for planning cannot occur through omission.

3.2.3. Instigating

Customary international law recognised instigating as a mode of liability by 1975.[644] While the French and Khmer versions of Article 29 (new) of the ECCC Law referred to incitement ("*inciter*"), the notions of instigation and incitement are considered synonymous.[645] Instigation and incitement were codified in various international instruments, including: (1) Article 6 of

[636] Case 002/01, Judgment, fn. 2173.
[637] Ibid.
[638] Ibid, fn. 2174; Case 001, Judgment, para. 474, fn. 837.
[639] Case 002/02, Judgment, para. 3717; Case 002/01, Judgment, para. 698; Case 001, Judgment, para. 518. See also Case 002, Closing Order, para. 1544; Case 004/01, Dismissal Order, para. 80; Case 004/02, Closing Order (Indictment), para. 101; Case 003, Closing Order (Indictment), para. 96; Case 004, Closing Order (Indictment), para. 94.
[640] Case 002/02, Judgment, para. 3717; Case 002/01, Judgment, para. 698; Case 001, Judgment, para. 519. See also Case 002, Closing Order, para. 1544; Case 004/01, Dismissal Order, para. 80; Case 004/02, Closing Order (Indictment), para. 101; Case 003, Closing Order (Indictment), para. 96; Case 004, Closing Order (Indictment), para. 94.
[641] Case 002/02, Judgment, para. 3717.
[642] Case 002/01, Judgment, para. 697.
[643] Case 002/02, Judgment, para. 3717.
[644] Case 002/01, Judgment, para. 699; Case 001, Judgment, para. 475.
[645] Case 002/02, Judgment, para. 3718; Case 002/01, Judgment, para. 699.

the Nuremberg Charter; (2) Article 3 of the Convention on the Prevention and Punishment of the Crime of Genocide ("Genocide Convention"); (3) Article 6 of the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery ("Supplementary Slavery Convention"); (4) Article 20 of the International Covenant on Civil and Political Rights ("ICCPR"); (5) Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination; (6) Article II of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity ("Statutory Limitations Convention"); (7) Article III(a) of the International Convention on the Suppression and Punishment of the Crime of Apartheid ("Apartheid Convention"); and (8) Article 4(a) of the Hostages Convention. Post-WWII courts also entered convictions against Accused who incited and instigated crimes against humanity.[646] Instigating was also criminalised by Articles 83 and 84 of the 1956 Penal Code.[647]

For instigating liability, one person, through either an act or omission, must have prompted another person to commit a crime. Liability may ensue through implicit written or other non-verbal prompting, and may be express or implied. By contrast to ordering and superior responsibility, instigating does not require that the Accused have any authority over the perpetrator. Instigating also requires more than merely facilitating the commission of the crime, which may otherwise suffice for its aiding and abetting. The act or omission must precede and substantially contribute to, not merely facilitate, the criminal conduct.[648]

The Accused must have intended, or have been aware of a substantial likelihood of, the commission of a crime as a result of the instigation.[649] For specific intent crimes such as persecution and genocide, the Accused must have the requisite specific intent.[650]

In Case 001, the Trial Chamber considered that a superior's consistent failure to prevent or punish a perpetrator's crimes may, in some instances, amount to instigating the perpetrator to commit further crimes.[651]

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[646] Case 002/01, Judgment, fn. 2178.
[647] Ibid, fn. 2180; Case 001, Judgment, para. 474, fn. 836.
[648] Case 002/02, Judgment, para. 3719; Case 002/01, Judgment, para. 700; Case 001, Judgment, para. 522. See also Case 002, Closing Order, para. 1547; Case 004/01, Dismissal Order, para. 81; Case 004/02, Closing Order (Indictment), para. 102; Case 004, Closing Order (Indictment), para. 95.
[649] Case 002/02, Judgment, para. 3719; Case 002/01, Judgment, para. 700; Case 001, Judgment, para. 524. See also Case 002, Closing Order, para. 1547; Case 004/01, Dismissal Order, para. 81; Case 004/02, Closing Order (Indictment), para. 102; Case 004, Closing Order (Indictment), para. 95.
[650] Case 002/02, Judgment, para. 3719.
[651] Case 001, Judgment, para. 523.

In Case 002/01, the Trial Chamber held that instigating as a mode of liability was foreseeable to the Accused given their senior positions and that it was recognised as a mode of liability in both customary international and Cambodian law by 1975.[652]

3.2.4. Ordering

Customary international law recognised ordering as a mode of liability by 1975.[653] Ordering was codified in international instruments prior to 1975, including Article 49 of Geneva Convention IV and Article II(2)(b) of Control Council Law No. 10. Post-WWII courts also entered convictions against the Accused for ordering war crimes and crimes against humanity.[654] Ordering was also criminalised by Articles 83 and 85 of the 1956 Penal Code.[655]

For ordering liability, an Accused, in a position of authority – *de facto* (in fact) or *de jure* (in law) – must have instructed another person to commit a crime. No formal superior-subordinate relationship between the two persons is required. Liability for ordering a crime may ensue where an Accused issues, passes down, or otherwise transmits the order, including through intermediaries. There is no requirement that an order be given in writing or in any particular form, and the existence of an order may be proved through circumstantial evidence. The order must precede and substantially contribute to the commission of a crime.[656]

The Accused must have intended, or have been aware of a substantial likelihood that the execution of the order would result in the commission of a crime.[657] For specific intent crimes such as persecution and genocide, the Accused must have the requisite specific intent.[658]

In Case 002/01, the Trial Chamber held that ordering as a mode of liability was foreseeable to the Accused given their senior positions and that it was recognised as a mode of liability in both customary international and Cambodian law by 1975.[659]

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[652] Case 002/01, Judgment, para. 699.
[653] Ibid, para. 701; Case 001, Judgment, para. 475.
[654] Case 002/01, Judgment, fn. 2186.
[655] Ibid, para. 701; Case 001, Judgment, para. 474, fn. 836.
[656] Case 002/02, Judgment, para. 3720; Case 002/01, Judgment, para. 702; Case 001, Judgment, para. 527. See also Case 002, Closing Order, para. 1553; Case 004/01, Dismissal Order, para. 82; Case 004/02, Closing Order (Indictment), para. 103; Case 003, Closing Order (Indictment), para. 97; Case 004, Closing Order (Indictment), para. 96.
[657] Case 002/02, Judgment, para. 3720; Case 002/01, Judgment, para. 702; Case 001, Judgment, para. 528. See also Case 002, Closing Order, para. 1553; Case 004/01, Dismissal Order, para. 82; Case 004/02, Closing Order (Indictment), para. 103; Case 003, Closing Order (Indictment), para. 96; Case 004, Closing Order (Indictment), para. 96.
[658] Case 002/02, Judgment, para. 3720.
[659] Case 002/01, Judgment, para. 701.

In Case 002/02, the Trial Chamber held that ordering is a mode of liability which requires a positive act to materialise. Thus, liability for ordering cannot occur through omission.[660]

3.2.5. Aiding and abetting

Customary international law recognised aiding and abetting as modes of liability by 1975.[661] Accomplice liability, including aiding and abetting, was recognised as a principle of international law and codified in various international instruments, including: (1) Article 6 of the Nuremberg Charter; (2) Article II(2)(b) of Control Council Law No. 10; (3) Principle VII of the Nuremberg Principles; (4) Articles 3, 5 and 6 of the Supplementary Slavery Convention; (5) Article II of the Statutory Limitations Convention; (6) Article III(b) of the Apartheid Convention; (7) Articles 1(2)(b) and 4(a) of the Hostages Convention; and (8) Article 2(1)(e) of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents. Post-WWII courts also entered convictions for aiding and abetting war crimes and crimes against humanity.[662] Aiding and abetting was also criminalised by Articles 83 and 87 of the 1956 Penal Code.[663]

Aiding and abetting consists of practical assistance, encouragement, or moral support which has a substantial effect on the commission of the crime by the perpetrator.[664] Though often considered jointly in the jurisprudence of international tribunals, "aiding" and "abetting" are not synonymous: "aiding" involves the provision of assistance, while "abetting" involves "facilitating the commission of an act by being sympathetic thereto".[665] Both acts and omissions can constitute aiding and abetting.[666]

No evidence of a plan or agreement between the aider and abettor and the perpetrator is required. An Accused may not be convicted of aiding and abetting a crime that was never carried out.[667] The perpetrator of the crime need not have been tried or identified.[668]

The *actus reus* of aiding and abetting a crime may occur before, during, or *after* the principal

[660] Case 002/02, Judgment, para. 3720.
[661] Case 002/01, Judgment, para. 703; Case 001, Judgment, para. 475.
[662] Case 002/01, Judgment, fn. 2193.
[663] Ibid, fn. 2195; Case 001, Judgment, para. 474, fn. 836.
[664] Case 002/02, Judgment, para. 3722; Case 002/01, Judgment, para. 704; Case 001, Judgment, para. 533. See also Case 002, Closing Order, para. 1550; Case 004/01, Dismissal Order, para. 83.
[665] Case 001, Judgment, para. 533.
[666] Case 002/01, Judgment, para. 706. See also Case 002, Closing Order, para. 1550; Case 004/01, Dismissal Order, para. 83.
[667] Case 002/02, Judgment, para. 3722; Case 002/01, Judgment, para. 704; Case 001, Judgment, para. 534.
[668] Case 002/01, Judgment, para. 704; Case 001, Judgment, para. 534.

crime has been perpetrated.[669] The overarching requirement is that the assistance, encouragement, or moral support has a substantial effect on the commission of a crime. Therefore, in the absence of any form of prior assistance, encouragement, or moral support, assistance provided exclusively after the time of perpetration cannot satisfy such requirement. It is only when a substantial effect occurs that the necessary causal link exists. A Chamber need not identify in the abstract all conduct that may have a substantial effect on the commission of a crime. Rather, this is a matter of evidence, to be assessed on a case-by-case basis.[670]

To be convicted under aiding and abetting liability, the Accused must have known that a crime was likely to occur and that their actions assisted or facilitated its commission. The Accused must have also been aware of the essential elements of the crime committed by the perpetrator. However, the Accused need not have shared the perpetrator's intent to commit the crime, including for specific intent crimes such as persecution as a crime against humanity.[671] This knowledge can be inferred from the circumstances.

In Cases 001, 002/01, and 002/02 the Trial Chamber noted that the French version of Article 29 (new) of the ECCC Law equated "aiding and abetting" to the notion of "*complicité*".[672] By contrast, the French versions of the Statutes of the International Criminal Tribunal for the former Yugoslavia ("ICTY") and International Criminal Tribunal for Rwanda ("ICTR") equated "aiding and abetting" to "*aidé et encouragé*". Given that Article 29 (new) of the ECCC Law was modelled on the liability provisions of the *ad hoc* international criminal tribunals and is derived from notions of international criminal law, the Trial Chamber found that the phrase "*aidé et encouragé*" more clearly reflects the nature of this mode of liability than did the notion of "*complicité*", which may encompass broader conduct. It also reasoned that the Khmer version of Article 29 (new) supported this interpretation.[673]

Aiding and abetting does not require an affirmative act. The Trial Chamber in Case 002/01 noted that post-WWII jurisprudence recognised that an Accused may be held criminally liable for an omission which aids and abets the commission of a crime. It further held that whether an omission aids or abets a crime is determined on a case-by-case basis, and will likely turn on

[669] Case 002/02, Judgment, para. 3723; Case 002/01, Judgment, para. 713. See also Case 002, Closing Order, para. 1550.
[670] Case 002/02, Judgment, para. 3723; Case 002/01, Judgment, para. 713. See also Case 004/01, Dismissal Order, para. 83.
[671] Case 002/02, Judgment, para. 3722; Case 002/01, Judgment, para. 703; Case 001, Judgment, para. 532. See also Case 002, Closing Order, para. 1550; Case 004/01, Dismissal Order, para. 84.
[672] Case 002/02, Judgment, para. 3721; Case 002/01, Judgment, para. 703; Case 001, Judgment, para. 532.
[673] Case 001, Judgment, para. 532; Case 002/01, Judgment, para. 703; Case 002/02, Judgment, para. 3721.

the Accused's position and authority.[674] The Case 002/02 Trial Chamber reaffirmed this approach.[675]

The Case 002/01 Trial Chamber rejected that a conviction for aiding and abetting may be entered only if the Accused's aid or support is "specifically directed" to facilitate the commission of a crime (commonly referred to as "specific direction" as applied in the ICTY *Perišić* Appeal Judgment).[676] The Trial Chamber noted that the ICTY *Šainović* Appeals Chamber unequivocally rejected the *Perišić* approach, arriving at the "compelling conclusion" that "'specific direction' is not an essential ingredient of the *actus reus* of aiding and abetting".[677] The Trial Chamber in Case 002/01 considered that the *Šainović* Appeals Chamber engaged in an extensive analysis of the jurisprudence of the *ad hoc* tribunals and customary international law. It also considered that the Special Court for Sierra Leone ("SCSL") *Taylor* Appeal Judgment similarly engaged in a convincing review of international jurisprudence and instruments, including those concluded before 1975, and determined that the key question is whether the Accused's actions had a substantial effect on the crime.[678] The Trial Chamber in Case 002/02 reaffirmed this approach,[679] as did the Co-Investigating Judges in Case 004/01.[680]

The Trial Chamber in Case 002/01 also rejected the argument that one who assists after the fact cannot be liable for aiding and abetting.[681] The Trial Chamber noted that the ICTY Appeals Chamber expressly held that the *actus reus* of aiding and abetting "may occur before, during or *after* the principal crime has been perpetrated". It considered that this approach reflects an understanding that an offer made before or during the commission of the crime, of assistance to be provided after the fact, may encourage or morally support the perpetrator and thus have a substantial effect on the commission of a crime, and was also favoured in post-WWII jurisprudence.[682] The Trial Chamber reaffirmed this approach in Case 002/02.[683]

3.3. Superior responsibility

Superior responsibility is a mode of liability under which a superior may be held criminally

[674] Case 002/01, Judgment, para. 706.
[675] Case 002/02, Judgment, para. 3724.
[676] Case 002/01, Judgment, paras 707-710.
[677] Ibid, para. 709.
[678] Ibid, para. 710.
[679] Case 002/02, Judgment, para. 3723.
[680] Case 004/01, Dismissal Order, para. 83.
[681] Case 002/01, Judgment, paras 711-713.
[682] Ibid, para. 712.
[683] Case 002/02, Judgment, para. 3723.

responsible for failing to prevent and/or punish crimes committed by their subordinates. Superior responsibility is thus "a mode of criminal responsibility by culpable omission".[684]

The doctrine was recognised in the military tribunal cases following the Second World War,[685] and was subsequently enshrined by the statutes and the case law of the international(ised) tribunals and the International Criminal Court ("ICC").[686] The concept of superior responsibility was included in the earliest discussions about the establishment of the ECCC. The 1999 Report of the Group of Experts, stated that "[i]nternational law has long recognized that persons are responsible for acts even if they did not directly commit them".[687]

Article 29 (new) of the ECCC Law outlines the legal basis for prosecuting individuals under the doctrine of superior responsibility. It provides that superior responsibility applies where:

i. there is a superior-subordinate relationship where the superior had effective command and control or authority and control over the subordinate;

ii. the superior knew or had reason to know that the subordinate was about to commit [criminal] acts, or had done so; and

iii. the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators.

Superior responsibility was charged in Cases 001, 002, 003, and 004.[688] The applicability of

[684] Case 004/01, Dismissal Order, para. 85; Case 004, Closing Order (Indictment), para. 97; Case 004/02, Closing Order (Indictment), para. 104; Case 003, Closing Order (Indictment), para. 98.
[685] See Case 002, Decision on Closing Order Appeals (Nuon Chea and Ieng Thirith), paras 196-230 (referring to the facts and findings of the trials of the military tribunals in the *Yamashita*, *High Command*, *Hostage*, *Medical*, *Ministries*, *Roechling* and *Toyoda* cases, as well as the Judgment of the International Military Tribunal for the Far East).
[686] See *e.g.*, Rome Statute of the International Criminal Court, *entered into force* 1 July 2002, article 28; Statute of the Special Court for Sierra Leone, *entered into force* 12 April 2002, article 6(3); Statute of the International Tribunal for Rwanda, *adopted* 8 November 1994, article 6(3); Statute of the International Criminal Tribunal for the Former Yugoslavia, *adopted* 25 May 1993, article 7(3). See also *Prosecutor v. Bemba*, Pre-Trial Chamber II (ICC), ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, paras 403-443; *Prosecutor v. Sesay et al*., Trial Chamber I (SCSL), SCSL-04-15-T, Judgment, 2 March 2009, paras 281-317; *Prosecutor v. Aleksovski*, Trial Chamber (ICTY), IT-95/1-T, 25 June 1999, paras 66-81; *Prosecutor v. Mucić et al*., Trial Chamber (ICTY), IT-96-21-T, Judgment, 16 November 1998, paras 344-401.
[687] UNGA/UNSC, Identical Letters Dated 15 March 1999 from the Secretary-General to the President of the General Assembly and to the President of the Security Council, 16 March 1999, UN Doc. No. A/53/850-S/1999/231, Annex, Report of the Group of Experts for Cambodia Established Pursuant to General Assembly Resolution 52/135, para. 80.
[688] Case 001, Closing Order, paras 157-158; Case 002, Closing Order, paras 1557-1563; Case 004/01, Dismissal Order, paras 78, 85-89; Case 004/02, Closing Order (Indictment), para. 99; Case 003, Closing Order (Indictment), paras 574-575; Case 004, Closing Order (Indictment), paras 1033-1034.

superior responsibility was briefly addressed by the Trial Chamber in Cases 001, 002/01 and 002/02,[689] and considered more extensively by the Pre-Trial Chamber in Case 002.[690] Relying primarily on post-WWII military tribunal case law, these rulings established that superior responsibility was clearly recognised under customary international law in 1975-1979.[691] The Trial Chamber outlined the elements of superior responsibility in Cases 001, 002/01 and 002/02,[692] following the provisions established in Article 29 (new) of the ECCC Law.[693] The Co-Investigating Judges adopted the same elements.[694]

In Cases 001 (Duch) and 002/01 (Nuon Chea), the Accused were found responsible under the doctrine of superior responsibility, with these findings being considered in sentencing because the Accused were convicted under principles of direct responsibility.[695] The Case 002/01 Trial Chamber found that Khieu Samphan did not exercise effective control over the perpetrators, and thus was not responsible under the superior responsibility doctrine.[696] The Supreme Court Chamber made no material findings on superior responsibility in any case. The Case 001 Trial Chamber's findings on superior responsibility were not appealed. The Supreme Court Chamber rejected evidentiary challenges to the superior responsibility findings raised by Nuon Chea (Case 002/01) and Khieu Samphan (Case 002/02) on the grounds that the Accused were not convicted on the basis of superior responsibility.[697]

3.3.1. Applicability at the ECCC

The ECCC had consistently held that, by 1975, superior responsibility was established as a

[689] Case 002/02, Judgment, para. 3704; Case 002/01, Judgment, paras 714, 718-719; Case 001, Judgment, paras 473-478.
[690] Case 002, Decision on Closing Order Appeals (Nuon Chea and Ieng Thirith), paras 185-232; Case 002, Decision on Closing Order Appeal (Ieng Sary), paras 399-460.
[691] Case 002/02, Judgment, para. 3704; Case 002/01, Judgment, paras 714, 718-719; Case 002, Decision on Closing Order Appeals (Nuon Chea and Ieng Thirith), paras 185-232; Case 002, Decision on Closing Order Appeal (Ieng Sary), paras 399-460; Case 001, Judgment, paras 473-478.
[692] Case 002/02, Judgment, paras 3725-3726; Case 002/01, Judgment, paras 715-716; Case 001, Judgment, paras 538, 540-547.
[693] ECCC Law, article 29 (new).
[694] Case 001, Closing Order, paras 157-158 (the Co-Investigating Judges charged Duch with exercising effective *de jure* and *de facto* command control over S-21 staff under the heading "Command Responsibility", but the Closing Order did not detail or explore the legal elements of the doctrine); Case 002, Closing Order, paras 1319, 1557-1558; Case 004/01, Dismissal Order, paras 85-89; Case 004/02, Closing Order (Indictment); paras 104-109; Case 003, Closing Order (Indictment), paras 98-104; Case 004, Closing Order (Indictment), paras 97-102.
[695] Case 002/02, Judgment, para. 3702; Case 002/01, Judgment, paras 892-898, 932-939, 940-941; Case 001, Judgment, paras 548-549.
[696] Case 002/01, Judgment, paras 1016-1022.
[697] Case 002/02, Appeal Judgment, para. 1745; Case 002/01, Appeal Judgment, paras 41-42, 49.

recognised doctrine under customary international law.[698]

While the applicability of superior responsibility went unchallenged in Case 001, the Trial Chamber briefly considered whether superior responsibility was recognised under national or international law during the 1975-1979 period, in compliance with the principle of legality.[699] The Trial Chamber found, citing the *Yamashita*, *High Command*, and *Pohl* cases, that the post-WWII cases established that the failure of a superior to carry out the duty to control their subordinates' criminal conduct could lead to criminal responsibility.[700] The Trial Chamber also agreed with the ICTY Appeals Chamber's holding in *Prosecutor v. Hadžihasanović et al.* that Articles 86 and 87 of the 1977 Additional Protocol I to the 1949 Geneva Conventions reflected a pre-existing consensus regarding the doctrine of superior responsibility.[701] The Trial Chamber was satisfied that superior responsibility had a firm basis in customary international law by 1975-1979.[702]

In Cases 002/01 and 002/02, the Trial Chamber affirmed this approach, holding that superior responsibility was accessible and foreseeable to the Accused under customary international and/or Cambodian law.[703] Considering Nuon Chea's argument that differences in the *mens rea* standard between the United States Supreme Court (*Yamashita*) and a United States military judge ruling of first instance (*Medina*) showed a "lack of clarity in the definition of superior responsibility", the Case 002/01 Trial Chamber clarified that "inconsistency between two cases in a single state, without more, does not demonstrate that a mode of liability is not customary international law".[704]

The Case 002 Pre-Trial Chamber conducted the most thorough evaluation of superior responsibility under customary international law in 1975-1979 when ruling on the appeals by Ieng Thirith and Ieng Sary against the Case 002 Closing Order.[705] The evolution of individual

[698] Case 002/02, Judgment, para. 3704; Case 002/01, Judgment, para. 714; Case 002, Decision on Closing Order Appeals (Nuon Chea and Ieng Thirith), paras 196-230; Case 002, Decision on Closing Order Appeal (Ieng Sary), paras 421-460; Case 001, Judgment, paras 473-478. See also Case 004/01, Dismissal Order, para. 78; Case 002, Closing Order, paras 1307, 1318; Case 004, Closing Order (Indictment), para. 92; Case 003, Closing Order (Indictment), para. 94; Case 004/02, Closing Order (Indictment), para. 99.
[699] Case 001, Judgment, para. 473.
[700] Ibid, paras 475-476.
[701] Ibid, para. 476.
[702] Ibid.
[703] Case 002/02, Judgment, para. 3704; Case 002/01, Judgment, para. 714.
[704] Case 002/01, Judgment, para. 719. The Trial Chamber also summarily dismissed Nuon Chea's challenge to the overall applicability of the doctrine on the basis that he repeated Ieng Sary and Ieng Thirith's earlier arguments, which had been considered and dismissed by the Pre-Trial Chamber. See Case 002/01, Judgment, para. 718.
[705] The Co-Investigating Judges observed that Article 29 (new) of the ECCC Law established provisions of superior responsibility, citing to the elements of superior responsibility as outlined in the Case 001 Trial Judgment.

criminal responsibility for superior responsibility was "foreshadowed" by events after World War I, in particular, the Paris Commission and the trial of 12 individuals before the Supreme Court of the German Reich.[706] However, it "was only in the aftermath of World War II that international prosecutions based on the doctrine of superior responsibility were actually carried out".[707] The Pre-Trial Chamber reviewed the facts and findings of the trial of *Yamashita*, cases before the Nuremberg Military Tribunals (the *High Command*, *Hostage*, *Medical*, *Ministries*, and *Roechling* cases), International Military Tribunal for the Far East ("IMTFE") Judgment, and the Australian/US military tribunal's finding in *Toyoda*.[708] Overall, the Pre-Trial Chamber concluded that while the "articulation of the contours of the fundamental elements of the doctrine was not always clear and complete", nonetheless the principle of superior responsibility, along with its core elements, was established by the post-WWII cases.[709]

In dismissing Nuon Chea's appeal against the Case 002 Closing Order, the Pre-Trial Chamber concluded that the post-WWII military tribunal cases showed the application of superior responsibility to crimes against humanity, as well as war crimes.[710] In dismissing Ieng Sary's appeal, the Pre-Trial Chamber further confirmed that "international" modes of liability – meaning joint criminal enterprise, superior responsibility, and instigation – would apply only to international crimes.[711]

In the Case 004/01 Closing Order, the Co-Investigating Judges dealt briefly with the legality of the superior responsibility, following the Trial Chamber's approach, and held that the doctrine was clearly established under customary international law during the ECCC's temporal jurisdiction.[712] The International Co-Investigating Judge adopted the same approach

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In relation to modes of liability not expressly established in the 1956 Penal Code (*i.e.*, joint criminal enterprise, instigation, and superior responsibility), the Case 002 Closing Order held that these doctrines "were also set out under international law through sources such as the trials following World War II, and as such can be considered sufficiently accessible to the Charged Persons". See Case 002, Closing Order, paras 1307, 1318. While the Co-Investigating Judges referred to the post-WWII trials in the textual holding, the citation did not refer to post-WWII case law. Instead, the Co-Investigating Judges referred to Case 001 Trial Chamber and ICTY holdings which established the principle that "immorality or appalling character of an act" may play a role in establishing criminalisation. See Case 002, Closing Order, paras 1305, 1307. See also Case 001, Judgment, paras 32, 295, 407.

[706] Case 002, Decision on Closing Order Appeals (Nuon Chea and Ieng Thirith), paras 193-194.

[707] Ibid, para. 195.

[708] Ibid, paras 196-230; Case 002, Decision on Closing Order Appeal (Ieng Sary), paras 421-460.

[709] Case 002, Decision on Closing Order Appeals (Nuon Chea and Ieng Thirith), para. 230; Case 002, Decision on Closing Order Appeal (Ieng Sary), paras 458, 460.

[710] Case 002, Decision on Closing Order Appeals (Nuon Chea and Ieng Thirith), para. 231.

[711] Case 002, Decision on Closing Order Appeal (Ieng Sary), para. 296. See also Case 004/02, Closing Order (Indictment), para. 121.

[712] Case 004/01, Dismissal Order, para. 78.

in the Closing Orders in Cases 004/02, 003, and 004.[713] Dismissing Meas Muth's arguments, the International Co-Investigating Judge concluded that Article 29 (new) of the ECCC Law explicitly provided that superior responsibility applied to genocide,[714] and further held that the superior responsibility clearly applied to both international and non-international armed conflicts.[715] The National Co-Investigating Judge did not make any pronouncements regarding this mode of liability.

3.3.2. Elements

Article 29 (new) of the ECCC Law outlined three core elements of the superior responsibility doctrine, which were further developed by the Trial Chamber in Cases 001, 002/01, and 002/02. These are:

i. a superior-subordinate relationship with effective command and control or authority and control;

ii. the superior knew or had reason to know that a crime was about to be or had been committed; and

iii. the superior failed to take the necessary and reasonable measures to prevent or punish the crimes.[716]

3.3.2.1. Superior-subordinate relationship with effective command and control or authority and control

Unlike the statutes of the ICTY, ICTR, and SCSL, Article 29 (new) of the ECCC Law incorporated the notion of effective control in statutory form, providing that a superior must "have effective command and control or authority and control over the subordinate". The ECCC has otherwise closely followed the approach of the *ad hoc* tribunals in applying and interpreting an element of effective control in the superior-subordinate relationship.[717] The

[713] Case 004, Closing Order (Indictment), para. 103; Case 003, Closing Order (Indictment), para. 103; Case 004/02, Closing Order (Indictment), para. 99.
[714] Case 003, Closing Order (Indictment), para. 103. The International Co-Investigating Judge referred to "Article 29" rather than Article 29 (new), which appears to be an oversight.
[715] Case 002, Closing Order, para. 1319, where no distinction was made between international and non-international armed conflicts; Case 003, Closing Order (Indictment), para. 104.
[716] Case 002/02, Judgment, paras 3725-3726; Case 002/01, Judgment, para. 714; Case 001, Judgment, paras 538, 540-547. See also Case 004/01, Dismissal Order, para. 78; Case 002, Closing Order, paras 1307, 1318; Case 004, Closing Order (Indictment), paras 97-103; Case 003, Closing Order (Indictment), paras 98-103; Case 004/02, Closing Order (Indictment), paras 104-109.
[717] Case 002/02, Judgment, para. 3725; Case 002/01, Judgment, paras 715, 720; Case 001, Judgment, para. 540. See also Case 004/01, Dismissal Order, para. 86; Case 002, Closing Order, para. 1319; Case 004, Closing Order

Trial Chamber did not expressly state that a superior's control may be *de facto* as well as *de jure* in the Case 002/01 or Case 002/02 Trial Judgments, although this conclusion is implicit in the holding in both judgments that "effective control", meaning the possession of the material ability to prevent or punish the crimes, must be proven.[718]

There is no requirement for formal designation as a commander or superior to trigger superior responsibility, which arises by virtue of a superior's power, in law or fact, over those who committed the crime.[719] Whether a superior had effective control is a matter of evidence, not of law, and thus must be assessed on a case-by-case basis.[720] A core tenet of the test is the material ability to prevent or punish the subordinate's commission of the crime.[721] Factors which show effective control include the nature of the position occupied, capacity to issue orders, authority to invoke disciplinary measures, and the authority to release/transfer prisoners.[722] To the contrary, "[s]ubstantial influence alone does not establish effective control within a command structure".[723]

A "superior", for these purposes, includes civilian as well as military superiors.[724] In Case 002, the Pre-Trial Chamber, addressing separate challenges by Ieng Thirith and Ieng Sary, observed that the IMTFE and *Yamashita* post-WWII judgments adopted a notion of superior responsibility that is "not as developed" as the present day definition, pointing to the effective control analysis.[725] In particular, the IMTFE Judgment did "not make explicit findings demonstrating [effective control], but seems to assume it by virtue of the accused's high level

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(Indictment), para. 98; Case 003, Closing Order (Indictment), para. 99; Case 004/02, Closing Order (Indictment), para. 105.

[718] Case 002/01, Judgment, para. 715; Case 002/02, Judgment, para. 3725.

[719] Case 001, Judgment, para. 540. See also Case 004/01, Dismissal Order, para. 86; Case 002, Closing Order, para. 1558; Case 004, Closing Order (Indictment), para. 98; Case 003, Closing Order (Indictment), para. 99; Case 004/02, Closing Order (Indictment), para. 105; Case 002, Decision on Closing Order Appeal (Ieng Sary), para. 459.

[720] Case 002/02, Judgment, para. 3725; Case 002/01, Judgment, paras 715, 720; Case 001, Judgment, para. 541. See also Case 002, Decision on Closing Order Appeal (Ieng Sary), para. 459.

[721] Case 002/02, Judgment, para. 3725; Case 002/01, Judgment, para. 715; Case 001, Judgment, para. 540. See also Case 004/01, Dismissal Order, para. 86; Case 004, Closing Order (Indictment), para. 98; Case 003, Closing Order (Indictment), para. 99; Case 004/02, Closing Order (Indictment), para. 105.

[722] Case 001, Judgment, para. 541. See also Case 002, Decision on Closing Order Appeal (Ieng Sary), para. 459 ("it will be for the Trial Chamber to determine under the facts of this case the actual position and level of control over subordinates each accused possessed within the structure of the Khmer Rouge regime and whether, in light of that, the doctrine of superior responsibility applies to them").

[723] Case 002/01, Judgment, para. 1021.

[724] Case 002/02, Judgment, para. 3725; Case 002/01, Judgment, para. 714; Case 001, Judgment, para. 477. See also Case 004/01, Dismissal Order, para. 86; Case 002, Closing Order, paras 1319, 1558; Case 004, Closing Order (Indictment), paras 97-98; Case 003, Closing Order (Indictment), para. 99; Case 004/02, Closing Order (Indictment), para. 105.

[725] Case 002, Decision on Closing Order Appeal (Ieng Sary), para. 454; Case 002, Decision on Closing Order Appeals (Nuon Chea and Ieng Thirith), para. 225.

positions".[726] By consequence, the IMTFE was not conclusive as to whether the doctrine extends to non-military superiors, as it failed to make the findings that there was a superior-subordinate relationship, either *de jure* or *de facto*, between government officials and the military staff involved in the crime.[727] The Pre-Trial Chamber concluded, nonetheless, that the doctrine extended to both civilian and military superiors.[728]

The same standard of effective control applies whether the superior is of civilian or military background. In Case 002/01, the Trial Chamber rejected Nuon Chea's submission that a civilian superior could only be held liable to the extent that his or her effective control over subordinates was similar to that exercised by military superiors.[729] The duty to act arises from the notion of effective control, regardless of whether an Accused was a civilian or a military superior.[730]

Superior responsibility applies to both direct and indirect relationships of subordination.[731] Each person in the chain of command who exercised effective control over subordinates may be considered to be responsible for the crimes of subordinates, provided that the other elements of superior responsibility were established.[732] The Trial Chamber rejected Nuon Chea's argument that, under customary international law in 1975-1979, a superior could only be responsible for the conduct of direct subordinates; on the contrary, the post-WWII case law clearly established that a superior's responsibility was "not limited to a control of units directly under his command".[733]

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[726] Case 002, Decision on Closing Order Appeal (Ieng Sary), para. 454; Case 002, Decision on Closing Order Appeals (Nuon Chea and Ieng Thirith), para. 225.
[727] Case 002, Decision on Closing Order Appeal (Ieng Sary), para. 454; Case 002, Decision on Closing Order Appeals (Nuon Chea and Ieng Thirith), para. 225.
[728] Case 002, Decision on Closing Order Appeal (Ieng Sary), para. 459. In considering Ieng Thirith's appeal, the Pre-Trial Chamber declined to take a view on whether the doctrine applied to civilian superiors, given that the matter was not expressly raised by Ieng Thirith. See Case 002, Decision on Closing Order Appeals (Nuon Chea and Ieng Thirith), paras 192, 230.
[729] Case 002/01, Judgment, para. 720.
[730] Ibid.
[731] Case 002/02, Judgment, para. 3725; Case 002/01, Judgment, para. 721; Case 001, Judgment, para. 542. See also Case 004/01, Dismissal Order, para. 89; Case 002, Closing Order, para. 1558; Case 004, Closing Order (Indictment), para. 101; Case 003, Closing Order (Indictment), para. 102; Case 004/02, Closing Order (Indictment), para. 108.
[732] Case 002/02, Judgment, para. 3725; Case 002/01, Judgment, para. 721; Case 001, Judgment, para. 542. See also Case 004/01, Dismissal Order, para. 89; Case 002, Closing Order, para. 1558; Case 004, Closing Order (Indictment), para. 101; Case 003, Closing Order (Indictment), para. 102; Case 004/02, Closing Order (Indictment), para. 108.
[733] Case 002/01, Judgment, para. 721 (quoting Case 001, Judgment, para. 542).

3.3.2.2. The superior knew or had reason to know that a crime was about to be or had been committed by his or her subordinates

The requirement that the superior must have known, or had reason to know, that a crime was about to be or had been committed by his or her subordinates was the established *mens rea* requirement for the doctrine of superior responsibility.[734]

There are two scenarios that may satisfy this element: the situation where the crime has already happened, and the situation where the crime has yet to happen and is preventable. Knowledge of a crime that has occurred cannot be presumed and can be established by direct or circumstantial evidence.[735] The superior must have knowledge of the alleged criminal conduct of his or her subordinates, and not simply knowledge of the crimes themselves.[736]

The "failure to acquire knowledge" standard will apply where, in the circumstances of the case, the superior possessed information "sufficiently alarming" to justify further inquiry.[737] The information can be general in nature and does not need to contain specific details of the crimes.[738] The superior need not know the precise identity of the subordinate-perpetrator, but their existence must be proven.[739] A superior cannot be liable for having failed to seek out the information in the first place, but may not deliberately refrain from obtaining the information when it is otherwise available to them.[740]

3.3.2.3. Failure to take measures to prevent or punish

ECCC jurisprudence required the superior to have failed to take the necessary and reasonable measures to prevent the crime or, in the alternative, to punish the perpetrator.[741]

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[734] Case 002/02, Judgment, para. 3725; Case 002/01, Judgment, para. 715; Case 001, Judgment, para. 543. See also Case 004/01, Dismissal Order, para. 87; Case 002, Closing Order, para. 1319; Case 004, Closing Order (Indictment), para. 99; Case 003, Closing Order (Indictment), para. 100; Case 004/02, Closing Order (Indictment), paras 106, 109.
[735] Case 001, Judgment, para. 543. See also Case 002/02, Judgment, para. 3725; Case 002/01, Judgment, para. 715.
[736] Case 002/02, Judgment, para. 3725; Case 002/01, Judgment, para. 715; Case 001, Judgment, para. 543.
[737] Case 002/02, Judgment, para. 3725; Case 002/01, Judgment, para. 715; Case 001, Judgment, para. 544. See also Case 004/01, Dismissal Order, para. 87; Case 004, Closing Order (Indictment), para. 99; Case 003, Closing Order (Indictment), para. 100; Case 004/02, Closing Order (Indictment), para. 106.
[738] Case 001, Judgment, para. 544.
[739] Case 004, Closing Order (Indictment), para. 99; Case 003, Closing Order (Indictment), para. 100; Case 004/02, Closing Order (Indictment), para. 106.
[740] Case 001, Judgment, para. 544.
[741] Case 002/02, Judgment, para. 3726; Case 002/01, Judgment, para. 716; Case 001, Judgment, para. 545. See also Case 004/01, Dismissal Order, para. 86; Case 002, Closing Order, paras 1319, 1557; Case 004, Closing Order (Indictment), para. 98; Case 003, Closing Order (Indictment), para. 98; Case 004/02, Closing Order (Indictment), para. 105.

The requirement to prevent or punish reflects a "duty".[742] There was no obligation under customary international law in 1975 for a duty to act to be recognised in domestic law.[743]

The failure to prevent and the failure to punish are legally and factually distinct in terms of the type of knowledge involved: the duty to prevent arises before a crime is committed, while the duty to punish arises after its commission.[744] A superior may be responsible for both failures.[745] In Case 002/01, the Trial Chamber rejected Khieu Samphan's argument that the *actus reus* of superior responsibility must precede a crime in light of the holding that the responsibility to punish a perpetrator may arise after the crime.[746] It is not necessary to prove a causal link between a superior's failure to prevent the subordinate's crimes and the occurrence of these crimes.[747]

The question of what amounts to necessary and reasonable measures must be considered on a case-by-case basis.[748] The question is not a matter of law but of evidence.[749] Necessary measures are those appropriate in the circumstances for the superior to discharge his or her obligation, showing a genuine effort to prevent or punish.[750] Reasonable measures are those reasonably falling within the material powers of the superior.[751]

3.4. Joint Criminal Enterprise ("JCE")

JCE is a form of individual criminal liability designed to address situations of collective criminality where two or more persons act together to further a common criminal purpose. Under this form of liability, individuals can be held liable for crimes they participated in and significantly contributed to with other individuals, even where they were remote from the

[742] Case 001, Judgment, para. 547; Case 002/01, Judgment, para. 720. See also Case 002, Closing Order, paras 1557-1558.
[743] Case 002/02, Judgment, para. 3726; Case 002/01, Judgment, para. 720. See also Case 001, Judgment, para. 477.
[744] Case 002/02, Judgment, para. 3726; Case 002/01, Judgment, para. 716; Case 001, Judgment, paras 546-547. See also Case 004/01, Dismissal Order, para. 88; Case 004/02, Closing Order (Indictment), para. 107.
[745] Case 001, Judgment, para. 546. See also Case 004/01, Dismissal Order, para. 88; Case 004, Closing Order (Indictment), para. 100; Case 003, Closing Order (Indictment), para. 101; Case 004/02, Closing Order (Indictment), para. 107.
[746] Case 002/01, Judgment, para. 716.
[747] Case 002/02, Judgment, para. 3726, fn. 12438 (referring to Case 002/01, Judgment, para. 716 (when quoting an ICTY case, the Trial Chamber refers to the failure to punish rather than to prevent the crime, which appears to be an oversight)). See also Case 004/01, Dismissal Order, para. 86; Case 004, Closing Order (Indictment), para. 98; Case 003, Closing Order (Indictment), para. 99; Case 004/02, Closing Order (Indictment), para. 105.
[748] Case 002/02, Judgment, para. 3726; Case 001, Judgment, para. 545.
[749] Case 001, Judgment, para. 545.
[750] Case 002/02, Judgment, para. 3726; Case 002/01, Judgment, para. 716; Case 001, Judgment, para. 545.
[751] Ibid.

actual physical perpetration of the crime.[752]

JCE is not a form of liability under Cambodian law and was not contained explicitly in the ECCC Law. Nonetheless, it was considered to be a form of "commission" within the scope of Article 29 (new) of the ECCC Law.[753]

Although this form of liability was considered to have existed in customary international law since the time of the Nuremberg trials, it was first pronounced as a distinct form of criminal liability by the ICTY *Tadić* Appeals Chamber in July 1999, which described it as having three forms: JCE I, JCE II, and JCE III.[754] The objective elements for each form are the same, namely a plurality of persons, a common purpose (also sometimes referred to as a common plan), and an individual contribution by the Accused to the execution of the common purpose.[755] It is the subjective elements that differentiate the categories. JCE I, known as the "basic form", requires a shared intent to perpetrate the crime(s) that forms part of the common purpose. JCE II, known as the "systemic form", is considered to be a variant of JCE I.[756] It requires personal knowledge of a system of ill-treatment and the intent to further it.[757] JCE III, known as the "extended form", requires an intention to participate in a common purpose and contribute to its execution, with responsibility arising for extraneous crimes that are outside the common purpose where the Accused could foresee their commission and willingly took that risk.[758]

Although JCE was applied in many cases at the *ad hoc* tribunals prior to the start of ECCC operations, at the time the ECCC Law was first passed by the National Assembly on 11 July 2001, JCE had been applied only by the *Tadić* Appeals Chamber. Thus, there were questions not only concerning JCE's status in customary international law in 1975-1979, but also whether

[752] See Case 002, Decision on the Appeals Against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE), 20 May 2010, D97/15/9, para. 101; Case 001, Decision on Closing Order Appeal, para. 114.
[753] See *e.g.*, Case 002/01, Judgment, para. 690; Case 001, Judgment, para. 511; Case 002, Decision on the Appeals Against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE), 20 May 2010, D97/15/9, para. 49; Case 003, Closing Order (Indictment), paras 95, 116; Case 002, Closing Order, paras 1318, 1521.
[754] See Case 002/01, Appeal Judgment, para. 773; Case 001, Judgment, paras 504-507.
[755] Case 002/02, Judgment, para. 3708. See also Case 001, Judgment, para. 508; Case 002, Decision on the Appeals Against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE), 20 May 2010, D97/15/9, para. 38; Case 003, Closing Order (Indictment), para. 110. For more on the objective elements of JCE, see section 3.4.2.1.
[756] See Case 002/01, Appeal Judgment, para. 775, fn. 2030.
[757] Case 002/01, Judgment, para. 694; Case 002, Decision on the Appeals Against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE), 20 May 2010, D97/15/9, para. 39; Case 002, Order on the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise, 8 December 2009, D97/13, para. 15.
[758] Case 002/02, Judgment, para. 3714; Case 002, Decision on the Appeals Against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE), 20 May 2010, D97/15/9, para. 39; Case 002, Order on the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise, 8 December 2009, D97/13, para. 16. For more on the subjective elements of JCE III, see section 3.4.2.2.

this form of liability was intended to be included in the ECCC Law, which does not provide for it explicitly.

3.4.1. Applicability at the ECCC

JCE I and II were held to be applicable at the ECCC specifically to international crimes.[759] JCE III was considered inapplicable at the ECCC.[760]

The Supreme Court Chamber considered JCE to be an applicable form of liability to address crimes falling *within* the common purpose (JCE I and II).[761] It held that JCE could not be applied to hold individuals liable for crimes falling *outside* the common purpose (JCE III).[762] The Supreme Court Chamber preferred not to use the labels JCE I, II, and III, since these labels were not used in post-World War II jurisprudence and are not sharp-contoured legal definitions, free from overlap.[763] It extensively considered JCE's basis under customary international law, examining the post-World War II jurisprudence cited by the *Tadić* Appeals Chamber and by the Co-Prosecutors- as well as a number of other cases.[764] The other cases it considered were *Rüsselsheim*, a US Military Commission in Germany case, *Tashiro*, a US Military Commission in Japan case, and three Australian military cases: *Hatakeyama*, *Matsumoto*, and *Ishiyama and Yasusaka*. The Supreme Court Chamber could not conclude that the form of liability applied in those cases amounted to JCE III.[765] It found that the vast majority of cases and legislation alleged to support JCE III had no international element and thus could not be a basis for establishing customary international law.[766] It also explained that the examples of domestic legislation were insufficient to establish the existence of a general principle of law that the crimes of others may be imputed to an Accused who did not personally carry out the *actus reus*,

[759] Case 001, Judgment, paras 504-513; Case 002, Decision on the Appeals Against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE), 20 May 2010, D97/15/9, paras 53-69; Case 002, Order on the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise, 8 December 2009, D97/13. The Supreme Court Chamber implicitly confirmed that JCE I and II are applicable by finding JCE III inapplicable, by upholding Nuon Chea's and Khieu Samphan's convictions for crimes committed via JCE I in Case 002/01, and by itself re-characterising Khieu Samphan's aiding and abetting liability to liability by way of a JCE in Case 002/02. See Case 002/02, Appeal Judgment, paras 1946-1976; Case 002/01, Appeal Judgment, section VI.
[760] Case 002/01, Appeal Judgment, para. 807; Case 002, Decision on the Applicability of Joint Criminal Enterprise, 12 September 2011, E100/6, para. 38; Case 002, Decision on the Appeals Against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE), 20 May 2010, D97/15/9, paras 87-88.
[761] Case 002/01, Appeal Judgment, para. 807. See also Case 002/02, Appeal Judgment, para. 1961.
[762] Case 002/01, Appeal Judgment, para. 807.
[763] Case 002/01, Appeal Judgment, para. 775. See also Case 002/02, Appeal Judgment, para. 1947.
[764] Case 002/01, Appeal Judgment, paras 780-804.
[765] Ibid, paras 799-804.
[766] Ibid, para. 805.

when these crimes were not encompassed by a common purpose.[767]

The Pre-Trial Chamber conducted the most in-depth analysis of JCE I and II when deciding on appeals by Ieng Thirith, Ieng Sary, Khieu Samphan, and certain Civil Party lawyers against the Co-Investigating Judges' order that JCE in each of its forms could be applied at the ECCC.[768] The Pre-Trial Chamber held that JCE I and II were applicable, but that JCE III could not be applied at the ECCC.[769] It reviewed international jurisprudence and a number of treaties and authoritative announcements and found that JCE I and II were recognised in customary international law by 1975.[770] It did not limit itself to analysing the cases relied on by the *Tadić* Appeals Chamber (as had the Co-Investigating Judges in pronouncing that all forms of JCE could be applied at the ECCC). It found that in addition to that jurisprudence, application of the "notion of common purpose" was reinforced through Article 6 of the London Charter of the International Military Tribunal and Control Council Law No. 10,[771] and the *Justice* and *RuSHA* cases.[772]

However, the Pre-Trial Chamber could not conclude that JCE III formed part of customary international law at the relevant time.[773] It did not consider the authorities relied on by the *Tadić* Appeals Chamber to provide sufficient evidence of consistent state practice or *opinio juris* at the relevant time, and noted that the Nuremberg Charter and Control Council Law No. 10 do not specifically offer support for JCE III.[774] It also found that while the facts of two cases relied on by the *Tadić* Appeals Chamber – *Essen Lynching* and *Borkum Island* – could be relevant to JCE III, the lack of reasoned judgments in these cases precluded certainty as to the form of liability applied.[775] It noted that the *Tadić* Appeals Chamber had relied on some Italian cases, but did not find that national jurisprudence could be a proper precedent for this international form of liability.[776] It discussed whether JCE III could be considered a general principle of law, but determined that it did not need to decide on the matter since it was not convinced that such liability would have been foreseeable to the Charged Persons since it had no underpinning in

[767] Ibid, para. 806.
[768] Case 002, Order on the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise, 8 December 2009, D97/13.
[769] Case 002, Decision on the Appeals Against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE), 20 May 2010, D97/15/9, paras 72-73, 87-88.
[770] Ibid, para. 69.
[771] Ibid, paras 57-58.
[772] Ibid, paras 65-68.
[773] Ibid, para. 83.
[774] Ibid, paras 77-83.
[775] Ibid, para. 79.
[776] Ibid, para. 82.

Cambodian law in 1975.[777] In such circumstances, it considered that the principle of legality required the ECCC to refrain from relying on JCE III in its proceedings.

Following this decision, the Trial Chamber in Case 001 also found that JCE I and II could be applied at the ECCC. It did not consider the applicability of JCE III, as that form had been pled by the Co-Prosecutors only in the alternative.[778] With regard to whether JCE I and II were applicable under Article 29 (new) of the ECCC Statute, the Trial Chamber noted that this provision mirrored the ICTY Statute, and that the jurisprudence of the ICTY had held that the word "committed" includes participation in a JCE. It thus considered that the notion of JCE was included in Article 29 (new) of the ECCC Law.[779] It also determined, in light of the Nuremberg Charter, Control Council Law No. 10, and the international jurisprudence identified by the *Tadić* Appeals Chamber, that JCE I and II were part of customary international law during 1975-1979.[780]

In Case 002, the Trial Chamber rejected the Co-Prosecutors' request to find that JCE III was applicable at the ECCC, reaffirming its decision in Case 001 that JCE I and II were part of customary international law in 1975-1979, and holding that JCE III was neither part of customary international law at the time, nor was it a general principle of law.[781] The Trial Chamber, noting that the Pre-Trial Chamber had already extensively reviewed pre-1975 legal instruments and the post-World War II jurisprudence relied on by the *Tadić* Appeals Chamber, stated that it would not "issue lengthy decisions in circumstances where it can find no cogent reasons to depart from the Pre-Trial Chamber's analysis and where it concurs in the result".[782]

The Trial Chamber considered the post-World War II cases cited in the *Tadić* Appeals Judgment as well as two additional World War II era cases, *U.S. v. Ulrich and Merkle* and *U.S. v. Wuelfert*, cited in a then-recent decision on JCE made by the Special Tribunal for Lebanon ("STL").[783] Both *U.S. v. Ulrich and Merkle* and *U.S. v. Wuelfert* involved businessmen who were held responsible for the mistreatment of prisoners at their factories and the Dachau concentration camp. In reviewing the judgments, the Trial Chamber found that the cases appeared to support JCE I and JCE II, because the Accused were part of the concentration camp

[777] Ibid, paras 84-87.
[778] Case 001, Judgment, para. 513.
[779] Ibid, para. 511.
[780] Ibid, paras 505-506, 512.
[781] Case 002, Decision on the Applicability of Joint Criminal Enterprise, 12 September 2011, E100/6.
[782] Ibid, para. 26.
[783] Ibid, paras 30-34.

structure and participated personally in the mistreatment of prisoners but did not necessarily support findings of guilt based on JCE III. The Trial Chamber observed that the STL's decision "cites review judgements which do not provide the legal reasoning behind the affirmed convictions".[784] Since the legal basis for conviction was not clear in either of the cases, the Trial Chamber found that the cases could not support a conclusion that JCE III had emerged as a principle of customary international law by 1975-1979.[785] Finally, the Trial Chamber surveyed the legal systems of the United Kingdom, Germany, the Soviet Union, the Netherlands, France, and Cambodia and found that there was a "considerable divergence of approach between various national jurisdictions". It therefore could not conclude that JCE III was a general principle of law.[786]

3.4.1.1. Applicability limited to international crimes

JCE I and II could only be applied to international crimes, and not to the domestic Cambodian crimes contained in Article 3 (new) of the ECCC Law. The Co-Investigating Judges explained that under the principle of interpretation of autonomous legal *regimes* in French Law – under which international crimes fall under autonomous legal *regimes*, distinct from domestic criminal law – international modes of liability can only be applied to international crimes.[787] Certain Civil Party lawyers appealed against this limitation, and the Co-Prosecutors in their response to the appeals concerning the applicability of JCE also argued that such limitation did not exist, but the Pre-Trial Chamber was of the view that irrespective of whether the reference to the French concept of autonomous legal *regimes* was misplaced, "none of the arguments raised by the parties […] demonstrate that the Impugned Order is in error in considering that JCE, a form of liability recognized in customary international law, shall apply to international crimes rather than domestic crimes".[788] The Trial and Supreme Court Chambers never considered this issue since none of the Accused were convicted of domestic crimes under Article 3 (new).

3.4.2. Elements

ECCC jurisprudence held that the objective elements for each form of JCE are the same: a

[784] Ibid, para. 34.
[785] Ibid, para. 35.
[786] Ibid, para. 37.
[787] Case 002, Order on the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise, 8 December 2009, D97/13, paras 22-23.
[788] Case 002, Decision on the Appeals Against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE), 20 May 2010, D97/15/9, para. 102.

plurality of persons, a common purpose, and an individual contribution by the Accused to the execution of the common purpose.[789] It is the subjective elements that differentiate the categories. JCE I requires a shared intent to perpetrate a crime forming part of the common purpose.[790] JCE II requires personal knowledge of a system of ill-treatment and the intent to further it.[791] JCE III requires an intention to participate in a common criminal purpose and contribute to its execution, with responsibility arising for extraneous crimes that are outside the common purpose where the Accused could foresee their commission and willingly took that risk.[792]

3.4.2.1. Objective elements

3.4.2.1.1. *Plurality of persons*

ECCC jurisprudence required a plurality of persons, but these persons needed not be organised in a military, political or administrative structure.[793] The plurality of persons belonging to the JCE had to be identified, but it was not necessary to identify by name each person involved.[794] It may be sufficient to refer to categories or groups of persons.[795] JCE members may vary or evolve over time.[796]

JCE participants can incur liability for crimes committed by direct perpetrators who were not JCE members, provided that it is established that the crimes can be imputed to at least one JCE participant and that this participant, when using a direct perpetrator, acted to further the common purpose.[797] Establishing the link between a JCE member and a direct perpetrator is a matter to be assessed on a case-by-case basis.[798] It is not determinative whether the direct perpetrator shared the *mens rea* of the JCE member or knew of the existence of the JCE; what matters is whether the JCE member used the direct perpetrator to commit the *actus reus* of the

[789] Case 002/02, Judgment, para. 3708; Case 002/01, Judgment, para. 692; Case 002, Decision on the Appeals Against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE), 20 May 2010, D97/15/9, para. 38; Case 002, Order on the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise, 8 December 2009, D97/13, para. 14.
[790] Case 001, Judgment, paras 507, 509; Case 002, Decision on the Appeals Against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE), 20 May 2010, D97/15/9, para. 39.
[791] Case 001, Judgment, para. 507; Case 002, Decision on the Appeals Against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE), 20 May 2010, D97/15/9, para. 39.
[792] Ibid.
[793] Case 001, Judgment, para. 508; Case 003, Closing Order (Indictment), para. 110.
[794] Case 002/02, Judgment, para. 3708; Case 002/01, Judgment, para. 692; Case 001, Judgment, para. 508.
[795] Case 003, Closing Order (Indictment), para. 110.
[796] Case 004/01, Dismissal Order, para. 95.
[797] Case 002/01, Appeal Judgment, para. 774; Case 002/02, Judgment, para. 3711; Case 002/01, Judgment, para. 693; Case 003, Closing Order (Indictment), para. 115.
[798] Case 002/02, Judgment, para. 3711.

crime forming part of the common purpose.[799] While the existence of an express agreement between a JCE participant and a direct perpetrator may be used to establish that a certain crime formed part of the common purpose, the existence of such an express agreement is not a requirement.[800] Nor is it a requirement that the JCE member exercised effective control over the direct perpetrator.[801]

3.4.2.1.2. *The common purpose*

ECCC jurisprudence required the existence of a common purpose that amounts to or involves the commission of a crime over which the Chamber has jurisdiction.[802] The common purpose is at the core of this form of responsibility, as it is this element that ties the JCE members together and provides the justification for the mutual imputation of the members' conduct that gives rise to criminal responsibility.[803] The common purpose must be of a criminal character.[804]

The common purpose "amounts to" the commission of a crime if the commission of the crime is the, or among the primary objective(s) of the common purpose.[805] An example is a situation where the common purpose is to kill a group of political enemies. "In such a scenario, there would be no doubt that the members of the joint criminal enterprise acted with direct intent to kill".[806]

The common purpose "involves" the commission of a crime if the crime is a means to achieve an ulterior motive which itself may not be criminal:

> In such a scenario, it is not necessary that those who agree on the common purpose actually desire that the crime be committed, as long as they recognise that the crime is to be committed to achieve an ulterior objective. This may include crimes that are foreseen as means to achieve a given common purpose, even if their commission is not certain. For instance, if a gang agrees to break into a house to steal and to use, if necessary, deadly force to overcome any resistance that they may encounter, it would be unconvincing to conclude that the eventual murder was not encompassed by the common purpose because it was not certain that murder would actually be committed in the course of the break-in. Rather, in such scenario, the crime of murder

[799] Ibid.
[800] Ibid.
[801] Ibid.
[802] Case 001, Judgment, para. 508; Case 002, Decision on the Appeals Against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE), 20 May 2010, D97/15/9, para. 39; Case 003, Closing Order (Indictment), para. 107; Case 004/01, Dismissal Order, para. 92.
[803] Case 002/01, Appeal Judgment, para. 789.
[804] Ibid.
[805] Ibid, para. 807.
[806] Ibid.

> was a constituent element of the plan that was conceived, even if the members of the gang did not know whether it would actually be committed.[807]

Since liability under JCE can only arise for crimes within the common purpose, the criteria for deciding which crimes are encompassed by the common purpose are therefore of great relevance.[808] The Supreme Court Chamber explained that if attaining the objective of the common purpose may bring about the commission of crimes (*i.e.*, "involve" the commission of crimes), but it is agreed to pursue this objective regardless, these crimes are encompassed by the common purpose because, even though not directly intended, they are contemplated by it.[809]

An explicit agreement is not required.[810] The common purpose may materialise extemporaneously and may be inferred.[811] It can also be fluid and change over time to include additional crimes.[812] "[L]iability arises when JCE members, while knowing that new types of crime are included in the common plan, have taken no effective measures to prevent the recurrence of such new types of crime and have subsequently persisted in the implementation of the common purpose".[813]

3.4.2.1.3. *Participation in the common purpose*

ECCC jurisprudence required the participation or individual contribution of the Accused in the common purpose.[814] Participation in a common purpose may be by positive act or culpable omission.[815]

This participation need not involve the commission of a specific crime but may take the form of assistance, or contribution, to the execution of the common purpose.[816] In other words, it must further the common purpose at the core of the JCE.[817] The contribution need not be

[807] Ibid, para. 808.
[808] Ibid, para. 807.
[809] Ibid, para. 808.
[810] Case 002/02, Judgment, para. 3709.
[811] Ibid; Case 001, Judgment, para. 508; Case 003, Closing Order (Indictment), para. 109; Case 004/01, Dismissal Order, para. 94.
[812] Case 002/02, Judgment, para. 3709.
[813] Ibid.
[814] Case 002/02, Judgment, para. 3708; Case 001, Judgment, para. 508; Case 002, Decision on the Appeals Against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE), 20 May 2010, D97/15/9, para. 38.
[815] Case 002/01, Judgment, para. 693; Case 003, Closing Order (Indictment), para. 111.
[816] Case 002/02, Judgment, para. 3710; Case 002/01, Judgment, para. 693; Case 001, Judgment, para. 508; Case 003, Closing Order (Indictment), para. 112.
[817] Case 002, Decision on the Appeals Against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE), 20 May 2010, D97/15/9, para. 38.

necessary (indispensable) or substantial, but should at least be a significant contribution to the crimes for which the Accused is found responsible.[818] A JCE member's involvement in the crime must form a link in the chain of causation.[819] The significance of a contribution to the commission of crimes within the common purpose is to be determined on a case-by-case basis, taking into account a variety of factors including the position of the Accused, the level and efficiency of the participation, and any efforts to prevent crimes.[820] Such significance is relevant for determining whether a link in the chain of causation existed.[821] It is also relevant in determining whether the Accused possessed the requisite *mens rea*.[822] The Accused's activities should be assessed in totality and particular contributions should not be assessed in isolation.[823]

3.4.2.2. Subjective elements

For JCE I, the Accused must have intended to participate in the common purpose and the intent must be shared with the other participants.[824]

JCE II is considered a variant of JCE I.[825] For JCE II, the Accused must have knowledge of the criminal nature of a system of ill-treatment and intend to further the common system of such ill-treatment.[826]

For JCE III, which was not applicable at the ECCC,[827] the Accused must have been aware that the crimes outside the common purpose are a natural and foreseeable consequence of the

[818] Case 002/02, Judgment, para. 3710; Case 001, Judgment, para. 508; Case 002, Decision on the Appeals Against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE), 20 May 2010, D97/15/9, para. 38; Case 003, Closing Order (Indictment), para. 112.
[819] Case 002/02, Judgment, para. 3710.
[820] Ibid; Case 003, Closing Order (Indictment), para. 112.
[821] Case 002/02, Judgment, para. 3710.
[822] Case 002/01, Judgment, para. 694.
[823] Case 003, Closing Order (Indictment), para. 112.
[824] Case 002/02, Judgment, para. 3712; Case 002/01, Judgment, para. 694; Case 002, Decision on the Appeals Against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE), 20 May 2010, D97/15/9, para. 39; Case 002, Order on the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise, 8 December 2009, D97/13, para. 15.
[825] Case 002, Decision on the Appeals Against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE), 20 May 2010, D97/15/9, para. 37; Case 002, Order on the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise, 8 December 2009, D97/13, paras 15, 17.
[826] Case 002/01, Judgment, para. 694; Case 002, Decision on the Appeals Against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE), 20 May 2010, D97/15/9, para. 39; Case 002, Order on the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise, 8 December 2009, D97/13, para. 15.
[827] Case 002/01, Appeal Judgment, para. 807; Case 002, Decision on the Applicability of Joint Criminal Enterprise, 12 September 2011, E100/6; Case 002, Decision on the Appeals Against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE), 20 May 2010, D97/15/9, paras 87-88. For more on the applicability of JCE III at the ECCC, see section 3.4.1.

common purpose and have willingly taken the risk that they would be committed.[828]

Participants in either JCE I or II must be shown to share the required intent of the direct perpetrators, including the specific intent for the crime where required, as with persecution or genocide.[829] Thus, JCE intent must cover both the common purpose and the crimes it encompasses.[830]

The requisite level of intent for JCE I came into question after the Case 002/01 Appeal Judgment. In this Judgment, the Supreme Court Chamber, when discussing what it means for the common purpose to "involve" rather than "amount to" a crime, explained:

> the common purpose "involves" the commission of a crime if the crime is a *means* to achieve an ulterior objective (which itself may not be criminal). In such a scenario, it is not necessary that those who agree on the common purpose actually *desire* that the crime be committed, as long as they recognise that the crime is to be committed to achieve an ulterior objective. This may include crimes that are foreseen as means to achieve a given common purpose, even if their commission is not certain.[831]

It also recharacterised certain facts from the crime against humanity of extermination to the crime against humanity of murder committed with *dolus eventualis*. *Dolus eventualis* refers to crimes that are not directly intended but where the suspect is aware of the risk that the objective elements of the crime may result from his or her actions or omissions, and accepts such an outcome by reconciling himself or herself with it or consenting to it.[832] The Supreme Court Chamber found that these crimes were encompassed by the common purpose and that the Accused bore JCE liability for them.[833] It explained:

> [i]f murder is committed through a joint criminal enterprise, it has to be established that the accused had the objective to bring about the death of the victim through the implementation of the common purpose or was aware that the death would be the certain result thereof (direct intent), or *was aware that the death of the victim was a possible consequence of the implementation of the common purpose, but proceeded to implement it regardless, having*

[828] Case 002/02, Judgment, para. 3714; Case 002, Decision on the Appeals Against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE), 20 May 2010, D97/15/9, para. 39; Case 002, Order on the Application at the ECCC of the Form of Liability Known As Joint Criminal Enterprise, 8 December 2009, D97/13, para. 16.
[829] Case 002/02, Judgment, para. 3712; Case 002/01, Judgment, para. 694; Case 004, Closing Order (Indictment), para. 112; Case 003, Closing Order (Indictment), para. 113.
[830] Case 002/02, Judgment, para. 3712.
[831] Case 002/01, Appeal Judgment, para. 808.
[832] See ibid, paras 390-391.
[833] Ibid, paras 561-562, 868, 1088-1089.

*accepted the possible occurrence of deaths (*dolus eventualis*).*[834]

In Case 004/01, the Co-Investigating Judges explained their interpretation of the Supreme Court's jurisprudence on this point:

> The [Supreme Court Chamber] has recently clarified that, in the instance of common purpose *involving* the commission of crime or crimes, it is not necessary that those who agree on the common purpose actually desire that the crime be committed, as long as they recognise that the crime is to be committed to achieve the ulterior objective. The [Supreme Court Chamber] added that this may include crimes that are foreseen as means to achieve given common purpose, even if their commission is not certain. If attaining the objective of common purpose may bring about the commission of crimes, but it is agreed to pursue the objective regardless, the common purpose encompasses these crimes because, even though not directly intended, they are contemplated in it. We interpret this holding of the [Supreme Court Chamber] also on the basis of its use of the word "*desire*" as clarification that the commission of the crimes need not be the primary objective of the JCE members. However, there remains the need to show intent to commit the crimes by the JCE members, which is a fundamental requirement of the first type of JCE.[835]

The International Co-Investigating Judge repeated this statement in Cases 004/02, 003 and 004.[836]

The Supreme Court Chamber had the opportunity to address this issue again in Case 002/02. In Case 002/02, the Trial Chamber, in response to an argument by Khieu Samphan that JCE I requires proof of direct intent with respect to both the common purpose and the underlying crime, found "that the degree of intent required under JCE I is direct intent".[837] This led the Trial Chamber to conclude that the crime against humanity of murder committed with *dolus eventualis* fell outside the common purpose of the JCE. It therefore considered Khieu Samphan's responsibility for this crime under aiding and abetting, rather than JCE.[838]

In the Case 002/02 Appeal Judgment, the Supreme Court Chamber on its own motion decided to address this point. It found that the Trial Chamber disregarded its jurisprudence and instead relied on ICTY jurisprudence to determine that since such crimes were not directly intended but merely foreseeable, they must fall outside the common purpose.[839] According to the

[834] Ibid, para. 1054 (emphasis added).
[835] Case 004/01, Dismissal Order, para. 99.
[836] Case 004/02, Closing Order (Indictment), para. 119; Case 004, Closing Order (Indictment), para. 113; Case 003, Closing Order (Indictment), para. 114.
[837] Case 002/02, Judgment, para. 3715.
[838] Ibid, para. 4311.
[839] Case 002/02, Appeal Judgment, paras 1950-1952.

Supreme Court Chamber, this ignores situations where the probable commission of a crime was jointly and willingly agreed upon by all JCE participants, as in an example it had given in Case 002/01 of a gang breaking into a house and agreeing to use lethal force if necessary.[840] It explained that in such situations, as the JCE participants share an agreement as regards the potential commission of a crime with *dolus eventualis* in furtherance of the common purpose, the crime is encompassed by the common purpose and the Accused can be liable via JCE.[841]

According to the Supreme Court Chamber, it would be inappropriate to require a higher *mens rea* for the form of participation than for the underlying crime, so if one can incur liability for individually committing with *dolus eventualis* the crime against humanity of murder, he or she should equally be held liable for participating in a joint criminal enterprise that commits the same crime.[842] The Supreme Court Chamber did not consider this approach to be a "fundamental reshaping of the concept of individual responsibility for collective criminal action" and noted that the threshold for liability is not lowered by considering that one could be liable for *any* crime within the common plan so long as its commission was merely foreseeable.[843]

3.5. Defences to individual criminal responsibility

Defences to individual criminal responsibility were examined in Case 001. Throughout the trial, Duch argued that his actions at S-21 were conducted pursuant to superior orders and under duress. He contended that he had no choice but to follow orders from his superiors and that he acted under threats to his own life and safety, arguing that this should exclude his criminal responsibility and result in a full acquittal, or alternatively, constitute mitigating factors for sentencing purposes.[844]

3.5.1. Superior orders

Superior orders were not a full defence to individual criminal responsibility before the ECCC. However, ECCC jurisprudence did not settle whether superior orders could mitigate punishment in conditions such as those listed in Article 33 of the Rome Statute, *i.e.*, if: "(a) The person was under a legal obligation to obey orders of the Government or the superior in

[840] Ibid, para. 1952.
[841] Ibid.
[842] Ibid, para. 1959.
[843] Ibid, para. 1960.
[844] Case 001, Judgment, para. 550.

question; (b) The person did not know that the order was unlawful; and (c) The order was not manifestly unlawful".[845]

In examining the defence of superior orders, the Trial Chamber in Case 001 cited Article 29 (new) (4) of the ECCC Law, which provided that the fact that a Suspect acted under orders from the Government of Democratic Kampuchea or from a superior did not exempt them from individual criminal responsibility. It also noted that international legal instruments, such as the Nuremberg Charter and the *ad hoc* tribunal statutes, also provided that acting pursuant to superior orders did not constitute a legitimate defence to charges of crimes against humanity or war crimes. It then pointed out that Article 33 of the Rome Statute "excludes individual criminal responsibility for war crimes where the Accused did not know that the order was unlawful and the order was not manifestly unlawful".[846] However, it found that Duch knew that the Democratic Kampuchea Government's orders were unlawful, leaving it unclear whether the principles underlying Article 33 of the Rome Statute could apply at the ECCC.

3.5.2. Duress

Duress was not a full defence to individual criminal responsibility before the ECCC. However, it could be considered in mitigation of sentence.[847]

No ECCC provision specifically addressed whether duress could exclude individual criminal responsibility.[848] Article 97(2) of the 1956 Penal Code provided that "[a]bsolute necessity exists where the perpetrator of the offence, faced with an inevitable and imminent danger could only avoid it by committing the offence and, in addition, the danger did not arise from an act within his or her control, committed in order to create the danger".

The Trial Chamber in Case 001 noted that international tribunals held that duress does not afford a complete defence to charges of crimes against humanity or war crimes, although it is admissible in mitigation of sentence.[849] While it accepted that towards the end of the existence of S-21, Duch may have feared for his life (as well as his close relatives) if his superiors found his conduct unsatisfactory, it held that duress cannot be invoked when the perceived threat results from the implementation of a policy of terror in which the Accused willingly and

[845] See ibid, paras 551-552, fn. 964.
[846] Ibid, para. 552.
[847] Ibid, paras 553-558.
[848] Ibid, para. 553.
[849] Ibid, para. 554.

actively participated.[850] Accordingly, the Trial Chamber found that Duch did not act under duress as Deputy and later Chairman of S-21, rendering the defence of duress irrelevant to both his criminal responsibility and sentence.[851]

[850] Ibid, para. 557.
[851] Ibid, para. 558.

4. Fair trial rights

4.1. Sources of fair trial rights

The ECCC Law not only authorised the ECCC to apply domestic criminal procedure, but also "obligate[d] it to interpret these rules and determine their conformity with international standards prescribed by human rights conventions and followed by international criminal courts".[852] Moreover, the ECCC was required to consider Article 31 of the Constitution of the Kingdom of Cambodia ("Constitution"), which provides that "the Kingdom of Cambodia shall recognize and respect human rights as stipulated in the United Nations Charter, the Universal Declaration of Human Rights, and the covenants and conventions related to human rights".[853] Article 38 of the Constitution provides the following fair trial rights:

> i. The law guarantees there shall be no physical abuse against any individual.
>
> ii. The law shall protect life, honour, and dignity of the citizens.
>
> iii. The prosecution, arrest, or detention of any person shall not be done except in accordance with the law.
>
> iv. Coercion, physical ill-treatment or any other mistreatment that imposes additional punishment on a detainee or prisoner shall be prohibited. […].
>
> v. Confessions obtained by physical or mental force shall not be admissible as evidence of guilt.
>
> vi. Any case of doubt shall be resolved in favour of the accused.
>
> vii. The accused shall be considered innocent until the court has judged finally on the case.
>
> viii. Every citizen shall enjoy the right to defence through judicial recourse.[854]

In accordance with Article 31 of the Constitution, Article 12(2) of the UN-RGC Agreement provided that the ECCC was required to exercise jurisdiction "in accordance with international standards of justice, fairness and due process of law", as set out in Articles 14 and 15 of the International Covenant on Civil and Political Rights ("ICCPR").[855] Cambodia ratified the

[852] Case 001, Decision on Request for Relief, 15 June 2009, E39/5, para. 15.
[853] Constitution of the Kingdom of Cambodia, 21 September 1993, article 31.
[854] Ibid, article 38.
[855] UN-RGC Agreement, article 12(2).

ICCPR on 26 May 1992.[856]

In guaranteeing the equality of all persons before courts and tribunals, Article 14(1) of the ICCPR provides that "everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law". Article 14(2) provides that everyone charged with the criminal offence "shall have the right to be presumed innocent until proved guilty according to law". Article 14(3) lists specific minimum guarantees that must be complied with in determining criminal charges against anyone:

i. To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

ii. To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

iii. To be tried without undue delay;

iv. To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing, without payment by him if he is indigent and where interest of justice so require;

v. To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

vi. To have the free assistance of an interpreter if he cannot understand or speak the language used in court; and

vii. Not to be compelled to testify against himself or to confess guilt.

In compliance with the Constitution and Article 12 of the UN-RGC Agreement, Article 35 (new) of the ECCC Law mirrored Article 14(3) of the ICCPR. Internal Rule 21(1) also required the ECCC framework to be interpreted "so as to always safeguard the interests of Suspects, Charged Persons, Accused and Victims and so as to ensure legal certainty and transparency of proceedings". Specifically, Internal Rule 21 provided that:

a) ECCC proceedings shall be fair and adversarial and preserve a balance

[856] See Case 002, Decision on Ieng Sary's Rule 89 Preliminary Objections (*Ne bis in Idem* and Amnesty and Pardon), 3 November 2011, E51/15, fn. 13.

between the rights of the parties. They shall guarantee separation between those authorities responsible for prosecuting and those responsible for adjudication;

b) Persons who find themselves in a similar situation and prosecuted for the same offences shall be treated according to the same rules;

c) The ECCC shall ensure that victims are kept informed and that their rights are respected throughout the proceedings; and

d) Every person suspected or prosecuted shall be presumed innocent as long as his/her guilt has not been established. Any such person has the right to be informed of any charges brought against him/her, to be defended by a lawyer of his/her choice, and at every stage of the proceedings shall be informed of his/her right to remain silent.

Most jurisprudence related to the right to a fair trial was issued under Internal Rule 21, which is the focus of the following sections.

4.2. Right to equality of arms

The right to equality of arms in Internal Rule 21(1)(a) required proceedings to be "fair and adversarial and preserve a balance between the rights of the parties".[857] This right was considered in terms of allocating time for witness examination, ensuring the right to participate in the investigation and access the case file, and providing legal aid and adequate time for defence teams to prepare for trial.

4.2.1. Allocation of time for examination of witnesses

The principle of equality of arms did not require that equal time must always be given to the defence on the one hand, and to the Co-Prosecutors and Civil Party Lead Co-Lawyers on the other.[858] For example, the Supreme Court Chamber declined to provide additional time to the Co-Prosecutors and Civil Party Lead Co-Lawyers to examine a witness. It emphasised the distinction between an accused in a criminal trial, whose liberty is at stake and who enjoys fair trial rights under Articles 14(2) and (3) of the ICCPR, and the prosecution, which represents the public interest in ensuring justice according to the law. The Supreme Court Chamber further considered that although the Civil Parties enjoyed fair trial rights under Article 14(1) of the ICCPR, they had "a specific and limited role in the proceedings, as set out in the ECCC's

[857] Internal Rules, rule 21(1)(a).
[858] Case 002/01, Decision on Co-Prosecutors and Civil Party Lead Co-Lawyers' Request for Additional Time for Examination of SCW-5, 30 June 2015, F26/2/2, paras 6-7.

Internal Rules", consistent with international standards.[859]

4.2.2. Right to participate in the investigation and access to the case file

ECCC jurisprudence did not conclusively settle when the Suspect's or Charged Person's right to participate in the investigation and have access to the case file begins.

In Case 002, the Co-Investigating Judges held that any person named in the Introductory Submission acquired the status of a "Charged Person" by relying on the glossary of the Internal Rules and French jurisprudence.[860] In Cases 003 and 004, the Co-Investigating Judges affirmed the status of a "Charged Person", stating that such person was entitled to access the case file and participate in the investigation, but only when formally charged at an initial appearance. The Co-Investigating Judges distinguished a "Suspect" from a "Charged Person" based on the formal charging process under Internal Rules 55(4) and 57.[861]

In Case 004, the Pre-Trial Chamber failed to attain the requisite supermajority to decide on Ao An's appeal against the International Co-Investigating Judge's decision rejecting his requests to have access to the case file and to be allowed to participate in the judicial investigation.[862] The Pre-Trial Chamber Judges were divided between the "contradictory interpretations" of a "Charged Person" adopted by the Co-Investigating Judges in Case 002 and then in Cases 003 and 004.[863]

The National Pre-Trial Chamber Judges in Case 004 accepted the Co-Investigating Judges' previous interpretation of a "Charged Person" in Cases 003 and 004, observing that the Co-Investigating Judges had "not officially charged or placed any person under judicial investigation in case 004 yet".[864] They concluded that Ao An was neither party to the

[859] Case 002/01, Decision on Co-Prosecutors and Civil Party Lead Co-Lawyers' Request for Additional Time for Examination of SCW-5, 30 June 2015, F26/2/2, paras 6-7.
[860] Case 002, Order Refusing Request for Further Charging, 16 February 2010, D298/2, fn. 6. See also Internal Rules, glossary (a "Charged Person" is "any person who is subject to prosecution in a particular case, during the period between the Introductory Submission and Indictment or dismissal of the case").
[861] See Case 004, Considerations of the Pre-Trial Chamber on Ta An's Appeal Against the Decision Denying his Requests to Access the Case File and Take Part in the Judicial Investigation, 15 January 2014, D121/4/1/4, Opinion of Judges Chang-Ho Chung and Rowan Downing, para. 16 (citing Case 004, Decision on the Ta An Defence Requests to Access the Case File and Take Part in the Judicial Investigation, 31 July 2013, D121/4, paras 36-37, 40-44).
[862] Case 004, Considerations of the Pre-Trial Chamber on Ta An's Appeal Against the Decision Denying his Requests to Access the Case File and Take Part in the Judicial Investigation, 15 January 2014, D121/4/1/4, para. 1, disposition.
[863] Ibid, Opinion of Judges Chang-Ho Chung and Rowan Downing, para. 15.
[864] Ibid, Opinion of Judges Prak Kimsan, Ney Thol and Huot Vuthy, para. 7.

proceedings nor a Charged Person, and therefore was "not accorded a status of a party" at this stage of the proceedings.[865]

By contrast, the International Pre-Trial Chamber Judges considered Ao An's appeal to be admissible and accepted the Co-Investigating Judges' interpretation of a "Charged Person" in Case 002.[866] They observed that the Pre-Trial Chamber had previously noted that the fundamental principles expressed in Internal Rule 21 – which reflect the fair trial requirements under the ECCC framework and the ICCPR – may warrant a liberal interpretation of the right to appeal. The International Judges considered that such a liberal interpretation was warranted in Ao An's case "to ensure that the proceedings are fair and adversarial and that a balance is preserved between the rights of the parties".[867]

On the merits, the International Pre-Trial Chamber Judges opined that because they are subject to prosecution, individuals named in an Introductory Submission should be accorded the rights of Charged Persons, "irrespective of the fact that they have not been formally charged by the Co-Investigating Judges and summoned for an initial appearance".[868] Thus, they concluded that Ao An should have been allowed to exercise the rights afforded to Charged Persons under the Internal Rules in order to protect his right to prepare a defence and to ensure adherence to the principle of equality of arms.[869]

Later in Case 003, the Pre-Trial Chamber deviated from its previous decisions and unanimously ordered the Co-Investigating Judges to grant Meas Muth's Co-Lawyers access to the case file for the purpose of appealing a decision on legal representation.[870] The Pre-Trial Chamber considered that the Co-Lawyers were "not in a position to meaningfully challenge the factual conclusions reached" in the impugned decision "without any access to the evidentiary documents relied upon by the International Co-Investigating Judge".[871] In particular, the International Co-Investigating Judge had found that a conflict of interest existed based on his examination of documents in Cases 002 and 003 concerning an alleged superior-subordinate relationship between Meas Muth and Ieng Sary. Therefore, the Pre-Trial Chamber determined that granting the Co-Lawyers access to the case file in Case 003 was essential to prevent any

[865] Ibid, Opinion of Judge Prak Kimsan, Ney Thol and Huot Vuthy, paras 7-8.
[866] Ibid, Opinion of Judges Chang-Ho Chung and Rowan Downing, para. 6.
[867] Ibid, Opinion of Judges Chang-Ho Chung and Rowan Downing, paras 4-5.
[868] Ibid, Opinion of Judges Chang-Ho Chung and Rowan Downing, para. 21.
[869] Ibid, Opinion of Judges Chang-Ho Chung and Rowan Downing, para. 27.
[870] Case 003, Second Decision on Requests for Interim Measures, 19 February 2014, D56/19/16, paras 15-16.
[871] Ibid, para. 15.

right of appeal against the impugned decision from becoming meaningless and to ensure fairness in the appellate process through equality of arms.[872]

4.2.3. Allocation of legal aid and adequate time to prepare a defence

The right to adequate time and facilities to prepare a defence at the ECCC required that "each party be afforded a reasonable opportunity to present his or her case under conditions that do not place him or her at disadvantage *vis-à-vis* his or her opponent".[873] What amounted to "adequate time" depended on the circumstances of the case.[874] Concerning adequate facilities, the principle of equality of arms did not require "material equality" in the amount of staff or resources for the defence and Co-Prosecutors.[875] However, the Co-Investigating Judges considered that resource requests by a defence team at no cost to the ECCC should only be denied "if they are in violation of a specific rule of equal importance with the fundamental rights that would be fostered and protected by the provision of cost-free resources".[876]

In Case 002/02, the Supreme Court Chamber denied an urgent request by the Nuon Chea defence to immediately reinstate all members following the termination of the case upon Nuon Chea's death. It determined that the administration of legal aid before the ECCC was the responsibility of the Defence Support Section under Internal Rule 11, and thus the Chamber had "no jurisdiction to intervene in the dispensation of public moneys following the death of a person otherwise eligible for legal aid".[877]

In Case 003, the International Co-Investigating Judge, citing the International Criminal Tribunal for Rwanda ("ICTR") Appeals Chamber in *Kayishema and Ruzindana*, held that the principle of equality of arms "does not necessarily require material equality in the amount of staff at the disposal of the defence and the prosecution". He noted that "in all jurisdictions the prosecution has generally a larger office because it must be able to deal with broader

[872] Ibid.
[873] Case 003, Decision on Meas Muth's Urgent Request for the Recruitment of Two Additional Legal Consultants, 4 August 2016, D200/1, para. 22.
[874] Case 004/02, Decision on Ao An's Request to Order DSS to Provide Additional Resources, 18 March 2016, D304/1, para. 8.
[875] Case 003, Decision on Meas Muth's Urgent Request for the Recruitment of Two Additional Legal Consultants, 4 August 2016, D200/1, para. 22.
[876] Case 004, Decision on Yim Tith's Urgent Requests Concerning Defence's Resources, 7 June 2016, D321/1, para. 7.
[877] Case 002/02, Response to Request to Reinstate Nuon Chea Defence Team, 2 September 2019, F46/6.

responsibilities" and a larger case load.[878]

In Case 004/02, the International Co-Investigating Judge requested the Defence Support Section "to take all necessary steps to appoint, as soon as possible" additional staff requested by the Ao An defence team.[879] In a previous decision on the matter, the International Co-Investigating Judge held that the right to adequate time and facilities to prepare one's defence "is a fundamental element of the guarantee of a fair trial and a corollary of the principle of equality of arms", and recalled that it is well established at the international level that judicial bodies have inherent powers to review administrative decisions which may prejudice fair trial rights.[880] However, the International Co-Investigating Judge requested further particulars as to why additional defence team members were necessary, finding the request insufficiently substantiated.[881] After receiving the further particulars, he granted the request, noting that "the Defence are best placed to determine how to allocate their resources to ensure a robust representation of their client". He also reasoned that the administrative regulations, rather than being an impediment, must be interpreted under Internal Rule 21 so "as to always safeguard the interest of charged persons".[882]

After the parties filed their written submissions against the Closing Orders in Case 004/02, the Defence Support Section reduced Ao An defence team's budget, prompting a request to reinstate the full defence budget until the Pre-Trial Chamber decided on the appeals. The Pre-Trial Chamber found the request to be inadmissible, observing that the dispute fell "squarely within the scope of the dispute resolution procedure" in the Legal Aid Scheme. Noting that the Defence Support Section monitored the Co-Lawyers' contracts with the Accused, the Pre-Trial Chamber considered that the guarantees in the legal framework were sufficient to protect Ao An's fair trial rights.[883] However, it noted that the Defence Support Section erred in relying on the Completion Plan as a justification for the budget reduction. Rather, the Pre-Trial Chamber's final decision on the appeals against the Closing Orders would

[878] Case 003, Decision on Meas Muth's Urgent Request for the Recruitment of Two Additional Legal Consultants, 4 August 2016, D200/1, para. 22.
[879] Case 004/02, Decision on Resources to be Provided to the Ao An Defence, 9 May 2016, D304/7, paras 6-7.
[880] Case 004/02, Decision on Ao An's Request to Order DSS to Provide Additional Resources, 18 March 2016, D304/1, paras 7-8; Case 004/02, Further Decision on Ao An's Request to Order DSS to Provide Additional Resources, 26 April 2016, D304/4, para. 18.
[881] Case 004/02, Decision on Ao An's Request to Order DSS to Provide Additional Resources, 18 March 2016, D304/1, para. 10.
[882] Case 004/02, Further Decision on Ao An's Request to Order DSS to Provide Additional Resources, 26 April 2016, D304/4, para. 16.
[883] Case 004/02, Decision on Ao An's Urgent Request for Continuation of Ao An's Defence Team Budget, 2 September 2019, D359/17, para. 8.

determine whether Case 004/02 proceeded to trial.[884] Accordingly, the Pre-Trial Chamber "caution[ed] the Section to be diligently and conscious of the fair trial rights of the Accused in their budget planning and the assessment of Fee Claims by the Defence".[885]

In Case 004, when ruling on the Yim Tith's request to appoint a *pro bono* expert consultant, the International Co-Investigating Judge held that requests for resources by a defence team that come at no expense to the ECCC "should only be denied if they are in violation of a specific rule of equal importance with the fundamental rights that would be fostered and protected by the provision of cost-free resources".[886] The International Co-Investigating Judge cited the Pre-Trial Chamber's holding that Article 14 of the ICCPR "provides for overarching rights which will transcend local procedures", and considered that the ICCPR is "thus hierarchically superior to the Internal Rules and administrative regulations" in this respect.[887]

4.3. Right to equal treatment

The right to equal treatment was prescribed by Internal Rule 21(1)(b), which required that persons "who find themselves in a similar situation and prosecuted for the same offence" be treated "according to the same rules". This right was interpreted as providing a right to the defence to respond to the Co-Prosecutors' Final Submission based on prior practice, despite the lack of an express right to file a response in the ECCC framework.[888]

The Pre-Trial Chamber found that Co-Investigating Judges' refusal to accept Ieng Sary's response to the Co-Prosecutors' Final Submission infringed upon his fair trial rights by failing to respect the right to equal treatment and principle of quality of arms.[889] The Co-Investigating Judges previously accepted Duch's response to the Co-Prosecutors' Final Submission in Case 001, even though the Internal Rules and the Code of Criminal Procedure ("CCP") did not specifically provide for such a right. While the Pre-Trial Chamber stated that equal treatment before the law "cannot mean repeating an error in a future case", even if it benefits the Charged

[884] Case 004/02, Decision on Ao An's Urgent Request for Continuation of Ao An's Defence Team Budget, 2 September 2019, D359/17, para. 13.
[885] Ibid, para. 14.
[886] Case 004, Decision on Yim Tith's Urgent Requests Concerning Defence's Resources, 7 June 2016, D312/1, para. 7.
[887] Ibid, para. 6 (citing Case 002, Decision on Ieng Thirith's Appeal against the Co-Investigating Judge's Order Rejecting the Request for Stay of Proceedings on the Basis of Abuse of Process (D264/1), 10 August 2010, D264/2/6, para. 13).
[888] Case 002, Decision on Ieng Sary's Appeal Against Co-Investigating Judges' Decision Refusing to Accept the Filing of Ieng Sary's Response to the Co-Prosecutor's Rule 66 Final Submission and Additional Observations, and Request for Stay of the Proceedings, 20 September 2010, D390/1/2/4, para. 22.
[889] Ibid, paras 9, 23.

Person, it found that the Co-Investigating Judges did not err in accepting Duch's response.[890] It reviewed Article 175 of the French CCP, the model for Article 246 of the Cambodian CCP. It reasoned that the amendment to Article 175 of the French CCP to allow a Charged Person to respond to the prosecution's final submissions provided "more balance between the parties during the investigation". Finding no error in accepting Duch's response, the Pre-Trial Chamber concluded that the Co-Investigating Judges' "principled objection" to Ieng Sary's filing of a response would result in "unequal treatment before the law to the detriment of the Charged Person Ieng Sary".[891]

In Case 004/01, and subsequently in Cases 004/02, 003, and 004, the Co-Investigating Judges continued to grant the defence the right to file a response to the Co-Prosecutors' Final Submission based on the principle of equal treatment.[892]

4.4. Presumption of innocence

Internal Rule 21(1)(d) provided for the presumption of innocence: "[e]very person suspected or prosecuted shall be presumed innocent as long as his/her guilt has not been established". The presumption of innocence applied "up until the final decision upholding or quashing the verdict of conviction" and to the Supreme Court Chamber's standard of review.[893] This presumption, however, was not a declaration of a not guilty status such that an appellant commenced their appeal in the same position as an accused before the Trial Chamber.[894] Rather, the presumption of innocence on appeal "impose[d] […] an absolute requirement" on the Supreme Court Chamber "to evaluate all submissions made by the appellant with an open mind".[895]

In the event that an appellant died before their appeal could be determined, their death extinguished the appeal and enjoyment of personal rights applicable to the appeal process.[896] Applying international standards and taking a "more expansive approach", the Supreme Court Chamber held that the presumption of innocence applied to its standard of review. However, it

[890] Ibid, paras 7, 15.
[891] Ibid, para. 19.
[892] See *e.g.*, Case 004/01, Decision on Im Chaem's Request in Relation to the Conclusion of the Investigation, 1 February 2016, D286/6, paras 11-12; Case 003, Forwarding Order Pursuant to Internal Rule 66(4), 25 July 2017, D256, para. 14.
[893] Case 002/02, Decision on Urgent Request Concerning the Impact on Appeal Proceedings of Nuon Chea's Death Prior to the Appeal Judgment, 22 November 2019, F46/2/4/2, para. 69.
[894] Ibid, paras 68-69.
[895] Ibid, para. 65.
[896] Ibid, para. 69.

considered that this "presumption is not intended to be exercised in a legal void". The Supreme Court Chamber did not agree with the International Criminal Tribunal for the Former Yugoslavia ("ICTY") *Delić* Trial Chamber's decision, which held that the presumption *does not* apply to convicted persons pending appeal. However, it agreed with the *Delić* Trial Chamber's observations that on appeal, the appealing party must demonstrate errors rather than attempt to initiate a trial *de novo*. It considered that the presumption of innocence on appeal imposed "an absolute requirement to evaluate all submissions made by the appellant with an open mind from that properly high standard".[897]

Public statements about an Accused's guilt could be "incompatible with the presumption of innocence". The Trial Chamber emphasised that the presumption of innocence is a "fundamental principle of criminal proceedings" and essential component of an Accused's right to a fair trial, enshrined in Internal Rule 21(d), Article 38 of the Constitution, Article 14(2) of the ICCPR, Article 6(2) of the European Convention of Human Rights ("ECHR"), and Article 7(1)(b) of the African Charter on Human and Peoples' Rights.[898] It also considered that regardless of the intent in making the statements, public statements of alleged guilt risk being misinterpreted as an attempt to improperly influence Judges and therefore subject to the measures listed in Internal Rule 35(2).[899]

4.5. Principle of *in dubio pro reo*

A corollary to the presumption of innocence, the principle of *in dubio pro reo* mandates that doubt be resolved in the Accused's favour.[900] Guaranteed by the Constitution, the primary function of the *in dubio pro reo* principle is "to denote a default finding in the event where factual doubts are not removed by the evidence".[901] The principle applied to all stages of the proceedings, including the pre-trial stage.[902] It also applied to "dilemmas about the meaning of the law" where doubts remained after the application of the civil law rules of interpretation, namely the language of the provision, its place in the system, and its objective.[903]

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[897] Ibid, para. 65.
[898] Case 002/01, Decision on Rule 35 Applications for Summary Action, 11 May 2012, E176/2, paras 16-18.
[899] Ibid, para. 29.
[900] Case 002, Decision on Closing Order Appeal (Ieng Sary), para. 310; Case 002, Decision on Closing Order Appeals (Nuon Chea and Ieng Thirith), para. 144.
[901] Case 002, Decision on Immediate Appeal by Khieu Samphan on Application for Release, 6 June 2011, E50/3/1/4, para. 31. See also Case 004/01, Dismissal Order, para. 26.
[902] Case 002, Decision on Closing Order Appeal (Ieng Sary), para. 310; Case 002, Decision on Closing Order Appeals (Nuon Chea and Ieng Thirith), para. 144.
[903] Case 002, Decision on Immediate Appeal by Khieu Samphan on Application for Release, 6 June 2011, E50/3/1/4, para. 31.

The *in dubio pro reo* principle is applicable to "doubts about the content of a legal norm that remain after application of the civil law rules of interpretation, that is, upon taking into account the language of the provision, its place in the system, including its relation to the main underlying principles, and its objective".[904] As a practical matter, *in dubio pro reo* will usually be unnecessary when addressing legal *lacunae*, but may become relevant in the far rarer event of a collision of norms.[905]

In Case 002/01, the Pre-Trial Chamber applied the *in dubio pro reo* principle at the pre-trial stage to doubts about the meaning of the law when ruling on the appeals against the Closing Orders.[906] In considering the submission that crimes against humanity at the ECCC required a nexus between the underlying acts and an international armed conflict, the Pre-Trial Chamber found that it remained unclear precisely when severance of this nexus requirement was effected in customary international law. In the absence of clear state practice and *opinio juris*, the Pre-Trial Chamber was unable to identify the crucial tipping point between 1968 and 1984 as to when this transition occurred. It considered that according to the *in dubio pro reo* principle, "any ambiguity such as this must be resolved in favour of the accused".[907]

4.6. Right to be informed of the charges

Internal Rule 21(1)(d) provided every person suspected or prosected before the ECCC the right to be informed of any charges against them. This right was addressed when determining the specificity requirements of Introductory Submissions and Closing Orders, and the translation rights of the parties. These are discussed below.

4.6.1. Specificity requirements of Introductory Submissions and Closing Orders

The right to receive notice of charges was a fundamental right of Charged Persons. This right arose upon arrest and ensured that the Charged Person had the ability to fully participate in the investigation.[908] ECCC jurisprudence did not conclusively settle what constitutes "sufficient

[904] Case 002, Decision on Immediate Appeal by Khieu Samphan on Application for Release, 6 June 2011, E50/3/1/4, para. 31.
[905] Ibid.
[906] Case 002, Decision on Closing Order Appeal (Ieng Sary), para. 310; Case 002, Decision on Closing Order Appeals (Nuon Chea and Ieng Thirith), para. 144.
[907] Case 002, Decision on Closing Order Appeal (Ieng Sary), para. 310.
[908] Case 002, Decision on the Appeals Against the Co-Investigating Judges Order on Joint Criminal Enterprise (JCE), 20 May 2010, D97/15/9, para. 92.

notice".

In Case 001, the Pre-Trial Chamber found that a lack of particulars in the Introductory Submission about the nature of the Accused's participation in a JCE amounted to a lack of notice of charges.[909] It noted that the Internal Rules are intended to ensure fairness to the Charged Person by requiring notice of the "the scope and nature of the acts under investigation".[910] It also considered that Internal Rule 21(1)(d) provided Suspects the right to be informed of any charges brought against them at the time of the arrest and, thus, at the investigation stage as prescribed in Internal Rule 51(1).[911] In determining whether the S-21 JCE allegations against Duch formed part of the factual basis for the investigation, the Pre-Trial Chamber outlined the legal elements of JCE liability, and concluded that alleged JCE expanded the type of conduct attributable to Duch in the Introductory Submission.[912] The Pre-Trial Chamber found that while some elements of the S-21 JCE were investigated, others were not. Thus, this issue was not only one of legal characterisation but also whether there was enough factual basis to support that characterisation.[913] It concluded that Duch was not informed of the allegations related to his participation in the S-21 JCE prior to the Final Submission and decided not to add them to the amended Closing Order.[914]

By contrast, in Case 002/01, the Pre-Trial Chamber concluded that only a summary of the facts and the type of offence under investigation were required at the Introductory Submission stage. A more detailed description of the material facts and their legal characterisation was needed in the Closing Order.[915] The Pre-Trial Chamber reasoned that the Co-Prosecutors made their Introductory Submission without the benefit of a full investigation, and thus particularity could not be demanded. It further held that the Co-Prosecutors were not precluded from alleging the Charged Person's responsibility as a participant in a JCE and to refer to the particular form(s) (basic or systemic) for the first time in an Introductory Submission, since the Co-Investigating Judges could do so in their Closing Order.[916] It concluded that the lack of details about each appellant's role in the alleged JCE did not constitute inadequate notice of charges, as long as the Closing Order included specific aspects of the Accused's conduct that allowed the

[909] Case 001, Decision on Closing Order Appeal, paras 131-141.
[910] Ibid, para. 138.
[911] Ibid, paras 138-140.
[912] Ibid, paras 131-136.
[913] Ibid, para. 137.
[914] Ibid, para. 141.
[915] Case 002, Decision on the Appeals Against the Co-Investigating Judges Order on Joint Criminal Enterprise (JCE), 20 May 2010, D97/15/9, para. 92.
[916] Ibid, para. 95.

Co-Investigating Judges to infer their participation in the JCE and the necessary *mens rea*.[917]

The Pre-Trial Chamber did not discuss the specificity requirements of Introductory Submissions or Closing Orders in Cases 003 and 004.

4.6.2. Translation rights of the parties

While the Charged Persons had a right to be informed of the charges under Internal Rule 21(1)(d), they did not have any explicit right to receive all documents in the case file in their own language or in that of their Co-Lawyers.[918] Thus, the fact that a language was one of the three official languages of the ECC did not amount to a right for the Charged Person to have all documents on the case file translated into this language.[919] However, the Pre-Trial Chamber held that depending on the specific circumstances of a case, document translation may be necessary to ensure the Charged Person can exercise their rights during the investigation.[920] The "key requirement" is to ensure that the Charged Person knows the case against them and can defend themselves, particularly by presenting their version of the events.[921]

The Pre-Trial Chamber found that this approach was consistent with jurisprudence of international tribunals, which denied requests to translate all case documents. This jurisprudence considered that translating every document in advance to the Accused's language could "seriously jeopardize the Accused's right to an expeditious trial".[922] The Pre-Trial Chamber also noted that international jurisprudence recognised that "providing a defendant with an interpreter is an adequate substitute for provision of the translation of certain documents".[923]

[917] Ibid, para. 97.
[918] Case 002, Decision on Ieng Sary's Appeal Against the OCIJ's Order on Translation Rights and Obligations of the Parties, 20 February 2009, A190/II/9, para. 34; Case 002, Decision on Khieu Samphan's Appeal Against the Order on Translation Rights and Obligations of the Parties, 20 February 2009, A190/I/20, para. 40.
[919] Ibid.
[920] Case 002, Decision on Ieng Sary's Appeal Against the OCIJ's Order on Translation Rights and Obligations of the Parties, 20 February 2009, A190/II/9, para. 36; Case 002, Decision on Khieu Samphan's Appeal Against the Order on Translation Rights and Obligations of the Parties, 20 February 2009, A190/I/20, para. 43.
[921] Case 002, Decision on Ieng Sary's Appeal Against the OCIJ's Order on Translation Rights and Obligations of the Parties, 20 February 2009, A190/II/9, para. 35; Case 002, Decision on Khieu Samphan's Appeal Against the Order on Translation Rights and Obligations of the Parties, 20 February 2009, A190/I/20, para. 41.
[922] Ibid.
[923] Case 002, Decision on Ieng Sary's Appeal Against the OCIJ's Order on Translation Rights and Obligations of the Parties, 20 February 2009, A190/II/9, para. 41; Case 002, Decision on Khieu Samphan's Appeal Against the Order on Translation Rights and Obligations of the Parties, 20 February 2009, A190/I/20, para. 47.

4.7. Right to counsel

Internal Rule 21(1)(d) provided every person suspected or prosecuted the right to be defended by a lawyer of their choice. Most notably, this right was addressed when considering issues such as access to the case file and participation in the investigation, removal of counsel for conflicts of interest, and the right to counsel at the adversarial hearing on provisional detention. These are discussed below.

4.7.1. Suspects' right to counsel during the investigation

ECCC jurisprudence did not conclusively settle whether a Suspect was entitled to counsel before being formally charged under Internal Rule 57.

In Cases 003 and 004, the Co-Investigating Judges found that unnamed Suspects were not entitled to defence counsel.[924] They considered that unnamed Suspects were not officially informed of the criminal proceedings in accordance with Internal Rule 57, and accordingly had not been substantially affected by the investigations – *e.g.*, by having been approached, interviewed, subjected to any search and seizure actions or detention, or been in any way affected by the Co-Investigating Judges' investigation.[925]

In Case 004, the (Reserve) International Co-Investigating Judge notified a "named suspect" of the allegations against him, and informed him of his Internal Rule 21(1)(d) rights to be defended by a lawyer and have access to the case file.[926] The (Reserve) International Co-Investigating Judge considered that the Suspect was entitled to Internal Rule 21(1)(d) rights "in the unique circumstances of this case", despite not having been formally charged under Internal Rules 55(4) and 57.[927] This Notification created unique circumstances by granting Suspect status to a person named in the Co-Prosecutors' Introductory Submission but not yet charged.[928]

4.7.2. Right to counsel at the adversarial hearing on provisional detention

Under Internal Rule 63(1), a Charged Person was required to be advised of their right to have

[924] Case 003/004, Decision on Access to Case Files 003 and 004, 5 April 2011, D3/1, para. 2.
[925] Ibid, paras 3-6.
[926] Case 004, Decision on Motion and Supplemental Brief on Suspect's Right to Counsel, 17 May 2013, D122/6, para. 22.
[927] Ibid, para. 95.
[928] Ibid, para. 23.

a lawyer, and that this right could be waived during the adversarial hearing on provisional detention.[929] In Case 002, the Pre-Trial Chamber found that Nuon Chea had unequivocally and voluntarily waived his right to a lawyer during the adversarial hearing and that his waiver was therefore valid.[930]

4.8. Right to remain silent

Internal Rule 21(1)(d) guaranteed the right to remain silent. The right to remain silent was most notably discussed: (1) in Case 001, given that the Accused chose to cooperate with the Co-Prosecutors and Co-Investigating Judges and to testify during the trial; and (2) in Case 002 where, despite Khieu Samphan's invocation of his right to remain silent, the Trial Chamber put questions to him or asked him "clarify", comment on, and react to documents put to him.

In Case 001, the Pre-Trial Chamber reviewed the Provisional Detention Order by examining the Co-Investigating Judges' procedures prior to the Order being issued. The Pre-Trial Chamber observed, *inter alia*, that: (1) the Co-Lawyers were present during each hearing and interview of Duch; (2) Duch was aware of his Internal Rule 21(1)(d) right to remain silent during each hearing and interview; and (3) Duch nonetheless voluntarily delivered written statements to the Co-Investigating Judges.[931] Although the Pre-Trial Chamber found that it was apparent that Duch was only informed of his right to remain silent at the commencement of the initial hearing – which may have raised an issue as to what is meant by the phrase "at every stage of the proceedings" – the Chamber did not consider it necessary to rule on the meaning of this phrase. The Co-Lawyers conceded that the Co-Investigating Judges complied with the requirement to inform Duch of his right to silence.[932]

At the trial stage, Duch chose to respond to questions at trial and confirmed many of the facts in the Amended Closing Order, despite being informed of his right to silence. The Trial Chamber held that Duch's responses "constituted evidence, the probative value of which [had] been evaluated by the Chamber".[933]

In Case 002/01, the Supreme Court Chamber rejected Khieu Samphan's argument that the Trial

[929] Case 002/01, Decision on Appeal Against Provisional Detention Order on Nuon Chea, 20 March 2008, C11/54, para. 18.
[930] Ibid, para. 39.
[931] Case 001, Decision on Appeal Against Provisional Detention Order of Kaing Guek Eav alias "Duch", 3 December 2007, C5/45, paras 8-10.
[932] Ibid, para. 10.
[933] Case 001, Judgment, para. 50.

Chamber violated his rights by frequently asking him to comment on matters, despite his clear indication that he wished to exercise his right to remain silent.[934] It found that Khieu Samphan did not explain why this amounted to an error of law and how he was prejudiced, noting that Khieu Samphan was legally represented throughout the procedure. The Chamber concluded that there was no indication that the Trial Chamber exercised pressure on him to renounce his right to silence, but "merely invited him to comment on certain issues in the course of a lengthy trial".[935]

4.9. Right to expeditious proceedings

Internal Rule 21(4) required proceedings to "be brought to a conclusion within a reasonable time". ECCC jurisprudence did not conclusively settle what constitutes "a reasonable time". However, as described below, the Pre-Trial Chamber in Cases 004, 004/01 and 004/02 unanimously found that the Co-Investigating Judges caused undue delay to the proceedings by taking between 16 and 21 months to issue their Closing Orders after the conclusion of judicial investigations.

In Case 004/01, the Pre-Trial Chamber unanimously found that Co-Investigating Judges' 18-month delay in issuing their reasoned Closing Order after the conclusion of the investigation was disproportionate and constituted undue delay.[936] It found that the 18-month drafting process was unreasonable when considering: (1) the limited complexity of the case; (2) the fact that the investigation was concluded within nine and a half months from the notification of charges; (3) the fact that both Co-Investigating Judges had already expressed their intent to dismiss the case; and (4) the age and state of health of the Charged Person, witnesses, and victims.[937] However, the Pre-Trial Chamber did not pronounce on the impact of this delay on Im Chaem's fair trial rights.

In Case 004/02, the Pre-Trial Chamber unanimously found that the Co-Investigating Judges' issuance of separate and opposing Closing Orders in only one of the ECCC's working languages, without reasonable showing of exceptional circumstances, "precipitated an undue delay in the whole proceedings in Case 004/02". The Pre-Trial Chamber acknowledged that the drafting process in Case 004/02 (16 months) had been shorter than that in Case 004/01 (18

[934] Case 002/01, Appeal Judgment, para. 197.
[935] Ibid. See also Case 002/01, Judgment, paras 27-29.
[936] Case 004/01, Considerations on Closing Order Appeal, para. 31.
[937] Ibid, para. 30.

months), even though the case and volume of the record in Case 004/02 was more significant. Nonetheless, the Chamber found that this period was "excessive in comparison with the Closing Orders issued in Cases 001 and 002, with a period of three and eight months, respectively, after the closure of the investigations".[938]

In Case 003, contrary to their practice in Cases 004/01 and 004/02, the Pre-Trial Chamber did not unanimously find undue delay concerning the Co-Investigating Judges' Closing Orders, even though the Co-Investigating Judges issued their Closing Orders more than 22 months after notifying the conclusion of the judicial investigation.[939] Noting the Chamber's previous findings in Cases 004/01 and 004/02, and examining the volume and complexity of Case 003, the International Judges opined that the Co-Investigating Judges failed to issue the Closing Orders within a reasonable time. They considered that the identified difficulties listed in the annex to the Indictment did not justify this delay, as issues concerning staff and translation were foreseeable based on previous cases, and could have been mitigated.[940]

In Case 004, the Pre-Trial Chamber unanimously found that the Co-Investigating Judges failed to issue their Closing Orders within a reasonable time, taking more than 21 months after notifying the conclusion of the judicial investigation.[941] However, it was not persuaded that the delay in this case "so seriously erode[d] the fairness of the proceedings that it would be oppressive to continue".[942]

The International Pre-Trial Chamber Judges set out a test for assessing the right to have proceedings concluded within a reasonable time. They considered that "the starting point for assessing the reasonable duration of criminal proceedings is when the suspect was officially notified that he or she would be prosecuted even if he or she was not formally charged until later".[943] According to them, determining if this right was violated involves assessing: (1) the complexity of the case; (2) the conduct of the Accused; and (3) the conduct of the relevant authorities.[944]

In fashioning this test, the International Pre-Trial Chamber Judges considered European Court

[938] Case 004/02, Considerations on Closing Order Appeals, paras 70, 72.
[939] See Case 003, Considerations on Closing Order Appeals, paras 13, 22.
[940] Ibid, Opinion of Judges Olivier Beauvallet and Kaing Jin Baik, paras 146-147.
[941] Case 004, Considerations on Closing Order Appeals, paras 74-76.
[942] Ibid, para. 78.
[943] Case 003, Considerations on Meas Muth's Appeal Against the International Co-Investigating Judge's Re-Issued Decision on Meas Muth's Motion to Strike the International Co-Prosecutor's Supplementary Submission, 26 April 2016, D120/3/1/8, Opinion of Judges Olivier Beauvallet and Kaing Jin Baik, para. 35.
[944] Ibid, Opinion of Judges Olivier Beauvallet and Kaing Jin Baik, para. 37.

of Human Rights ("ECtHR") jurisprudence holding that the term "charge" for the purpose of Article 6 of the European Convention on Human Rights may be defined as the "official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence, a definition that corresponds to the test whether the situation of the suspect has been substantially affected".[945] They also cited ECtHR jurisprudence holding that the assessment of whether someone was tried within a reasonable time must be conducted "in light of the circumstances of the case, regard being had to […], in particular, the complexity of the case, the applicant's conduct and the conduct of the competent authorities".[946] Under this test, the International Pre-Trial Chamber Judges concluded that, in their opinion, the new legal characterisations of the alleged facts and the further investigation in the Supplementary Submission in Case 003 was limited and would not cause undue delay in concluding the investigation.[947]

4.10. Impact of undue delay from non-ECCC cases

In Case 001, the Trial Chamber found that Duch's prior detention before the Cambodian Military Court violated the domestic law applicable at the time and breached his internationally recognised right to a trial within a reasonable time and to detention in accordance with law.[948] While these violations were not attributable to the ECCC, the Trial Chamber held that Duch, if convicted, would be entitled to a remedy to be decided at the sentencing stage for the time spent unlawfully in detention before the Military Court between 10 May 1999 and 30 July 2007. If acquitted, the Trial Chamber held that he would be entitled to pursue remedies available to him under national law.[949] However, the Supreme Court Chamber found that the Trial Chamber misinterpreted relevant international jurisprudence to mean that violations of Duch's rights by another body should be remedied by the ECCC.[950]

The Trial Chamber's analysis focused on the then-applicable criminal procedure, which imposed a maximum ceiling of three years' provisional detention in relation to charges of genocide, war crimes, and crimes against humanity, noting that Duch was held under this law for nearly eight years, and thus illegally, until his transfer to the ECCC.[951] It found that there

[945] Ibid, Opinion of Judges Olivier Beauvallet and Kaing Jin Baik, para. 36, fn. 134.
[946] Ibid, Opinion of Judges Olivier Beauvallet and Kaing Jin Baik, para. 37, fn. 139.
[947] Ibid, Opinion of Judges Olivier Beauvallet and Kaing Jin Baik, para. 49.
[948] Case 001, Decision on Request for Release, 15 June 2009, E39/5, para. 21.
[949] Ibid, paras 37-37.
[950] Case 001, Appeal Judgment, para. 390.
[951] Case 001, Decision on Request for Release, 15 June 2009, E39/5, para. 19.

was no substantial and systemic investigation throughout the periods of detention, and that there was a general lack of reasoning setting out the basis for Duch's various detentions.[952] Citing the ICTR's jurisprudence in *Barayagwiza* and *Rwamakuba*, the Trial Chamber found that these cases indicate that even where violations cannot be attributed to an international tribunal or do not amount to an abuse of process, "an accused may be entitled to seek a remedy for violations of his rights by national authorities". Under this case law, if an Accused is convicted, "he is entitled not only to credit for time already spent in detention, but also to a reduction in sentence as a result of previous violations to his rights".[953]

By contrast, the Supreme Court Chamber found that international jurisprudence clearly affirmed that before being able to obtain a remedy, the convicted person must be able to attribute the infringement of their rights to one of the organs of the tribunal or show that at least some responsibility for that infringement lies with that tribunal. Since Duch's detention by the Cambodian Military Court was not attributable to the ECCC, the Supreme Court Chamber held that the Trial Chamber should have rejected Duch's request for a remedy.[954]

4.11. Right to appeal

Internal Rule 21(1) required the "applicable ECCC Law, Internal Rules, Practice Directions and Administrative Regulation" to be "interpreted so as to always safeguard the interests of Suspects, Charged Persons, Accused and Victims". On numerous occasions, the Pre-Trial Chamber applied Internal Rule 21 to broaden the right to appeal, where the situation at issue was not contemplated by the Rules, when appeals filed against an Indictment raised matters that could not be rectified by the Trial Chamber, and when the particular circumstances of the case required the Pre-Trial Chamber's intervention to avoid irreparable harm to the Charged Person's fair trial rights.[955]

4.12. Right to assist in one's own defence, right to be present at trial, and fitness to stand trial

Internal Rule 81 provided the Accused the right to be tried in his or her own presence, subject to exceptions, such as where the Accused could not attend in person due to health or other

[952] Ibid, para. 20.
[953] Ibid, para. 35.
[954] Case 001, Appeal Judgment, paras 392, 396. For more on the re-sentencing of Duch in Case 001, see section 6.6.
[955] For more on the Pre-Trial Chamber's standards of admissibility, see section 5.5.3.4.

serious reasons. Internal Rule 32 also provided the Co-Investigating Judges and chambers discretion to order expert psychiatric or psychological examination to determine a Charged Person's or Accused's fitness to stand trial. ECCC jurisprudence examined these rights in the context of the right to a psychiatric assessment, the assessment of fitness to stand trial, and the consequences of a finding of unfitness.

4.12.1. Right to psychiatric assessment

Charged Persons were entitled to an expert assessment of their capacity to exercise their procedural rights effectively during the investigation and pre-trial phase, if they properly justify their request.[956] The issue of a Charged Person's capacity to effectively participate in the proceedings arose immediately upon being charged with a crime before the ECCC. A Charged Person's capacity to cooperate with his counsel was also of particular relevance during the investigative stage of proceedings.[957]

In reaching these holdings, the Pre-Trial Chamber in Case 002 observed that the ECCC's founding documents, the Internal Rules, and Cambodian law did not define the precise meaning of "fitness to stand trial" or indicate when a psychiatric evaluation could be requested, or whether the issue of a Charged Person's mental capacity could be raised at the pre-trial stage.[958] Resorting to procedural rules established at the international level in accordance with Article 12 of the UN-RGC Agreement, the Pre-Trial Chamber relied on the ICTY *Strugar* Trial Chamber's decision in noting that Charged Persons enjoy procedural rights from the beginning of a judicial investigation before the ECCC. Among these rights were the right to be informed of the charges, to prepare a defence, and to defend oneself – the enjoyment of which required that a Charged Person had a level of mental and physical capacity.[959]

4.12.2. Assessment of fitness to stand trial

The standard in determining fitness to stand trial was "meaningful participation": *i.e.*, whether the Accused could exercise their fair trial rights to such a degree that allowed them to meaningfully and effectively participate in their trial and understand the essential aspects of

[956] Case 002, Decision on Ieng Sary's Appeal Regarding the Appointment of a Psychiatric Expert, 21 October 2008, A189/I/8, para. 35.
[957] Ibid, para. 34.
[958] Ibid, para. 28.
[959] Ibid, paras 28-34.

the proceedings.[960] The Trial Chamber was required to consider all pertinent material and relevant factors, including, as appropriate, its own observations.[961] The availability of practical measures mitigating the negative effects of any impairment also had to be considered.[962]

In determining the standard for determining fitness to stand trial, the Trial Chamber relied on the ICTY *Strugar* Trial Chamber's holding that fitness to stand trial turns on whether an Accused's capacities "viewed overall and in a reasonable and commonsense manner" are at a level that it is possible for them to participate in the proceedings and exercise identified rights to: (1) plead; (2) understand the nature of the charges; (3) understand the details of the evidence; (4) instruct counsel; (5) understand the consequences of the proceedings; and (6) testify.[963] It noted that the ICTY *Strugar* Appeals Chamber emphasised that an Accused represented by counsel cannot be expected to have the same understanding of the case material as a qualified and experienced lawyer, and that even persons in good physical health require considerable legal assistance, especially before international tribunals. It further reasoned that while the availability of counsel may compensate for certain deficiencies, the use of counsel requires that the Accused has sufficient ability to *instruct* them.[964]

In Case 002, the Trial Chamber found that Ieng Thirith was suffering from a progressive, degenerative illness and, based on the unanimous opinion that her condition would likely worsen during the trial, decided it was in the interests of justice to sever the charges and stay the proceedings against her.[965] Despite the Trial Chamber's unanimous agreement on this issue, it failed to reach a majority decision on whether it should have ordered Ieng Thirith to seek medical treatment, or whether she should have been released without condition. In light of the disagreement between the National and International Trial Chamber Judges, the Trial Chamber ordered her release from the ECCC Detention Facility.[966] The Supreme Court Chamber overturned the Trial Chamber's decision to unconditionally release Ieng Thirith without

[960] See Case 002, Decision on Ieng Thirith's Fitness to Stand Trial, 17 November 2011, E138, para. 27. The Supreme Court Chamber overturned the Trial Chamber's decision to unconditionally release Ieng Thirith without reviewing or overturning the Trial Chamber's legal criteria for evaluating fitness to stand trial. See Case 002, Decision on Immediate Appeal against the Trial Chamber's Order to Release the Accused Ieng Thirith, 13 December 2011, E138/1/7. See also Case 002, Decision on Ieng Sary's Fitness to Stand Trial, 26 November 2012, E238/9, para. 18.
[961] Case 002, Decision on Ieng Sary's Fitness to Stand Trial, 26 November 2012, E238/9, para. 18.
[962] Case 002, Decision on Immediate Appeal against the Trial Chamber's Order to Release the Accused Ieng Thirith, 13 December 2011, E138/1/7, para. 29; Case 002, Decision on Ieng Sary's Fitness to Stand Trial, 26 November 2012, E238/9, para. 18.
[963] Case 002, Decision on Ieng Thirith's Fitness to Stand Trial, 17 November 2011, E138, paras 26-27.
[964] Ibid, para. 28.
[965] Ibid.
[966] Ibid, disposition.

reviewing or overturning the Trial Chamber's legal criteria for evaluating fitness to stand trial.[967]

In a separate instance, the Trial Chamber affirmed its findings that Ieng Sary was fit to stand trial and held that Ieng Sary could be ordered to participate in proceedings by audio-visual means from his holding cell and gave notice that it could so order where Ieng Sary was "deemed fit to stand trial, but where his presence in the courtroom would be contrary to his medical interests and/or to the expeditious conduct of the trial".[968] It rejected subsequent requests from the Ieng Sary defence to audio and/or video record Ieng Sary in the holding cell, holding that there is no right implicitly guaranteed in the ICCPR to do so. It further considered that this holding did not deny Ieng Sary an adequate record of whether or not he was fit to be tried, given that he was assessed by court-appointed experts to be fit, and was regularly assessed by medical personnel who provided daily written records to the Trial Chamber.[969]

4.12.3. Consequences of a finding of unfitness

Upon a finding of unfitness, remedial action must be undertaken in light of a possibility, even slight, of a meaningful improvement, considering the interests of justice in trying the Accused.[970] Before releasing an Accused, the Trial Chamber must evaluate security measures according to the specific circumstances of the case and within the applicable legal framework, carefully assess all interests at stake, and give proper weight to all relevant factors.[971] The Trial Chamber must also be vigilant that any continued detention is not for an unreasonably long period of time, in breach of internationally recognised human rights.[972]

In finding that the Trial Chamber erred in deciding to stay criminal proceeding and unconditionally release Ieng Thirith as unfit to stand that trial, the Supreme Court Chamber considered that unconditional release was irreconcilable with the interests of justice and was not substantiated by practice at the national or international level.[973] It noted that international criminal courts had "gone to great lengths to ensure that every possibility to prosecute the

[967] See Case 002, Decision on Immediate Appeal against the Trial Chamber's Order to Release the Accused Ieng Thirith, 13 December 2011, E138/1/7.
[968] Case 002/01, Decision on the Ieng Sary Defence Request to Audio and or Video Record Ieng Sary in the Holding Cell, 16 January 2013, E254/3, para. 2.
[969] Ibid, para. 14.
[970] Case 002/01, Decision on Immediate Appeal against the Trial Chamber's Order to Release the Accused Ieng Thirith, 13 December 2011, E138/1/7, para. 29.
[971] Ibid, para. 30.
[972] Ibid.
[973] Ibid, paras 28, 30.

accused is exhausted", and that at the ICTY, measures to secure the presence of Accused before the court were applied notwithstanding their ill-health.[974] It also cited the ICC *Lubanga* Appeals Chamber's holding in concluding that international case law indicates that unconditional release is not the only option available to it where it has stayed or suspended proceedings due to an obstacle that might be removed in the future.[975] It considered that for Ieng Thirith, the Trial Chamber should have assessed security measures according to the specific circumstances of the case, and before releasing her, should have carefully assessed all interests at stake and given proper weight to all relevant factors.[976] It ordered the Trial Chamber to institute additional medical treatment and re-review Ieng Thirith's condition and to detain her in a hospital or other appropriate facility as determined by the Trial Chamber.[977]

4.13. Visitation rights

Internal Rule 21 did not expressly provide for visitation rights. While Internal Rule 55 gave the Co-Investigating Judges jurisdiction to limit contacts between detainees in the interests of investigation, limitations on contacts could only be ordered in certain circumstances to prevent pressure on witnesses or victims.[978] Without any other legal authority, the Co-Investigating Judges had no power over the conditions at the ECCC Detention Facility, which remained under the Chief of Detention's authority,[979] *i.e.*, under the General Department of Prisons of the Ministry of the Interior.

In setting aside the Provisional Detention Conditions Order in Case 002, the Trial Chamber cited ICC and ECtHR jurisprudence in concluding that limitations on contacts could "only be ordered to prevent pressure on witnesses or victims when there is evidence reasonably capable of showing that there is a concrete risk that the charged persons might collude with other charged persons to exert such pressure while in detention".[980] It found that "in none of the five cases before the Co-Investigating Judges, where provisional detention was ordered, was

[974] Ibid, paras 19-20.
[975] Ibid, para. 25.
[976] Ibid, para. 30.
[977] Ibid, paras 42-43, 49, disposition.
[978] Case 002, Decision on Nuon Chea's Appeal Concerning Provisional Detention Conditions, 26 September 2008, C33/I/7, paras 28, 21. See also Case 002, Decision on Appeal Concerning Contact Between the Charged Person and his Wife, 30 April 2008, A104/II/7, paras 14-20.
[979] Case 002, Decision on Nuon Chea's Appeal Concerning Provisional Detention Conditions, 26 September 2008, C33/I/7, para. 28; Case 002, Decision on Appeal Concerning Contact Between the Charged Person and his Wife, 30 April 2008, A104/II/7, paras 10, 14, 21.
[980] Case 002, Decision on Nuon Chea's Appeal Concerning Provisional Detention Conditions, 26 September 2008, C33/I/7, paras 28, 21. See also Case 002, Decision on Appeal Concerning Contact Between the Charged Person and his Wife, 30 April 2008, A104/II/7, paras 14-20.

detention stated to be a necessary measure to prevent collusion between the Charged Persons".[981] It also reasoned that the ECCC Detention Facility was under the jurisdiction of the national prison authorities and subject to Cambodian law.[982]

In ordering that Ieng Sary and Ieng Thirith be allowed to meet in accordance with the Detention Rules, the Trial Chamber found that the Co-Investigating Judges' decisions preventing them from doing so were not adequately reasoned, failing to explain how the limitation on contacts was necessary and proportionate to protect the interests of the investigation.[983] It noted that Ieng Sary and Ieng Thirith had been married for 57 years, the alleged crimes were committed 30 years ago, and thus the Charged Persons had had "all that time to discuss any matter related to such allegations".[984]

4.14. Authority to order a stay of proceedings when a fair trial is not possible

Although the UN-RGC Agreement, the ECCC Law, and the Internal Rules did not provide for a "stay of proceedings", Cambodian criminal procedure provides for the power to "suspend" or "stay" proceedings in circumstances where there is a lasting impediment to the continuation of the proceedings.[985] However, unconditional release was not the only option where the ECCC stayed or suspended proceedings due to an obstacle that might be removed in the future.[986] Where a chamber had decided to stay the proceedings and the obstacle was conditional or reversible, the ECCC retained jurisdiction over the Accused.[987]

In reaching these conclusions, the Supreme Court Chamber interpreted a "stay" to refer to either a "postponement or halting of a proceeding, judgment, or the like" or an "order to suspend all or part of a judicial proceeding or a judgment resulting from that proceeding". It reasoned that where a stay of criminal proceedings is permitted, it functions as a response to long-lasting obstacles to the continuation of proceedings, and that if that obstacle is not removed, the state of suspension can be lifted through termination of the proceedings upon the death or lapse of a statute of limitations, or where the legal system so allows. It further reasoned

[981] Case 002, Decision on Nuon Chea's Appeal Concerning Provisional Detention Conditions, 26 September 2008, C33/I/7, para. 23.
[982] Ibid, para. 26.
[983] Case 002, Decision on Appeal Concerning Contact Between the Charged Person and his Wife, 30 April 2008, A104/II/7, para. 18.
[984] Ibid, para. 19.
[985] Case 002, Decision on Immediate Appeal against the Trial Chamber's Order to Release the Accused Ieng Thirith, 13 December 2011, E138/1/7, paras 17-18.
[986] Ibid, para. 25.
[987] Ibid, para. 24.

that the stay does not bar procedural actions aimed at removing the obstacle. Rather, it considered this to be an obligation of the authority exercising jurisdiction over the case "based in the duty to prosecute, the presumption of innocence, fairness relating to the right to trial within a reasonable time, and in the economy of proceedings".[988]

The Supreme Court Chamber also held that it was irrelevant and inappropriate for the Trial Chamber to rely on the ECCC's financial situation in their decision to sever the charges in Case 002.[989] It reasoned that "[w]hile Judges are at all times obligated to be mindful of the efficiency of proceedings, they must act within the *sacrum* sphere of the law, the tenants of which cannot be overridden by the *profanum* of budgetary savings".[990] It considered that beyond shaping the subject-matter jurisdiction, efficiency-driven prosecutorial decisions on which cases to prosecute, and efficiency-driven decisions on the withdrawal of the charges, "trial judges cannot tailor their cognisance of pending matters into budgetary savings". It concluded that "if there is insufficient funding to guarantee a trial driven by law, all ECCC proceedings must be terminated, and the court must close down".[991]

In Cases 004/02, 003 and 004, the Co-Investigating Judges, considering that the ECCC's funding had reached a "crisis" point and that the outlook going forward had become incompatible with the basic principles of a fair trial, the rule of law, and judicial independence, contemplated issuing a stay of proceedings permanently with full prejudice.[992] They accordingly requested submissions from the parties and Office of Administration on the budgetary situation of the ECCC and its impact on Cases 004/02, 003 and 004. After conducting an extensive review of Cambodian and international law, they concluded that they have the power to stop all investigations because of a fundamental breach of fair trial rights.[993] However, the Principal Donor Group gave assurances of being "deeply committed" and the ECCC experienced a rapid increase in funding. Therefore, the Co-Investigating Judges deferred their decision on a stay, remaining "actively seised of the matter until the last closing order

[988] Ibid, para. 18.
[989] Case 002, Decision on Immediate Appeals Against Trial Chamber's Second Decision on Severance of Case 002, 25 November 2013, E284/4/8, paras 45, 49, 75.
[990] Ibid, para. 75.
[991] Ibid, para. 75.
[992] Cases 003, 004, 004/02, Request for Submissions on the Budgetary Situation of the ECCC and its Impact on Case 003, 004, and 004/2, 5 May 2017, D349, paras 75-82.
[993] Cases 003, 004, 004/02, Combined Decision on the Impact of the Budgetary Situation on Cases 003, 004, and 004/2, 11 August 2017, D349/6, para. 16; Cases 003, 004, 004/02, Request for Submissions on the Budgetary Situation of the ECCC and its Impact on Case 003, 004, and 004/2, 5 May 2017, D349, paras 75-87.

[was] issued".[994] Ultimately, the Co-Investigating Judges did not order a stay of proceedings, instead proceeding to issue their separate and opposing Closing Orders in each case.[995]

[994] Cases 003, 004, and 004/02, Combined Decision on the Impact of the Budgetary Situation on Cases 003, 004, and 004/2, 11 August 2017, D349/6, para. 69.
[995] For more on Cases 004/02, 003, and 004, the Closing Orders, and the termination of these three cases, see *Guide to the ECCC (Volume I)*, section 5.3.

5. Procedure

The Internal Rules provided for much of the structure of the ECCC's proceedings, codifying Cambodian procedure and adapting it to the international character of the ECCC, adopting additional rules where existing procedures were insufficient. The Internal Rules also included general provisions addressing issues such as self-incrimination by witnesses, the protective measures applicable to participating victims, the inclusion of expert evidence, the regime applicable to *amicus curiae* and other interventions, and the procedure for the filing of documents related to proceedings.

5.1. General features

5.1.1. Architecture of proceedings

Under Article 16 of the ECCC Law, the Co-Prosecutors (one Cambodian, one International) "work[ed] together to prepare indictments against the Suspects in the Extraordinary Chambers".[996] If the Co-Prosecutors had reason to believe that crimes within the ECCC's jurisdiction had been committed, they opened an investigation by sending an Introductory Submission to the Co-Investigating Judges.[997] In the event of a disagreement between the Co-Prosecutors, both or either Co-Prosecutor could submit the facts and reasons behind their dispute to the Pre-Trial Chamber for adjudication.[998] The Co-Prosecutors had the right to appeal decisions of the Co-Investigating Judges[999] and trial judgments.[1000] Decisions of the Co-Prosecutors were not subject to appeal.[1001]

The Office of the Co-Investigating Judges was an independent office.[1002] Under Article 23 (new) of the ECCC Law, the Co-Investigating Judges (one Cambodian, one International) were responsible for the conduct of the investigations and had the power to question suspects and victims, to hear witnesses, and to collect evidence.[1003] They also made decisions on the admissibility of Civil Parties, who could participate in investigations.[1004] Except for actions that had to be taken jointly under the ECCC Law or the Internal Rules, the Co-Investigating

[996] ECCC Law, article 16. See also UN-RGC Agreement, article 6.
[997] ECCC Law, article 16; Internal Rules, rule 53(1).
[998] ECCC Law, article 20 (new). See also Internal Rules, rules 13(5), 71; UN-RGC Agreement, articles 6(4), 7.
[999] Internal Rules, rule 74(2).
[1000] ECCC Law, article 17 (new).
[1001] Internal Rules, rule 13(6).
[1002] Internal Rules, rule 14(1); UN-RGC Agreement, article 5(3).
[1003] ECCC Law, article 23 (new). See also UN-RGC Agreement, article 5(1).
[1004] Internal Rules, rule 23 *bis*.

Judges could delegate power to one Co-Investigating Judge (by joint written decision) or to their investigators (by rogatory letter).[1005]

The Co-Investigating Judges had the power to charge any Suspects named in the Introductory Submission.[1006] At the conclusion of their investigation, the Co-Investigating Judges issued a Closing Order, either indicting the Charged Person and sending him or her to trial or dismissing the case.[1007]

Under Articles 20 (new) and 23 (new) of the ECCC Law, the Pre-Trial Chamber had jurisdiction to hear disagreements between the Co-Prosecutors and the Co-Investigating Judges (should they choose to seize the Pre-Trial Chamber with their disagreements).[1008] The Pre-Trial Chamber also had jurisdiction to hear appeals from decisions and orders of the Co-Investigating Judges on a limited number of grounds and to hear applications for requests for annulment of investigative action.[1009] A decision of the Pre-Trial Chamber required the affirmative vote of at least four Judges.[1010]

The Trial Chamber was composed of five Judges, of which three were Cambodian (including one as President) and two were foreign Judges.[1011] Once seized of an indictment, a Trial Chamber tried the case and decided whether there was proof of the Accused's guilt beyond reasonable doubt.[1012] The Trial Chamber Judges were required to attempt to achieve unanimity in their decisions.[1013] If this were not possible, a decision by the Trial Chamber required an affirmative vote of at least four Judges.[1014] In the event that unanimity could not be reached, a judicial decision would contain the opinions of the majority and the minority.[1015]

The Supreme Court Chamber, which served as both appellate chamber and court of final instance, was composed of seven Judges. Of these, four were Cambodian (one of whom was President) and three were foreign Judges.[1016] A decision by the Supreme Court Chamber

[1005] Internal Rules, rule 14(4)-(5).
[1006] Internal Rules, rule 55(4).
[1007] Internal Rules, rule 67(1).
[1008] ECCC Law, articles 20 (new), 23 (new). See also UN-RGC Agreement, articles 5(4), 6(4), 7; Internal Rules, rules 14(7), 72.
[1009] Internal Rules, rules 73, 74, 76.
[1010] UN-RGC Agreement, article 7(4).
[1011] ECCC Law, article 9 (new).
[1012] Internal Rules, rule 87(1).
[1013] ECCC Law, article 14(1) (new); UN-RGC Agreement, article 4(1).
[1014] ECCC Law, article 14(1)(a) (new); UN-RGC Agreement, article 4(1)(a).
[1015] ECCC Law, article 14(2) (new).
[1016] ECCC Law, article 9 (new); UN-RGC Agreement, article 3(2)(b).

required unanimity or the affirmative vote of at least five Judges.[1017] The Supreme Court Chamber could decide appeals against a judgment or a decision of the Trial Chamber on the grounds of an error on a question of law invalidating the judgment or decision, or on the grounds of an error of fact which occasioned a miscarriage of justice.[1018] The Supreme Court Chamber could either confirm, annul, or amend decisions in whole or in part.[1019] An appeal against a trial judgment could be filed by the Co-Prosecutors or the Accused, while the Civil Parties could appeal a decision on reparations.[1020]

The Defence Support Section was directed by a Head, with a national and international Deputy.[1021] The Defence Support Section was responsible for maintaining lists of qualified defence lawyers, providing basic legal assistance and support (including legal and document research) for defence counsel, and making determinations on indigence and the assignment of lawyers to indigent persons.[1022] During the investigation, Suspects were entitled to assistance from counsel of their own choosing, and to legal aid if they could not afford counsel.[1023]

The Internal Rules established a Victims Support Section and the Civil Party Lead Co-Lawyers Section.[1024] The Victims Support Section had responsibilities including assisting victims in the lodging of complaints under the supervision of the Co-Prosecutors, assisting victims in submitting Civil Party applications under the supervision of the Co-Investigating Judges,[1025] and maintaining lists of counsel to facilitate legal representation.[1026] The Victims Support Section also had the responsibility of developing and implementing non-judicial activities and measures addressing the broader interests of victims.[1027]

The Civil Party Lead Co-Lawyers comprised a Cambodian and foreign lawyer.[1028] They were responsible for organising the representation of Civil Parties during the trial stage and beyond,

[1017] ECCC Law, article 14(1)(b) (new); UN-RGC Agreement, article 4(1)(b).
[1018] Internal Rules, rule 104(1). An immediate appeal against a decision of the Trial Chamber may also be based on a discernible error in the exercise of the Trial Chamber's discretion which resulted in prejudice to the appellant. Decisions which may be subject to immediate appeal are: (1) decisions which have the effect of terminating the proceedings; (2) decisions on detention and bail; (3) decisions on protective measures; and (4) decisions on interference with the administration of justice. See Internal Rules, rule 104(4). See also ECCC Law, article 36 (new).
[1019] Internal Rules, rule 104(2).
[1020] Internal Rules, rule 105(1).
[1021] Internal Rules, rule 11(1).
[1022] Internal Rules, rule 11.
[1023] ECCC Law, article 24 (new).
[1024] Internal Rules, rules 12, 12 *ter*.
[1025] Internal Rules, rule 12 *bis* (1)(a), (b).
[1026] Internal Rules, rules 12 *bis* (1)(c)-(e), (g), (2).
[1027] Internal Rules, rule 12 *bis* (4).
[1028] Internal Rules, rule 12 *ter* (4).

"whilst balancing the rights of all parties and the need for an expeditious trial within the unique ECCC context".[1029] The Civil Party Lead Co-Lawyers had "ultimate responsibility to the [ECCC] for the overall advocacy, strategy and in-court presentation of the interests of the consolidated group of Civil Parties during the trial stage and beyond".[1030] They were also responsible for coordinating the actions of Civil Party lawyers.[1031]

5.1.2. The legal basis for the Internal Rules

The ECCC Trial Chamber repeatedly held that the 2007 Code of Criminal Procedure governed proceedings before the ECCC and that the Internal Rules codified the 2007 Code of Criminal Procedure, while also reflecting the need to take into account international standards where necessary and appropriate.[1032] Thus, "while Cambodian law governs the procedure before the Chamber, guidance [was] also sought from procedural rules established at the international level, where appropriate".[1033]

In reaching this conclusion, the Trial Chamber cited Article 12 of the UN-RGC Agreement, which provided that "procedure shall be in accordance with Cambodian law", with recourse to procedural rules at the international level being permissible where Cambodian law did not deal with a certain matter, where there was uncertainty regarding the interpretation or application of a relevant rule of Cambodian law, or where there was a question regarding the consistency of such a rule with international standards.[1034] The ECCC Law included identical language in the procedure governing the roles of the Co-Prosecutors,[1035] Co-Investigating Judges,[1036] Trial Chamber,[1037] and Supreme Court Chamber.[1038] The Preamble to the Internal Rules also followed these provisions.[1039]

The Trial Chamber conducted an in-depth analysis of the legality of the Internal Rules while

[1029] Internal Rules, rule 12 *ter* (1).
[1030] Internal Rules, rule 12 *ter* (5)(b).
[1031] Internal Rules, rule 12 *ter* (6). See also Internal Rules, rule 23 *ter* (1), providing that Civil Parties will be represented by a Civil Party lawyer at the latest from the issuance of the Closing Order onwards.
[1032] Case 002/02, Judgment, para. 35; Case 002/01, Judgment, para. 21; Case 001, Judgment, para. 35.
[1033] Case 001, Judgment, para. 35.
[1034] See Case 002/02, Judgment, para. 35; Case 002/01, Judgment, para. 21; Case 001, Judgment, para. 35 (referring to UN-RGC Agreement, article 12(1)).
[1035] ECCC Law, article 20 (new).
[1036] ECCC Law, article 23 (new).
[1037] ECCC Law, article 33 (new).
[1038] ECCC Law, article 37 (new).
[1039] Internal Rules (Rev. 0), preamble.

addressing Nuon Chea's argument that the Internal Rules were "unconstitutional".[1040] The Trial Chamber dismissed the assertion that the judges were acting *ultra vires* in adopting the Internal Rules, stating that "[n]othing […] in the ECCC Agreement prohibits the adoption of procedural rules by a Plenary Session convened for that purpose".[1041] The Supreme Court Chamber also rejected arguments regarding the unconstitutionality of the Internal Rules, considering that they were "an expression of a consolidation of the applicable legal framework rather than usurpation of legislative powers".[1042]

5.1.3. Relationship with national legal procedure

The nature of the relationship between national and international standards has been debated: ECCC Judges described the ECCC variously as a "new internationalised court applying international norms and standards",[1043] a "hybrid court [with] jurisdiction to prosecute both international and domestic crimes",[1044] and a domestic court "established by and within the domestic system".[1045] This question was considered specifically in the context of the ECCC's procedural regime.

The Trial Chamber established that the Internal Rules codified Cambodian procedure at the point of drafting.[1046] Subsequently, the Internal Rules had self-standing status, meaning that the Internal Rules had primacy in the event of a conflict between the Rules and Cambodian procedure.[1047] Several judicial rulings confirmed, however, that Cambodian procedure would continue to apply in the event of a lacuna in the Internal Rules.[1048]

[1040] Case 002/01, Decision on Nuon Chea's Preliminary Objection Alleging the Unconstitutional Character of the ECCC Internal Rules, 8 August 2011, E51/14, paras 1, 3.
[1041] Ibid, para. 6.
[1042] Case 002/01, Appeal Judgment, para. 106.
[1043] Case 002, Decision on Co-Lawyers' Urgent Application for Disqualification of Judge Ney Thol pending the Appeal Against the Provisional Detention Order in the Case of Nuon Chea, 4 February 2008, C11/29, para. 30. See also Case 001, Decision on Appeal Against Provisional Detention Order, 3 December 2007, C5/45, paras 13-25; Case 002, Decision on Closing Order Appeal (Ieng Sary), para. 131.
[1044] Case 001, Separate and Dissenting Opinion of Judge Jean-Marc Lavergne on Sentence, 26 July 2010, E188.1, para. 5.
[1045] Case 001, Appeal Judgment, Partially Dissenting Joint Opinion of Judges Agnieszka Klonowiecka-Milart and Chandra Nihal Jayasinghe, paras 9-11.
[1046] Case 002/02, Judgment, para. 35; Case 002/01, Judgment, para. 21; Case 001, Judgment, para. 35.
[1047] Case 002, Decision on Nuon Chea's Appeal Against Order Refusing Request for Annulment, 26 August 2008, D55/I/8, para. 14.
[1048] Case 002/01, Decision on Immediate Appeal by Khieu Samphan on Application for Release, 6 June 2011, E50/3/1/4, para. 47; Case 002, Decision on Closing Order Appeal (Ieng Sary), para. 118; Case 002, Decision on Ieng Sary's Appeal Regarding the Appointment of a Psychiatric Expert, 21 October 2008, A189/I/8, para. 22; Case 002, Decision on Nuon Chea's Appeal Against Order Refusing Request for Annulment, 26 August 2008, D55/I/8, para. 15; Case 001, Decision on Appeal Against Provisional Detention Order, 3 December 2007, C5/45, para. 7.

The Internal Rules were "a self-contained regime of procedural law related to the unique circumstances of the ECCC".[1049] Other international courts and tribunals had adopted Rules of Procedure and Evidence which were "specifically adapted to the requirements of complex international criminal trials".[1050] The ECCC Plenary adopted a similar approach when drafting the Internal Rules, as was fitting given the nature of the ECCC.[1051] By consequence, the Internal Rules applied in the event of any difference between the procedures outlined in the Internal Rules and the Code of Criminal Procedure.[1052]

In the event of a lacuna in the Internal Rules, however, recourse could be had to the Code of Criminal Procedure.[1053] In considering Kaing Guek Eav *alias* Duch's appeal against provisional detention, the Pre-Trial Chamber found that there was no relevant provision in the UN-RGC Agreement or ECCC Law directly dealing with appeals against orders of provisional detention, and concluded that the Pre-Trial Chamber fulfils the role of the Cambodian Investigation Chamber at the ECCC.[1054] In Case 002, the Pre-Trial Chamber placed supplementary weight on the Code of Criminal Procedure when ruling on a request in relation to the appointment of an expert.[1055] The Supreme Court Chamber, Judge Noguchi dissenting, also read requirements in the Code of Criminal Procedure into the Internal Rules when determining the criteria for provisional detention under Rule 81.[1056]

Other judicial rulings, however, adopted different approaches to lacunae in the Internal Rules.

[1049] Case 002, Decision on Nuon Chea's Appeal Against Order Refusing Request for Annulment, 26 August 2008, D55/I/8, para. 14.
[1050] Case 002/01, Decision on Nuon Chea's Preliminary Objection Alleging the Unconstitutional Character of the ECCC Internal Rules, 8 August 2011, E51/14, para. 7. The Trial Chamber also clarified that the ECCC was entitled to adopt its own Internal Rules in compliance with international standards "which take into account the specific mechanisms necessary to adjudicate mass crimes". See Case 001, Decision on Request for Release, 15 June 2009, E39/5, para. 11.
[1051] Case 002/01, Decision on Nuon Chea's Preliminary Objection Alleging the Unconstitutional Character of the ECCC Internal Rules, 8 August 2011, E51/14, para. 7.
[1052] Case 002, Decision on Nuon Chea's Appeal Against Order Refusing Request for Annulment, 26 August 2008, D55/I/8, para. 14.
[1053] Ibid, para. 15. See also Internal Rules, rule 2 ("Where in the course of ECCC proceedings, a question arises which is not addressed by these IRs, the Co-Prosecutors, Co-Investigating Judges or the Chambers shall decide in accordance with Article 12(1) of the Agreement and Articles 20 new, 23 new, 33 new or 37 new of the ECCC Law as applicable, having particular attention to the fundamental principles set out in Rule 21 and the applicable criminal procedural laws. In such a case, a proposal for amendment of these IRs shall be submitted to the Rules and Procedure Committee as soon as possible"); Case 001, Decision on Appeal Against Provisional Detention Order, 3 December 2007, C5/45, paras 6-7.
[1054] Case 001, Decision on Appeal Against Provisional Detention Order, 3 December 2007, C5/45, paras 6-7. See also Case 001, Decision on Closing Order Appeal, para. 41.
[1055] Case 002, Decision on Ieng Sary's Appeal Regarding the Appointment of a Psychiatric Expert, 21 October 2008, A189/I/8, para. 22.
[1056] Case 002/01, Decision on Immediate Appeal by Khieu Samphan on Application for Release, 6 June 2011, E50/3/1/4, para. 47.

In Case 001, the Trial Chamber considered that a request to read in Civil Party reparations from international systems was impermissible because it was not presently permitted under the Internal Rules, holding that "[l]imitations of this nature cannot be circumvented through jurisprudence but instead require [Internal] Rule amendments".[1057] By contrast, the Pre-Trial Chamber in Case 002 made recourse to international rules and examined ICTY jurisprudence to fill a lacuna in the Internal Rules regarding the precise meaning of "fitness to stand trial".[1058]

5.2. General provisions of the Internal Rules

5.2.1. Self-incrimination by a witness

The regime governing potentially self-incriminating evidence was set out in Internal Rule 28. The Co-Investigating Judges and chambers were not to call as a witness any person against whom there was evidence of criminal responsibility under Rule 24(4) of the Internal Rules, except as outlined in Internal Rule 28.[1059] The right against self-incrimination applied at all stages of proceedings, including preliminary investigations by the Co-Prosecutors, investigations by the Co-Investigating Judges, and proceedings before the chambers.[1060]

A witness had to be notified of their right to object to making any statement that might tend to incriminate themselves. If a witness had not already been notified of this right, the Co-Prosecutors, Co-Investigating Judges, or chambers had to notify them before any interview or testimony.[1061] In Cases 001, 002/01, and 002/02, the Trial Chamber observed that witnesses had been informed of their right not to self-incriminate and, upon request, had been assisted by counsel.[1062]

A person against whom there was inculpatory evidence could provide evidence of other facts and circumstances seen or heard, beyond the personal acts of the witness, but a fear of self-incrimination was a factor which could be of relevance when assessing the reliability of a witness's testimony.[1063] Furthermore, a convicted person could be called to testify without

[1057] Case 001, Judgment, para. 662.
[1058] Case 002, Decision on Nuon Chea's Appeal Regarding Appointment of an Expert, 22 October 2008, D54/V/6, paras 20-27.
[1059] Internal Rules, rule 24(4).
[1060] Internal Rules, rule 28(1).
[1061] Internal Rules, rule 28(2).
[1062] See Case 002/02, Judgment, para. 50; Case 002/01, Judgment, para. 30; Case 001, Judgment, para. 50. See also Case 002/01, Trial Chamber Response to Motions following Trial Management Meeting of 5 April 2011, 8 April 2011, E74, pp. 1-2.
[1063] Case 002/02, Judgment, para. 62.

falling foul of the self-incrimination provisions.[1064] In a trial management meeting, the Trial Chamber clarified that, if it decided to do so, it could call Duch to testify under oath as an ordinary witness;[1065] Internal Rule 24(4) would not prevent a person convicted in Case 001 from testifying as a witness in Case 002. If appeal proceedings in Case 001 had not concluded, the Trial Chamber could nonetheless hear Duch as a witness, following appropriate directions from the Chamber regarding his right against self-incrimination.[1066]

A question of self-incrimination could be raised by the witness or a party.[1067] If an issue of self-incrimination arose, and the witness did not waive that right, the Co-Investigating Judges or chambers would suspend the taking of testimony and provide the witness with a lawyer.[1068] After consultation with the Co-Prosecutors, a questioning judicial body had the discretion to assure the witness that evidence would be kept confidential and would not be used against the witness in further prosecution by the ECCC.[1069] In considering whether to compel the witness to provide the evidence, the judicial body would examine the importance and uniqueness of the evidence, the nature of the possible incrimination, and the sufficiency of protection for the witness.[1070] Considering these provisions, the Trial Chamber in Case 002/02 chose not to call Im Chaem as a witness, as the allegations falling within the scope of the Case 002/02 trial largely overlapped with those in the judicial investigation against her.[1071]

If the evidence was given, the Co-Investigating Judges or Chambers could order that the evidence be given *in camera*, without disclosure of the witness's identity to the public, and could order the use of further protective measures.[1072]

5.2.2. Protective measures

The ECCC assumed the obligation to protect victims who participated in the proceedings,[1073]

[1064] See Case 002/01, Trial Chamber Response to Motions following Trial Management Meeting of 5 April 2011, 8 April 2011, E74, pp. 1-2.
[1065] Case 002/01, Trial Chamber Response to Motions following Trial Management Meeting of 5 April 2011, 8 April 2011, E74, p. 1.
[1066] Ibid, pp. 1-2.
[1067] Internal Rules, rule 28(8).
[1068] Internal Rules, rule 28(9).
[1069] Internal Rules, rules 28(3)-(4).
[1070] Internal Rules, rule 28(5).
[1071] Case 002/02, Decision on Witnesses, Civil Parties and Experts Proposed to be Heard During Case 002/02, 18 July 2017, E459, paras 53-54.
[1072] Internal Rules, rule 28(7).
[1073] UN-RGC Agreement, article 23; ECCC Law, article 33 (new); Internal Rules, rule 29(1). The ECCC Law placed this obligation on "the Court". The Rules referred to "the ECCC", and the Agreement to "the co-investigating judges, the co-prosecutors and the Extraordinary Chambers".

whether as complainants, Civil Parties, or witnesses.[1074] Trials had to be fair and expeditious, with full respect not only for the rights of the Accused but also for "the protection of victims or witnesses".[1075]

Protective measures could be granted at the request of parties or their lawyers, or by the Co-Investigating Judges or chambers on their own motion.[1076] The protection of victims had to be considered by the Co-Investigating Judges or chambers when making any order, with the same obligation applying to other organs as applicable in the fulfilment of their duties.[1077] Additionally, the Co-Investigating Judges or chambers could, on their own motion after consultation with the appropriate supportive units, order appropriate measures to protect victims and witnesses.[1078] To decide whether to order protective measures, the Co-Investigating Judges or chambers could hold an *in camera* hearing, which could be held remotely to facilitate the participation of interested parties.[1079]

Before granting protective measures, the Co-Investigating Judges or chambers would balance the three fundamental principles applicable during ECCC proceedings: the needs of victims and witnesses; the rights of the Suspect, Charged Person, or Accused; and the fairness of the proceedings.[1080] The Co-Investigating Judges or chambers would consider whether the situation was "liable to place [the person's] life or health or that of their family members or close relatives in serious danger".[1081] A full assessment of the facts would be undertaken to determine whether such measures would be appropriate and would particularly look at the proportionality of such measures to the risk.[1082] The Co-Investigating Judges or chambers

[1074] UN-RGC Agreement, article 23; ECCC Law, article 33 (new); Internal Rules, rule 29(1). The ECCC Law and UN-RGC Agreement refer to "victims and witnesses"; the Internal Rules clarify that the provisions apply to "[v]ictims who participate in the proceedings, whether as complainants, Civil Parties, [or] witnesses". The Internal Rules provide that "victim" refers to any natural person (individual) or legal entity (*e.g.*, victims' association, school or temple) who has suffered harm caused by a crime within the jurisdiction of the ECCC. See Internal Rules, glossary ("Victim"). The Royal Government of Cambodia also assumed the obligation to take all effective and adequate actions to ensure the security, safety, and protection of persons referred to in the UN-RGC Agreement. See UN-RGC Agreement, article 24.
[1075] ECCC Law, article 33 (new).
[1076] Internal Rules, rule 29(3); Practice Direction on Protective Measures, para. 2.1. Communication with victims by any office of the court would take place via their lawyers or via the Victims' Association if direct communication could place the life or well-being of that person in danger. See Internal Rules, rule 29(2). When a witness, Civil Party, or complainant requested protection measures or informed an officer of the court that they had security or confidentiality concerns, they were referred to the WESU or the Victims Unit, as appropriate. See Practice Direction on Protective Measures, para. 2.2.
[1077] Internal Rules, rule 29(2). See also Practice Direction on Protective Measures, para. 1.3.
[1078] Internal Rules, rule 29(3).
[1079] Practice Direction on Protective Measures, para. 2.4.
[1080] Practice Direction on Protective Measures, para. 1.3.
[1081] Internal Rules, rule 29(3).
[1082] Practice Direction on Protective Measures, para. 1.4.

would also seek to obtain the consent of persons in respect of whom the measures were sought.[1083]

The Trial Chamber examined the threshold for protective measures. It considered that the case law of other international criminal tribunals, while focused on the protection of witnesses rather than Civil Parties, could provide guidance for the protection of Civil Parties. This case law showed that "protective measures [were] granted on a case by case basis when supported by information regarding the identity of the applicant and a particularized risk or threat of harm to the applicant or their relatives".[1084] The Trial Chamber also considered decisions taken by the Co-Investigating Judges, which demonstrated that protective measures were "usually granted in favour of designated persons on the basis of a specified risk",[1085] and that different considerations could apply at the investigation and trial stages as "[t]he confidentiality of judicial investigations is distinguishable from trial proceedings, which are instead presumptively public".[1086] The Trial Chamber applied a similar standard, finding that protective measures were not warranted in the absence of any information regarding the identity of the Civil Parties, the specific circumstances warranting such measures, or their safety concerns.[1087]

Protective measures ordered by the Co-Investigating Judges or chambers could include, but were not limited to, the conduct of *in camera* proceedings[1088] and allowing the presentation of evidence by electronic or other special means.[1089] The Practice Direction on Protective Measures specified that electronic measures included distortion of the protected person's voice and/or physical features,[1090] the use of audio-visual means such as video-conferencing or closed-circuit television,[1091] the use of purely audio means of communication,[1092] or any "other electronic means which permit the protection of the protected person".[1093]

[1083] Practice Direction on Protective Measures, para. 1.5.
[1084] Case 001, Decision on Protective Measures for Civil Parties, 2 June 2009, E71, para. 7.
[1085] Ibid, para. 8.
[1086] Ibid, para. 9.
[1087] Ibid, paras 11-12.
[1088] UN-RGC Agreement, article 23; ECCC Law, article 33 (new), Internal Rules, rule 29(4)(e).
[1089] Internal Rules, rule 29 (4)(e); Practice Direction on Protective Measures, para. 3.2(d).
[1090] Practice Direction on Protective Measures, para. 3.2 (a). See also Internal Rules, rule 29(4)(d). The Internal Rules specify that this measure will be appropriate if the Charged Person or Accused requested confrontation. The Practice Direction is broader, providing that distortion may be appropriate "in particular during confrontation procedures or judgment hearings".
[1091] Practice Direction on Protective Measures, para. 3.2(b).
[1092] Ibid, para. 3.2(c).
[1093] Ibid, para. 3.2(d).

Additional measures included ordering the written record (wholly or in part) to be placed under seal,[1094] forbidding public access to specific material from the case file,[1095] physical protection (including the relocation of a protected person to a safe residence inside or outside of Cambodia),[1096] and redaction of information identifying the protected person or location.[1097] Further measures could include the establishment of contact through third parties rather than the victim directly,[1098] the use of a pseudonym,[1099] and the authorised recording of statements without identification in the case file.[1100]

Details of the identity of the protected person had to be recorded in a classified register separate from the case file,[1101] and disclosure of the identity or address of a person falling under the protective regime could be punished in accordance with Cambodian law.[1102] In general, applications for protective measures would take place no later than 15 days after the indictment became final, and protective measures for witnesses no later than the date for the filing of the witness list.[1103]

A Civil Party could appeal decisions by the Co-Investigating Judges which related to protective measures granted under Internal Rule 29(4)(c).[1104] Once granted, protective measures would apply *mutatis mutandis* throughout the entire proceedings in the case concerned as well as any other proceedings before the chambers until they were cancelled or varied.[1105] The parties could apply to vary the protective measures, or the Co-Investigating Judges or chambers could vary on their own initiative.[1106] Variations or cancellations would take place, where possible, with the consent of the protected person.[1107]

[1094] Ibid, para. 3.1(a).
[1095] Ibid, para. 3.1(b).
[1096] Internal Rules, rule 29(7); Practice Direction on Protective Measures, para. 3.1(c).
[1097] Practice Direction on Protective Measures, para. 3.1(d). See also Internal Rules, rule 29(4)(b).
[1098] Internal Rules, rules 29(2), (4)(a).
[1099] Internal Rules, rule 29(4)(b).
[1100] Internal Rules, rule 29(4)(c). A conviction could not be based solely upon statements given anonymously. See Internal Rules, rule 29(6).
[1101] Internal Rules, rule 29(5); Practice Direction on Protective Measures, para. 2.6.
[1102] Internal Rules, rule 29(5).
[1103] Internal Rules, rule 29(3) (referring to witness list filing in Internal Rule 80).
[1104] Internal Rules, rule 74(4).
[1105] Practice Direction on Protective Measures, para. 4.1.
[1106] Ibid, para. 4.3.
[1107] Ibid, para. 4.4. See *e.g.*, Case 001, Decision on Group 1 – Civil Parties' Co-Lawyers' Request to Cancel Protective Measures, 25 March 2011, F23/1 (cancelling protective measures for E2/62 following dialogue between the individual and WESU).

5.2.3. Expert witnesses

The role of the expert witness was to "provide specialised knowledge, be it a skill, or knowledge acquired through training or research, which assists the Chamber in understanding the evidence presented".[1108] The general provisions addressing expert evidence were outlined in Internal Rule 31, with Internal Rule 32 addressing the appointment of medical experts to determine whether a Charged Person or Accused were fit to stand trial. An expert opinion could be sought by the Co-Investigating Judges or the chambers on any subject considered necessary to investigations or proceedings.[1109]

An expert was appointed through order of the Co-Investigating Judges or the chambers.[1110] Pursuant to Internal Rule 80 *bis* (2), "[w]here the Chamber considers that the hearing of a proposed […] expert would not be conducive to the good administration of justice, it [could] reject the request that such person be summoned".

The Trial Chamber heard expert evidence in Cases 001,[1111] 002/01,[1112] and 002/02[1113] on issues such as historical context, state structures and policy, detention conditions and the psychological impact of crimes, forced marriage, and forensic evidence.[1114] The Trial Chamber took account of the fact that at other hybrid or international tribunals, experts have been those "possessing relevant skill or specialised knowledge acquired through education, experience or training in the proposed field of expertise". Furthermore, previous association with an external organisation needed not disqualify the individual from being called as an expert.[1115] In Case 002, the Trial Chamber considered expert evidence to assess Ieng Thirith's fitness to stand trial, concluding on the basis of the expert reports that she was unfit to stand trial, staying proceedings against her, and ordering her unconditional release.[1116]

The selected expert witness was supervised by the Co-Investigating Judges or the chambers, as appropriate.[1117] If they did not abide by the time limits set by the Co-Investigating Judges or

[1108] Case 001, Judgment, para. 55. See also Case 002, Decision on Assignment of Experts, 5 July 2012, E215, para. 16.
[1109] Internal Rules, rule 31(1).
[1110] Internal Rules, rule 31(3).
[1111] Case 001, Judgment, para. 55.
[1112] Case 002/01, Judgment, para. 30.
[1113] Case 002/02, Judgment, para. 13.
[1114] Ibid, paras 285, 2530, 2533; Case 002/01, Judgment, paras 57, 348, 834; Case 001, Judgment, paras 68, 102-103, 259. See also Case 002/02, Appeal Judgment, paras 1319, 1322-1324.
[1115] Case 002, Decision on Assignment of Experts, 5 July 2012, E215, para. 15.
[1116] Case 002, Decision on Ieng Thirith's Fitness to Stand Trial, 17 November 2011, E138, paras 1, 80-81.
[1117] Internal Rules, rule 31(4).

the chambers, a new expert could be appointed in their place.[1118] If necessary, several experts could be appointed who would produce separate reports in the event of any differences of opinion.[1119] If necessary to perform his or her assignment, the expert could have access to certain evidence on the case file, except where such access would pose a danger to victims or witnesses, or was contrary to protective measures ordered under Internal Rule 29.[1120] If necessary for the completion of the assignment, an expert could also be permitted to participate in the interview of a witness, Charged Person, Accused, or Civil Party by the Co-Investigating Judges or chambers,[1121] or to conduct such an interview.[1122]

The Co-Prosecutors, Charged Person or Accused, Civil Party or their lawyers, or the Civil Party Lead Co-Lawyers could request the Co-Investigating Judges or chambers to appoint additional experts to conduct new examinations or to re-examine a matter which was already the subject of an expert report.[1123] The request would be ruled upon as soon as possible and in any event before the end of the investigation or proceedings.[1124]

If the Co-Investigating Judges rejected such a request, the ruling could be appealed to the Pre-Trial Chamber.[1125] In considering Ieng Sary's request to appoint an expert to evaluate his own fitness in Case 002, the Pre-Trial Chamber considered that the failure of the Co-Investigating Judges to rule on the request as soon as possible amounted to a constructive refusal of the application which could therefore be appealed.[1126]

Under Internal Rule 32, the Co-Investigating Judges or chambers could, for the purposes of determining whether a Charged Person or Accused was physically and mentally fit to stand trial, or for any other reasons or at the request of a party, order that they undergo a medical, psychiatric, or psychological examination by an expert.[1127] In Case 002, the Pre-Trial Chamber considered the fitness of the Charged Persons to stand trial and concluded that there was no evidence to suggest that it was necessary to appoint an expert on mental capacity to assess Ieng

[1118] Internal Rules, rule 31(5).
[1119] Internal Rules, rule 31(9).
[1120] Internal Rules, rule 31(3).
[1121] Internal Rules, rule 31(6).
[1122] Internal Rules, rule 31(6).
[1123] Internal Rules, rule 31(10).
[1124] Internal Rules, rule 31(10).
[1125] Internal Rules, rule 31(10).
[1126] Case 002, Decision on Ieng Sary's Appeal Regarding the Appointment of a Psychiatric Expert, 21 October 2008, A189/I/8, paras 23-24.
[1127] Internal Rules, rule 32.

Sary[1128] or Nuon Chea.[1129]

5.2.4. *Amicus curiae* and intervention

The regime for permitting *amicus curiae* interventions was outlined in Internal Rule 33. Internal Rule 33 provided that, at any stage in proceedings, the Co-Investigating Judges or chambers could, "if they consider it desirable for the proper adjudication of the case", invite or grant leave to persons or entities to submit an amicus curiae brief in writing.[1130] Such interventions were to be granted, if at all, on a case-by-case basis if the interests of justice so dictated.[1131]

The Supreme Court Chamber elaborated on the differences between *amicus curiae* and interveners. It held that the interest of the *amicus* was "in an abstract interest in a particular question [rather] than in promoting or producing any particular outcome in relation to the criminal case".[1132] Interveners, by contrast, were those who did have such an interest.[1133] An *amicus curiae* should therefore be unaffiliated with the ECCC or any of its offices.[1134]

An *amicus curiae* brief could be requested on any issue and the Co-Investigating Judges or chambers had discretion to determine what time limits, if any, applied to the filing of these briefs.[1135] Following similar principles to those adopted by the *ad hoc* tribunals, the ECCC established that a broad range of persons or entities could act as *amici curiae*. The primary purpose of an *amicus curiae* in international criminal law is to aid in the determination of a case, and "primarily this concerns matters of law relevant to the current proceedings", with an *amicus curiae* adding to the arguments already received from the parties to those proceedings.[1136]

Amicus curiae submissions were invited by the Co-Investigating Judges (most notably on the definition of an "attack against a civilian population" for the purpose of crimes against

[1128] Case 002, Decision on Ieng Sary's Appeal Regarding the Appointment of a Psychiatric Expert, 21 October 2008, A189/I/8.
[1129] Case 002, Decision on Nuon Chea's Appeal Regarding Appointment of an Expert, 22 October 2008, D54/V/6.
[1130] Internal Rules, rule 33 (1).
[1131] Case 002/01, Decision on Requests to Intervene or Submit *Amici Curiae* Briefs in Case 002/01 Appeal Proceedings, 8 April 2015, F20/1, para. 12.
[1132] Ibid, para. 9.
[1133] Ibid, para. 11.
[1134] Ibid, para. 9. See also Case 001, Decision on DSS Request to the Supreme Court Chamber to Invite *Amicus Curiae* Briefs from Independent Third Parties, 3 March 2011, F16/3, para. 9.
[1135] Internal Rules, rule 33(1).
[1136] Case 002/01, Decision on Requests to Intervene or Submit *Amici Curiae* Briefs in Case 002/01 Appeal Proceedings, 8 April 2015, F20/1, para. 8.

humanity under Article 5 of the ECCC Law)[1137] and by the Pre-Trial Chamber (on issues such as Joint Criminal Enterprise ("JCE")).[1138] The Trial Chamber also granted leave for submissions on adjudicated issues such as forced marriage.[1139]

The Supreme Court Chamber rejected a request from the Defence Support Section to invite *amicus curiae* briefs on matters raised, but in their view not properly addressed, by the Accused and his Co-Lawyers.[1140] The Pre-Trial Chamber rejected an unsolicited request to file an *amicus curiae* brief regarding alleged fair trial implications of corruption allegations at the ECCC.[1141]

Charged Persons attempted to file *amicus curiae briefs* (alternatively, "intervention" briefs) in other cases. There were no specific provisions in either the ECCC framework or at the international criminal courts and tribunals regarding the admission of Charged Persons as "interveners" in the proceedings.[1142]

In Case 001, the Pre-Trial Chamber rejected a Charged Person's request to make submissions on the applicability of JCE in the Co-Prosecutor's Appeal of the Case 001 Closing Order.[1143] The Pre-Trial Chamber concluded that the Internal Rules did not provide for third party intervening submissions on issues raised on appeal, rejecting the request as the Charged Person was not charged as a member of the alleged JCE in Case 001 and the decision would not be directly applicable to the Charged Person.[1144] While a legal ruling might provide guidance in future cases, it did not follow that Charged Persons had the right to intervene in a case file to which they were not parties.[1145] The Supreme Court Chamber rejected two requests by Charged

[1137] See *e.g.*, Cases 003 and 004, Call for Submissions by the Parties in Cases 003 and 004 and Call for *Amicus Curiae* Briefs, 19 April 2016, D191.
[1138] See *e.g.*, Case 001, Decision on Request for Leave to File *Amicus Curiae* Brief, 2 October 2008, D99/3/17; Case 001, Invitation to *Amicus Curiae*, 23 September 2008, D99/3/12.
[1139] See *e.g.*, Case 002/02, Decision on Request for Leave to Submit *Amicus Curiae* Brief on Forced Marriage, 13 September 2016, E418/3.
[1140] Case 001, Decision on DSS Request to the Supreme Court Chamber to Invite *Amicus Curiae* Briefs from Independent Third Parties, 3 March 2011, F16/3.
[1141] Case 002, Decision on Request for Leave to File *Amicus Curiae* Brief, 4 August 2009, D158/5/1/14.
[1142] Case 002/01, Decision on Requests to Intervene or Submit *Amici Curiae* Briefs in Case 002/01 Appeal Proceedings, 8 April 2015, F20/1, para. 10.
[1143] Case 001, Decision on Ieng Sary's Request to Make Submissions on the Application of JCE, 6 October 2008, D99/3/19. See also Case 001, Decision on Urgent Joint Defence Request to Intervene on the Issue of JCE, 5 November 2008, D99/3/31.
[1144] Case 001, Decision on Ieng Sary's Request to Make Submissions on the Application of JCE, 6 October 2008, D99/3/19, paras 8-9, 11-13. See also Decision on Urgent Joint Defence Request to Intervene on the Issue of JCE, 5 November 2008, D99/3/31, paras 5-6.
[1145] Case 001, Decision on Ieng Sary's Request to Make Submissions on the Application of JCE, 6 October 2008, D99/3/19, para. 14. See also Decision on Urgent Joint Defence Request to Intervene on the Issue of JCE, 5 November 2008, D99/3/31, para. 8.

Persons in Cases 003 and 004 to intervene on the issue of termination of proceedings in Case 004/02.[1146]

5.2.5. Filing of documents

The procedural provisions governing the filing of documents were set out generally in the Practice Direction on the Filing of Documents and Internal Rule 39.[1147] Rules 75 and 107 set specific deadlines for submissions filed before the Pre-Trial Chamber and the Supreme Court Chamber, respectively.[1148] Parties to proceedings regularly sought extensions of the time and page limitations or permission to file outside the deadlines, which were granted in certain circumstances.[1149]

5.2.6. Format, content, language and filing

Filings had to be presented in the format outlined in the Practice Direction.[1150] Any documents submitted had to bear the appropriate classification ("Public", "Confidential", or "Strictly Confidential"), as determined by the Co-Investigating Judges or relevant chamber.[1151] In the event of filings marked "Public" or "Confidential", parties bore the responsibility of determining that filings did not contain confidential or strictly confidential information, as applicable.[1152]

Documents filed before the Co-Investigating Judges or a chamber had to follow several requirements in terms of the substance of the filing.[1153] Documents had to include an outline of the legal basis and the relief sought, a summary of the grounds of the argument, a factual outline and chronology, a summary of the relevant law, and a detailed legal argument,[1154] as

[1146] Case 004/02, Decision on Yim Tith's Request for Leave to Intervene in Case 004/2 on the Jurisdiction of the Supreme Court Chamber, 17 June 2020, E004/2/4/1, pp. 2-3; Case 004/02, Decision on Meas Muth's Request for Leave to Intervene and Respond to the International Co-Prosecutor's Immediate Appeal of the Trial Chamber's Effective Termination of Case 004/2, 17 June 2020, E004/2/2/1, pp. 2-3.
[1147] Internal Rules, rule 39.
[1148] Internal Rules, rules 75, 107.
[1149] See *e.g.*, Case 001, Decision on Co-Prosecutors' Two Applications for Extension of Page Limit for their Appeal Brief, 18 October 2010, F5/2; Case 001, Decision on Request of the Co-Lawyers for Kaing Guek Eav *alias* Duch to Extend the Time Limit for Filing an Appeal Brief Against the Judgment of the Trial Chamber of 26 July 2010, 18 October 2010, F6/2; Case 002, Decision on Khieu Samphan's Request for Extension of Time and Page Limits for Filing his Appeal Brief, 23 August 2019, F49; Case 002, Decision on Co-Prosecutors' Request for Additional Pages to Respond to Khieu Samphan's Appeal Brief of the Case 002/02 Judgment, 24 April 2020, F55/3.
[1150] Practice Direction on the Filing of Documents, article 3.2, appendix B.
[1151] Ibid, articles 3.12-3.14.
[1152] Ibid, article 3.13.
[1153] See ibid, article 4.
[1154] Ibid, article 4.1.

well any legal authorities relied upon by the applicant.[1155]

Documents generally had to be filed electronically, except in exceptional circumstances.[1156] Documents generally had to be filed in Khmer as well as in either English or French.[1157] Exceptionally, the Co-Investigating Judges or relevant chamber could authorise a party to file a document in French or English, provided that a Khmer translation was filed at the first opportunity.[1158] However, in Case 002/02, the Supreme Court Chamber ruled on a request for extension of word limits in the absence of official Khmer and English translations, relying on unofficial translations "in the interests of expedition and fairness to all parties".[1159]

5.2.7. Word and page limits

A document filed before the Co-Investigating Judges or Trial Chamber generally could not exceed 15 pages in English or French, or 30 pages in Khmer.[1160] In relation to filings under Internal Rule 92, which provided that parties may make written submissions up until closing statements at trial, the page limit could not exceed 100 pages in English or French, or 200 pages in Khmer.[1161] There were no page limits for Introductory Submissions under Internal Rule 53, Supplementary Submissions under Internal Rule 55, or Final Submissions under Internal Rule 66.[1162]

The Co-Investigating Judges or a chamber could, at the request of a participant, extend the page limit in "exceptional circumstances".[1163] The Supreme Court Chamber found that "international tribunals trying cases of similar magnitude and complexity as the ECCC provide higher page limits for appeals against judgments".[1164] By consequence, considering the magnitude and complexity of the trial judgments at the ECCC, "exceptional circumstances exist which warrant extensions of time and page limits".[1165] Nonetheless, appellate proceedings

[1155] Ibid, articles 4.2, 6.
[1156] Ibid, article 2.5. Manual filing should be used only if there is technical failure or in the event of filing items such as maps, photographs or CDs.
[1157] Ibid, article 7.1.
[1158] Ibid, article 7.2.
[1159] Case 002/02, Decision on Co-Prosecutors' Request for Additional Pages to Respond to Khieu Samphan's Appeal Brief of the Case 002/02 Judgment, 24 April 2020, F55/3, para. 19.
[1160] Practice Direction on the Filing of Documents, article 5.1.
[1161] Ibid, article 5.3.
[1162] Ibid, article 5.5.
[1163] Ibid, article 5.4.
[1164] Case 001, Decision on Co-Prosecutors' Two Applications for Extension of Page Limit for their Appeal Brief, 18 October 2010, F5/2, para. 7.
[1165] Case 002/02, Decision on Khieu Samphan's Request for Extension of Time and Page Limits for Filing his Appeal Brief, 23 August 2019, F49, para. 14.

differed at the ECCC from other international(ised) tribunals since the appellate jurisdiction was more restricted.[1166] Considering this, the Supreme Court Chamber granted an extension of a maximum of 35 pages to the Co-Prosecutor's appeal brief in Case 001,[1167] but considered Khieu Samphan's request for a 920 page additional limit to be "unduly excessive", applying a limit of 750 pages in Case 002/02.[1168]

In Case 002/02, Khieu Samphan's attempt to incorporate by reference submissions made in his Case 002/01 appeal brief was rejected by the Trial Chamber on the basis that "[t]his approach constitutes an impermissible attempt to circumvent the page limits imposed by the Chamber on the parties' respective briefs".[1169] These submissions were then excluded from the Trial Chamber's consideration.[1170]

5.2.8. Time limits

Except as otherwise provided, an application or pleading had to be filed at least 30 calendar days before any court hearing;[1171] or, in the case of a response to an application or pleadings, within 10 calendar days of notification of the document to which the participant was responding.[1172] A reply to a response was only permitted in the event that oral arguments would not be made, and had to be filed within five calendar days of notification of the response to which the participant was replying.[1173]

The time limits set out in the Internal Rules, applicable laws and Practice Directions, and, where appropriate, judicial decisions, had to be respected.[1174] Except as otherwise provided by the Internal Rules and in compliance with applicable Practice Directions, Judges could set specific time limits for the filing of pleadings, written submissions, and documents relating to a request or appeal, considering the circumstances of the case, in particular whether a Charged Person or Accused was in detention.[1175] The Co-Investigating Judges or chambers could, either through

[1166] Case 002/02, Decision on Khieu Samphan's Request for Extension of Time and Page Limits for Filing his Appeal Brief, 23 August 2019, F49, para. 16.
[1167] Case 001, Decision on Co-Prosecutors' Two Applications for Extension of Page Limit for their Appeal Brief, 18 October 2010, F5/2, para. 8. See also Case 002/02, Decision on Co-Prosecutors' Request for Additional Pages to Respond to Khieu Samphan's Appeal Brief of the Case 002/02 Judgment, 24 April 2020, F55/3.
[1168] Case 002/02, Decision on Khieu Samphan's Request for Extension of Time and Page Limits for Filing his Appeal Brief, 23 August 2019, F49, paras 15, 36.
[1169] Case 002/02, Judgment, para. 3705.
[1170] Ibid.
[1171] Practice Direction on the Filing of Documents, article 8.2.
[1172] Ibid, article 8.3.
[1173] Ibid, article 8.4.
[1174] Internal Rules, rule 39(1).
[1175] Internal Rules, rule 39(2).

request of the concerned party or on their own motion, extend a time limit or recognise the validity of an action executed after the expiration of a time limit.[1176]

In the event of a disagreement between the Co-Prosecutors or Co-Investigating Judges under Rules 71 or 72,[1177] time limits would be suspended until either consensus was achieved, the relevant 30-day period had ended, or the Pre-Trial Chamber had been seized and had completed its consideration of the dispute, as appropriate.[1178]

Internal Rule 75 outlined the timing for filing of appeals before the Pre-Trial Chamber. Generally, a notice of appeal had to be filed within 10 days from the date of the impugned decision or order,[1179] and submissions on appeal within 30 days of that date.[1180] A time limit could be extended under exceptional circumstances.[1181] Appeal submissions had to contain the arguments of fact and law upon which the appeal was based, and an appellant could not raise matters of fact or law during the hearing which were not already contained in the written submission.[1182] In the case of an immediately appealable decision of the Trial Chamber, the appeal would be filed within 30 days of the date of the decision or of its notification.[1183] If a decision was subject to immediate appeal and related to detention, bail, or protective measures, the appeal would be filed within 15 days of the date of the decision or its notification.[1184]

Under Internal Rule 107, a notice of appeal in relation to a trial judgment had to be filed within 30 days of the pronouncement of the decision or of its notification.[1185] The appeal brief then had to be filed within 60 days of the notice of appeal.[1186] Once a party had appealed, the other parties had an additional 15 days to file their notice of appeal.[1187] These time limits could also be extended. For example, the Supreme Court Chamber accepted a defence request to extend the time limit for filing an appeal brief against the Trial Judgment by 30 days, given the length

[1176] Internal Rules, rule 39(4).
[1177] These Internal Rules outline the procedure to be followed in the event of a disagreement between the Co-Prosecutors (Rule 71) and the Co-Investigating Judges (Rule 72).
[1178] Internal Rules, rule 39(5).
[1179] Internal Rules, rule 75(1).
[1180] Internal Rules, rule 75(3).
[1181] Internal Rules, rule 75(3).
[1182] Internal Rules, rule 75(4).
[1183] Internal Rules, rule 107(1).
[1184] Internal Rules, rule 107(2).
[1185] Internal Rules, rule 107(4).
[1186] Internal Rules, rule 107(4).
[1187] Internal Rules, rule 107(4).

and complexity of the issues raised.[1188]

5.3. Prosecution

Any prosecution of crimes within ECCC's jurisdiction had to be initiated by the Co-Prosecutors, either on their own initiative or after receiving one or more complaints.[1189] The Co-Prosecutors were "solely responsible for exercising the public action for crimes within the jurisdiction of the ECCC, at their own discretion or on the basis of a complaint".[1190] Any person, organisation, or other source who witnessed or was a victim of alleged relevant crimes, or had knowledge of them, had the ability to lodge a complaint.[1191] A lawyer or Victims' Association was able to prepare and/or lodge a complaint on behalf of a victim.[1192]

A complaint did not automatically initiate a prosecution. Internal Rule 49(4) provided the Co-Prosecutors discretion to reject the complaint, include the complaint in an ongoing preliminary investigation, conduct a new preliminary investigation, or forward the complaint directly to the Co-Investigating Judges. The Co-Prosecutors were required to inform the complainant of their decision in this regard as soon as possible, and in any event, not later than 60 days after registration of the complaint.[1193]

However, the Co-Prosecutors could change their decision at any time, in which case the complainant had to be informed within 30 days.[1194] The Co-Prosecutors' decision not to pursue a complaint did not establish *res judicata*.[1195] Any complaints filed with the Office of the Co-Investigating Judges had to be immediately forwarded to the Co-Prosecutors for action.[1196] Where the Co-Prosecutors decided not to pursue a complaint at the end of the preliminary

[1188] Case 001, Decision on Request of the Co-Lawyers for Kaing Guek Eav *alias* Duch to Extend the Time Limit for Filing an Appeal Brief Against the Judgment of the Trial Chamber of 26 July 2010, 18 October 2010, F6/2, para. 10.
[1189] Internal Rules, rule 49(1).
[1190] Case 002, Decision on Appeals Against Co-Investigating Judges' Combined Order D250/3/3 Dated 13 January 2010 and Order D250/3/2 Dated 13 January 2010 on Admissibility of Civil Party Applications, 27 April 2010, D250/3/2/1/5, para. 51. See also ECCC Law, article 16; Internal Rules, rule 49(1); Case 002, Decision on Appeal of Co-Lawyers for Civil Parties Against Order Rejecting Request to Interview Persons Named in the Forced Marriage and Enforced Disappearance Requests for Investigative Action, 21 July 2010, D310/1/3, para. 38.
[1191] Internal Rules, rule 49(2). See also Case 002, Order on the Admissibility of Civil Party Applicants from Current Residents of Kep Province, 25 August 2010, D392, para. 4; Case 002, Order on the Admissibility of Civil Party Applicants from Current Residents of Preah Vihear Province, 30 August 2010, D396, para. 4.
[1192] Internal Rules, rule 49(3).
[1193] Internal Rules, rule 49(4).
[1194] Internal Rules, rule 49(5).
[1195] Internal Rules, rule 49(5).
[1196] Internal Rules, rule 49(2). See *e.g.*, Case 004, Considerations of the Pre-Trial Chamber Regarding the Appeal Against Order on the Admissibility of Civil Party Applicant Robert Hamill, 14 February 2012, D5/2/4/3, Separate Opinion of Judges Rowan Downing and Katinka Lahuis, para. 2.

investigation, all associated complainants had to be informed of the decision within 30 days.[1197]

The Co-Prosecutors' role under the Internal Rules was strictly related to the ongoing cases and investigations of crimes within the ECCC's jurisdiction.[1198] Therefore, their role did not automatically extend to issues concerning interference with the administration of justice and/or the misconduct of a lawyer under Internal Rules 35 and 38, respectively.[1199] In first instance proceedings of interference with the administration of justice or misconduct of a lawyer, the Co-Prosecutors could be designated as investigators, but were not automatically a party to any appeals in that regard.[1200]

The Co-Prosecutors had "wide discretion to perform their statutory duties".[1201] Internal Rule 50(1) permitted them to conduct preliminary investigations to determine whether evidence indicated that crimes within the ECCC's jurisdiction had been committed and to identify Suspects and potential witnesses.[1202] The Pre-Trial Chamber considered that under the ECCC framework, the "the Co-Prosecutors' primary focus of their preliminary investigations is to determine whether evidence indicates that *crimes* under ECCC's jurisdiction have been committed, the *identification of suspects* being a secondary or optional focus".[1203]

Under Internal Rules 50(2) and (3), the Judicial Police and/or ECCC Investigators could search for and gather documents either: (1) with a written order of the Co-Prosecutors and agreement of the owner or the occupier of the premises; or (2) with the President of the Pre-Trial Chamber's authorisation, which had to be in writing and placed in the case file.[1204] In an emergency where there was an "absolute impossibility" to immediately provide a written authorisation, the President of the Pre-Trial Chamber could provide authorisation verbally with

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[1197] Internal Rules, rule 53(6).
[1198] Internal Rules, rules 49, 50, 53; Case 002, Decision on Admissibility on "Appeal Against the Co-Investigating Judges' Order on Breach of Confidentiality of the Judicial Investigation", 13 July 2009, D138/1/8, para. 14.
[1199] Internal Rules, rules 35, 38; Case 002, Decision on Admissibility on "Appeal Against the Co-Investigating Judges' Order on Breach of Confidentiality of the Judicial Investigation", 13 July 2009, D138/1/8, paras 13-14.
[1200] Case 002, Decision on Admissibility on "Appeal Against the Co-Investigating Judges' Order on Breach of Confidentiality of the Judicial Investigation", 13 July 2009, D138/1/8, paras 25-26.
[1201] Case 003, Decision on Meas Muth's Appeal Against the Co-Investigating Judges' Constructive Denial of Fourteen of Meas Muth's Submissions to the Office of the Co-Investigating Judges, 23 April 2014, D87/2/2, para. 38.
[1202] Internal Rules, rule 50(1); Case 002, Decision on Appeal of Co-Lawyers for Civil Parties Against Order Rejecting Request to Interview Persons Named in the Forced Marriage and Enforced Disappearance Requests for Investigative Action, 21 July 2010, D310/1/3, para. 38.
[1203] Case 003, Decision on Meas Muth's Appeal Against the Co-Investigating Judges' Constructive Denial of Fourteen of Meas Muth's Submissions to the Office of the Co-Investigating Judges, 23 April 2014, D87/2/2, para. 38 (internal citations omitted, italics in original). See also Internal Rules, rules 50(1), 53(1)(d) ("the name of the person to be investigated, if applicable").
[1204] Internal Rules, rule 50(3).

a written decision to follow within 48 hours. Any search had to be conducted in the presence of the owner or occupier of the premises or in the presence of two witnesses selected by the Co-Prosecutors who are not either Investigators or Judicial Police officers involved in the search.[1205]

The Co-Prosecutors, through the Judicial Police or ECCC Investigators, were able to summon or interview any person who may have been able to provide relevant information on the case under investigation.[1206] The Co-Prosecutors were required to draw up an inventory of items seized and provide it to the individual from whom they were seized; any items of no evidentiary value had to be returned at the end of the preliminary investigation.[1207] The Co-Prosecutors were not allowed to "eavesdrop conversations or to intercept or record any telephone or electronic correspondence, such as facsimiles or email messages" in conducting their investigation.[1208]

The Co-Prosecutors were able to order that a person suspected of having participated in a crime within the ECCC's jurisdiction or an accomplice be taken into custody. Such persons had to be informed of the reason(s) they had been taken into custody and be informed of their rights.[1209] An order for police custody had to be put in writing, signed by the Co-Prosecutors, and served on the individual being detained, unless urgency did not allow in which case the order was allowed to be made orally and committed to writing as soon as possible thereafter.[1210]

When a Suspect was detained, the Co-Prosecutors were able to order detention for up to 48 hours, with the possible extension of an additional 24 hours.[1211] At the end of this period, the Suspect had to be released or brought before the Co-Investigating Judges for an initial appearance.[1212] A Suspect could request to see a lawyer of their choice, and that lawyer had to be informed of the request immediately.[1213] The Suspect was able to meet with this lawyer, or, if that was not possible, a lawyer provided by the Defence Support Section, for a maximum of 30 minutes before the Suspect appeared before the Co-Prosecutors.[1214] The lawyer had the right

[1205] Internal Rules, rule 50(3).
[1206] Internal Rules, rule 50(4).
[1207] Internal Rules, rule 50(5).
[1208] Internal Rules, rule 52.
[1209] Internal Rules, rule 51(1).
[1210] Internal Rules, rule 51(2).
[1211] Internal Rules, rule 51(3). See *e.g.*, Case 002, Police Custody Decision for Ieng Sary, 12 November 2007, C14, p. 2; Case 002, Police Custody Decision for Ieng Thirith, C15, 12 November 2007, p. 2.
[1212] Internal Rules, rules 51(7), 57.
[1213] Internal Rules, rule 51(5). See Case 003, Arrest Warrant of Meas Muth, 10 December 2014, C1, p. 3.
[1214] Internal Rules, rule 51(5).

to be present during the period of police custody, subject to the administrative requirements of the detention centre.[1215]

The Co-Prosecutors could ask a doctor to examine a Suspect at any time, and the doctor had to examine whether the Suspect had any health conditions that made them unsuitable for further custody.[1216] The Pre-Trial Chamber held that Internal Rule 51(6) implicitly "provide[d] for the possibility that a suspect be released from police custody when he/she 'has any health conditions that make him or her unsuitable for further custody'".[1217] The Co-Prosecutors had to create a final report for every arrest and attach it to the case file, which was required to contain:

i. The full name and position of the Judicial Police officer who executed the order for police custody;

ii. The identity of the Suspect;

iii. The reason for the police custody;

iv. The date and time of the commencement of the police custody;

v. The full name of the doctor who examined the Suspect, if applicable;

vi. The identity of any lawyer who visited the Suspect;

vii. The duration of any interview and the duration of any breaks between interview periods;

viii. The date and time of the termination of police custody;

ix. Any incidents that occurred during the period of police custody; and

x. The decision made by the Co-Prosecutors at the expiry of the police custody period.[1218]

During the preliminary investigation, the Co-Prosecutors were able to jointly, or through the

[1215] Internal Rules, rule 51(5). See Case 003, Arrest Warrant of Meas Muth, 10 December 2014, C1, p. 3.
[1216] Internal Rules, rule 51(6).
[1217] Case 002, Decision on Khieu Samphan's Appeals Against Order Refusing Request for Release and Extension of Provisional Detention Order, 3 July 2009, C26/5/26, para. 81.
[1218] Internal Rules, rule 51(8).

Public Affairs Section, correct any false or misleading information.[1219] The preliminary investigation ended with the sending of the Introductory Submission to the Co-Investigating Judges.[1220]

5.3.1. Introductory Submission

If, at the conclusion of a preliminary investigation, the Co-Prosecutors had "reason to believe" that crimes within the ECCC's jurisdiction had been committed, they were required to "open a judicial investigation by sending an Introductory Submission to the Co-Investigating Judges, either against one or more named persons or against unknown persons".[1221] The Introductory Submission was required to contain: (1) a summary of the facts; (2) the type of offence(s) alleged; (3) the relevant provisions of the law that define and punish the crimes; (4) the name of any person to be investigated, if applicable; and, (5) the date and signature of both Co-Prosecutors.[1222] Non-compliance with either the formal or substantive conditions of Internal Rule 53(1) rendered an Introductory Submission null and void.[1223] However, "only a summary of the facts and the type of offence alleged are required at the stage of the Introductory Submission".[1224]

The Introductory Submission played a notice function.[1225] It and any Supplementary Submissions made pursuant to Rule 53 defined the scope of the ensuing investigation.[1226] However, "the level of particularity demanded in an indictment cannot be directly imposed upon the Introductory Submission, because the [Office of the Co-Prosecutors] makes its

[1219] Internal Rules, rule 54.
[1220] Case 003, Order on International Co-Prosecutor's Public Statement Regarding Case File 003, 18 May 2011, D14, para. 5.
[1221] Internal Rules, rule 53(1). See also Case 003, Decision on Meas Muth's Appeal Against the Co-Investigating Judges' Constructive Denial of Fourteen of Meas Muth's Submissions to the Office of the Co-Investigating Judges, 23 April 2014, D87/2/2, para. 38. See Case 002, Decision on Appeal of Co-Lawyers for Civil Parties Against Order Rejecting Request to Interview Persons Named in the Forced Marriage and Enforced Disappearance Requests for Investigative Action, 21 July 2010, D310/1/3, para. 38.
[1222] Internal Rules, rules 53(1), 53(3). See Case 002, Decision on the Appeals Against the Co-Investigating Judges Order on Joint Criminal Enterprise (JCE), 20 May 2010, D97/15/9, para. 31.
[1223] Internal Rules, rule 53(3); Case 003, Decision on Meas Muth's Appeal Against Co-Investigating Judge Harmon's Decision on Meas Muth's Applications to Seise the Pre-Trial Chamber with Two Applications for Annulment of Investigative Action, 23 December 2015, D134/1/10, paras 36-38. See also Case 002, Order on Civil Party Request for Investigative Action Concerning Enforced Disappearance, 21 December 2009, D180/6, fn. 15.
[1224] Case 002, Decision on the Appeals Against the Co-Investigating Judges Order on Joint Criminal Enterprise (JCE), 20 May 2010, D97/15/9, para. 92.
[1225] Ibid, para. 95.
[1226] Case 002, Decision on Appeal of Co-Lawyers for Civil Parties Against Order on Civil Parties' Request for Investigative Actions Concerning All Properties Owned by the Charged Persons, 4 August 2010, D193/5/5, para. 14.

Introductory Submission without the benefit of a full investigation".[1227] As an example, while it was preferable for an Introductory Submission to allege the particular type(s) of joint criminal enterprise alleged, it need not have done so. At the latest, however, the Co-Investigating Judges had to refer to the particular forms of joint criminal enterprise and/or other participation in the Closing Order.[1228]

Once the Co-Prosecutors filed an Introductory Submission, a judicial investigation was compulsory for crimes within the ECCC's jurisdiction. The Co-Prosecutors could not "reduce or withdraw all or part of the charges which must be determined by judicial decision".[1229]

The Co-Prosecutors were allowed to provide the public with an objective summary of information contained in an Introductory Submission, in order to ensure that the public was duly informed of ongoing proceedings. In doing so, the Co-Prosecutors had to account for the rights of the defence and the interests of victims, witnesses, and any other persons mentioned in the Introductory Submission, as well as the needs of the investigation.[1230] This possibility of keeping the public informed applied to the Introductory Submission, any Supplementary Submissions, and the Final Submission, but did not cover the judicial investigation as a whole.[1231]

5.3.2. Disclosure obligations

The Introductory Submission was required to be accompanied by the case file and "any other material of evidentiary value in the possession of the Co-Prosecutors, including any evidence that in the actual knowledge of the Co-Prosecutors may be exculpatory".[1232] The Co-Prosecutors could subsequently file Supplementary Submissions.[1233]

Materials merely placed by the Co-Prosecutors in a shared drive that was available to the Co-Investigating Judges and/or parties did not fall under Internal Rule 53(2), and did not create an obligation for the Co-Investigating Judges to review the material as it was not part of the

[1227] Case 002, Decision on the Appeals Against the Co-Investigating Judges Order on Joint Criminal Enterprise (JCE), 20 May 2010, D97/15/9, para. 95.
[1228] Ibid.
[1229] Case 002/01, Judgment, fn. 1.
[1230] Internal Rules, rule 54.
[1231] Case 003, Considerations of the Pre-Trial Chamber Regarding the International Co-Prosecutor's Appeal Against the Co-Investigating Judges' Order on International Co-Prosecutor's Statement Regarding Case 003, 24 October 2011, D14/1/3, paras 23-24.
[1232] Internal Rules, rule 53(2).
[1233] See Internal Rules, rules 54, 55(2), 55(3), 55(4).

Introductory Submission or any Supplementary Submissions.[1234] The glossary of terms defined "case file" for the purposes of Internal Rule 53(2) as "all the written records (*procès verbaux*) of investigative action undertaken in the course of a Preliminary Investigation or a Judicial Investigation, together with all applications by parties, written decisions and any attachments thereto at all stages of the proceedings, including the record of proceedings before the Chambers".[1235] According to the Pre-Trial Chamber, "[w]hen read in conjunction with the definition of 'case file' set out in the glossary, the expression 'any other material of evidentiary value in the possession of the Co-Prosecutors' set out in Internal Rule 53(2) appears to refer to documents other than those described in the definition of 'case file' that the Co-Prosecutor considers to constitute evidence as these either support their Introductory Submission or are of exculpatory nature".[1236]

Thereafter, the Co-Prosecutors were required as soon as practicable to disclose to the Co-Investigating Judges any material that in their actual knowledge may have suggested the innocence or mitigated the guilt of the Suspect or the Charged Person or affected the credibility of the prosecution evidence.[1237] The Pre-Trial Chamber noted a discrepancy in the various language versions of the Internal Rules in the content of Internal Rule 53(4), where the French and Khmer versions referred to the notion of "inculpatory evidence" and not to the broader category of "prosecution evidence" as in the English.[1238] The Co-Prosecutors' disclosure obligation covered material that "in the actual knowledge of the Co-Prosecutors" was exculpatory,[1239] or that affected "the reliability of inculpatory evidence which in effect amounts to exculpatory evidence".[1240]

The Co-Prosecutors did not need to speculate about defence theories, nor did uncertainties about precise defence theories provide an excuse to undertake an overbroad approach to disclosure, or include clearly inculpatory evidence within disclosures made pursuant to Internal Rule 53(4). Rather, it was "the exclusive responsibility of the Co-Prosecutors to determine in

[1234] Case 002, Decision on the Appeal from the Order on the Request to Seek Exculpatory Evidence in the Shared Material Drive, 18 November 2009, D164/4/13, para. 35.
[1235] Internal Rules, glossary.
[1236] Case 002, Decision on the Appeal from the Order on the Request to Seek Exculpatory Evidence in the Shared Materials Drive, 12 November 2009, D164/3/6, para. 32.
[1237] Internal Rules, rule 53(4).
[1238] Case 002/02, Decision on Khieu Samphan Defence Motion Regarding Co-Prosecutors' Disclosure Obligations, 22 October 2015, E363/3, fn. 36.
[1239] Ibid, para. 24.
[1240] Case 002/02, Decision on International Co-Prosecutor's Requests to Admit Written Records of Interview Pursuant to Rules 87(3) and 87(4), 29 June 2016, E319/47/3, para. 14.

good faith what information may be exculpatory".[1241] This was a continuing obligation that extended even into the trial, and also included evidence gathered in other cases with which the Co-Prosecutors were involved.[1242] It was in the interests of ascertaining the truth that Judges in relevant cases had access to these documents.[1243]

5.3.3. Disagreements between Co-Prosecutors

Where the Co-Prosecutors could not reach a common approach regarding an Introductory Submission, Article 6(4) of the UN-RGC Agreement and Article 20 of the ECCC Law directed that "the prosecution shall proceed" unless the Co-Prosecutors or one of them requested within 30 days that the Pre-Trial Chamber settle their difference.[1244] Where the difference was then brought before the Pre-Trial Chamber, and if there was again no required majority, Article 7(4) of the UN-RGC Agreement and Article 20 of the ECCC Law directed that the investigation or prosecution would proceed. Unless the Co-Prosecutors reached an agreement on how to proceed, the result of a disagreement would be that the Introductory Submission was submitted to the Co-Investigating Judges in order to open a judicial investigation.[1245] This is what occurred in Case 003 following a disagreement procedure before the Pre-Trial Chamber.[1246] No disagreement procedure was initiated in Case 004 because the Introductory Submission was submitted to the Co-Investigating Judges by the International Co-Prosecutor.

The Pre-Trial Chamber observed that Articles 6(1) and 6(4) of the UN-RGC Agreement, and Articles 16 and 20 (new) of the ECCC Law, and Internal Rule 71(3) clearly indicated that one Co-Prosecutor could act without the consent of the other Co-Prosecutor if neither of them brought their disagreement before the Pre-Trial Chamber within a specific time limit.[1247] A disagreement regarding the filing of an Introductory Submission prevented one Co-Prosecutor

[1241] Case 002/02, Decision on Khieu Samphan Defence Motion Regarding Co-Prosecutors' Disclosure Obligations, 22 October 2015, E363/3, para. 24.
[1242] Case 002/01, Decision on Part of Nuon Chea's Third Request to Obtain and Consider Additional Evidence in Appeal Proceedings of Case 002/01, 16 March 2015, F2/4/2, para. 17; Case 002/02, Decision on Khieu Samphan Defence Motion Regarding Co-Prosecutors' Disclosure Obligations, 22 October 2015, E363/3, para. 16. See *e.g.*, Case 004, International Co-Investigating Judge Memorandum Regarding Continuing Legal Obligation Pursuant to Internal Rule 53(4), 13 November 2013, D175.
[1243] Case 002/02, Decision on Khieu Samphan Defence Motion Regarding Co-Prosecutors' Disclosure Obligations, 22 October 2015, E363/3, para. 16.
[1244] Case 003, Decision on Meas Muth's Appeal Against the Co-Investigating Judges' Constructive Denial of Fourteen of Meas Muth's Submissions to the Office of the Co-Investigating Judges, 23 April 2014, D87/2/2, para. 40.
[1245] Ibid, para. 41.
[1246] See Case 003, Considerations of the Pre-Trial Chamber Regarding the Disagreement Between the Co-Prosecutors Pursuant to Internal Rule 71, 18 August 2009, D1/1.3.
[1247] Ibid, para. 16.

from proceeding until it was resolved.[1248] A supermajority of four Pre-Trial Chamber Judges was necessary to prevent an action by a Co-Prosecutor, and if that threshold was not reached, the default position was that the Introductory Submissions would be forwarded to the Co-Investigating Judges for judicial investigation.[1249]

The Co-Prosecutor who objected to forwarding the Introductory Submission to the Co-Investigating Judges was required to file their written statement of facts with the Pre-Trial Chamber first. The other Co-Prosecutor then had an opportunity to respond.[1250]

The scope of the Pre-Trial Chamber's review was limited to "settling the specific issues on which the Co-Prosecutors disagree".[1251] Therefore, the Pre-Trial Chamber considered only the facts and reasons raised in the written statement of the Co-Prosecutor who seized the Pre-Trial Chamber with the disagreement, and any response by the other Co-Prosecutor.[1252] However, the Pre-Trial Chamber could request further submissions from the Co-Prosecutors.[1253] The Co-Prosecutor who sought to have the Introductory Submission forwarded to the Co-Investigating Judges did not bear any burden of persuasion. Instead, the Pre-Trial Chamber evaluated the arguments of the Co-Prosecutor whose position it was that the Introductory Submission should not go forward, and determined if they were sufficient to prevent the Introductory Submission from being forwarded.[1254]

The Director of Administration was required to immediately inform the Co-Prosecutors of the decision on the disagreement, and the Co-Prosecutors were then required to immediately proceed in accordance with the decision.[1255] Publication of the decision of the Pre-Trial Chamber was at the discretion of the Director of the Office of Administration.[1256]

5.4. Investigation phase

A judicial investigation was compulsory for crimes within ECCC's jurisdiction.[1257] The Internal Rules "govern[ed] the conduct of the judicial investigation, consolidate[d] applicable Cambodian law and, where appropriate, adopt[ed] additional rules established at the

[1248] Ibid, para. 16.
[1249] Ibid, para. 17.
[1250] Ibid, para. 27.
[1251] Ibid, para. 24.
[1252] Ibid, paras 23-24.
[1253] Ibid, para. 24.
[1254] Ibid, para. 26.
[1255] Ibid, para. 51.
[1256] Ibid, para. 53.
[1257] Internal Rules, rule 55(1). See also Case 001, Decision on Closing Order Appeal, para. 34.

international level". The Internal Rules included provisions aimed at safeguarding the integrity of the investigation, the truthfulness of the record, the rights of all parties including the rights of the Accused.[1258]

5.4.1. Scope of the investigation

The Co-Investigating Judges had a duty to investigate *in rem* all the facts alleged in the Introductory Submission or any Supplementary Submission.[1259] They were *only* permitted to investigate those facts set out in the Introductory Submission and any Supplementary Submissions.[1260] As part of the investigation, the Co-Investigating Judges were required to determine if, *prima facie*, the Suspects fell within the ECCC's personal jurisdiction.[1261]

The Co-Investigating Judges had no jurisdiction to investigate facts unless they were requested to do so by the Co-Prosecutors.[1262] If, in the course of an investigation, the Co-Investigating Judges learned of new facts outside the scope of the Introductory and any Supplementary Submissions, or were requested to investigate such facts, they were required to inform the Co-Prosecutors. They could not investigate the new facts unless they become the subject of a Supplementary Submission.[1263]

The Co-Investigating Judges were also seized of the circumstances surrounding the facts mentioned in the Introductory or Supplementary Submission, such as where the new facts were limited to aggravating circumstances relating to an existing submission.[1264] The circumstances

[1258] Case 002/01, Decision on Defence Requests Concerning Irregularities Alleged to Have Occurred During the Judicial Investigation, 7 December 2012, E251, para. 12.
[1259] Case 001, Decision on Closing Order Appeal, para. 35; Case 004, Decision on the International Co-Prosecutor's Appeal of Decision on Request for Investigative Action Regarding Sexual Violence at Prison No. 8 and in Bakan District, 13 February 2018, D365/3/1/5, para. 39.
[1260] Internal Rules, rule 55(2); Case 001, Decision on Closing Order Appeal, para. 34; Case 002, Decision on Appeal of Co-Lawyers for Civil Parties Against Order on Civil Parties' Request for Investigative Actions Concerning All Properties Owned by the Charged Persons, 4 August 2010, D193/5/5, para. 14; Case 002, Order on Request for Investigative Action, 3 April 2009, D158/5, para. 9.
[1261] Case 003, Decision on Personal Jurisdiction and Investigative Policy Regarding Suspect, 5 May 2012, D49, para. 13.
[1262] Case 001, Decision on Closing Order Appeal, para. 36.
[1263] Internal Rules, rule 55(3); Case 001, Decision on Closing Order Appeal, para. 34; Case 002, Decision on Appeal of Co-Lawyers for Civil Parties Against Order on Civil Parties' Request for Investigative Actions Concerning All Properties Owned by the Charged Persons, 4 August 2010, D193/5/5, para. 14; Case 002, Decision on Appeals Against Co-Investigating Judges' Combined Order D250/3/3 Dated 13 January 2010 and Order D250/3/2 Dated 13 January 2010 on Admissibility of Civil Party Applications, 27 April 2010, D250/3/2/1/5, para. 30.
[1264] Internal Rules, rule 55(3); Case 001, Decision on Closing Order Appeal, para. 35; Case 002, Decision on Appeal of Co-Lawyers for Civil Parties Against Order Rejecting Request to Interview Persons Named in the Forced Marriage and Enforced Disappearance Requests for Investigative Action, 21 July 2010, D310/1/3, para. 11.

in which an alleged crime was committed that contributed to the determination of its legal characterisation were not considered new facts. The Co-Investigating Judges were guided by the legal characterisation proposed by the Co-Prosecutors to define the scope of their investigation.[1265] New facts alleged in the Final Submissions were not part of the judicial investigation.[1266]

5.4.2. Power to charge

The Co-Investigating Judges had the power to charge any Suspects named in the Introductory Submission.[1267] They also had discretion to charge any other persons against whom there was "clear and consistent evidence indicating that such person may be criminally responsible for the commission of a crime referred to in an Introductory Submission or a Supplementary Submission, even where such persons were not named in the submission".[1268] However, if such persons were not named in the Introductory or Supplementary Submissions, then the Co-Investigating Judges were required to seek the Co-Prosecutors' advice before they charged such persons.[1269]

5.4.3. Charging procedure

A Charged Person was first brought before the Co-Investigating Judges for an initial appearance.[1270] At the time of the initial appearance, the Co-Investigating Judges recorded the Charged Person's identity and informed them of the charges, their right to a lawyer, and their right to remain silent.[1271] The Charged Person had the right to consult with a lawyer prior to being interviewed and to have a lawyer present while statements were taken.[1272] If the Charged Person agreed, the Co-Investigating Judge was required to take a statement immediately, and a written record of the statement was placed in the case file.[1273] From the moment a person was charged, an assessment of that person's capacity to effectively participate in the proceedings

[1265] Case 001, Decision on Closing Order Appeal, para. 35.
[1266] Ibid, para. 36.
[1267] Internal Rules, rule 55(4); Case 004, Decision on the Ta An Defence Requests to Access the Case File and Take Part in the Judicial Investigation, 31 July 2013, D121/4, para. 40.
[1268] Internal Rules, rule 55(4). See also Case 004, Decision on the Ta An Defence Requests to Access the Case File and Take Part in the Judicial Investigation, 31 July 2013, D121/4, para. 40.
[1269] Internal Rules, rule 55(4).
[1270] Internal Rules, rule 57(1). See *e.g.*, Case 003, Summons to Initial Appearance, 26 November 2014, A66; Case 002, Order Refusing a Request for Annulment, 24 January 2008, D55/I, para. 2.
[1271] Internal Rules, rule 57(1). See *e.g.*, Case 002, Order Refusing a Request for Annulment, 24 January 2008, D55/I, para. 2.
[1272] Ibid.
[1273] Ibid, paras 2-3.

was triggered.[1274] Therefore, if properly justified, Charged Persons were "entitled to have their capacity to exercise their procedural rights effectively during the investigation and pre-trial phase evaluated by an expert".[1275]

Charged Persons in detention had the right to raise any issues relating to the execution or procedural regularity of the provisional detention, and any such information was recorded in the case file.[1276] If the Charged Person was not detained after the initial appearance, they were required to inform the Co-Investigating Judges of their address, which was recorded in the case file.[1277] The Charged Persons were informed that: (1) they were required to notify the Co-Investigating Judges of any change of address; and (2) all service or notification at the last address provided would be deemed to be valid.[1278]

The International Co-Investigating Judge in Cases 003 and 004 considered that the ECCC framework permitted charging *in absentia* when a Suspect refused to appear for an Internal Rule 57 initial appearance and when subsequent efforts to secure the presence of the Suspect were fruitless.[1279] However, on appeal the Pre-Trial Chamber did not definitively rule whether this practice was legally permissible, having been unable to assemble the required majority for a decision on the merits.[1280]

5.4.4. Powers and conduct of investigations

Only the Co-Investigating Judges had the power to conduct investigations, and they were independent in the conduct of the investigation.[1281] The Co-Investigating Judges were required to conduct their investigation impartially.[1282] A presumption of reliability attached to

[1274] Case 002, Decision on Nuon Chea's Appeal Regarding Appointment of an Expert, 22 October 2008, D54/V/6, para. 26; Case 002, Decision on Ieng Sary's Appeal Regarding the Appointment of a Psychiatric Expert, 21 October 2008, A189/I/8, para. 34.
[1275] Case 002, Decision on Ieng Sary's Appeal Regarding the Appointment of a Psychiatric Expert, 21 October 2008, A189/I/8, para. 35.
[1276] Internal Rules, rule 57(2), 57(4).
[1277] Internal Rules, rules 57(3), 57(4).
[1278] Internal Rules, rule 57(3).
[1279] Case 003, Decision to Charge Meas Muth *In Absentia*, 3 March 2015, D128, para. 54. See also Case 003, Notification of Charges Against Meas Muth, 3 March 2015, D128.1; Case 004, Decision to Charge Im Chaem *In Absentia*, 3 March 2015, D239.
[1280] Case 003, Considerations on Meas Muth's Appeal Against Co-Investigating Judge Harmon's Decision to Charge Meas Muth *In Absentia*, 30 March 2016, D128/1/9, paras 37-38.
[1281] Case 003, Decision on Meas Muth's Request for the Co-Investigating Judges to Clarify Whether the Defence May Contact Individuals, 4 December 2015, D173/2.3, para. 8; Case 002, Decision on the Appeal from the Order on the Request to Seek Exculpatory Evidence in the Shared Materials Drive, 18 November 2009, D164/4/13, para. 22.
[1282] Internal Rules, rule 55(5).

investigative action, which was rebuttable.[1283] When the Co-Investigating Judges conducted the investigation, they were entitled to take any investigative action "conducive to ascertaining the truth" and had wide discretion in this regard.[1284] However, such discretion was limited by the ECCC's jurisdiction.[1285]

The permitted acts of investigation included the following: summoning and questioning Suspects and Charged Persons; interviewing victims and witnesses and recording their statements; seizing exhibits; and seeking expert opinions.[1286] The Co-Investigating Judges were required to investigate not only inculpatory, but also exculpatory, evidence.[1287] This required reviewing documents or other materials when there was a *prima facie* reason to believe that they may contain exculpatory evidence.[1288] The Co-Investigating Judges also inquired into alternative versions of events as could be reasonably identified from the case file.[1289]

The Co-Investigating Judges could conduct site visits to carry out any investigations they considered useful.[1290] When doing so, they were required to be accompanied by their Greffiers, who were required to make a written record for the case file.[1291] This obligation did not

[1283] Case 004, Decision on Yim Tith's Application to Annul the Investigative Material produced by [OCIJ Investigator], 25 August 2017, D351/1/4, para. 13.
[1284] Internal Rules, rule 55(5); Case 004, Decision on Yim Tith's Application to Annul the Investigative Material produced by [OCIJ Investigator], 25 August 2017, D351/1/4, paras 13, 26; Case 002, Decision on the Appeal from the Order on the Request to Seek Exculpatory Evidence in the Shared Materials Drive, 12 November 2009, D164/3/6, para. 21; Case 002, Memorandum: Your "Request for Investigative Action", Concerning, *Inter Alia*, The Strategy of the Co-Investigating Judges in Regard to the Judicial Investigation, 11 December 2009, D171/5, para. 40.
[1285] ECCC Law, article 2; Case 002, Order on Request for Investigative Action, 3 April 2009, D158/5, para. 8.
[1286] Internal Rules, rule 55(5)(a). See also Case 003, Decision on Meas Muth's Request for the Co-Investigating Judges to Clarify Whether the Defence May Contact Individuals, 4 December 2015, D173/2.3, para. 8.
[1287] Internal Rules, rule 55(5); Case 002, Decision on the Appeal from the Order on the Request to Seek Exculpatory Evidence in the Shared Materials Drive, 18 November 2009, D164/4/13, para. 36. See also Case 002, Memorandum: Your "Request for Investigative Action", Concerning, *Inter Alia*, The Strategy of the Co-Investigating Judges in Regard to the Judicial Investigation, 11 December 2009, D171/5, para. 41.
[1288] Case 002, Decision on the Appeal from the Order on the Request to Seek Exculpatory Evidence in the Shared Materials Drive, 18 November 2009, D164/4/13, para. 36; Case 002, Decision on the Appeal from the Order on the Request to Seek Exculpatory Evidence in the Shared Materials Drive, 12 November 2009, D164/3/6, para. 35; Case 002, Memorandum: Your "Request for Investigative Action", Concerning, *Inter Alia*, The Strategy of the Co-Investigating Judges in Regard to the Judicial Investigation, 11 December 2009, D171/5, para. 43.
[1289] Case 002, Memorandum: Your "Request for Investigative Action", Concerning, *Inter Alia*, The Strategy of the Co-Investigating Judges in Regard to the Judicial Investigation, 11 December 2009, D171/5, para. 43.
[1290] Internal Rules, rules 55(5)(a), 55(8); Case 003, Decision on Meas Muth's Request for the Co-Investigating Judges to Clarify Whether the Defence May Contact Individuals, 4 December 2015, D173/2.3, para. 8. See *e.g.*, Case 001, Report of Reconstruction, 11 April 2008, E3/242, p. 2.
[1291] Internal Rules, rule 55(8); Case 004, Decision on Yim Tith's Application to Annul the Investigative Material produced by [OCIJ Investigator], 25 August 2017, D351/1/4, para. 21. See *e.g.*, Case 001, Report of Reconstruction, 11 April 2008, E3/242.

encompass creating a record of initial contact with a witness or of screening questions.[1292] The Co-Investigating Judges were permitted to inform the parties of on-site investigatory visits where the Co-Investigating Judges deemed their presence may be necessary.[1293] So informed, the parties were permitted to request to attend.[1294]

The Co-Investigating Judges had discretion over the nature and form of questions asked during witness and Civil Party interviews.[1295] Interviews were read as a whole when assessing their regularity.[1296] Investigators could confront witnesses with other evidence and narratives.[1297] The Co-Investigating Judges were required to make a written record of every interview.[1298] A written record was not required of preliminary discussions with potential witnesses to determine if they were in possession of relevant information.[1299] The interviewee was required to sign and/or fingerprint each page of the interview after they read it.[1300] If necessary, the Greffier, with the assistance of the interpreter, read the record back to the interviewee. If the interviewee refused to sign or fingerprint the record, the Greffier was required to note this on the record.[1301]

Written records by the Co-Investigating Judges or their delegates were not verbatim records of the statements made by a victim or witness, but instead were summary reports.[1302] The reports were to be as complete and impartial as possible and, sufficiently thorough to allow for assessment of the reliability and probative value of the evidence.[1303] Although open questions

[1292] Case 004, Decision on Yim Tith's Application to Annul the Investigative Material produced by [OCIJ Investigator], 25 August 2017, D351/1/4, para. 21.
[1293] Internal Rules, rule 55(8).
[1294] Internal Rules, rule 55(8). See *e.g.*, Case 001, Report of Reconstruction, 11 April 2008, E3/242, p. 2.
[1295] Case 004, Decision on Yim Tith's Application to Annul the Investigative Material produced by [OCIJ Investigator], 25 August 2017, D351/1/4, para. 16.
[1296] Case 004, Decision on Yim Tith's Application to Annul the Investigative Material produced by [OCIJ Investigator], 25 August 2017, D351/1/4, para. 16.
[1297] Case 004, Decision on Tith's Application to Annul the Investigative Material produced by [OCIJ Investigator], 25 August 2017, D351/1/4, para. 19.
[1298] Internal Rules, rule 55(7). See also Case 004, Decision on Yim Tith's Application to Annul the Investigative Material produced by [OCIJ Investigator], 25 August 2017, D351/1/4, para. 21; Case 002/01, Decision on Defence Requests Concerning Irregularities Alleged to Have Occurred During the Judicial Investigation, 7 December 2012, E251, para. 16.
[1299] Case 004, Decision on Ao An's Request for Translation and Transcription of Audio-Recordings and to Place Certain Documents on the Case File, 9 August 2016, D274/1, para. 25.
[1300] Internal Rules, rule 55(7). See also Case 004, Decision on Yim Tith's Application to Annul the Investigative Material produced by [OCIJ Investigator], 25 August 2017, D351/1/4, para. 31; Case 002/01, Decision on Defence Requests Concerning Irregularities Alleged to Have Occurred During the Judicial Investigation, 7 December 2012, E251, para. 16.
[1301] Internal Rules, rule 55(7).
[1302] Case 002/01, Decision on Nuon Chea's Request for a Rule 35 Investigation Regarding Inconsistencies in the Audio and Written Records of OCIJ Witness Interviews, 13 March 2012, E142/3, para. 11.
[1303] Case 002/01, Decision on Defence Requests Concerning Irregularities Alleged to Have Occurred During the Judicial Investigation, 7 December 2012, E251, para. 16; Case 004, Decision on Ao An's Request for Translation

were preferred, leading questions were sometimes permitted when necessary to obtain information during the investigative stage.[1304] Audio or video recordings of witness or Civil Party interviews were not required.[1305]

The Co-Investigating Judges were permitted to issue orders that were necessary to conduct the investigation, including summonses, Arrest Warrants, Detention Orders, and Arrest and Detention Orders.[1306] The Co-Investigating Judges were permitted to seek information and assistance from any state, the United Nations, "or any other intergovernmental or non-governmental organization, or other sources that they deem[ed] appropriate".[1307] The Co-Investigating Judges could also take "any appropriate measures to provide for the safety and support of potential witnesses and other sources".[1308]

The Co-Investigating Judges were permitted to issue Rogatory Letters requesting the Judicial Police or ECCC Investigators to undertake such action as necessary for the conduct of their investigations, as provided in the Internal Rules.[1309] A proven breach of impartiality by a Co-Investigating Judge or Investigator would result in a "substantive nullity" of the investigative actions performed by them.[1310] Likewise, a substantial failure to follow essential parts of the required investigative procedure could result in the annulation of evidence.[1311]

All records of investigative action were placed on the case file.[1312] Due notice of charges and modes of liability were provided throughout the course of the investigation and in the Closing Order.[1313]

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and Transcription of Audio-Recordings and to Place Certain Documents on the Case File, 9 August 2016, D274/1, paras 20-21.

[1304] Case 004, Decision on Ao An's Request for Translation and Transcription of Audio-Recordings and to Place Certain Documents on the Case File, 9 August 2016, D274/1, para. 24.

[1305] Case 002/01, Decision on Nuon Chea's Request for a Rule 35 Investigation Regarding Inconsistencies in the Audio and Written Records of OCIJ Witness Interviews, 13 March 2012, E142/3, para. 6.

[1306] Internal Rules, rule 55(5)(d). See *e.g.*, Case 003, Arrest Warrant, 10 December 2014, C1; Case 004, Arrest Warrant, 14 August 2014, C1.

[1307] Internal Rules, rule 55(5)(c). See also Case 003, Closing Order (Indictment), fn. 274.

[1308] Internal Rules, rule 55(5)(b).

[1309] Internal Rules, rule 55(9), p. 85. See also Case 002, Decision on Ieng Sary's Appeal Against the OCIJ's Order on Translation Rights and Obligations of the Parties, 20 February 2009, A190/II/9, para. 23.

[1310] Case 004, Decision on Yim Tith's Application to Annul the Investigative Material produced by [OCIJ Investigator], 25 August 2017, D351/1/4, para. 14.

[1311] Ibid, para. 33. For more on the annulment procedure, see section 5.5.2.

[1312] See Case 002, Memorandum: Your "Request for Investigative Action", Concerning, *Inter Alia*, The Strategy of the Co-Investigating Judges in Regard to the Judicial Investigation, 11 December 2009, D171/5, para. 22.

[1313] Case 002, Order on the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise, 8 December 2009, D97/13, para. 10.

5.4.4.1. Interviews of Charged Persons

When the Co-Investigating Judges interviewed a Charged Person who had a lawyer, the lawyer was summoned at least five days before the interview.[1314] A Charged Person was only questioned in the presence of their lawyer, unless the Charged Person waived the right to the presence of a lawyer, in a separate written record signed by the Charged Person, included in the case file.[1315] Whenever possible, such waiver was to be audio or video recorded.[1316] If the lawyer was validly summoned, but failed to appear on the date and time set, the Co-Investigating Judges could request that the Defence Support Section designate a lawyer temporarily, from the lists provided for in Internal Rule 11. Once the designated lawyer had the opportunity to review the case file for a reasonable period, the Co-Investigating Judges could question the Charged Person in the presence of the designated lawyer. The presence of the designated lawyer was noted in the record of the interview, along with the reason for the absence of the Charged Person's chosen lawyer, if known.[1317]

In an emergency, and when the Charged Person consented, the Co-Investigating Judges were permitted to question the Charged Person in the absence of their lawyer. An emergency situation could arise when there was a high probability of irretrievable loss of evidence while awaiting the arrival of a lawyer, such as the impending death of the Charged Person. The reason for the emergency was required to be clearly stated in the written record of the interview.[1318]

When the Charged Person was to be interviewed, the Co-Investigating Judges were required to notify the Co-Prosecutors of the interview in a timely manner. The Co-Prosecutors could attend the interview and could request that questions be put to the Charged Person with the Co-Investigating Judges' authorisation. The written record noted any refusals by the Co-Investigating Judges to allow a question. The other parties could not be present during the Charged Person's interview, unless the Co-Investigating Judges decided to confront the Charged Person directly with any other party or witness. During a confrontation between a witness and a Charged Person, and subject to any protection orders, the procedural modalities

[1314] Internal Rules, rule 58(1). See *e.g.*, Case 002, Order Refusing a Request for Annulment, 24 January 2008, D55/I, para. 15; Case 002, Written Record of Interview of Charged Person, 14 December 2007, E3/37; Case 001, Written Record of Interview of Charged Person, 20 October 2009, E3/83.
[1315] Internal Rules, rule 58(2).
[1316] Internal Rules, rules 25, 58(2). See also Case 002/01, Decision on Defence Requests Concerning Irregularities Alleged to Have Occurred During the Judicial Investigation, 7 December 2012, E251, para. 17; Case 002/01, Decision on Nuon Chea's Request for a Rule 35 Investigation Regarding Inconsistencies in the Audio and Written Records of OCIJ Witness Interviews, 13 March 2012, E142/3, para. 6.
[1317] Internal Rules, rule 58(2).
[1318] Internal Rules, rule 58(3).

concerning the interview of a Charged Person continued to apply.[1319]

In the case of a confrontation, the Co-Prosecutors and the lawyers for the other parties were permitted to ask questions, with the Co-Investigating Judges' permission.[1320] If the Co-Investigating Judges refused to permit a question, the refusal was noted in the written record of the interview.[1321]

5.4.4.2. Interview of Civil Parties

The Co-Investigating Judges were also permitted to interview Civil Parties.[1322] When a Civil Party had a lawyer, the Co-Investigating Judges were required to summon the lawyer at least five days before the interview took place, and during that period, the lawyer was permitted to consult the case file.[1323]

The Co-Investigating Judges could only question a Civil Party in the presence of their lawyer, unless the Civil Party waived the right to the presence of a lawyer, in a separate written record signed by the Civil Party, included in the case file.[1324] However, if the lawyer was validly summoned, but failed to appear on the date and time set, the interview was allowed to proceed, and the absence was noted in the written record.[1325]

When the Co-Investigating Judges interviewed a Civil Party, the other parties were not permitted to be present, unless the Co-Investigating Judges decided to confront the Civil Party directly with any other party or witness.[1326] The general rules regarding notice and presence of a Civil Party's lawyer contained in Internal Rules 59(1) and 59(2) also applied to any confrontation.[1327] During a confrontation, the Co-Prosecutors and the lawyers for the other parties were permitted to ask questions, with the Co-Investigating Judges' permission. If the Co-Investigating Judges refused to permit a question, the refusal was noted in the written record of the interview.[1328]

A Civil Party could also be interviewed by the ECCC Investigators, upon issuance of a

[1319] Internal Rules, rule 58(4).
[1320] Internal Rules, rule 58(5). See also Case 004, Decision on the Ta An Defence Requests to Access the Case File and Take Part in the Judicial Investigation, 31 July 2013, D121/4, para. 37.
[1321] Internal Rules, rule 58(5).
[1322] Internal Rules, rule 59(1). See also Case 002/01, Appeal Judgment, para. 313.
[1323] Internal Rules, rule 59(1).
[1324] Internal Rules, rules 25, 59(2).
[1325] Internal Rules, rule 59(2).
[1326] Internal Rules, rule 59(2).
[1327] Internal Rules, rule 59(3).
[1328] Internal Rules, rule 59(4).

Rogatory Letter: (1) when they expressly agreed thereto (in which case such agreement must be mentioned in the written record of interview); (2) when they had a lawyer and waived the lawyer's presence in a separate written record, as provided in Internal Rule 59(2); and (3) were questioned in the absence of any other parties.[1329]

5.4.4.3. Interview of witnesses

The Co-Investigating Judges were permitted to take statements from any person whom they considered conducive to ascertaining the truth, subject only to the provisions of Internal Rule 28 concerning the right against self-incrimination.[1330] Interviews of victims and witnesses were a fundamental feature of the investigation.[1331]

Except where a confrontation was organised, the Co-Investigating Judges or their delegates were required to interview witnesses in the absence of the Charged Person, any other party, or their lawyers, in a place and manner that protected confidentiality.[1332] Investigators were required to promptly take reasonable and necessary measures to stop interference with witness interviews, and if there was a belief that interference influenced a witness, that was to be noted in the written record of the interview.[1333] Before being interviewed, witnesses would swear an oath.[1334] Audio or video recording of a witness interview was permitted but not required.[1335] However, in Cases 003 and 004, the International Co-Investigating Judge instructed his Investigators and staff to audio-record all interviews. While he considered that the Co-Investigating Judges previously acted within their discretion in not requiring audio recordings of interviews, in his view, audio recording interviews was "good practice".[1336]

Any person who was summoned by the Co-Investigating Judges as a witness was required to appear. If the witness refused to appear, the Co-Investigating Judges could issue an order

[1329] Internal Rules, rule 59(6).
[1330] Internal Rules, rules 28, 60(1).
[1331] Case 002/01, Decision on Defence Requests Concerning Irregularities Alleged to Have Occurred During the Judicial Investigation, 7 December 2012, E251, para. 15.
[1332] Internal Rules, rule 60(2). See also Case 002/01, Decision on Defence Requests Concerning Irregularities Alleged to Have Occurred During the Judicial Investigation, 7 December 2012, E251, para. 15; Case 004, Decision on Ao An's Request for Translation and Transcription of Audio-Recordings and to Place Certain Documents on the Case File, 9 August 2016, D274/1, para. 26.
[1333] Case 004, Decision on Ao An's Request for Translation and Transcription of Audio-Recordings and to Place Certain Documents on the Case File, 9 August 2016, D274/1, para. 27.
[1334] Internal Rules, rule 24. See also Case 002/01, Decision on Defence Requests Concerning Irregularities Alleged to Have Occurred During the Judicial Investigation, 7 December 2012, E251, para. 16.
[1335] Internal Rules, rule 25; Case 002/01, Decision on Defence Requests Concerning Irregularities Alleged to Have Occurred During the Judicial Investigation, 7 December 2012, E251, para. 17.
[1336] See Case 004, Memorandum from the International Co-Investigating Judge to all OCIJ Investigators concerning "Instructions on the Recording of Witness and Civil Party Interviews", 22 September 2015, D266.

requesting the Judicial Police to compel the witness's appearance. Such order had to include the identity of the witness, the date, and had to be signed by the Co-Investigating Judges.[1337]

Any payments to witnesses by Investigators, as well as the reason and date of such payments, were recorded in registers and verified by the Witness and Expert Support Unit. Such payments were limited to covering loss of salary, meal, and transport costs, and were based on rates set by administrative decision.[1338]

5.4.4.4. Search and seizure

The Co-Investigating Judges or their delegates were required to endeavour to conduct any search of premises in the presence of its occupant, if any, failing which they were permitted to search in the presence of two witnesses, to be selected by the Co-Investigating Judges or their delegates. Such witnesses were not allowed to be police officers.[1339]

A written record of every search was required to be made, which had to identify the premises, and any occupant or witnesses, as appropriate. The Co-Investigating Judges or their delegates, and any occupant or witnesses, were required to sign the written record.[1340]

The Co-Investigating Judges or their delegates were required to show any evidence seized to the occupant or witnesses, before they sealed it. A written record of the evidence seized had to be made, and a detailed inventory of the evidence attached.[1341]

At any time, and after consulting the parties, the Co-Investigating Judges were permitted to order the return of any items to the person from whom it was seized where that did not prejudice the proceedings. Such an order had to be immediately notified to the person.[1342]

When Investigators obtained documents, they established a chain of custody between the source of the documents and the Office of the Co-Investigating Judges, which was contained in the report on the completion of the Rogatory Letter.[1343]

[1337] Internal Rules, rule 60(3).
[1338] Case 002, Memorandum: Your "Request for Investigative Action", Concerning, *Inter Alia*, The Strategy of the Co-Investigating Judges in Regard to the Judicial Investigation, 11 December 2009, D171/5, para. 28.
[1339] Internal Rules, rule 61(1).
[1340] Internal Rules, rule 61(2).
[1341] Internal Rules, rule 61(3).
[1342] Internal Rules, rule 61(4).
[1343] Case 002, Memorandum: Your "Request for Investigative Action", Concerning, *Inter Alia*, The Strategy of the Co-Investigating Judges in Regard to the Judicial Investigation, 11 December 2009, D171/5, para. 35.

5.4.4.5. Rogatory Letters

The Co-Investigating Judges were permitted to issue Rogatory Letters requiring any Investigator from their office, or the Judicial Police, to conduct investigative action.[1344] However, only the Judicial Police had the power to undertake coercive action.[1345]

A Rogatory Letter could not be issued in a general form. The Rogatory Letter had to clearly specify the nature of investigative work to be done, which had to relate directly to the crime or crimes under investigation. The Co-Investigating Judges were required to set the time limit for compliance with a Rogatory Letter. The Rogatory Letter had to be signed and dated by the Co-Investigating Judges. The Judges could withdraw a Rogatory Letter at any time.[1346]

The delegates were required to act under the Co-Investigating Judges' supervision and could report only to them concerning the enforcement of the Rogatory Letter.[1347] When a Rogatory Letter was issued to an Investigator or the Judicial Police, that person proceeded as follows: (1) the Judicial Police or Investigator drew up a written record of their investigations and findings, which were required to comply with the provisions of Internal Rule 51(8) as appropriate; and (2) the Judicial Police or Investigators were not permitted to question the Charged Person but could interview Civil Parties as provided in Rule 59(6); and (3) the Judicial Police could search for and seize evidence, as authorised by the Co-Investigating Judges.[1348]

The provisions of Internal Rule 51 relating to police custody applied to the execution of Rogatory Letters.[1349] In such a case, Co-Investigating Judges exercised the powers of the Co-Prosecutors.[1350] Evidence collected by Investigators was submitted to Greffiers who placed it on the case file.[1351]

[1344] Internal Rules, rule 62(1). See also Case 002/01, Decision on Defence Requests Concerning Irregularities Alleged to Have Occurred During the Judicial Investigation, 7 December 2012, E251, para. 15; Case 002/01, Decision on Nuon Chea's Request for a Rule 35 Investigation Regarding Inconsistencies in the Audio and Written Records of OCIJ Witness Interviews, 13 March 2012, E142/3, para. 6.
[1345] Internal Rules, rule 62(1).
[1346] Internal Rules, rule 62(2).
[1347] Internal Rules, rule 62(3).
[1348] Internal Rules, rule 62(3). See also Case 002/01, Decision on Defence Requests Concerning Irregularities Alleged to Have Occurred During the Judicial Investigation, 7 December 2012, E251, para. 15; Case 002/01, Decision on Nuon Chea's Request for a Rule 35 Investigation Regarding Inconsistencies in the Audio and Written Records of OCIJ Witness Interviews, 13 March 2012, E142/3, para. 6.
[1349] Internal Rules, rule 62(4).
[1350] Internal Rules, rule 62(4).
[1351] Case 002, Memorandum: Your "Request for Investigative Action", Concerning, *Inter Alia*, The Strategy of the Co-Investigating Judges in Regard to the Judicial Investigation, 11 December 2009, D171/5, para. 35.

5.4.5. Access to the case file

The Co-Investigating Judges' Greffier was required to keep a case file, including a written record of the investigation.[1352] The case file contained all evidence, both inculpatory and exculpatory, gathered during the judicial investigation and relevant to the charges against an Accused, including records of investigative action undertaken during the judicial investigation, written records and audio or video recordings of interviews, as well as all applications made by the parties to the proceedings.[1353] Suspects, upon being charged, and their lawyers, were given immediate access to the case file.[1354]

The Co-Prosecutors and the lawyers for other parties had the right to examine the case file at all times during the investigation, and to make copies, under the Greffier's supervision.[1355] Such access was only required during working days and was "subject to the requirements of the proper functioning of the ECCC".[1356] The Co-Prosecutors and the lawyers for other parties also had the right to consult the original case file, subject to reasonable limitations to ensure the continuity of the proceedings.[1357]

5.4.6. Role of the parties during the investigation

The Co-Prosecutors, a Charged Person, Civil Party, or Civil Party applicant[1358] could request – but not oblige – the Co-Investigating Judges at any time to make orders or undertake investigative action as they considered useful for ascertaining the truth.[1359] The Co-Investigating Judges were vested with broad discretion in deciding on the usefulness or opportunity to carry out an investigative action requested by a party, and were required to consider the impact that the granting of any such request would have on the fairness of the

[1352] Internal Rules, rule 55(6).
[1353] Case 002/01, Decision on Defence Requests Concerning Irregularities Alleged to Have Occurred During the Judicial Investigation, 7 December 2012, E251, para. 18.
[1354] Ibid. For more on Suspects' rights to access the case file prior to being charged, see section 4.2.2.
[1355] Internal Rules, rule 55(6), 55(11). See also Case 004, Decision on the Ta An Defence Requests to Access the Case File and Take Part in the Judicial Investigation, 31 July 2013, D121/4, para. 37; Case 002/01, Decision on Defence Requests Concerning Irregularities Alleged to Have Occurred During the Judicial Investigation, 7 December 2012, E251, para. 18.
[1356] Internal Rules, rule 55(6).
[1357] Internal Rules, rule 55(11).
[1358] Civil Party applicants could make such requests as long as their applications had not been rejected by a final decision.
[1359] Internal Rules, rule 55(10); Case 003, Decision on Meas Muth's Request for the Co-Investigating Judges to Clarify Whether the Defence May Contact Individuals, 4 December 2015, D173/2.3, para. 9; Case 002, Decision on the Appeal from the Order on the Request to Seek Exculpatory Evidence in the Shared Materials Drive, 18 November 2009, D164/4/13, para. 19.

proceedings.[1360] Relevant to that consideration were rights to a fair trial, in particular, the right to be tried within a reasonable time and to have adequate time to prepare a defence.[1361] The Co-Investigating Judges also considered whether the requesting party acted with due diligence in making their requests at a reasonable stage of the investigation.[1362]

To be valid, requests for investigative action had to correspond to acts within the ECCC's jurisdiction.[1363] Requests for investigative action were also required to be requests for action to be performed by the Co-Investigating Judges or, upon delegation, by Investigators or the Judicial Police, with the purpose of collecting information conducive to ascertaining truth.[1364]

In order to be granted, the subject matter of the request had to be within the scope of the investigation.[1365] A party making an investigative request was required to identify specifically the investigative action being requested and explain the reasons why they considered the action to be necessary for the conduct of the investigation.[1366] The relevance requirement had two sub-requirements: (1) the request had to be relevant to the scope of the investigation pursuant to the limitations and parameters of the Introductory and Supplementary Submissions; and (2) it had to detail why the requested information was conducive to ascertaining the truth.[1367] The Co-Investigating Judges were best placed to determine if a request was conducive to ascertaining the truth.[1368] An investigation request had to be specific enough to give clear

[1360] Case 004, Consolidated Decision on the Requests for Investigative Action Concerning the Crime of Forced Pregnancy and Forced Impregnation, 13 June 2016, D301/5, para. 34.
[1361] Ibid, paras 34, 36.
[1362] Ibid, para. 90; Case 004, Decision on the International Co-Prosecutor's Appeal of Decision on Request for Investigative Action Regarding Sexual Violence at Prison No. 8 and in Bakan District, 13 February 2018, D365/3/1/5, para. 40.
[1363] Case 002, Decision on the Charged Person's Appeal Against the Co-Investigating Judges' Order on Nuon Chea's Eleventh Request for Investigative Action, 25 August 2009, D158/5/3/15, para. 24.
[1364] Case 002, Decision on Admissibility of the Appeal Against Co-Investigating Judges' Order on Use of Statements Which Were or May Have Been Obtained by Torture, 18 December 2009, D130/9/21, para. 18.
[1365] Case 002, Decision on Appeal of Co-Lawyers for Civil Parties Against Order on Civil Parties' Request for Investigative Actions Concerning All Properties Owned by the Charged Persons, 4 August 2010, D193/5/5, para. 14; Case 004, Decision on Ao An's Amended Fourth Request for Investigative Action, 17 October 2016, D244/1, para. 14.
[1366] Case 002, Decision on Reconsideration of 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, 27 September 2010, D365/2/17, paras 45, 47; Case 002, Decision on the Appeal from the Order on the Request to Seek Exculpatory Evidence in the Shared Materials Drive, 18 November 2009, D164/4/13, para. 44.
[1367] Case 002, Decision on Reconsideration of 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, 27 September 2010, D365/2/17, paras 49-50; Case 004/02, Decision on Appeal Against Decision on Ao An's Twelfth Request for Investigative Action, 16 March 2017, D320/1/1/4, para. 13.
[1368] Case 004, Considerations on Appeal Against Decision on Ao An's Fifth Request for Investigative Action, 16 June 2016, D260/1/1/3, para. 16.

indications to the Co-Investigating Judges as to what they should search for, and point towards the presence of the evidence that was sought.[1369]

If the Co-Investigating Judges did not agree with an investigation request, they were required to issue a rejection order as soon as possible, and in any event, before the end of the judicial investigation.[1370] The order notifying the parties was required to set out the reasons for the rejection, and was subject to appeal.[1371] A rejection could be made on a variety of grounds, including in consideration of the usefulness or opportunity to carry out the requested actions.[1372] Rejections of investigative requests allowed under the Internal Rules were subject to appeal under Internal Rule 74.[1373]

The parties' ability to carry out their own investigative action was limited to preliminary inquiries that were strictly necessary for the effective exercise of their right to request investigative action.[1374] Thus, the parties could review public sources, could contact States to inquire into the existence of relevant materials and seek copies of them, and could contact individuals to inquire whether they were in possession of certain documents.[1375] However, reviewing non-public sources could amount to prohibited investigative action.[1376]

The parties could also challenge the validity of any part of the investigation and seek annulment where a procedural defect affected the right of the party.[1377] The Co-Prosecutors could also

[1369] Case 004, Decision on ICP's Request for Investigative Action Regarding Case 004 Crime Sites and Responsibility of Ao An, 7 December 2016, D41/2, para. 11.
[1370] Internal Rules, rule 55(10). See *e.g.*, Case 002, Memorandum from Co-Investigating Judges to Nuon Chea Defence: Your Letter of 15 October 2009 Expressing Your "Lack of Confidence in the Judicial Investigation", 27 October 2009, D221/1, p. 3.
[1371] Internal Rules, rule 55(10). See also Case 002, Decision on the Ieng Thirith Defence Appeal Against 'Order on Requests for Investigative Action by the Defence for Ieng Thirith' of 15 March 2010, 14 June 2010, D353/2/3, paras 22-28.
[1372] Case 002, Decision on the Appeal from the Order on the Request to Seek Exculpatory Evidence in the Shared Materials Drive, 18 November 2009, D164/4/13, para. 22.
[1373] Internal Rules, rule 74(3)(b); Case 002, Decision on the Appeal from the Order on the Request to Seek Exculpatory Evidence in the Shared Materials Drive, 12 November 2009, D164/3/6, para. 15.
[1374] Case 003, Decision on Meas Muth's Request for the Co-Investigating Judges to Clarify Whether the Defence May Contact Individuals, 4 December 2015, D173/2.3, para. 10; Case 002/01, Decision on Defence Requests Concerning Irregularities Alleged to Have Occurred During the Judicial Investigation, 7 December 2012, E251, para. 37.
[1375] Case 002, 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, 15 June 2010, D365/2/10, para. 12; Case 002, Decision on Appeal Against OCIJ Order on Nuon Chea's Eighteenth Request for Investigative Action, 10 June 2010, D273/3/5, para. 29.
[1376] Case 003, Decision on Meas Muth's Request for the Co-Investigating Judges to Clarify Whether the Defence May Contact Individuals, 4 December 2015, D173/2.3, para. 11.
[1377] Internal Rules, rule 48, 76. For more on the annulment procedure, see section 5.5.2.

request additional charges during the investigation.[1378]

At any time during an investigation, the Charged Person was permitted to request the Co-Investigating Judges to interview them, question witnesses, go to a site, order expertise or collect other evidence on their behalf.[1379] The request was required to be made in writing with a statement of factual reasons for the request.[1380] If the Co-Investigating Judges did not grant the request, they were required to issue a rejection order as soon as possible, and in any event, before the end of investigation.[1381] The rejection order was required to state the factual reasons for rejection.[1382] The Charged Person was immediately notified of the rejection order, and was permitted to appeal the rejection order to the Pre-Trial Chamber.[1383]

At any point in an investigation, a Civil Party was permitted to request the Co-Investigating Judges to interview them, question witnesses, go to a site, order expertise or collect other evidence on their behalf. This request was required to be made in writing with a statement of factual reasons for the request. If the Co-Investigating Judges did not grant the request, they were required to issue a rejection order as soon as possible, and in any event, before the end of investigation. The rejection order was required to state the factual reasons for rejection. The Civil Party was immediately notified of the rejection order, and was permitted to appeal to the Pre-Trial Chamber.[1384] Civil Parties and Civil Party applicants had no standing to bring investigative requests that related to facts that were not encompassed by the Initial Submission or Supplementary Submissions.[1385]

5.4.7. Publication of information

As a general matter, judicial investigations were not permitted to be conducted publicly, in

[1378] Case 004, Decision on the International Co-Prosecutor's Appeal of Decision on Request for Investigative Action Regarding Sexual Violence at Prison No. 8 and in Bakan District, 13 February 2018, D365/3/1/5, para. 38.
[1379] Internal Rules, rule 58(6); Case 002, Decision on Ieng Sary's Appeal Regarding the Appointment of a Psychiatric Expert, 21 October 2008, A189/I/8, para. 33. See *e.g.*, Case 003, Notification of Charges Against Meas Muth, 3 March 2015, D128.1, paras 20-21.
[1380] Internal Rules, rule 58(6); Case 002, Decision on the Appeal from the Order on the Request to Seek Exculpatory Evidence in the Shared Materials Drive, 12 November 2009, D164/3/6, para. 42.
[1381] Internal Rules, rule 58(6).
[1382] Internal Rules, rule 58(6); Case 002, Decision on the Appeal from the Order on the Request to Seek Exculpatory Evidence in the Shared Materials Drive, 18 November 2009, D164/4/13, para. 43.
[1383] Internal Rules, rule 58(6).
[1384] Internal Rules, rule 59(5).
[1385] Case 002, Decision on Appeal of Co-Lawyers for Civil Parties Against Order Rejecting Request to Interview Persons Named in the Forced Marriage and Enforced Disappearance Requests for Investigative Action, 21 July 2010, D310/1/3, para. 11. See *e.g.*, Case 002, Decision on Appeals Against Co-Investigating Judges' Combined Order D250/3/3 Dated 13 January 2010 and Order D250/3/2 Dated 13 January 2010 on Admissibility of Civil Party Applications, 27 April 2010, D250/3/2/1/5, para. 16.

order to preserve the rights and interests of the parties.[1386] All persons that participated in an investigation were required to maintain confidentiality.[1387] The Co-Investigating Judges had broad discretion in handling confidentiality issues and granting limited access to the judicial investigations.[1388] This extended to classifying and re-classifying documents, and issuing public redacted versions of documents.[1389] However, confidentiality had to be balanced with a Charged Person's right to the transparency of proceedings under Internal Rule 21(1).[1390]

The Co-Investigating Judges were permitted to jointly issue, through the Public Affairs Section, information regarding a case under judicial investigation that they deemed "essential to keep the public informed of the proceedings, or to rectify any false or misleading information".[1391]

The Co-Investigating Judges could jointly grant limited access to the judicial investigation to the media or other non-parties in exceptional circumstances, under their strict control and after they sought observations from the parties to the proceedings.[1392] If any person did not respect any conditions that the Co-Investigating Judges imposed, the Co-Investigating Judges could deal with the matter in accordance with Internal Rules 35 through 38.[1393] Any disagreements between the Co-Investigating Judges as to publicity of the investigation were not to be dealt with under Internal Rule 72, the general rule for disagreements between the Co-Investigating Judges.[1394]

[1386] Internal Rules, rule 56(1). See Case 004/01, Decision on International Co-Prosecutor's Request for Closing Order Reasons and CIJ's Decision to be Made Public, 10 July 2017, D309/2, para. 13; Case 004/01, Decision on Im Chaem's Request for Reclassification of Selected Documents from Case File 004/1, 26 June 2018, D313/2, para. 4; Case 003, Decision on Meas Muth's Second Request to Reclassify as Public with Public Annex A and Confidential Annex B, 3 July 2015, D142/1, para. 13.
[1387] Internal Rules, rule 56(1). See Case 002, Order on Breach of Confidentiality of the Judicial Investigation, 3 March 2009, D138, para. 12.
[1388] Case 004, Decision on International Co-Prosecutor's Appeal Concerning Testimony at Trial in Closed Session, 20 July 2016, D309/6, para. 20.
[1389] Case 004/01, Decision on International Co-Prosecutor's Request for Closing Order Reasons and CIJ's Decision to be Made Public, 10 July 2017, D309/2, para. 12.
[1390] Case 003, Decision on Meas Muth's Request to Reclassify as Public with Public Annexes A and B and Confidential Annex C, 16 June 2015, D129/1, para. 11.
[1391] Internal Rules, rule 56(2)(a). See Case 003, Considerations of the Pre-Trial Chamber Regarding the International Co-Prosecutor's Appeal Against the Co-Investigating Judges' Order on International Co-Prosecutor's Public Statement Regarding Case 003, 24 October 2011, D14/1/3, paras 25, 31.
[1392] Internal Rules, rule 56(2)(b); Case 004, Decision on Yim Tith's Consolidated Appeal Against the International Co-Investigating Judge's Consolidated Decision on Yim Tith's Requests for Reconsideration of Disclosure (D193/76 and D193/77) and the International Co-Prosecutor's Request for Disclosure (D193/72) and Against the International Co-Investigating Judge's Consolidated Decision on International Co-Prosecutor's Request to Disclose Case 004 Document to Case 002 (D193/70, D193/72, D193/75), 15 February 2017, D193/91/7, para. 29.
[1393] Internal Rules, rule 56(2)(b).
[1394] Internal Rules, rule 56(3).

After a Closing Order was issued, the Pre-Trial Chamber could reclassify documents with redactions if they considered it necessary in their discretion. In this regard, the Pre-Trial Chamber balanced the confidentiality of judicial investigations with the need to ensure transparency of public proceedings and meet the purposes of education and legacy.[1395]

5.4.8. Provisional detention and bail

The Co-Investigating Judges could order the provisional detention of a Charged Person after an adversarial hearing.[1396] If the Charged Person did not have the assistance of a lawyer, they were advised of the right to a lawyer as provided by Internal Rule 21(1)(d).[1397] The Charged Person could waive their right to a lawyer.[1398] The Charged Person also had the right to a reasonable period in order to prepare their defence.[1399] During the hearing, the Co-Investigating Judges heard the Co-Prosecutors, the Charged Person, and their lawyer, and at the end decided on detention. If provisional detention was not ordered, the Charged Person was released.[1400] If the Co-Investigating Judges decided to order provisional detention they issued a Detention Order.[1401]

However, where the Charged Person or their lawyer requested a period to prepare their defence, the Co-Investigating Judges did not order immediate provisional detention. In that case, the Co-Investigating Judges could, by reasoned order, decide to detain the Charged Person for a limited period of time, which could not exceed seven days. Within that time, the Charged Person had to be brought before the Co-Investigating Judges again, who would then proceed with the provisional detention processes, whether or not the Charged Person had the assistance of a lawyer. Any temporary period of provisional detention had to be considered in calculating the permitted length of provisional detention under Internal Rule 63.[1402]

Where a Charged Person's lawyer was not available or if they were absent at the scheduled

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[1395] Case 004/01, Decision on Im Chaem's Request for Reclassification of Selected Documents from Case File 004/1, 26 June 2018, D313/2, para. 5.
[1396] Internal Rules, rule 63(1)(a).
[1397] Internal Rules, rule 63(1)(a).
[1398] Case 002, Decision on Appeal Against Provisional Detention Order of Nuon Chea, 20 March 2008, C11/54, paras 13, 18. See *e.g.*, Case 002, Order Refusing a Request for Annulment, 24 January 2008, D55/I, para. 7.
[1399] Internal Rules, rule 63(1)(a); Case 002, Police Custody Decision (Ieng Thirith), 12 November 2007, C15, p. 2; Case 002, Police Custody Decision (Ieng Sary), 12 November 2007, C14, p. 2.
[1400] Internal Rules, rule 63(1)(a).
[1401] Internal Rules, rule 63(1)(a). See *e.g.*, Case 002, Provisional Detention Order (Ieng Thirith), 14 November 2007, C20; Case 002, Provisional Detention Order (Nuon Chea), 19 September 2007, C11/1; Case 002, Provisional Detention Order (Khieu Samphan), 19 November 2007, C26; Case 001, Order of Provisional Detention (Duch), 31 July 2007, C4.
[1402] Internal Rules, rule 63(1)(b).

date and time, and where Charged Person asked for the assistance of lawyer, the Co-Investigating Judges had to request the Defence Support Section to temporarily assign a lawyer, from the lists mentioned in Internal Rule 11.[1403]

A provisional detention order had to: (1) set out the legal grounds and factual basis for detention, based on Internal Rule 63(3); (2) specify the maximum initial period of provisional detention possible; and (3) when served on the Charged Person, be accompanied by a statement of their rights.[1404]

The Co-Investigating Judges could order the provisional detention of the Charged Person only where the following conditions were met: (1) there was a well-founded reason to believe that the person may have committed the crime or crimes specified in the Introductory or Supplementary Submission; and (2) provisional detention was necessary to:

i. prevent the Charged Person from exerting pressure on any witnesses or victims, or prevent any collusion between the Charged Person and accomplices of crimes falling within the jurisdiction of the ECCC;

ii. preserve evidence or prevent the destruction of any evidence;

iii. ensure the presence of the Charged Person during the proceedings;

iv. protect the security of the Charged Person; or

v. preserve public order.[1405]

Only one of these conditions needed to be met, and the Co-Investigating Judges were not required to indicate a view on all of them.[1406] The phrase "have committed" meant "incur individual responsibility for", which included planning, instigating, ordering, aiding and abetting, or committing, and superior responsibility.[1407] In examining whether there were well-founded reasons to believe that the Charged Person may have committed the crime or

[1403] Internal Rules, rule 63(1)(c).
[1404] Internal Rules, rule 63(2).
[1405] Internal Rules, rule 63(3). See *e.g.*, Case 002, Decision on Ieng Thirith's Appeal Against Order on Extension of Provisional Detention, 11 May 2009, C20/5/18, paras 25-45; Case 002, Decision on Khieu Samphan's Appeals Against Order Refusing Request for Release and Extension of Provisional Detention Order, 3 July 2009, C26/5/26, paras 38-63; Case 002, Decision on Appeal Against Provisional Detention Order of Ieng Thirith, 9 July 2008, C20/I/27, paras 43-72.
[1406] Case 002, Order on Extension of Provisional Detention, 18 November 2009, C26/8, para. 22; Case 002, Decision on Appeal Against Provisional Detention Order of Ieng Sary, 17 October 2008, C22/I/74, para. 66.
[1407] Case 002, Decision on Appeal Against Provisional Detention Order of Ieng Sary, 17 October 2008, C22/I/74, para. 71.

crimes mentioned in the Introductory Submission, the Pre-Trial Chamber decided whether facts or information existed which would satisfy an objective observer that the person concerned may have committed the offences.[1408] In examining the need to ensure the presence of the Charged Person, it was reasonable to consider whether the gravity of the offences charged and the possibility that a lengthy sentence may have constituted an incentive to flee. However, this could not be the sole, deciding factor.[1409]

The Co-Investigating Judges' Greffier was required to immediately serve copies of a provisional detention order on the Charged Person and their lawyer, and to the Co-Prosecutors and the Office of Administration.[1410]

Provisional detention could be ordered for genocide, war crimes and crimes against humanity, for a period not exceeding one year, though the Co-Investigating Judges could extend this for further one-year periods. Provisional detention could be ordered for all crimes other than genocide, war crimes, and crimes against humanity coming within the ECCC's jurisdiction for a period not exceeding six months. However, the Co-Investigating Judges could extend that provisional detention for further six-month periods.[1411]

In considering whether the length of detention was reasonable, the criteria considered were:

i. the effective length of the detention;

ii. the length of the detention in relation to the nature of the crime;

iii. the physical and psychological consequences of the detention on the detainee;

iv. the complexity of the case and the investigations; and

v. the conduct of the entire procedure.[1412]

In reviewing whether continued provisional detention was warranted, the Pre-Trial Chamber considered the reasonableness of the length of detention, and the progress and diligence of the

[1408] Case 002, Decision on Appeal Against Provisional Detention Order of Ieng Thirith, 9 July 2008, C20/I/27, para. 21; Case 002, Decision on Appeal Against Provisional Detention Order of Nuon Chea, 20 March 2008, C11/54, para. 46.
[1409] Case 002/01, Decision on Immediate Appeal by Khieu Samphan on Application for Release, 6 June 2011, E50/3/1/4, para. 40.
[1410] Internal Rules, rule 63(5).
[1411] Internal Rules, rule 63(6).
[1412] Case 002, Decision on Khieu Samphan's Appeals Against Order Refusing Request for Release and Extension of Provisional Detention Order, 3 July 2009, C26/5/26, para. 69.

Co-Investigating Judges in conducting their investigation.[1413] Specifically, the proportionality of the length of the detention to the circumstances of the case was considered, whether the investigating organs acted swiftly and "at no moment were proceedings dormant", and if the investigation into the crimes had been "ongoing and conducted in a reasonable manner".[1414]

Provisional detention could be extended where the conditions for detention continued to be met.[1415] However, once the existence of "well-founded reasons" was established, unless exculpatory evidence was found to undermine it, it was sufficient to fulfil that requirement throughout the pre-trial stage.[1416] The Co-Investigating Judges' decision concerning extension of provisional detention had to be in writing and set out the reasons for such extension.[1417]

An extension could be made only after the Co-Investigating Judges notified the Charged Person and their lawyer and gave them 15 days to submit objections.[1418] No more than two such extensions could be ordered, and all such orders were open to appeal.[1419] The threshold for extending detention was whether an objective observer, based on the available facts and information, was satisfied that well-founded reasons still existed to believe the Charged Person committed the crimes outlined in the Introductory and Supplementary Submissions.[1420]

In all cases, a Charged Person in provisional detention was required to be personally brought before the Co-Investigating Judges at least every four months.[1421] These periods continued after an Indictment was issued.[1422] The Co-Investigating Judges were required to offer the Suspect an opportunity to discuss their treatment and conditions during provisional detention. Where any action was required, the Co-Investigating Judges could issue appropriate orders. A written

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[1413] Case 002, Decision on Ieng Thirith's Appeal Against Order on Extension of Provisional Detention, 11 May 2009, C20/5/18, paras 48, 61; Case 002, Decision on Khieu Samphan's Appeals Against Order Refusing Request or Release and Extension of Provisional Detention Order, 3 July 2009, C26/5/26, paras 64, 68. See *e.g.*, Case 002, Decision on Ieng Thirith's Appeal Against Order on Extension of Provisional Detention, 30 April 2010, C20/9/15, para. 49.
[1414] Case 002, Decision on Khieu Samphan's Appeals Against Order Refusing Request for Release and Extension of Provisional Detention Order, 3 July 2009, C26/5/26, para. 70.
[1415] See Case 002, Order on Extension of Provisional Detention, 10 November 2008, C20/4, para. 12.
[1416] Case 002, Decision on Appeal of Ieng Sary Against OCIJ's Order on Extension of Provisional Detention, 26 June 2009, C22/5/39, para. 21.
[1417] Internal Rules, rule 63(7).
[1418] Internal Rules, rule 63(7); Case 002, Decision on Appeal Against Order on Extension of Provisional Detention of Nuon Chea, 4 May 2009, C9/4/7, para. 52. See *e.g.*, Case 001, Notice (Rule 63.7), 4 July 2008, C3/I.
[1419] Internal Rules, rule 63(7). See Case 002, Decision on Ieng Thirith's Appeal Against Order on Extension of Provisional Detention, 11 May 2009, C20/5/18, para. 55.
[1420] Case 002, Decision on Appeal Against Order on Extension of Provisional Detention of Nuon Chea, 4 May 2009, C9/4/7, para. 24.
[1421] Internal Rules, rule 63(8).
[1422] Case 002, Decision on Urgent Request to Order Resumption of Detention Interview, 19 January 2011, 2, paras 5-6.

record of the interview for this procedure was placed on the case file.[1423]

A Charged Person could appeal a provisional detention order to the Pre-Trial Chamber.[1424] The Pre-Trial Chamber could review provisional detention orders by examination of: (1) the Co-Investigating Judges' procedures prior to the order being issued; (2) the Co-Investigating Judges' exercise of discretion in considering the application of Internal Rule 63(3); (3) the sufficiency of the facts for reaching the conclusion under Internal Rule 63(3); (4) whether the circumstances on which the order was based still existed; and (5) any additional issues not otherwise dealt with which were the subject of specific grounds of appeal.[1425] The Civil Parties were permitted to participate in appeals regarding provisional detention.[1426]

Where the requirements of provisional detention set out in Internal Rule 63 were no longer satisfied, the Charged Person could be released either on the motion of the Co-Investigating Judges or at the request of the Co-Prosecutors.[1427] Where the Co-Investigating Judges considered releasing a Charged Person *proprio motu*, they were required to seek the Co-Prosecutors' opinion before making such order. Any order to release a Charged Person from pretrial detention was subject to appeal.[1428]

During the period of the provisional detention the Charged Person or their lawyer could submit an application for release to the Co-Investigating Judges, including where the Charged Person's health was "incompatible with detention".[1429] Old age itself was not an obstacle to detention, and compatibility of detention with a Charged Person's state of health was determined on a case-by-case basis in light of the overall circumstances of the case.[1430] As soon as possible after receiving the application, the Co-Investigating Judges were required to forward it to the Co-Prosecutors, who then had to provide their opinion within five days.[1431]

[1423] Internal Rules, rule 63(8).
[1424] Internal Rules, rule 63(4). See *e.g.*, Case 001, Decision on Appeal Against Provisional Detention Order, 3 December 2007, C5/45, para. 6.
[1425] Case 001, Decision on Appeal Against Provisional Detention Order, 3 December 2007, C5/45, para. 8.
[1426] Case 002, Decision on Civil Party Participation in Provisional Detention Appeals, 20 March 2008, C11/53, para. 41.
[1427] Internal Rules, rule 64(1). See also Case 002, Decision on Khieu Samphan's Appeals Against Order Refusing Request for Release and Extension of Provisional Detention Order, 3 July 2009, C26/5/26, para. 21.
[1428] Internal Rules, rule 64(1).
[1429] Internal Rules, rule 64(2); Case 002, Decision on Khieu Samphan's Appeals Against Order Refusing Request for Release and Extension of Provisional Detention Order, 3 July 2009, C26/5/26, para. 82. See *e.g.*, Case 002, Order Refusing the Request for Release, 23 June 2008, C36/III, para. 2; Case 002, Order Refusing Request for Release of Khieu Samphan, 28 October 2008, C40/4, para. 33.
[1430] Case 002, Order Refusing Request for Release, 28 October 2008, C40/4, para. 33.
[1431] Internal Rules, rule 64(2).

Subject to the provisions of Internal Rule 72(2) concerning disagreements, the Co-Investigating Judges were required to issue a reasoned decision within five days of receipt of the Co-Prosecutors' opinion.[1432] All such orders concerning release were open to appeal, wherein the Charged Person would have the burden of showing that provisional detention was no longer merited.[1433] If the Charged Person's circumstances changed since their last application, the Charged Person could file a further application not less than three months after the final determination of the previous application for release.[1434]

The Co-Prosecutors and the Charged Person were required to be notified immediately of an order to release a Charged Person from detention. The Co-Prosecutors and the Charged Person were also required to be notified immediately of an order not to release the Charged Person. The Office of Administration and the Head of the Detention Facility were required to be notified as soon as an order to release from detention became enforceable.[1435]

On their own motion, or at the request of the Co-Prosecutors, the Co-Investigating Judges could order that a Charged Person remain at liberty or be released from detention, including on bail.[1436] This decision required a determination of proportionality between public interest and a Charged Person's right to liberty.[1437] Bail would not be granted when the bail conditions were outweighed by the necessity for provisional detention.[1438] The Co-Investigating Judges' order had to specify whether a bail bond was payable, and imposed such conditions as were necessary to ensure the presence of the person during the proceedings and the protection of others. Any order granting bail was subject to appeal.[1439] A Charged Person received a receipt from the Co-Investigating Judges' Greffier in return for any property or monies handed over as bail.[1440] The Charged Person and the Co-Prosecutors were immediately notified of a bail order.[1441]

[1432] Internal Rules, rule 64(2).
[1433] Internal Rules, rule 64(2); Case 002, Decision on Khieu Samphan's Appeals Against Order Refusing Request for Release and Extension of Provisional Detention Order, 3 July 2009, C26/5/26, para. 21.
[1434] Internal Rules, rule 64(3). See also Case 002, Order Refusing Request for Release, 28 October 2008, C40/4, para. 2.
[1435] Internal Rules, rule 64(4).
[1436] Internal Rules, rule 65(1).
[1437] Case 002, Decision on Khieu Samphan's Appeals Against Order Refusing Request for Release and Extension of Provisional Detention Order, 3 July 2009, C26/5/26, para. 91. See *e.g.*, Case 002, Decision on Khieu Samphan's Appeal Against Order on Extension of Provisional Detention, 30 April 2010, C26/9/12, para. 49.
[1438] See *e.g.*, Case 002, Decision on Appeal Against Provisional Detention Order of Ieng Thirith, 9 July 2008, C20/I/27, para. 74; Case 002, Decision on Appeal Against Provisional Detention Order of Nuon Chea, 20 March 2008, C11/54, para. 83.
[1439] Internal Rules, rule 65(1).
[1440] Internal Rules, rule 65(2).
[1441] Internal Rules, rule 65(3).

The Co-Investigating Judges, at any time, on their own motion or at the request of the Co-Prosecutors, could change, suspend, add new conditions to, or terminate the bail order. The Charged Person and the Co-Prosecutors were immediately notified of any such orders, which were open to appeal.[1442]

A Charged Person could, at any time, have filed an application to change or suspend any conditions of the bail order, or to terminate it. The Co-Investigating Judges would immediately send that request to the Co-Prosecutors for their opinion, who would provide it within five days. Subject to the provisions of Internal Rule 72(2) concerning disagreements, the Co-Investigating Judges were required to issue an order within 10 days from the date of receipt of the Co-Prosecutors' opinion. The Charged Person and the Co-Prosecutors were immediately notified of the order.[1443]

If the Charged Person violated any of the bail conditions, the Co-Investigating Judges could issue a warning or issue a provisional detention order in respect of the Charged Person. Any such order was subject to appeal.[1444]

Limitation of contact between persons in pre-trial detention could be ordered to prevent pressure on witnesses or victims when there was evidence reasonably capable of showing that there was a concrete risk that the Charged Person might collude with other Charged Persons to exert such pressure while in detention.[1445]

The issuance of a Closing Order put an end to provisional detention and bail orders once any time limit for appeals against the Closing Order had expired.[1446] However, where the Co-Investigating Judges considered that the conditions for ordering provisional detention or bail under Internal Rules 63 and 65 were still met, they could, in a specific, reasoned decision included in the Closing Order, decide to maintain the Accused in provisional detention, or maintain the bail conditions of the Accused, until they were brought before the Trial Chamber.[1447]

[1442] Internal Rules, rule 65(4).
[1443] Internal Rules, rule 65(5).
[1444] Internal Rules, rule 65(6).
[1445] Case 002, Decision on Nuon Chea's Appeal Concerning Provisional Detention Conditions, 26 September 2008, C33/I/7, para. 21. For more on visitation rights, see section 4.13.
[1446] Internal Rules, rule 68(1); Case 002, Decision on Ieng Sary's Appeal Against the Closing Order's Extension of His Provisional Detention, 21 January 2011, D427/5/10, para. 25.
[1447] Internal Rules, rule 68(1). On what constitutes a "specific, reasoned decision", see Case 002, Decision on Ieng Sary's Appeal Against the Closing Order's Extension of His Provisional Detention, 21 January 2011, D427/5/10, paras 25-33.

Where an appeal was filed against the Indictment, the effect of the detention or bail order of the Co-Investigating Judges continued until there was a decision from the Pre-Trial Chamber.[1448] The Pre-Trial Chamber was required to decide within four months, and this time began to run from the filing of the appeals submissions against the Closing Order.[1449]

In any case, the decision of the Co-Investigating Judges or the Pre-Trial Chamber to continue to hold the Accused in provisional detention, or to maintain bail conditions, was required to cease to have any effect after four months unless the Accused was brought before the Trial Chamber within that time.[1450]

If the Accused could not appear in person before the Trial Chamber due to exceptional circumstances such as their ill-health, the Chamber would decide on provisional detention provided that it first heard the Accused using appropriate audio-visual means or by visiting them at the place of detention.[1451]

5.4.9. Conclusion of the investigation

The Co-Investigating Judges concluded the investigation when they had accomplished all the acts they deemed necessary to ascertaining the truth in relation to the facts set out in the Introductory and Supplementary Submissions.[1452] This included reviewing all exculpatory evidence.[1453] Where the Co-Investigating Judges considered that an investigation had been concluded, they notified all the parties and their lawyers.[1454] This decision was made public.[1455]

The parties then had 15 days to request further investigative action, which could be extended

[1448] Internal Rules, rule 68(2). See *e.g.*, Case 002, Decision on Ieng Sary's Appeal Against the Closing Order: Reasons for Continuation of Provisional Detention, 24 January 2011, D427/1/27, para. 4; Case 002, Decision on Ieng Thirith's and Nuon Chea's Appeals Against the Closing Order: Reasons for Continuation of Provisional Detention, 21 January 2011, D427/2/13.
[1449] Internal Rules, rule 68(2); Case 002/01, Decision on Immediate Appeal by Khieu Samphan on Application for Release, 6 June 2011, E50/3/1/4, para. 24.
[1450] Internal Rules, rule 68(3).
[1451] Internal Rules, rule 68(4).
[1452] Case 002, Decision on the Appeal from the Order on the Request to Seek Exculpatory Evidence in the Shared Materials Drive, 18 November 2009, D164/4/13, para. 36.
[1453] Case 002, Decision on the Appeal from the Order on the Request to Seek Exculpatory Evidence in the Shared Materials Drive, 12 November 2009, D164/3/6, para. 35.
[1454] Internal Rules, rule 66(1); Case 002, Decision on the Appeal from the Order on the Request to Seek Exculpatory Evidence in the Shared Materials Drive, 18 November 2009, D164/4/13, para. 36. See *e.g.*, Case 003, Decision to Reduce the Scope of Judicial Investigation Pursuant to Internal Rule 66 *bis*, 10 January 2017, D226, para. 8.
[1455] Internal Rules, rule 66(1).

pursuant to Internal Rule 39(4).[1456] The parties could waive such period.[1457] If the Co-Investigating Judges conducted further investigation, they were required to issue a new notification and allow an additional 15 days, and then issue another notice of closure of the investigation.[1458]

Where the Co-Investigating Judges decided to reject such requests for further investigative action, they issued a reasoned order. The order also rejected any remaining requests, filed earlier in the investigation, which had not yet been ruled upon by the Co-Investigating Judges.[1459]

All the parties could, within 30 days from notice of an order rejecting further investigative steps, file appeals to the Pre-Trial Chamber. The parties could, in the presence of their lawyer, or where the lawyer had been summoned in due form, waive their right to appeal.[1460] Once this period had expired, been waived, or the above mentioned appeals had been heard and decided, as the case was, the Co-Investigating Judges immediately forwarded the case file to the Co-Prosecutors.[1461]

Where the Co-Prosecutors considered, like the Co-Investigating Judges, that the investigation was concluded, they issued a written, reasoned Final Submission and returned the case file to the Co-Investigating Judges, within 45 days if a Charged Person was detained, and within three months in other cases, from the date the Co-Prosecutors received the case file.[1462] The Co-Prosecutors could request the Co-Investigating Judges to either indict the Charged Person and send them for trial, or to dismiss the case.[1463] A Charged Person could respond to the Co-Prosecutors' Final Submission.[1464]

[1456] Internal Rules, rule 66(1); Case 004/02, Considerations on Closing Order Appeals, para. 66. See *e.g.*, Case 004/02, Decision on Ao An's Request of Extension of Time Limit for Requesting Further Investigative Action Following Rule 66 Notice, 26 December 2016, D340/1, paras 6, 8.
[1457] Internal Rules, rule 66(1); Case 004/02, Considerations on Closing Order Appeals, para. 66.
[1458] See Case 004/02, Considerations on Closing Order Appeals, para. 65; Case 004/02, Second Notice of Conclusion of Judicial Investigation Against Ao An, 29 March 2017, D334/2, para. 13.
[1459] Internal Rules, rule 66(2).
[1460] Internal Rules, rule 66(3).
[1461] Internal Rules, rule 66(4); Case 004, Decision on the International Co-Prosecutor's Appeal of Decision on Request for Investigative Action Regarding Sexual Violence at Prison No. 8 and in Bakan District, 13 February 2018, D365/3/1/5, para. 32. See *e.g.*, Case 002, Forwarding Order, 19 July 2010, D385. On what constitutes "immediately", see Case 004/02, Considerations on Closing Order Appeals, para. 67.
[1462] Internal Rules, rule 66(5), p.83. See *e.g.*, Case 004, Forwarding Order Pursuant to Internal Rule 66(4), 1 March 2018, D378, paras 29-30.
[1463] Internal Rules, rule 66(5).
[1464] Case 002, Decision on Ieng Sary's Appeal Against Co-Investigating Judges' Decision Refusing to Accept the Filing of Ieng Sary's Response to the Co-Prosecutor's Rule 66 Final Submission and Additional Observations, and Request for Stay of the Proceedings, 20 September 2010, D390/1/2/4, para. 17.

When new evidence became available after a Dismissal Order, the Co-Investigating Judges could re-open the judicial investigation at the Co-Prosecutor's initiative.[1465]

5.4.10. Reducing the scope of the judicial investigation

In order to ensure a fair, meaningful and expeditious judicial process, in consideration of the specific requirements of the proceedings before the ECCC, the Co-Investigating Judges could, at the time of notification of conclusion of investigation, have decided to reduce the scope of judicial investigation by excluding certain facts set out in an Introductory Submission or any Supplementary Submission(s).[1466] The Co-Investigating Judges were required to ensure that the remaining facts were representative of the scope of the Introductory Submission and any Supplementary Submission(s).[1467]

Before reducing the scope of the judicial investigation, the Co-Investigating Judges were required to notify the details of the intended reduction to the Co-Prosecutors and the lawyers for the other parties.[1468] The parties then had 15 days to file submissions.[1469]

The Co-Investigating Judges also determined the effect of the decision made to reduce the scope of the investigation pursuant to Internal Rule 66 *bis* (1) on the status of the Civil Parties and on the right of Civil Party applicants to participate in the judicial investigation.[1470] A decision to reduce the scope of the investigation pursuant to Internal Rule 66 *bis* was appealable pursuant to Internal Rule 74.[1471]

The Co-Investigating Judges were required to terminate the judicial investigation concerning the excluded facts.[1472] Once the decision to reduce the scope of the judicial investigation became final, facts that had been excluded pursuant to Internal Rule 66 *bis* could not form the

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[1465] Internal Rules, rule 70.
[1466] Internal Rules, rule 66 *bis* (1). See *e.g.*, Case 004, Decision to Reduce the Scope of Judicial Investigation Pursuant to Internal Rule 66 *bis*, 16 December 2016, D337, para. 7.
[1467] Internal Rules, rule 66 *bis* (1). See *e.g.*, Case 004, Notification Pursuant to Internal Rule 66 *bis* (2), 4 May 2017, D354, para. 10; Case 004, Notification Pursuant to Internal Rule 66 *bis* (2), 9 November 2016, D307/4, para. 6.
[1468] Internal Rules, rule 66 *bis* (2). See *e.g.*, Case 003, Decision to Reduce the Scope of Judicial Investigation Pursuant to Internal Rule 66 *bis*, 10 January 2017, D226, para. 5; Case 004, Decision to Reduce the Scope of Judicial Investigation Pursuant to Internal Rule 66 *bis*, 13 June 2017, D359, para. 2.
[1469] Internal Rules, rule 66 *bis* (2); Case 003, Notice of Provisional Discontinuance Regarding Individual Allegations, 24 August 2016, D184/3, para. 7.
[1470] Internal Rules, rule 66 *bis* (3). See *e.g.*, Case 004, Notification Pursuant to Internal Rule 66 *bis* (2), 4 May 2017, D354, para. 12; Case 004, Decision to Reduce the Scope of Judicial Investigation Pursuant to Internal Rule 66 *bis*, 13 June 2017, D359, para. 14.
[1471] Internal Rules, rules 66 *bis* (4), 74.
[1472] Internal Rules, rule 66 *bis* (5). See *e.g.*, Case 004, Decision to Reduce the Scope of Judicial Investigation Pursuant to Internal Rule 66 *bis*, 13 June 2017, D359, para. 11.

basis for charges against any person(s) named to be investigated in the relevant Introductory and/or Supplementary Submission(s).[1473] Evidence relating to the facts excluded from the scope of judicial investigation could however be relied upon by the Co-Investigating Judges and the parties to the extent it was relevant to the remaining facts.[1474]

5.4.11. Closing Order

The Co-Investigating Judges concluded their investigations by issuing a Closing Order, that either indicted a Charged Person and sent them to trial on the basis of facts under investigation, or dismissed the case.[1475] A Closing Order could both send the case to trial for certain acts or against certain persons and dismiss the case for others.[1476] The Closing Order was to be a reasoned decision.[1477]

The Co-Investigating Judges had to consider both inculpatory and exculpatory evidence.[1478] When issuing a Closing Order, the Co-Investigating Judges had to decide on all, but only, the facts that were part of their investigation, and either dismiss them or use them as a basis for sending the Charged Person to trial. This determination did not involve the exercise of any discretionary power, and the Co-Investigating Judges were required to follow the procedures in the Internal Rules strictly.[1479]

The Co-Investigating Judges were not required to set out any legal characterisation of the facts until the Closing Order.[1480] The Co-Investigating Judges were not bound by the Co-Prosecutors' submissions; the facts as found during the investigation were decisive for the legal characterisation, irrespective of how they were qualified by the Co-Prosecutors.[1481]

[1473] Internal Rules, rule 66 *bis* (5).
[1474] Internal Rules, rule 66 *bis* (5). See *e.g.*, Case 004, Notification Pursuant to Internal Rule 66 *bis* (2), 4 May 2017, D354, para. 11; Case 003, Decision to Reduce the Scope of Judicial Investigation Pursuant to Internal Rule 66 *bis*, 10 January 2017, D226, para. 11.
[1475] Internal Rules, rule 67(1), pp. 83, 84. See Case 001, Decision on Closing Order Appeal, para. 32.
[1476] Internal Rules, rule 67(4). See Case 001, Decision on Closing Order Appeal, para. 32.
[1477] Internal Rules, rule 67(4); Case 002, Decision on Admissibility of Ieng Sary's Appeal Against the OCIJ's Constructive Denial of Ieng Sary's Requests Concerning the OCIJ's Identification of and Reliance on Evidence Obtained Through Torture, 10 May 2010, D130/7/3/5, para. 32.
[1478] Case 002, Decision on the Appeal from the Order on the Request to Seek Exculpatory Evidence in the Shared Materials Drive, 18 November 2009, D164/4/13, para. 36; Case 002, Decision on the Appeal from the Order on the Request to Seek Exculpatory Evidence in the Shared Materials Drive, 12 November 2009, D164/3/6, para. 35.
[1479] Case 001, Decision on Closing Order Appeal, para. 37.
[1480] Case 002, Order for Request on Investigative Action Concerning Forced Marriages and Forced Sexual Relations, 18 December 2009, D268/2, para. 9; Case 002, Order on Civil Party Request for Investigative Action Concerning Enforced Disappearance, 21 December 2009, D180/6, para. 7.
[1481] Internal Rules, rule 67(1); Case 001, Decision on Closing Order Appeal, paras 32, 39. See also Case 002, Decision on Ieng Sary's Appeal Against Co-Investigating Judges' Decision Refusing to Accept the Filing of Ieng

To indict on a charge, there needed to be "sufficient evidence", meaning a "probability" or "plausibility" of guilt. This required more than mere indicia or suspicion, but the evidence did not need to support guilt with certainty or beyond a reasonable doubt.[1482] A Charged Person could only be indicted on the facts – distinguishable from the circumstances surrounding these facts – for which they had previously been charged.[1483] In assessing the evidence, the Co-Investigating Judges initially followed the Trial Chamber's and Supreme Court Chamber's jurisprudence concerning the probative value of various categories of evidence, such as statements collected by non-ECCC entities and reports from the Documentation Center of Cambodia.[1484] The Pre-Trial Chamber later considered this approach to be an error, reasoning that the probative value of evidence was to be assessed according to its intrinsic value, rather than hierarchical categories based on formal provenance.[1485]

An Indictment would be void for procedural defect unless it set out the identity of the Accused, a description of the material facts, and their legal characterisation by the Co-Investigating Judges, including the relevant criminal provisions and the nature of the criminal responsibility.[1486] An Indictment was required to set out the material facts of the case with enough detail to inform the Accused clearly of the charges against them so that they could prepare their defence.[1487] The Indictment had to articulate each charge specifically and separately, and identify the particular acts in a satisfactory manner.[1488]

If an Accused was charged with alternative forms of participation, the Indictment had to set out each form charged.[1489] The level of particularity depended on the alleged mode of liability, as the relevance of certain facts – such as the identity of the victims, and the place, date, and description of the events – depended on the alleged proximity of the Accused to those

Sary's Response to the Co-Prosecutors' Rule 66 Final Submission and Additional Observations, and Request for Stay of the Proceedings, 20 September 2010, D390/1/2/4, para. 18.
[1482] Case 004/02, Considerations on Closing Order Appeals, paras 84-85.
[1483] See Case 004, Decision on the International Co-Prosecutor's Appeal of Decision on Request for Investigative Action Regarding Sexual Violence at Prison No. 8 and in Bakan District, 13 February 2018, D365/3/1/5, paras 35-36.
[1484] See Case 004/01, Dismissal Order, paras 103-139. For more on the Trial Chamber's and Supreme Court Chamber's holdings on specific categories of evidence, see section 5.6.3. For the Co-Investigating Judges' and Pre-Trial Chamber's holdings on the probative value of Civil Party evidence, see section 7.2.5.
[1485] Case 004/01, Considerations on Closing Order Appeal, paras 41-59.
[1486] Internal Rules, rule 67(2). See Case 002, Decision on Nuon Chea's Appeal Against Order Refusing Request for Annulment, 26 August 2008, D55/I/8, para. 37.
[1487] Case 001, Decision on Closing Order Appeal, para. 47. This standard did not require a precise number of victims to be identified. See Case 004/02, Considerations on Closing Order Appeals, para. 86.
[1488] Case 001, Decision on Closing Order Appeal, para. 47.
[1489] Ibid.

events.[1490] When it was alleged that the Accused personally carried out the acts underlying the crime in question, the identity of the victim, the place and approximate date of the alleged criminal acts, and the means by which they were committed had to be set out "with the greatest precision". However, the nature or scale of the alleged crimes may render it impracticable to particularise the identity of every victim or the dates of commission.[1491]

Where it was alleged that the Accused planned, instigated, ordered, or aided and abetted in the commission of the alleged crimes, the "particular acts" or "the particular course of conduct" on the part of the Accused which formed the basis for the charges in question had to be identified. For an allegation of superior responsibility, the Indictment had to specify with as many particulars as possible not only the superior's own alleged conduct, but also the conduct of those persons for whom the superior allegedly bears responsibility. Joint criminal enterprise as a form of criminal responsibility was required to be specified in the Indictment.[1492]

In the Closing Order, the Co-Investigating Judges also made any necessary decisions concerning sealed items and, for this purpose, could grant leave or invite the submission of *amicus curiae* briefs.[1493]

The Co-Investigating Judges were required to issue a Dismissal Order in the following circumstances: (1) The acts in question did not amount to crimes within the jurisdiction of the ECCC; (2) the perpetrators of the acts had not been identified; or (3) there was not sufficient evidence against the Charged Person or persons of the charges.[1494]

The Co-Prosecutors, the Charged Person/Accused, and Civil Parties had to be immediately notified when a Closing Order was issued, and received a copy thereof.[1495] The order was subject to appeal as provided in Internal Rule 74.[1496] In such an instance the Pre-Trial Chamber's scope of review would be limited to the issues raised by the appellant.[1497] Any Civil Party whose appeal against the denial of their Civil Party application was successful pursuant to Internal Rule 23(5) joined the single, consolidated group and accordingly, any Civil Party

[1490] Ibid, para. 48.
[1491] Ibid, para. 49.
[1492] Ibid.
[1493] Internal Rules, rule 67(6).
[1494] Internal Rules, rule 67(3), p. 83; Case 001, Decision on Closing Order Appeal, paras 32-33.
[1495] Internal Rules, rule 67(5).
[1496] Internal Rules, rule 67(5).
[1497] Case 001, Decision on Closing Order Appeal, paras 28-29. See *e.g.*, Case 004/01, Considerations on Closing Order Appeal; Case 002, Decision on Closing Order Appeal (Ieng Sary).

appeal of the Dismissal Order that was still pending.[1498] Where an appeal was filed against a Closing Order, the Co-Investigating Judges' Greffier was required to forward the case file to the Pre-Trial Chamber's Greffier as provided in Internal Rule 77.[1499]

Where no appeal was filed against a Closing Order, the Co-Investigating Judges were required to seal the case file, and either: (1) if an Indictment was issued, the Co-Investigating Judges' Greffier forwarded the case file to the Trial Chamber's Greffier to allow a date for trial to be set; or (2) if a Dismissal Order was issued, the case file was archived after the expiry of the time limit for appeal.[1500] The filing of an appeal against a Closing Order did not prevent access to the case file by the Trial Chamber and Civil Party Lead Co-Lawyers for the purposes of advance preparation for trial.[1501]

In Cases 004/02, 003, and 004, the Pre-Trial Chamber held that the Co-Investigating Judges were not permitted to issue separate and opposing Closing Orders based on a disagreement between them over whether the Charged Persons fell within the ECCC's personal jurisdiction. Rather, the Pre-Trial Chamber considered that the Co-Investigating Judges should have referred their disagreement to it for resolution, or reached a tacit agreement, but in any case could not proceed on a basis that is incoherent with the "default" mechanism in the ECCC framework that the "investigation proceed" such as issuing separate Closing Orders.[1502] Ultimately, the Supreme Court Chamber declared these three cases terminated for lack of valid Indictments.[1503]

5.4.12. Disagreements between Co-Investigating Judges

When the Co-Investigating Judges disagreed, either or both of them could record the exact nature of their disagreement in a signed, dated document which was placed in a register of disagreements kept by the Greffier of the Co-Investigating Judges.[1504] Within 30 days, either Co-Investigating Judge could bring the disagreement before the Pre-Trial Chamber by submitting a written statement of the facts and reasons for the disagreement to the Office of

[1498] Internal Rules, rule 67(5).
[1499] Internal Rules, rule 69(1). See also Case 002/01, Decision on the Co-Prosecutors' Immediate Appeal of the Trial Chamber's Decision Concerning the Scope of Case 002/01, 8 February 2013, E163/5/1/13, fn. 105.
[1500] Internal Rules, rule 69(2).
[1501] Internal Rules, rule 69(3).
[1502] See Case 003, Considerations on Closing Order Appeals, paras 106-107. For more on the Co-Investigating Judges' separate and opposing Closing Orders in Cases 004/02, 003, and 004, and the Pre-Trial Chamber's considerations on the permissibility of such action, see *Guide to the ECCC (Volume I)*, section 5.3.
[1503] For more on the termination of proceedings, see *Guide to the ECCC (Volume I)*, sections 5.3.2.12 (Case 003), 5.3.3.6.6 (Case 004/02), 5.3.3.7.7 (Case 004).
[1504] Internal Rules, rule 72(1).

Administration, which was required to immediately convene the Pre-Trial Chamber and communicate the statements to its Judges, with a copy to the other Co-Investigating Judge.[1505] If the disagreement related to the provisional detention of a Charged Person, the period within which either Co-Investigating Judge could bring the disagreement before the Pre-Trial Chamber was reduced to five days. The other Co-Investigating Judge was permitted to submit a response within 10 days.[1506]

The written statement of the facts and reasons for the disagreement was not placed on the case file, except in cases where the disagreement related to a decision against which a party to the proceedings had the right to appeal to the Pre-Trial Chamber under the Internal Rules.[1507] The Co-Investigating Judges' Greffier was required to forward a copy of the case file to the Pre-Trial Chamber immediately.[1508]

While the dispute settlement process between the Co-Investigating Judges played out, the Co-Investigating Judges were required to continue to seek consensus.[1509] A Co-Investigating Judge could act without the consent of the other Co-Investigating Judge where neither brought a disagreement before the Pre-Trial Chamber within the requisite time.[1510]

In Case 002 the Pre-Trial Chamber ruled that the Co-Investigating Judges were "under no obligation to seise the Pre-Trial Chamber when they do not agree on an issue before them".[1511] In Cases 004/02, 003, and 004, however, the Pre-Trial Chamber qualified that this discretion not to seize the Pre-Trial Chamber is only "insofar as the Judges agree on a course of action that is 'coherent' with the 'default position' […] 'being that the "investigation shall proceed"'".[1512] The Pre-Trial Chamber in these three cases considered that the nature and severity of the disagreement should inform the most appropriate procedure to be followed ranging from tacit toleration of an act or decision, to registration of a disagreement, to referral to seek a formal annulment of the act or decision.[1513] They concluded that when "the existing disagreement settlement procedure in force emerges as the only remaining mechanism

[1505] Internal Rules, rule 72(2). See also Case 004/02, Considerations on Closing Order Appeals, para. 117.
[1506] Internal Rules, rule 72(2).
[1507] Internal Rules, rules 72(2), 72(4)(b).
[1508] Internal Rules, rule 72(2).
[1509] Internal Rules, rule 72(3); Case 004/02, Considerations on Closing Order Appeals, paras 114, 118.
[1510] Case 004/02, Considerations on Closing Order Appeals, para. 116.
[1511] Case 002, Decision on Closing Order Appeal (Ieng Sary), para. 274.
[1512] Case 004/02, Considerations on Closing Order Appeals, para. 106. See also Case 003, Considerations on Closing Order Appeals, para. 94; Case 004, Considerations on Closing Order Appeals, para. 100.
[1513] Case 004/02, Considerations on Closing Order Appeals, para. 113; Case 003, Considerations on Closing Order Appeals, para. 99; Case 004, Considerations on Closing Order Appeals, para. 105.

available to the Co-Investigating Judges to prevent the occurrence of a procedural stalemate and guarantee the legality, fairness and effectiveness of the judicial investigation", the Co-Investigating Judges had the obligation to trigger the disagreement settlement mechanism.[1514]

A decision of the Pre-Trial Chamber on a disagreement required an affirmative vote of at least four Judges.[1515] If the required majority was not achieved the default decision was that the order or investigative act done by one Co-Investigating Judge stood, or the proposed order or act went forward.[1516]

The action or decision that was the subject of a disagreement was executed, except if it related to the following three categories: (1) any decision that would be open to appeal by the Charged Person or a Civil Party under the Internal Rules; (2) notification of charges; or (3) an Arrest and Detention Order.[1517] If it related to one of these areas, no action was taken until either consensus was achieved, the 30-day period ended, or the Pre-Trial Chamber had been seized and the dispute settlement procedure was completed, as appropriate.[1518]

5.5. Pre-trial phase

5.5.1. The Pre-Trial Chamber's jurisdiction and supermajority rule

The UN-RGC Agreement vested the Pre-Trial Chamber with jurisdiction to settle disagreements between the Co-Prosecutors or the Co-Investigating Judges.[1519] The Internal Rules also provided the Pre-Trial Chamber jurisdiction to decide on appeals against the Co-Investigating Judges' orders and decisions,[1520] applications for annulment of investigative actions,[1521] as well as other appeals specifically listed under Internal Rule 73(c).[1522] In

[1514] Case 004/02, Considerations on Closing Order Appeals, paras 119-120.
[1515] Internal Rules, rule 72(4)(d).
[1516] Internal Rules, rule 72(4)(d). See *e.g.*, Case 001, Appeal Judgment, para. 65; Case 004, Decision on Yim Tith's Appeal Against the International Co-Investigating Judge's Clarification on the Validity of a Summons Issued by One Co-Investigating Judge, 4 December 2014, D212/1/2/2, para. 7.
[1517] ECCC Law, article 23 (new) (3); Internal Rules, rule 72(3).
[1518] Internal Rules, rule 72(3).
[1519] UN-RGC Agreement, article 7(2); Internal Rules, rules 71, 72. For more on the disagreement procedure, see section 5.4.12.
[1520] Internal Rules, rules 73(a), 74. For more on the history of the establishment of the Pre-Trial Chamber, see *Guide to the ECCC (Volume I)*, section 3.7.3.
[1521] Internal Rules, rules 73(b), 76.
[1522] Internal Rules, rules 73(c) (listing appeals provided for under Internal Rules 11(5) and (6) (decisions concerning the list of lawyers for indigent persons, determinations on indigence, and assignment of lawyers to

exceptional circumstances, the Pre-Trial Chamber broadened the scope of its jurisdiction to hear appeals to ensure the fairness of the proceedings under Internal Rule 21.[1523] All Pre-Trial Chamber decisions required an affirmative vote of four out of the five Judges.[1524] Where the Pre-Trial Chamber failed to reach the required supermajority, Internal Rule 77(13) provided:

> a) As regards an appeal against or an application for annulment of an order or investigative action other than an indictment, that such order or investigative action shall stand.
>
> b) As regards appeals against indictments issued by the Co-Investigating Judges, that the Trial Chamber be seised on the basis of the Closing Order of the Co-Investigating Judges.

In Cases 003 and 004, the Pre-Trial Chamber was unable to attain the requisite supermajority in several matters before it. For example, in Case 004/01, the Pre-Trial Chamber could not decide on the merits of an application for annulment of witnesses' interviews, resulting in these investigative actions standing.[1525] In the same case, the Pre-Trial Chamber's inability to reach a supermajority on the International Co-Prosecutor's appeal against the joint Dismissal Order resulted in the Order standing and the case being dismissed.[1526] In Cases 004/02, 003, and 004, the Pre-Trial Chamber failed to reach a supermajority on the appeals against the conflicting Closing Orders, resulting in the termination of these cases for lack of a valid Indictment.[1527]

5.5.2. The Pre-Trial Chamber's jurisdiction over applications for annulment of investigative actions

The Pre-Trial Chamber had exclusive jurisdiction over applications for annulment of investigative actions.[1528] However, only the Co-Investigating Judges could seize the Pre-Trial Chamber, either at their own initiative or at the request of a party, with an application to annul

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indigent persons)), 35(6) (decisions related to interference with the administration of justice), 38(3) (decisions related to the misconduct of a lawyer), 77 *bis* (decisions related to Civil Party applications).

[1523] See Case 002, Decision on Closing Order Appeal (Khieu Samphan), para. 18.

[1524] Internal Rules, rule 77(13).

[1525] Case 004/01, Considerations on Im Chaem's Application for Annulment of Transcripts and Written Records of Witnesses' Interviews, 27 October 2016, D298/2/1/3, disposition.

[1526] Case 004/01, Considerations on Closing Order Appeal, disposition.

[1527] Case 004/02, Decision on International Co-Prosecutors' Immediate Appeal of the Trial Chamber's Effective Termination of Case 004/2, 10 August 2020, E004/2/1/1/2, para. 71; Case 003, Decision on International Co-Prosecutor's Appeal of the Pre-Trial Chamber's Failure to Send Case 003 to Trial as Required by the ECCC Legal Framework, 17 December 2021, 3/1/1/1, para. 44; Case 004, Decision on International Co-Prosecutor's Appeal of the Pre-Trial Chamber's Failure to Send Case 004 to Trial as Required by the ECCC Legal Framework, 28 December 2021, 2/1/1/1, para. 32. For more on the proceedings related to the issuance of two conflicting Closing Orders, see *Guide to the ECCC (Volume I)*, section 5.3.1.

[1528] Internal Rules, rule 73(b).

"any part of the proceedings";[1529] *i.e.*, "investigative acts of the Co-Investigating Judges or any person acting as representative of the judicial authority, and to the materials resulting from these acts".[1530] In accordance with Internal Rule 48, the Co-Investigating Judges were required to examine a request on two grounds: (1) the presence of a procedural defect; and (2) an infringement of the rights of the party making the application.[1531] Importantly, annulment applications had to be submitted and decided upon before the issuance of the Closing Order, which cured procedural defects.[1532]

5.5.2.1. Role of the Co-Investigating Judges in the annulment procedure

Where the Co-Investigating Judges considered any part of the proceedings null and void, Internal Rule 76(1) mandated that they inform the parties and submit a reasoned application to the Pre-Trial Chamber with a view to annulment, *unless* the party whose interests were affected regularised the proceedings by waiving their right to annulment.[1533] By contrast, a party who considered any part of the proceedings null and void could not directly seize the Pre-Trial Chamber with an application for annulment.[1534]

Internal Rule 76(2) required the party to file a reasoned application to the Co-Investigating Judges, requesting them to seize the Pre-Trial Chamber with a view to annulment.[1535] In one instance, the Pre-Trial Chamber found an application for annulment of transcripts and written records of witnesses' interviews admissible, but refused to address the admissibility of an addendum to the application because it had not been first submitted to the Co-Investigating

[1529] Internal Rules, rules 76(1), 76(2).
[1530] Case 001, Decision on Admissibility of Material on the Case File as Evidence, 26 May 2009, E43/4, para. 11.
[1531] Internal Rules, rule 48. See also Case 002, Decision on Nuon Chea's Appeal Against Order Refusing Request for Annulment, 26 August 2008, D55/I/8, paras 33-34; Case 002, Decision on Ieng Thirith's Appeal Against Co-Investigating Judges' Order Rejecting the Request to Seise the Pre-Trial Chamber with a View to Annulment of All Investigations (D263/1), 25 June 2010, D263/2/6, para. 21; Case 004/01, Considerations on Im Chaem's Application for Annulment of Transcripts and Written Records of Witnesses' Interviews, 27 October 2016, D298/2/1/3, Opinion of Judges Olivier Beauvallet and Baik Kang Jin, para. 42. The Pre-Trial Chamber interpreted "an infringement of rights" as "a harmed interest". See Case 002, Decision on Nuon Chea's Appeal Against Order Refusing Request for Annulment, 26 August 2008, D55/I/8, para. 36.
[1532] Internal Rules, rule 76(7); Case 004/02, Decision on Appeal Against the Decision on Ao An's Application to Annul the Entire Investigation, 5 September 2017, D350/1/1/4, para. 20. The scope of procedural deficits cured by the Closing Order does not extend to deficits in materials and documents introduced by parties. See Case 001, Decision on Admissibility of Material on the Case File as Evidence, 26 May 2009, E43/4, para. 11.
[1533] Internal Rules, rules 76(1), 76(6).
[1534] Internal Rules, rule 76(2). See also Case 002, Decision on Nuon Chea's Appeal Against Order Refusing Request for Annulment, 26 August 2008, D55/I/8, para. 16.
[1535] Internal Rules, rule 76(2).

Judges.[1536]

When considering requests to seize the Pre-Trial Chamber with a view to annulment, the Co-Investigating Judges were required to consider whether the application identified a procedural defect and the prejudice caused by the defect to the party making the application.[1537] In other words, Internal Rule 76(2) "cast […] a screening role on the Co-Investigating Judges" only.[1538] They only needed to be satisfied that there was an "arguable case" that the request: (1) *prima facie* advanced a reasoned argument; and (2) was not manifestly unfounded.[1539]

Instead, it was the Pre-Trial Chamber's role to examine the merits of annulment applications.[1540] Indeed, "[t]he need to ensure impartiality of the preliminary judicial investigation mandate[d] that adjudication of any defect that may void proceedings be the purview of the Pre-Trial Chamber and not of the Co-Investigating Judges, whose precise task it [was] to steer the investigations and see them through to completion".[1541]

5.5.2.2. Role of the Pre-Trial Chamber in the annulment procedure

5.5.2.2.1. *Admissibility of annulment applications*

Where the Co-Investigating Judges granted a request to seize the Pre-Trial Chamber with a view to annul investigative actions, they forwarded the case file to the Pre-Trial Chamber for its consideration on the merits.[1542] Pursuant to Internal Rule 76(4), the Pre-Trial Chamber could declare an application for annulment inadmissible if it was manifestly unfounded, did not set

[1536] Case 004/01, Considerations on Im Chaem's Application for Annulment of Transcripts and Written Records of Witnesses' Interviews, 27 October 2016, D298/2/1/3, para. 22.
[1537] Case 002, Decision on Ieng Thirith's Appeal Against Co-Investigating Judges' Order Rejecting the Request to Seise the Pre-Trial Chamber with a View to Annulment of All Investigations (D263/1), 25 June 2010, D263/2/6, para. 18.
[1538] Case 003, Decision related to (1) Meas Muth's Appeal Against Decision on Nine Applications to Seise the Pre-Trial Chamber with Requests for Annulment and (2) the Two Annulment Requests Referred by the International Co-Investigating Judge, 13 September 2016, D165/2/26, para. 33.
[1539] Case 004/02, Decision on Appeal Against the Decision on Ao An's Application to Annul the Entire Investigation, 5 September 2017, D350/1/1/4, para. 13.
[1540] Case 002, Decision on Ieng Thirith's Appeal Against Co-Investigating Judges' Order Rejecting the Request to Seise the Pre-Trial Chamber with a View to Annulment of All Investigations (D263/1), 25 June 2010, D263/2/6, para. 18; Case 003, Decision related to (1) Meas Muth's Appeal Against Decision on Nine Applications to Seise the Pre-Trial Chamber with Requests for Annulment and (2) the Two Annulment Requests Referred by the International Co-Investigating Judge, 13 September 2016, D165/2/26, para. 37.
[1541] Case 003, Decision related to (1) Meas Muth's Appeal Against Decision on Nine Applications to Seise the Pre-Trial Chamber with Requests for Annulment and (2) the Two Annulment Requests Referred by the International Co-Investigating Judge, 13 September 2016, D165/2/26, para. 37.
[1542] Internal Rules, rule 76(3).

out sufficient reasons, or related to an order that was open to appeal.[1543]

Applications which were manifestly unfounded were inadmissible. A request was "manifestly unfounded" only where "it [was] particularly *evident or very apparent* that it ha[d] no legal or factual foundation and hence no prospect of success".[1544] For example, the Pre-Trial Chamber concurred with the International Co-Investigating Judge's decision that a request to seize the Pre-Trial Chamber with an application seeking to annul the entire investigation in Case 004/02 "failed to put forward a legally or factually founded argument for a procedural defect" and was thus manifestly unfounded.[1545] In Case 004/01, despite not attaining the requisite supermajority vote to decide on the merits of an application for annulment of records of witness interviews, the Pre-Trial Chamber unanimously found it admissible on the basis that it was not "so obviously or very manifestly unfounded in law and fact that it [stood] no chance of being granted".[1546]

Applications which did not set sufficient reasons were inadmissible. The party seeking annulment of investigative actions must have stated which part of the proceedings is null and void and provide reasons for such an assertion.[1547] Particularising challenged portions of the proceedings in an annex was acceptable.[1548] In general, the Pre-Trial Chamber considered that it could not "be expected to consider a party's contention if it [did] not provide precise references". However, where the interests of justice and expediency so required, the Pre-Trial Chamber held that it would consider general contentions and require further submissions where appropriate.[1549]

Applications concerning orders subject to appeal were inadmissible. In Case 004, the International Pre-Trial Chamber Judges observed that the regimes for appellate review and for annulment were "mutually exclusive and appl[ied] to different categories of legal actions taken

[1543] Internal Rules, rule 76(4). See *e.g.*, Case 004/01, Considerations on Im Chaem's Application for Annulment of Transcripts and Written Records of Witnesses' Interviews, 27 October 2016, D298/2/1/3, paras 20-21.
[1544] Case 004/02, Decision on Appeal Against the Decision on Ao An's Application to Annul the Entire Investigation, 5 September 2017, D350/1/1/4, para. 13 (italics in original).
[1545] Ibid, paras 15-17.
[1546] Case 004/01, Considerations on Im Cheam's Application for Annulment of Transcripts and Written Records of Witnesses' Interviews, 27 October 2016, D298/2/1/3, para. 21.
[1547] Case 002, Decision on Appeal Against the Co-Investigating Judges' Order on the Charged Person's Eleventh Request for Investigative Action, 18 August 2009, D158/5/1/15, para. 36; Case 002, Decision on Nuon Chea's Appeal Against Order Refusing Request for Annulment, 26 August 2008, D55/I/8, para. 35.
[1548] Case 004, Decision on Yim Tith's Application to Annul the Investigative Material Produced by [OCIJ Investigator], 25 August 2017, D351/1/4, para. 7.
[1549] Case 004, Decision on Ao An's Application to Annul Non-Audio-Recorded Written Records of Interview, 30 November 2016, D296/1/1/4, para. 12.

by the Co-Investigating Judges, involving different standards of judicial review by the Pre-Trial Chamber".[1550] For instance, in Case 003, the Pre-Trial Chamber held that Internal Rule 76(2) excluded applications for annulment of the Closing Order because: (1) annulment applications had to be made before the issuance of the Closing Order; and (2) Closing Orders were appealable under Internal Rule 74(3).[1551]

5.5.2.2.2. *Assessment of annulment applications*

The Pre-Trial Chamber could not declare an investigative action null and void on its own initiative; rather, it was bound by the applications made by the Co-Investigating Judges or the parties.[1552] Annulment was expressly prescribed by the Internal Rules for certain procedural defects.[1553] For procedural defects not expressly prescribed as void in the Internal Rules, the Pre-Trial Chamber was required to ascertain whether an application: (1) specified the parts of the proceedings which were prejudicial to the rights and interests of the applicant; (2) made plain the prejudice; and, if so, (3) adduced evidence to sustain the allegations.[1554]

For instance, Internal Rule 67(2) provided that the "Indictment shall be void for procedural defect unless it sets out the identity of the Accused, a description of the material facts and their legal characterisation by the Co-Investigating Judges, including the relevant criminal provisions and the nature of the criminal responsibility".[1555] Internal Rule 53(3) required similar formalities for Introductory Submissions, the absence of which "render[ed] the submission void".

The "infringement of rights" meant "harmed interest".[1556] For instance, evidence obtained as a result of a proven violation of a Charged Person's rights as recognised in the ICCPR qualified

[1550] Case 004, Considerations on Closing Order Appeals, Opinion of Olivier Beauvallet and Baik Kang Jin, para. 165.
[1551] Case 003, Decision on Meas Muth's Request for the Pre-Trial Chamber to Take a Broad Interpretation of the Permissible Scope of Appeals Against the Closing Order and to Clarify the Procedure for Annulling the Closing Order, or Portions Thereof, if Necessary, 28 April 2016, D158/1, para. 18.
[1552] Case 002, Decision on Nuon Chea's Appeal Against Order Refusing Request for Annulment, 26 August 2008, D55/I/8, para. 35.
[1553] Ibid, para. 37.
[1554] Case 003, Decision on Meas Muth's Appeal Against Co-Investigating Judge Harmon's Decision on Meas Muth's Applications to Seise the Pre-Trial Chamber with Two Applications for Annulment of Investigative Action, 23 December 2015, D134/1/10, para. 22.
[1555] Internal Rules, rule 67(2).
[1556] Case 002, Decision on Ieng Thirith's Appeal Against Co-Investigating Judges' Order rejecting the Request to Seise the Pre-Trial Chamber with a View to Annulment of All Investigations (D263/1), 25 June 2010, D263/2/6, para. 21; Case 002, Decision on Nuon Chea's Appeal Against Order Refusing Request for Annulment, 26 August 2008, D55/I/8, para. 36.

as a procedural defect harming their interests, which may have led to annulment.[1557] However, the Pre-Trial Chamber held that for such evidence to be annulled, it would consider factors such as the "manner and surrounding circumstances in which evidence [was] obtained, as well as its reliability and effect on the integrity of the proceedings".[1558] Separately, the International Pre-Trial Chamber Judges considered that a procedural defect which was not prejudicial to the applicant, such as procedurally defective documents of no evidentiary value to the charges against the applicant, "does not entail annulment".[1559]

5.5.2.2.3. *Effect of annulment of investigative actions*

Where an application for annulment was granted, the investigative or judicial action(s) declared null and void was (or were) expunged from the material on the case file.[1560] The Pre-Trial Chamber was required to decide whether the annulment affected other actions or orders.[1561] However, nothing prevented a new investigation from placing new material, untainted by those defects, on the case file.[1562] While the annulment procedure was designed to nullify portions of the proceedings affected by procedural defects, "not […] investigations in general",[1563] the Pre-Trial Chamber had discretion to appreciate the consequences of the annulment on the entirety of the case.[1564] Any Judge, Co-Prosecutor or Co-Lawyer who drew an inference against the parties from annulled investigative actions or orders faced disciplinary proceedings under Internal Rule 6, which governed misconduct and negligence by ECCC personnel in the conduct of their duties, and Internal Rule 35, which governed interference with the administration of

[1557] Case 004, Decision on Yim Tith's Application to Annul the Investigative Material Produced by [OCIJ Investigator], 25 August 2017, D351/1/4, para. 14; Case 002, Decision on Nuon Chea's Appeal Against Order Refusing Request for Annulment, 26 August 2008, D55/I/8, para. 40; Case 002, Decision on Ieng Thirith's Appeal Against Co-Investigating Judges' Order Rejecting the Request to Seise the Pre-Trial Chamber with a View to Annulment of All Investigations (D263/1), 25 June 2010, D263/2/6, para. 21.
[1558] Case 002, Decision on Nuon Chea's Appeal Against Order Refusing Request for Annulment, 26 August 2008, D55/I/8, para. 41.
[1559] Case 004/01, Considerations on Im Cheam's Application for Annulment of Transcripts and Written Records of Witnesses' Interviews, 27 October 2016, D298/2/1/3, Opinion of Judges Olivier Beauvallet and Baik Kang Jin, paras 42, 50-53.
[1560] Internal Rules, rule 76(5); Case 002, Decision on Ieng Thirith's Appeal Against Co-Investigating Judges' Order Rejecting the Request to Seise the Pre-Trial Chamber with a View to Annulment of All Investigations (D263/1), 25 June 2010, D263/2/6, para. 27.
[1561] Internal Rules, rule 76(5).
[1562] Case 002, Decision on Ieng Thirith's Appeal Against Co-Investigating Judges' Order Rejecting the Request to Seise the Pre-Trial Chamber with a View to Annulment of All Investigations (D263/1), 25 June 2010, D263/2/6, para. 27.
[1563] Case 002, Decision on Khieu Samphan's Appeal Against the Order on the Request for Annulment for Abuse of Process, 4 May 2010, D197/5/8, para. 24.
[1564] Case 002, Decision on Ieng Thirith's Appeal Against Co-Investigating Judges' Order Rejecting the Request to Seise the Pre-Trial Chamber with a View to Annulment of All Investigations (D263/1), 25 June 2010, D263/2/6, paras 24-26.

justice.[1565]

5.5.3. The Pre-Trial Chamber's jurisdiction over appeals against the Co-Investigating Judges' orders and decisions

Internal Rule 73(a) granted the Pre-Trial Chamber jurisdiction over appeals against the Co-Investigating Judges' orders and decisions. Only a party to the case – the Co-Prosecutors, the Charged Person/Accused, and Civil Parties[1566] – could claim a right to be heard before the Pre-Trial Chamber decided on an appeal.[1567]

Suspects, who were not a party, did not have the right to appeal the Co-Investigating Judges' orders and decisions.[1568] Similarly, Charged Persons did not have the right to intervene in appeals in cases to which they were not parties.[1569] By contrast, in cases with multiple Charged Persons, each affected Charged Person had the right to appeal regardless of whether they joined the original request[1570] or submitted a related request that was not referred to in the order or decision being appealed.[1571]

5.5.3.1. Procedure for appeals against orders and decisions

Internal Rules 75 and 77(3) governed the procedure for all appeals against the Co-Investigating Judges' orders and decisions, except for appeals concerning Civil Party applications, which were governed by Internal Rule 77 *bis*.[1572]

[1565] Internal Rules, rules 6, 35(1), 76(5).
[1566] See Internal Rules, glossary ("Party").
[1567] Case 001, Decision on Ieng Sary's Request to Make Submissions on the Application of JCE, 6 October 2008, D99/3/19, para. 10 (referring to Internal Rules, rules 77(3), (10)). See also Case 004, Decision on International Co-Prosecutor's Appeal concerning Testimony at Trial in Closed Session, 20 July 2016, D309/6, para. 17. Affected non-parties had the capacity to appeal decisions refusing the return of seized items. See Internal Rules, rule 74(5). For the types of appeals available to the Co-Prosecutors, the Charged Person/Accused, and the Civil Parties, see Internal Rules, rules 74(2), 74(3), 74(4) respectively.
[1568] See Internal Rules, glossary ("Party"). See also Case 004, Decision on Ao An's Appeal Against International Co-Investigating Judge's Decision Denying Requests for Investigative Actions, 30 September 2014, D190/1/2, para. 18 (referring to Case 004, Decision on the Ta An Defence Requests to Access the Case File and Take Part in the Judicial Investigation, 31 July 2013, D121/4, para. 37). See also Case 004, Decision on International Co-Prosecutor's Appeal concerning Testimony at Trial in Closed Session, 20 July 2016, D309/6, para. 17.
[1569] Case 001, Decision on Ieng Sary's Request to Make Submissions on the Application of JCE, 6 October 2008, D99/3/19, para. 14; Case 004/01, Decision on Im Chaem's Request for Confirmation on the Scope of the Ao An's Annulment Application Regarding All Unrecorded Interviews, 15 September 2016, D296/4, para. 6.
[1570] See Case 002, Decision on Admissibility of the Appeal Against Co-Investigating Judges' Order on Use of Statements Which Were or May Have Been Obtained by Torture, 27 January 2010, D130/10/12, para. 14.
[1571] Case 002, Decision on Admissibility of Ieng Sary's Appeal Against the OCIJ's Constructive Denial of Ieng Sary's Requests Concerning the OCIJ's Identification of and Reliance on Evidence Obtained Through Torture, 10 May 2010, D130/7/3/5, para. 18.
[1572] Internal Rules, rules 75, 77(3), 77 *bis*.

Under Internal Rule 75, notices of appeal and submissions on appeal had to be filed with the Pre-Trial Chamber within ten and thirty days, respectively, from the date the order or decision was notified in both Khmer and either English or French.[1573] Responses to appeal submissions and replies to responses were required to be filed within ten and five calendar days, respectively, of the notification of the document to which the party was responding or replying.[1574] All written submissions were required to be filed in both Khmer and either English or French,[1575] and to respect the page limits provided for in the Practice Direction on the Filing of Documents before the ECCC.[1576] In exceptional circumstances, the Pre-Trial Chamber could grant the parties' requests for an extension of time[1577] and pages,[1578] as well as authorise them to file their written submissions in French or English first, with a Khmer translation to follow.[1579]

Absent good cause for late filing and in the absence of prior authorisation by the Pre-Trial Chamber, late submissions were found inadmissible.[1580] Under Internal Rule 77(3), upon receipt of a notice of appeal, the President of the Pre-Trial Chamber had to "set a hearing date".[1581] However, the Pre-Trial Chamber could decide to determine an appeal on the basis of written submissions alone.[1582] In practice, the Pre-Trial Chamber only exceptionally held hearings except when it considered appeals against Closing Orders[1583] and provisional detention orders.[1584]

The Pre-Trial Chamber considered appeals on the admissibility of Civil Party applications under Internal Rule 77 *bis* "expeditiously on the basis of written submissions alone".[1585] Written submissions had to be filed within ten days from the notification of the Co-Investigating Judges' order or decision, responses had to be filed within five days from the notification of the appeal submission, and no reply was allowed.[1586] The Pre-Trial Chamber

[1573] Internal Rules, rules 75(1), 75(3); Practice Direction on the Filing of Documents, article 8.5.
[1574] Practice Direction on the Filing of Documents, articles 8.3, 8.4.
[1575] Ibid, article 7.1.
[1576] Ibid, article 5.2.
[1577] Internal Rules, rule 39(4)(a); Practice Direction on the Filing of Documents, article 8.1.
[1578] Practice Direction on the Filing of Documents, article 5.4.
[1579] Ibid, article 7.2.
[1580] See Case 004, Decision on International Co-Prosecutor's Appeal of Decision on Request for Investigative Action, 11 August 2017, D338/1/1/3, paras 6-7.
[1581] Internal Rules, rule 77(3)(a).
[1582] Internal Rules, rule 77(3)(b).
[1583] See *e.g.*, Case 003, Scheduling Order for the Pre-Trial Chamber's Hearing on Appeals Against Closing Orders, 24 October 2019, D266/12.
[1584] See *e.g.*, Case 001, Scheduling Order, 23 October 2007, C5/20.
[1585] Internal Rules, rule 77 *bis* (1).
[1586] Internal Rules, rule 77 *bis* (2).

exceptionally departed from the procedure set forth in Internal Rule 77 *bis* by granting the Civil Party Co-Lawyers an extension of time and pages, as well as the right to file their appeal submissions in one language with translation to follow, when appealing the International Co-Investigating Judge's order denying thousands of Civil Party applications in the case at once.[1587]

5.5.3.2. Orders and decisions subject to appeal

Internal Rule 74 provided an exhaustive list of the Co-Investigating Judges' orders and decisions that were open to appeal. While the Co-Prosecutors could appeal "all orders by the Co-Investigating Judges",[1588] the Charged Persons/Accused and the Civil Parties were limited to specific orders and decisions, as follows:

i. *Appeals open to Charged Persons/Accused and Civil Parties:* Orders and decisions refusing requests for investigative actions;[1589] refusing requests for restitution of seized items;[1590] refusing requests for expert reports[1591] and additional expert investigations;[1592] refusing requests to seize the Pre-Trial Chamber with annulment applications;[1593] relating to protective measures;[1594] and reducing the scope of the judicial investigation under Internal Rule 66 *bis*.[1595]

ii. *Appeals open to Charged Persons/Accused but not the Civil Parties:* Orders and decisions confirming the jurisdiction of the ECCC;[1596] relating to provisional detention or bail;[1597] and declaring a Civil Party application admissible.[1598]

iii. *Appeals open to the Civil Parties but not the Charged Persons/Accused:* Orders declaring a Civil Party application inadmissible[1599] and Dismissal Orders if the

[1587] Case 004/02, Decision on Civil Party Requests for Extension of Time and Page Limits, 27 August 2018, D362/4, paras 9-12.
[1588] Internal Rules, rule 74(2).
[1589] Internal Rules, rules 74(3)(b), 74(4)(a).
[1590] Internal Rules, rules 74(3)(c), 74(4)(c).
[1591] Internal Rules, rules 74(3)(d), 74(4)(d).
[1592] Internal Rules, rules 74(3)(e), 74(4)(e).
[1593] Internal Rules, rules 74(3)(g), 74(4)(g).
[1594] Internal Rules, rules 74(3)(h), 74(4)(h).
[1595] Internal Rules, rules 74(3)(j), 74(4)(i).
[1596] Internal Rules, rule 74(3)(a).
[1597] Internal Rules, rule 74(3)(f).
[1598] Internal Rules, rule 74(3)(i).
[1599] Internal Rules, rule 74(4)(b).

Co-Prosecutors had also appealed.[1600]

Several of the grounds listed above were not litigated before the Pre-Trial Chamber and will therefore not be examined below.[1601]

5.5.3.2.1. *Confirming the jurisdiction of the ECCC*

Only jurisdictional challenges could be raised on appeal under Internal Rule 74(3)(a).[1602] Jurisdictional challenges were generally understood as challenges "against the court's competence *ratione personae*, *materiae*, *temporis* and *loci*".[1603] The Pre-Trial Chamber adopted the jurisprudence of *ad hoc* tribunals, rather that of domestic civil law systems, in determining what constituted a proper jurisdictional challenge.[1604]

Internal Rule 74(3) did not list indictments among the orders open to appeal by Charged Persons. However, the Pre-Trial Chamber held that "to the extent that it confirm[ed] the jurisdiction of the ECCC, [an indictment was] clearly subject to appeal on jurisdictional issues decided by the Co-Investigating Judges". Nonetheless, Pre-Trial Chamber reasoned that it would be inconsistent with the approach adopted by the Internal Rules to allow Charged Persons the right to appeal an Indictment "in its entirety" for generally confirming the ECCC's jurisdiction to prosecute them.[1605]

As such, challenges against procedural irregularities in the investigation raised on appeal against the Indictment or challenges alleging defects in the form of the Indictment itself did not constitute jurisdictional challenges within the meaning of Internal Rule 74(3)(a).[1606]

Challenges relating to the "specific contours" of a substantive crime or form of responsibility were inadmissible at the pre-trial phase because they "often involve factual or mixed questions of law and fact determinations to be made at trial upon hearing and weighing the relevant

[1600] Internal Rules, rule 74(4)(f). See *e.g.*, Case 004, Considerations on Closing Order Appeals, para. 43.
[1601] These include: appeals concerning orders and decisions refusing requests for restitution of seized items (Internal Rules 74(3)(c), 74(4)(c), and 74(5)); appeals by the Civil Parties against a Dismissal Order (Internal Rule 74(4)(f)); appeals against orders and decisions relating to protective measures (Internal Rules 74(3)(h) and 74(4)(h)); and appeals against orders and decisions reducing the scope of the judicial investigation (Internal Rules 74(3)(j) and 74(4)(i)).
[1602] See Case 002, Decision on the Appeals Against the Co-Investigating Judges Order on Joint Criminal Enterprise (JCE), 20 May 2010, D97/15/9, para. 21; Case 002, Decision on Closing Order Appeal (Ieng Sary), para. 45.
[1603] See Case 003, Considerations on Meas Muth's Appeal Against Co-Investigating Judge Harmon's Decision to Charge Meas Muth In Absentia, 30 March 2016, D128/1/9, para. 27.
[1604] Case 002, Decision on Closing Order Appeal (Ieng Sary), para. 45.
[1605] Case 002, Decision on Closing Order Appeal (Khieu Samphan), para. 14.
[1606] Ibid. See also Case 002, Decision on Closing Order Appeal (Ieng Sary), para. 47.

evidence". By contrast, the Pre-Trial Chamber considered an appeal to be a valid jurisdictional challenge if it challenged the "existence" or "recognition" of crimes or forms of responsibility at the time relevant to the Indictment, and demonstrated that the application of said crime or form of responsibility would infringe upon the principle of legality.[1607] The Pre-Trial Chamber reasoned that "[t]he principle of legality must be satisfied as a logical antecedent to establishing whether certain crimes and modes of liability existed at the time the crimes were allegedly committed".[1608]

Challenges to the Co-Investigating Judges' *implicit* decision that joint criminal enterprise applied at the ECCC were also considered valid jurisdictional challenges.[1609] The Pre-Trial Chamber noted that while the Co-Investigating Judges had not expressly confirmed the ECCC's jurisdiction to apply joint criminal enterprise in Case 002, their decision "expressly relie[d] on the ICTY case law treating as jurisdictional the question of whether a form of liability is recognized in customary international law".[1610]

Challenges to the International Co-Investigating Judge's decision to charge Suspects *in absentia* in the absence of explicit provisions amounted to a "decision 'confirming jurisdiction of the ECCC', when interpreted broadly".[1611] The Pre-Trial Chamber reasoned that a broad interpretation of the notion of jurisdiction was appropriate in these circumstances because: (1) the International Co-Investigating Judge had "sought to address a situation that he considered to be unforeseen" in the ECCC legal framework; and (2) appeals against the charging decisions were the "first opportunity for the parties to present their views" and had to "be resolved as early as possible as it may impact on the continuation of proceedings against [them]".[1612]

[1607] Case 002, Decision on Closing Order Appeal (Ieng Sary), paras 45-46. See also Case 004/02, Decision on Ao An's Appeal Against the Notification on the Interpretation of 'Attack Against the Civilian Population' in the Context of Crimes Against Humanity with regard to a State's or Regime's Own Armed Forces, 30 June 2017, D347.1/1/7, para. 11.
[1608] Case 002, Decision on Closing Order Appeal (Ieng Sary), para. 69.
[1609] Case 002, Decision on the Appeals Against the Co-Investigating Judges Order on Joint Criminal Enterprise (JCE), 20 May 2010, D97/15/9, paras 22-25.
[1610] Ibid, para. 24.
[1611] Case 003, Considerations on Meas Muth's Appeal Against Co-Investigating Judge Harmon's Decision to Charge Meas Muth *In Absentia*, 30 March 2016, D128/1/9, para. 29; Case 004/01, Considerations on Im Chaem's Appeal Against the International Co-Investigating Judge's Decision to Charge Her *In Absentia*, 1 March 2016, D239/1/8, para. 24.
[1612] Case 003, Considerations on Meas Muth's Appeal Against Co-Investigating Judge Harmon's Decision to Charge Meas Muth *In Absentia*, 30 March 2016, D128/1/9, para. 28; Case 004/01, Considerations on Im Chaem's Appeal Against the International Co-Investigating Judge's Decision to Charge her *In Absentia*, 1 March 2016, D239/1/8, para. 23.

5.5.3.2.2. *Refusing requests for investigative actions*

The Pre-Trial Chamber's jurisdiction under Internal Rules 74(3)(b) and 74(4)(a) required: (1) a request for investigative action which was "allowed under the Internal Rules"; and (2) a refusal of the request by the Co-Investigating Judges.[1613]

Pursuant to Internal Rule 55(10), a request for investigative action was a request "for action to be performed by the Co-Investigating Judges or, upon delegation, by ECCC Investigators or the Judicial Police, with the purpose of collecting information conducive to ascertaining the truth".[1614] Requests which had the purpose of obtaining information suggesting institutional "corruption",[1615] ascertaining the admissibility of or methods used for the evaluation of certain evidence by the Co-Investigating Judges,[1616] or receiving translations of documents into the language of the Charged Person or their Co-Lawyers[1617] did not constitute requests for investigative action.

The Co-Investigating Judges had discretion to decide on the usefulness or the opportunity to accomplish any investigative action.[1618] Where the Co-Investigating Judges did not agree with a party's request, they were required to issue a rejection order as soon as possible and, in any event, before the end of the judicial investigation.[1619]

5.5.3.2.3. *Refusing requests for expert reports or for additional expert investigations*

Internal Rule 74 separated grounds of appeal concerning the Co-Investigating Judges' orders and decisions refusing: (1) requests for expert reports under Internal Rules 74(3)(d) and 74(4)(d); and (2) requests for additional expert investigations under Internal Rules 74(3)(e) and

[1613] Case 002, Decision on Appeal Against the Co-Investigating Judges' Order on the Charged Person's Eleventh Request for Investigative Action, 18 August 2009, D158/5/1/15, para. 21.
[1614] Case 002, Decision on Khieu Samphan's Appeal Against the Order on Translation Rights and Obligations of the Parties, 20 February 2009, A190/I/20, para. 28. See also Case 002, Decision on Admissibility of Ieng Sary's Appeal Against the OCIJ's Constructive Denial of Ieng Sary's Requests Concerning the OCIJ's Identification of and Reliance on Evidence Obtained Through Torture, 10 May 2010, D130/7/3/5, para. 23.
[1615] Case 002, Decision on Appeal Against the Co-Investigating Judges' Order on the Charged Person's Eleventh Request for Investigative Action, 18 August 2009, D158/5/1/15, paras 24-28.
[1616] Case 002, Decision on Admissibility of Ieng Sary's Appeal Against the OCIJ's Constructive Denial of Ieng Sary's Requests Concerning the OCIJ's Identification of and Reliance on Evidence Obtained through Torture, 10 May 2010, D130/7/3/5, paras 22-24.
[1617] Case 002, Decision on Khieu Samphan's Appeal Against the Order on Translation Rights and Obligations of the Parties, 20 February 2009, A190/I/20, paras 28-30.
[1618] Case 002, Decision on the Appeal from the Order on the Request to Seek Exculpatory Evidence in the Shared Material Drive, 18 November 2009, D164/4/13, para. 22.
[1619] Internal Rules, rule 55(10).

74(4)(e). The two grounds, however, were essentially similar and have been applied on appeals relating to requests under Internal Rule 31(10),[1620] which allowed the parties to request the appointment of experts to conduct an examination which had not previously been conducted and/or to re-examine a matter already the subject of an expert report.[1621] The Pre-Trial Chamber's jurisdiction therefore required: (1) a request for an expert report or a request for additional expert investigation allowed under the Internal Rules; and (2) a refusal of the request by the Co-Investigating Judges.[1622]

The International Pre-Trial Chamber Judges considered that the requirement that the Co-Investigating Judges "set out the reasons for [their] rejection" of requests for investigative actions under Internal Rule 55(10) equally applied to expert requests under Internal Rule 31(10).[1623] The Co-Investigating Judges had to decide on requests for experts "as soon as possible and in any event before the end of the investigation".[1624] These two conditions were cumulative: the Co-Investigating Judges were not permitted to choose either to give a ruling "as soon as possible" or to give a ruling "before the end of the investigation".[1625]

In Case 002, the Pre-Trial Chamber held that the Co-Investigating Judges' failure to decide on a request to appoint a psychiatric expert as soon as possible deprived the Charged Person of the possibility of obtaining the benefit he sought – *i.e.*, to have his mental capacity to assist in his own defence and participate in the proceedings against him examined by an expert – thereby amounting to constructive refusal of the request, appealable before the Pre-Trial Chamber under Internal Rule 74(3)(d).[1626] However, in the same case, the Pre-Trial Chamber found an appeal under Internal Rule 74(3)(e) inadmissible where an expert was appointed by the Co-Investigating Judges, but the expert's report were yet to be completed.[1627]

[1620] *Cf.* Case 002, Decision on Ieng Sary's Appeal Regarding the Appointment of a Psychiatric Expert, 21 October 2008, A189/I/8, para. 24 (referring to Internal Rule 74(3)(d)); Case 002, Decision on Ieng Sary's Appeal Against the Co-Investigating Judges' Order on Request for Additional Expert, 14 December 2009, D140/4/5, para. 14 (referring to Internal Rule 74(3)(e)). For more on requests for experts, see section 4.12.
[1621] Internal Rules, rule 31(10). See also Case 002, Decision on Ieng Sary's Appeal Against the Co-Investigating Judges' Order on Request for Additional Expert, 14 December 2009, D140/4/5, para. 11.
[1622] Case 002, Decision on Ieng Sary's Appeal Against the Co-Investigating Judges' Order on Request for Additional Expert, 14 December 2009, D140/4/5, paras 11-14.
[1623] Case 004/02, Considerations on Appeal Against Decision on Ao An's Fifth Request for Investigative Action, 16 June 2016, D260/1/1/3, Opinion of Judges Olivier Beauvallet and Baik Kang Jin, para. 60.
[1624] Internal Rules, rule 31(10).
[1625] Case 002, Decision on Ieng Sary's Appeal regarding the Appointment of a Psychiatric Expert, 21 October 2008, A189/I/8, para. 21.
[1626] Ibid, paras 22-24. See also Case 002, Decision on Nuon Chea's Appeal regarding Appointment of an Expert, 22 October 2008, D54/V/6, para. 16.
[1627] Case 002, Decision on Ieng Sary's Appeal Against the Co-Investigating Judges' Order on Request for Additional Expert, 14 December 2009, D140/4/5, paras 12-14.

5.5.3.2.4. *Refusing requests to seize the Pre-Trial Chamber with annulment applications*

The Pre-Trial Chamber's jurisdiction under Internal Rules 74(3)(g) and 74(4)(g) required: (1) a reasoned application to the Co-Investigating Judges, requesting them to seize the Pre-Trial Chamber with a view to annulment; and (2) a refusal of the request by the Co-Investigating Judges.[1628] The Co-Investigating Judges were required to decide on requests to seize the Pre-Trial Chamber with a view to annul investigative actions "as soon as possible and, in any case, before the Closing Order",[1629] stating the reasons for seizing the Pre-Trial Chamber or for declining to do so.[1630]

5.5.3.2.5. *Relating to provisional detention and bail*

Provisional detention. The Charged Person or Accused could appeal any of the Co-Investigating Judges' orders or decisions relating to provisional detention.[1631] This included, for instance, challenges to the initial order on provisional detention,[1632] the extension of provisional detention,[1633] as well as the modalities[1634] and conditions of detention.[1635]

The Pre-Trial Chamber noted that, while neither the UN-RGC Agreement nor the ECCC Law provide for appeals against the Co-Investigating Judges' provisional detention orders, Internal Rule 74(3)(f) allowed for this possibility "knowing that the [Code of Criminal Procedure] makes such a provision with regards to *La Chambre d'instruction*".[1636] Accordingly, the Pre-

[1628] See *e.g.*, Case 002, Decision on Ieng Thirith's Appeal Against the Co-Investigating Judges' Order Rejecting the Request to Seise the Pre-Trial Chamber with a View to Annulment of All Investigations (D263/1), 25 June 2010, D263/2/6, para. 11; Case 003, Decision related to (1) Meas Muth's Appeal Against Decision on Nine Applications to Seise the Pre-Trial Chamber with Requests for Annulment and (2) the Two Annulment Requests Referred by the International Co-Investigating Judge, 13 September 2016, D165/2/26, paras 20-21. See also Case 003, Decision on Meas Muth's Appeal Against Co-Investigating Judge Harmon's Decision on Meas Muth's Applications to Seise the Pre-Trial Chamber with Two Applications for Annulment of Investigative Action, 23 December 2015, D134/1/10, para. 13. For more on the annulment procedure, see section 5.5.2.
[1629] Internal Rules, rule 76(2).
[1630] Case 003, Decision on Meas Muth's Appeal Against Co-Investigating Judge Harmon's Decision on Meas Muth's Applications to Seise the Pre-Trial Chamber with Two Applications for Annulment of Investigative Action, 23 December 2015, D134/1/10, para. 18.
[1631] See Case 002, Decision on Ieng Sary's Appeal Against the Closing Order's Extension of his Provisional Detention, 21 January 2011, D427/5/10, para. 16.
[1632] See *e.g.*, Case 001, Decision on Appeal Against Provisional Detention Order, 3 December 2007, C5/45.
[1633] See *e.g.*, Case 002, Decision on Appeal Against Order on Extension of Provisional Detention of Nuon Chea, 4 May 2009, C9/4/7.
[1634] Case 002, Decision on Ieng Sary's Appeal Against Co-Investigating Judges' Order Denying Request to Allow Audio/Video Recording of Meetings with Ieng Sary at the Detention Facility, 11 June 2010, A371/2/12, para. 11.
[1635] Case 002, Decision on the Admissibility of the Appeal Lodged by Ieng Sary on Visitation Rights, 21 March 2008, A104/II/4, para. 10; Case 002, Decision on Nuon Chea's Appeal concerning Provisional Detention Conditions, 26 September 2008, C33/I/7, para. 10.
[1636] Case 001, Decision on Appeal Against Provisional Detention Order, 3 December 2007, C5/45, para. 7.

Trial Chamber held that its jurisdiction to hear appeals relating to provisional detention stemmed from the jurisdiction afforded to the Investigation Chamber, which reviews appeals against orders of the Investigating Judges on provisional detention matters under Cambodian law.[1637]

Bail and release. Any request for release submitted to the President of the Pre-Trial Chamber, rather than the Co-Investigating Judges, was inadmissible.[1638] When applying for release from provisional detention, the Charged Person bore the burden of "demonstrat[ing] that the conditions set out in Internal Rule 63(3) [were] no longer satisfied".[1639] While the Internal Rules do not provide for the release of a Charged Person on the basis of health considerations, procedural rules established at the international level allow for a Charged Person's release from provisional detention on humanitarian grounds only where their condition was incompatible with detention.[1640]

5.5.3.2.6. *Relating to Civil Party applications*

The Pre-Trial Chamber considered appeals against orders and decisions relating to the admissibility of Civil Party applications pursuant to Internal Rule 77 *bis*.[1641] When assessing the materials supporting a Civil Party application and deciding whether the criteria set out by Internal Rule 23 *bis* for admitting a Civil Party applicant, the Pre-Trial Chamber had to be "satisfied that facts alleged in support of the application are more likely than not to be true".[1642] The International Pre-Trial Chamber Judges considered that facts excluded from the judicial investigation on the basis of Internal Rule 66 *bis* may still form part of a decision on the admissibility of their Civil Party application under Internal Rule 23 *bis*.[1643]

5.5.3.3. Appeals under Internal Rule 21

In exceptional circumstances, the Pre-Trial Chamber broadened the scope of grounds of appeal

[1637] Ibid. See also Case 002, Decision on Civil Party Participation in Provisional Detention Appeals, 20 March 2008, D11/53, para. 38.
[1638] See Case 002, Decision on Khieu Samphan's Supplemental Application for Release, 24 December 2008, C26/5/5, paras 12-14.
[1639] Case 002, Decision on Khieu Samphan's Appeals Against Order Refusing Request for Release and Extension of Provisional Detention Order, 3 July 2009, C26/5/26, para. 21.
[1640] Ibid, paras 79-83.
[1641] Internal Rules, rule 77 *bis*.
[1642] Case 004, Considerations on Appeal Against Order on the Admissibility of Civil Party Applicants, 29 September 2021, D384/7, para. 39. For more information about the criteria for admitting Civil Party applications, see section 7.1.
[1643] Case 003, Considerations on Appeal Against Order on the Admissibility of Civil Party Applicants, 10 June 2021, D269/4, Opinion of Judges Olivier Beauvallet and Baik Kang Jin, para. 87.

enumerated under Internal Rule 74 in light of Internal Rule 21(1)(a),[1644] where a case's particular facts and circumstances raised issues of fundamental rights or serious issues of fairness.[1645] In determining the admissibility of appeals raised under Internal Rule 21, the Pre-Trial Chamber applied a two-prong test, according to which the Appellant must demonstrate that: (1) the situation at issue did not fall within the applicable rules; and (2) the particular circumstances of the case required the Pre-Trial Chamber's intervention to avoid "irremediable damage to the fairness of the investigation or proceedings", or to the Appellant's "fundamental rights".[1646]

Internal Rule 21, however, did not provide an automatic avenue for appeals raising fair trial rights violations.[1647] For instance, the Pre-Trial Chamber would not exercise its jurisdiction over appeals under Internal Rule 21 to entertain general requests for clarification of the law, requests alleging hypothetical scenarios, or requests that do not allege what prejudice the party would concretely suffer should the hypothetical scenario materialise.[1648]

The Pre-Trial Chamber broadened the scope of grounds of appeal enumerated under Internal Rule 74 in light of Internal Rule 21. It considered that, while the Internal Rules did not expressly allow for appeals against an Indictment, such appeals may be allowed on a case-by-case basis where they "raise[d] matters which cannot be rectified by the Trial Chamber", because in such circumstances "not allowing the possibility to appeal […] would irreparably harm the fair trial rights of the [A]ccused".[1649] In other instances, the Pre-Trial Chamber exercised its jurisdiction to hear appeals in light of Internal Rule 21, including on questions

[1644] See Case 002, Decision on Closing Order Appeal (Ieng Sary), paras 48-49.
[1645] Case 004, Decision on Yim Tith's Appeal Against the Decision Denying his Request for Clarification, 13 November 2014, D205/1/1/2, para. 7. See *e.g.*, Case 002, Decision on Ieng Thirith's Appeal Against the Co-Investigating Judges' Order Rejecting the Request for Stay of Proceedings on the Basis of Abuse of Process (D264/1), 10 August 2010, D264/2/6, para. 14; Case 002, Decision on Ieng Sary's Appeal Against Co-Investigating Judges' Decision Refusing to Accept the Filing of Ieng Sary's Response to the Co-Prosecutors' Rule 66 Final Submission and Additional Observations, and Request for Stay of the Proceedings, 20 September 2010, D390/1/2/4, para. 13. *Cf.* Case 002/01, Decision on Appeal Against the Response of the Co-Investigating Judges on the Motion on Confidentiality, Equality and Fairness, 29 June 2011, A410/2/6, para. 10.
[1646] Case 004/01, Considerations on Im Chaem's Appeal Against the International Co-Investigating Judge's Decision to Charge her *In Absentia*, 1 March 2016, D239/1/8, para. 17.
[1647] Case 004, Decision on Yim Tith's Appeal Against the Decision Denying his Request for Clarification, 13 November 2014, D205/1/1/2, para. 7; Case 002, Decision on Appeal Against the Response of the Co-Investigating Judges on the Motion on Confidentiality, Equality and Fairness, 29 June 2011, A410/2/6, para. 10.
[1648] See Case 003, Decision on Meas Muth's Request for the Pre-Trial Chamber to Take a Broad Interpretation of the Permissible Scope of Appeals Against the Closing Order and to Clarify the Procedure for Annulling the Closing Order, or Portions Thereof, if Necessary, 28 April 2016, D158/1, para. 14; Case 004, Decision on Yim Tith's Appeal Against the Decision Denying his Request for Clarification, 13 November 2014, D205/1/1/2, para. 8.
[1649] Case 002, Decision on Closing Order Appeal (Ieng Sary), para. 48.

such as:

i. Whether the cumulative effect of irregularities and violations in investigations contributed to viewing the Co-Investigating Judges as not being fair, impartial, and unbiased;[1650]

ii. Whether allegations of widespread institutional corruption and irregularly obtained evidence threatened the Charged Person's right to an independent and impartial tribunal;[1651]

iii. Whether the publication of a Charged Person's home address on ECCC's documents and website during the pre-trial stage of the proceedings violated their right to privacy;[1652]

iv. Whether the lack of specificity and defects in an Indictment would have irremediably harmed the interests of a Charged Person;[1653] and

v. Whether dismissing an appeal in order to preserve judicial resources and accelerate the legal and procedural processes would have outweighed the Charged Person's fairness interests.[1654]

5.5.3.4. Standard of review on appeal

Standard of review for discretionary decisions. In reviewing the Co-Investigating Judges' discretionary decisions – such as those concerning requests for investigative actions under

[1650] See Case 002, Decision on Ieng Thirith's Appeal Against the Co-Investigating Judges' Order Rejecting the Request for Stay of Proceedings on the Basis of Abuse of Process (D264/1), 10 August 2010, D264/2/6, paras 29-39.
[1651] See Case 002, Decision on Appeal Against the Co-Investigating Judges' Order on the Charged Person's Eleventh Request for Investigative Action, 18 August 2009, D158/5/1/15, paras 30-51.
[1652] See Case 004, Decision on Ao An's Urgent Request for Redaction and Interim Measures, 5 September 2018, D360/3, paras 10-13.
[1653] See Case 003, Decision on Meas Muth's Request for the Pre-Trial Chamber to Take a Broad Interpretation of the Permissible Scope of Appeals Against the Closing Order and to Clarify the Procedure for Annulling the Closing Order, or Portions Thereof, if Necessary, 28 April 2016, D158/1, para. 15; Case 002, Decision on the Appeals Against the Co-Investigating Judges Order on Joint Criminal Enterprise (JCE), 20 May 2010, D97/15/9, para. 34.
[1654] See Case 002, Decision on the Appeals Against the Co-Investigating Judges Order on Joint Criminal Enterprise (JCE), 20 May 2010, D97/15/9, para. 35.

Internal Rule 55(10),[1655] requests for experts under Internal Rule 31(10),[1656] or their determinations of whether a person was among those most responsible for the purpose of the ECCC's personal jurisdiction[1657] – the Pre-Trial Chamber's role was "limited to the extent of determining whether the Co-Investigating Judges properly exercised their discretion".[1658]

The Pre-Trial Chamber could reverse discretionary decisions where they were: (1) based on an incorrect interpretation of the governing law so as to invalidate the decision; (2) based on a patently incorrect conclusion of fact occasioning a miscarriage of justice; and/or (3) so unfair or unreasonable as to constitute an abuse of the Co-Investigating Judges' discretion and force the conclusion that they failed to exercise their discretion judiciously.[1659] The error or abuse had to be "fundamentally determinative of the exercise of the [Co-Investigating Judges'] discretion".[1660]

When the Pre-Trial Chamber overturned discretionary decisions, it normally remitted the decision to the Co-Investigating Judges for reconsideration,[1661] considering it "inappropriate

[1655] See *e.g.*, Case 002, Decision on the Appeal from the Order on the Request to Seek Exculpatory Evidence in the Shared Materials Drive, 12 November 2009, D164/3/6, para. 24; Case 002, Decision on Reconsideration of 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, 27 September 2010, D365/2/17, para. 36.
[1656] See *e.g.*, Case 002, Decision on Ieng Sary's Appeal Against the Co-Investigating Judges' Order Denying his Request for Appointment of an Additional Expert to Re-Examine the Subject Matter of the Expert Report Submitted by Ms. Ewa Tabeau and Mr. They Kheam, 28 June 2010, D140/9/5, para. 16; Case 002, Decision on Nuon Chea's Appeal Against the Co-Investigating Judges' Order Rejecting Request for a Second Expert Opinion, 1 July 2010, D356/2/9, para. 17.
[1657] See *e.g.*, Case 004/01, Considerations on Closing Order Appeal, para. 20; Case 004/02, Considerations on Closing Order Appeals, para. 28; Case 003, Considerations on Closing Order Appeals, para. 44; Case 004, Considerations on Closing Order Appeals, para. 34.
[1658] Case 002, Decision on Ieng Sary's Appeal Against the Co-Investigating Judges' Order Denying his Request for Appointment of an Additional Expert to Re-Examine the Subject Matter of the Expert Report Submitted by Ms. Ewa Tabeau and Mr. They Kheam, 28 June 2010, D140/9/5, para. 16.
[1659] Case 002, Decision on Reconsideration of 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, 27 September 2010, D365/2/17, para. 36; Case 002, Decision on Ieng Sary's Appeal Against Co-Investigating Judges' Order Denying Request to Allow Audio/Video Recording of Meetings with Ieng Sary at the Detention Facility, 11 June 2010, A371/2/12, para. 22; Case 002, Decision on Ieng Sary's Appeal Against the Co-Investigating Judges' Order Denying his Request for Appointment of an Additional Expert to Re-Examine the Subject Matter of the Expert Report Submitted by Ms. Ewa Tabeau and Mr. They Kheam, 28 June 2010, D140/9/5, para. 16; Case 002, Decision on Nuon Chea's Appeal Against the Co-Investigating Judges' Order Rejecting Request for a Second Expert Opinion, 1 July 2010, D356/2/9, para. 17; Case 004/02, Decision on Appeal Against the Decision on Ao An's Application to Annul the Entire Investigation, 5 September 2017, D350/1/1/4, para. 14; Case 004/01, Considerations on Im Chaem's Appeal Against the International Co-Investigating Judge's Decision to Charge her *In Absentia*, 1 March 2016, D239/1/8, para. 29; Case 004/01, Considerations on Closing Order Appeal, para. 21.
[1660] Case 004, Decision on the International Co-Prosecutor's Appeal of Decision on Request for Investigative Action regarding Sexual Violence at Prison No. 8 and in Bakan District, 13 February 2018, D365/3/1/5, para. 15.
[1661] Case 004/01, Considerations on Closing Order Appeal, para. 22.

[…] to substitute the exercise of its discretion for that of the Co-Investigating Judges".[1662] Only in exceptional circumstances did the Pre-Trial Chamber substitute its decision for that of the Co-Investigating Judges such as, for example, when the latter failed to comply with the Pre-Trial Chamber's previous directions on the issue at hand,[1663] or under the constructive refusal doctrine, where the Co-Investigating Judges' inaction or delay in acting caused prejudice to the requesting party.[1664]

Standard of review for non-discretionary decisions. For the Co-Investigating Judges' non-discretionary orders and decisions, such as those addressing jurisdictional matters,[1665] the "Pre-Trial Chamber [did] not apply the deferential standard of review applicable to discretionary decisions".[1666] Rather, the Pre-Trial Chamber assessed whether the Co-Investigating Judges "committed a specific error of law or fact invalidating the decision or weighed relevant considerations or irrelevant considerations in an unreasonable manner".[1667] Alleged errors of law were reviewed *de novo* to determine whether the legal holdings were correct and alleged errors of fact were reviewed under a standard of reasonableness to determine whether no reasonable trier of fact could have reached the finding of fact at issue.[1668]

Standard of review for orders on provisional detention and bail. The Pre-Trial Chamber reviewed orders on provisional detention by undertaking its own analysis, applying the criteria set out in Internal Rule 63(3), considering both the Internal Rules and the procedure applicable under Cambodian Law.[1669] Specifically, the Pre-Trial Chamber reviewed provisional detention

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[1662] Case 002, Decision on the Appeal from the Order on the Request to Seek Exculpatory Evidence in the Shared Materials Drive, 12 November 2009, D164/3/6, para. 24; Case 002, Decision on the Appeal from the Order on the Request to Seek Exculpatory Evidence in the Shared Material Drive, 18 November 2009, D164/4/13, para. 25.
[1663] Case 002, Decision on Reconsideration of 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, 27 September 2010, D365/2/17, paras 66-67.
[1664] See *e.g.*, Case 002, Decision on Ieng Sary's Appeal regarding the Appointment of a Psychiatric Expert, 21 October 2008, A189/I/8, paras 22-24, 41-46 (recognising constructive refusal of a request to appoint a psychiatric expert to evaluate Ieng Sary's fitness to participate in his defence and assessing whether said expert should be appointed). As to the application of the constructive refusal doctrine, see Case 003, Decision on Meas Muth's Appeal Against the Co-Investigating Judges' Constructive Denial of Meas Muth's Motion to Strike the International Co-Prosecutor's Supplementary Submission, 17 June 2015, D120/1/1/2, para. 8.
[1665] Case 002, Decision on Closing Order Appeals (Nuon Chea and Ieng Thirith), para. 86; Case 002, Decision on the Appeals Against the Co-Investigating Judges Order on Joint Criminal Enterprise (JCE), 20 May 2010, D97/15/9, para. 36.
[1666] Case 002, Decision on Closing Order Appeals (Nuon Chea and Ieng Thirith), para. 86.
[1667] Ibid.
[1668] Ibid; Case 002, Decision on Appeals Against Orders of the Co-Investigating Judges on the Admissibility of Civil Party Applications, 24 June 2011, D411/3/6, para. 34; Case 004, Considerations on Appeal Against Order on the Admissibility of Civil Party Applicants, 29 September 2021, D384/7, para. 29.
[1669] Case 001, Decision on Appeal Against Provisional Detention Order, 3 December 2007, C5/45, para. 8. See *e.g.*, Case 002, Decision on Appeal Against Provisional Detention Order of Ieng Thirith, 9 July 2008, C20/I/27, para. 18.

orders by assessing factors such as: (1) the Co-Investigating Judges' procedure before issuing the detention order; (2) the sufficiency of the facts for ordering provisional detention; (3) whether the circumstances on which the detention order was based continued to exist at the time of the review; (4) the Co-Investigating Judges' exercise of discretion in applying Internal Rule 63(3); and (5) hospitalisation as an alternative form of detention.[1670] Where the grounds on the basis of which provisional detention was ordered were no longer met, the Pre-Trial Chamber reviewed the Charged Person's requests for release on bail *de novo*.[1671]

5.5.4. The Pre-Trial Chamber's inherent jurisdiction

The Pre-Trial Chamber held that "in instances where statutory provisions do not expressly or by necessary implication contemplate its power to pronounce on a matter, it ha[d] inherent jurisdiction 'to determine incidental issues which arise as a direct consequence of the procedures of which [it was] seized'".[1672] For the Pre-Trial Chamber to exercise its inherent jurisdiction prior to its primary appellate jurisdiction, two conditions had to be met: (1) there had to be a statutory right to appeal; and (2) the effectiveness of this right could have become compromised by the violation of specific fundamental rights.[1673]

The Pre-Trial Chamber exercised its inherent jurisdiction on a case-by-case basis on several occasions. For instance, in Case 003, the Pre-Trial Chamber lifted the Co-Investigating Judges' order suspending communications between the Charged Person and his Co-Lawyers, considering it of "fundamental importance for Meas Muth to be able to communicate [with them] in order to get the information and advice necessary to decide whether [to pursue an appeal]".[1674] In Case 004/01, the Pre-Trial Chamber exercised its inherent jurisdiction to invite applicants whose Civil Party status was rejected to express their views in the proceedings on appeal against the joint Dismissal Order in the case.[1675] The Pre-Trial Chamber considered that

[1670] See Case 002, Decision on Appeal Against Provisional Detention Order of Ieng Thirith, 9 July 2008, C20/I/27, para. 15; Case 002, Decision on Appeal Against Provisional Detention Order of Ieng Sary, 17 October 2008, C22/I/74, para. 9.
[1671] Case 002, Decision on Khieu Samphan's Appeals Against Order Refusing Request for Release and Extension of Provisional Detention Order, 3 July 2009, C26/5/26, para. 89.
[1672] Case 003, Decision on Meas Muth's Request for the Pre-Trial Chamber to Take a Broad Interpretation of the Permissible Scope of Appeals Against the Closing Order and to Clarify the Procedure for Annulling the Closing Order, or Portions Thereof, if Necessary, 28 April 2016, D158/1, para. 11.
[1673] Case 003, Decision on Meas Muth's Request for the Pre-Trial Chamber to Take a Broad Interpretation of the Permissible Scope of Appeals Against the Closing Order and to Clarify the Procedure for Annulling the Closing Order, or Portions Thereof, if Necessary, 28 April 2016, D158/1, para. 12.
[1674] Case 003, Decision on Requests for Interim Measures, 31 January 2014, D56/19/8, para. 15.
[1675] Case 004/01, Decision on the National Civil Party Co-Lawyer's Request Regarding the Filing of Response to the Appeal Against the Closing Order and Invitation to File Submissions, 29 August 2017, D308/3/1/8, para. 13.

even though the Civil Party applicants were no longer parties to the proceedings as a result of the joint Dismissal Order and, therefore, not entitled to be heard in appeals proceedings, the significance of the issues raised in the Dismissal Order and on appeal against it, as well as the interests of justice, favoured affording them the opportunity to be heard on the limited issue of the position of the ECCC within the Cambodian legal system.[1676]

5.5.5. The Pre-Trial Chamber's role as an Investigation Chamber

While the UN-RGC Agreement, ECCC Law, and Internal Rules did not expressly provide for an investigation chamber, the Pre-Trial Chamber decided that it fulfilled the role of the Cambodian Investigation Chamber,[1677] vested with broad powers when seized of an appeal.[1678]

In Case 001, the Pre-Trial Chamber noted that, under the Code of Criminal Procedure, the Investigation Chamber could:

> "(i) examine the regularity of the procedure and annul part or all of the proceedings […];
>
> (ii) order or conduct further investigation […]; [and]
>
> (iii) […] order the extension of the judicial investigation to any offences related to those already identified by the Investigating Judges […]".[1679]

In Case 004/02, the Pre-Trial Chamber elaborated that the functions of the Cambodian Investigation Chamber consists of "both appellate jurisdiction over the investigating judge's acts and decisions, and a second-instance investigating jurisdiction",[1680] and that it exercises "the ultimate authority over the investigation phase".[1681] The Pre-Trial Chamber unanimously considered that its power of review as a second-instance investigative chamber enabled it to "holistically address all the acts related to the case that the prosecution or the investigating judge has or should have done for the instruction to be complete and legal".[1682] This included the power to:

i. "[P]urge any irregularities in the procedure it is seised of before sending the [c]ase

[1676] Case 004/01, Decision on the National Civil Party Co-Lawyer's Request regarding the Filing of Response to the Appeal Against the Closing Order and Invitation to File Submissions, 29 August 2017, D308/3/1/8, paras 11-13.
[1677] See Case 001, Decision on Appeal Against Provisional Detention Order, 3 December 2007, C5/45, para. 7; Case 004/02, Considerations on Closing Order Appeals, para. 44.
[1678] Case 001, Decision on Closing Order Appeal, para. 41.
[1679] Ibid.
[1680] Case 004/02, Considerations on Closing Order Appeals, para. 44.
[1681] Ibid, para. 49.
[1682] Ibid, para. 47.

to trial;"

ii. "[E]ntirely review and revise a case including to correct any of the investigating judges' erroneous legal qualifications and to note all the legal circumstances linked to the facts;" and

iii. "[R]eview and revise the work of the investigating judges in proceeding to any necessary operations for the sake of the manifestation of the truth".[1683]

The Pre-Trial Chamber also emphasised that the Investigation Chamber "shall investigate the case by itself" when seized of a Dismissal Order as a result of an appeal.[1684] The Supreme Court Chamber noted that the Pre-Trial Chamber in Case 004/02 had "elected not to take that route" despite being "aware of its powers to go beyond declaring the illegality of the situation relating to the issuance of two conflicting Closing Orders and to issue its own valid closing order".[1685]

5.6. Trial phase

Internal Rules 79-103 regulated the procedure applicable during the ECCC trial phase. Many of these rules were interpreted in the ECCC jurisprudence beyond the strict letter of the rules themselves, whereas others attracted extensive commentary. This section addresses several aspects of trial procedure, namely: (1) seizure of the case file, (2) provisional detention and bail, (3) rules of evidence, (4) preliminary objections, (5) severance, (6) additional investigations, (7) legal recharacterisation, and (8) burden and standard of proof.

5.6.1. Seizure of the case file

Internal Rule 79(1) mandated that the Trial Chamber be seized by an Indictment issued by the Co-Investigating Judges *or* the Pre-Trial Chamber. Generally, this meant that if an appeal was filed against the Closing Order, the Trial Chamber became seized following the Pre-Trial Chamber's decision on appeal. Accordingly, the Pre-Trial Chamber considered that Internal

[1683] Ibid (emphasis omitted). Note that, on appeal against the Closing Orders in Case 003, the International Pre-Trial Chamber Judges, but not their national counterparts, discussed the Pre-Trial Chamber's functions as the Cambodian Investigation Chamber. See Case 003, Considerations on Closing Order Appeals, Opinion of Judges Olivier Beauvallet and Baik Kang Jin, paras 129-30. The Pre-Trial Chamber did not discuss its functions as the Cambodian Investigation Chamber in its considerations on the appeals against the Closing Orders in Case 004.
[1684] Case 004/02, Considerations on Closing Order Appeals, para. 30. See also Case 004/01, Considerations on Closing Order Appeal, para. 22.
[1685] Case 004/02, Decision on International Co-Prosecutors' Immediate Appeal of the Trial Chamber's Effective Termination of Case 004/2, 10 August 2020, E004/2/1/1/2, para. 61.

Rule 79(1) suggested that it had the power to issue a new or revised Closing Order that would serve as the basis for trial.[1686]

In Case 001, the Trial Chamber acknowledged that it could not be considered "formally seized of the case until the decision of the Pre-Trial Chamber on the appeal against the Closing Order".[1687] To commence preparatory work, the Trial Chamber requested and obtained early access to the case file from the Pre-Trial Chamber pending a decision on the appeals against the Closing Order. Considering the nature of the issues under appeal, the Pre-Trial Chamber considered that granting the requested access would enable the Trial Chamber to commence its preparatory work and would "assist in ensuring a fair and expeditious trial".[1688]

This practice was maintained in Case 002. Following a three-year judicial investigation, the Co-Investigating Judges indicted the four Accused for crimes against humanity, genocide, grave breaches of the Geneva Conventions and violations of the 1956 Penal Code. On appeal, the Pre-Trial Chamber confirmed the Closing Order, with some amendments, and formally forwarded the Accused for trial.[1689] Following these Pre-Trial Chamber decisions, the Trial Chamber considered itself formally seized of Case File 002.[1690]

The unique circumstances of Cases 003 and 004, characterised by disagreements between the National and International components of the Office of the Co-Investigating Judges and the Pre-Trial Chamber, entailed a different practice. The Pre-Trial Chamber in Cases 004/02, 003, and 004 was unable to secure the requisite supermajority for a decision on the appeals against the Closing Orders, even though it unanimously held that the Co-Investigating Judges' simultaneous issuance of conflicting Closing Orders was illegal under the ECCC framework.[1691] When the International Co-Prosecutor in Case 004/02 attempted to seize the Trial Chamber with the case, the Trial Chamber observed that it had never been formally notified of the case and did not receive the case file.[1692] The Supreme Court Chamber held that

[1686] Case 001, Decision on Closing Order Appeal, para. 40; Case 004/01, Considerations on Closing Order Appeal, para. 22; Case 004/02, Considerations on Closing Order Appeals, para. 30; Case 004, Considerations on Closing Order Appeals, para. 36.
[1687] Case 001, Decision on Trial Chamber Request to Access the Case File, 11 September 2008, D99/3/5, para. 7.
[1688] Ibid, paras 1, 8.
[1689] See Case 002/02, Judgment, para. 3.
[1690] See Case 002/01, Scheduling Order – Hearing Pursuant to Rule 68(3), 27 April 2011, E79.
[1691] For more on the Co-Investigating Judges' opposing Closing Orders in Cases 004/02, 003 and 004, the Pre-Trial Chamber's considerations on the appeals against the Closing Orders, and the Supreme Court Chamber's termination of these cases, see *Guide to the ECCC (Volume I)*, section 5.3.
[1692] See Case 004/02, Statement of the Judges of the Trial Chamber of the ECCC Regarding Case 004/2 Involving Ao An, 3 April 2020, E004/2/1.1.16.

the Trial Chamber was in "no position to authorise and/or notify electronic filings", as the Pre-Trial Chamber's Considerations had rendered the Closing Orders null and void.[1693] "[I]n the absence of a definite and enforceable indictment", the Supreme Court Chamber declared Case 004/02 to have been terminated.[1694] The Supreme Court Chamber subsequently rendered similar rulings in Cases 003 and 004.[1695]

5.6.2. Provisional detention and bail

Internal Rule 82(1) provided that unless provisional detention had already been ordered in accordance with the Internal Rules, the Accused was to remain at liberty while appearing before the Trial Chamber. Where an Accused was in detention at the initial appearance before the Trial Chamber, they remained in detention until the Trial Chamber handed down a new decision on provisional detention or its judgment.[1696] The term "initial appearance" in Internal Rule 82(1) was distinct from the initial appearance that marked the beginning of the trial pursuant to Internal Rule 80 *bis* (1) and encompassed "any appearance of the Accused before the Trial Chamber, whether at his or her request or ordered by the Trial Chamber, and relates to any matter within the Trial Chamber's competence, as long as the Trial Chamber is seised of the case".[1697]

The Accused or their lawyers could request the Trial Chamber to release them either orally during a hearing, or by written application submitted to the Trial Chamber Greffier under Internal Rule 82(3). After hearing from the Co-Prosecutors, the Accused, and their Co-Lawyers, the Trial Chamber had to decide on the request as soon as possible, and in any event, no later than 30 days after receiving the oral request or written application.[1698] When seized of an application for release, the Trial Chamber was obliged to examine whether all the legal and factual requirements were fulfilled at that current stage of the proceedings.[1699]

[1693] Case 004/02, Decision on International Co-Prosecutors' Immediate Appeal of the Trial Chamber's Effective Termination of Case 004/2, 10 August 2020, E004/2/1/1/2, paras 53-54.
[1694] See ibid, para. 71.
[1695] Case 003, Decision on International Co-Prosecutor's Appeal of the Pre-Trial Chamber's Failure to Send Case 003 to Trial as Required by the ECCC Legal Framework, 17 December 2021, 3/1/1/1; Case 004, Decision on International Co-Prosecutor's Appeal of the Pre-Trial Chamber's Failure to Send Case 004 to Trial as Required by the ECCC Legal Framework, 28 December 2021, 2/1/1/1.
[1696] Internal Rules, rules 82(1)-(2). See also Case 001, Decision on Request for Release, 15 June 2009, E39/5, para. 23.
[1697] Case 002/01, Decision on Immediate Appeal by Khieu Samphan on Application for Release, 6 June 2011, E50/3/1/4, para. 44.
[1698] Internal Rules, rule 82(3).
[1699] Case 001, Decision on Request for Release, 15 June 2009, E39/5, para. 24.

At any time during the proceedings, the Trial Chamber could order an Accused's release, or, where necessary, release an Accused on bail, or detain an Accused.[1700] The Supreme Court Chamber held that Internal Rule 82(1) established a rebuttable presumption "that conditions for detention, as previously ordered by the Co-Investigating Judges [or the Pre-Trial Chamber] […] continue to apply when the case has been forwarded for trial". The Accused had the onus of challenging the persistence of the grounds of their detention in their request to the Trial Chamber.[1701]

If a request for release was refused, the Accused could file a further application where their circumstances had changed since the last application was rejected.[1702] Both the Accused and Co-Prosecutors could appeal the Trial Chamber's provisional detention decisions.[1703]

If the Trial Chamber granted a request for release, the Accused was to be released "unless the President of the Supreme Court Chamber, on the request of the Co-Prosecutors, decide[d] otherwise". The Co-Prosecutors had to request to stay such a release order within 24 hours of its notification, together with a copy of the appeal against the release order. The President of the Supreme Court Chamber was required to decide within 48 hours of a request to stay the release order, during which the effects of the order were suspended. If the President refused to grant a stay of the Chamber's order or failed to decide on the request within the time limit, the Accused had to be released immediately. If the President granted a stay of the Chamber's order, the Accused had to remain in detention until the Supreme Court Chamber handed down its decision the Co-Prosecutors' appeal. Except in exceptional circumstances, the Supreme Court Chamber was required to decide on such appeals within 15 days of receipt of the case file by the Supreme Court Chamber Greffier.[1704]

In Case 001, the Trial Chamber denied Duch's request for release based on his continuous detention from 10 May 1999 by the Cambodian authorities. While the Trial Chamber found that the Accused's prior detention constituted a violation of national law applicable at the time and contravened his internationally recognised right to a trial within a reasonable time and detention in accordance with the law,[1705] it considered that this unlawfulness entitled Duch to

[1700] Internal Rules, rule 82(2).
[1701] Case 002/01, Decision on Immediate Appeal by Khieu Samphan on Application for Release, 6 June 2011, E50/3/1/4, paras 47-48.
[1702] Internal Rules, rule 82(4).
[1703] Internal Rules, rule 82(5).
[1704] Internal Rules, rule 82(6).
[1705] Case 001, Decision on Request for Release, 15 June 2009, E39/5, paras 18-21.

a remedy *at a later stage*.[1706] It instead examined the issue of whether his provisional detention under the ECCC's authority continued to be justified under the criteria set out in Internal Rule 63(3). The Trial Chamber found that three reasons in the Pre-Trial Chamber's decision on provisional detention remained valid, namely with respect to flight risk, the necessity to preserve public order, and the protection of the Accused's security. It also considered provisional detention justified by the requirements of the trial proceedings, in particular, the need to ensure the Accused's presence at trial.[1707]

In Case 002, the Trial Chamber had to decide if the lack of reasons in the Pre-Trial Chamber's decisions on the Closing Order appeals invalidated those decisions and required the immediate release of the four Accused.[1708] While the Trial Chamber found that the Pre-Trial Chamber's deferral of reasons constituted a procedural defect, impacting the Accused's fundamental fair trial rights, it considered that the defect was remedied by the subsequent issuance of full reasoning. It also noted that the Accused's provisional detention had been reviewed periodically and frequently by the Co-Investigating Judges and the Pre-Trial Chamber, ensuring that they were aware of the basis for their continuing detention.[1709] The Trial Chamber went on to examine the legal basis for the Accused's detention under Internal Rule 63(3). The Trial Chamber found that detention was the only means to guard against flight risks and ordered the continuation of detention against the four Accused. Noting that the lack of advance notice to adequately prepare their Rule 63(3) submissions, the Trial Chamber held that the defence would not be required to establish a change in circumstances under Internal Rule 82(4) if they brought a fresh application before the Chamber.[1710]

In ruling on Khieu Samphan's appeal of this decision, the Supreme Court Chamber held that although Internal Rule 82(1) established a rebuttable presumption that the conditions for detention continue to apply when the case has been forwarded for trial, the Trial Chamber was required to conduct a "meaningful" review.[1711] The Supreme Court Chamber found that the Trial Chamber inadequately substantiated the decision to continue detention solely based on

[1706] Ibid, paras 27-37.
[1707] Ibid, paras 22-26.
[1708] Case 002/01, Decision on the Urgent Applications for Immediate Release of Nuon Chea, Khieu Samphan and Ieng Thirith, 16 February 2011, E50, para. 9. See also Case 002/01, Decision on Ieng Sary's Request for Release, 12 May 2011, E79/2.
[1709] Case 002/01, Decision on the Urgent Applications for Immediate Release of Nuon Chea, Khieu Samphan and Ieng Thirith, 16 February 2011, E50, paras 29-34.
[1710] Ibid, paras 38-42.
[1711] Case 002/01, Decision on Immediate Appeal by Khieu Samphan on Application for Release, 6 June 2011, E50/3/1/4, para. 49.

Internal Rule 63(3)(b)(iii) – the risk of absconding due to the severity of potential penalties – without adequately addressing other conditions.[1712] Additionally, it considered that it was not in a position to consider whether any other conditions in Rule 63(3)(b) were met. It emphasised that its role as the final court of appeal was to review the impugned decision based on the grounds of appeal presented. It considered that an appellate court can only substitute its own reasoning for a flawed first-instance decision only if the issue has been appealed and supported by available factual findings. Since the Co-Prosecutors did not appeal the Trial Chamber's decision, the Supreme Court Chamber's review was limited to the specific ground of detention related to ensuring the presence of the Accused during proceedings. Therefore, having found legal error, it remanded the decision to the Trial Chamber for a new determination.[1713]

5.6.3. Rules of evidence

Internal Rule 87(1) provided that unless provided otherwise, all evidence was admissible before the ECCC. All Trial Chamber decisions had to be based solely on evidence that was put before it and subjected to examination.[1714] In order to be considered as "put before" the Chamber, all evidence had to be summarised, read out, or otherwise appropriately identified.[1715] If there was no objection to a document, or if the Trial Chamber rejected an objection to a document, it admitted and considered the documents that were properly summarised or identified (including in the request for admission), and which otherwise met the criteria of Internal Rules 87(3)-(4). Each document admitted before the Chamber was accorded an "E3" number.[1716]

The Trial Chamber had discretion to reject any request for evidence that was "irrelevant or repetitious, impossible to obtain within a reasonable time, unsuitable to prove the facts it purports to prove, not allowed under the law or intended to prolong proceedings".[1717] The Trial Chamber also had broad discretion in determining which witnesses to hear.[1718]

The parties could propose the admission of evidence at any stage of the trial. The Trial Chamber could also summon or hear any person as a witness or admit any new evidence it deemed

[1712] Ibid, paras 40-41.
[1713] Ibid, paras 42-50, 52, 54.
[1714] Internal Rules, rule 87(2). See also Case 001, Judgment, para. 39.
[1715] Internal Rules, rule 87(3).
[1716] Case 002/02, Judgment, para. 44 (referring to Internal Rules, rules 87(3)-(4)). See also Case 002/01, Judgment, para. 25; Case 001, Judgment, para. 40.
[1717] Case 002/02, Judgment, para. 42. See also Case 002/01, Judgment, para. 26; Case 001, Judgment, para. 41.
[1718] See Case 002/01, Judgment, para. 24. See generally Case 002/01, Final Decision on Witnesses, Experts and Civil Parties to be Heard in Case 002/01, 7 August 2014, E312; Case 002/02, Decision on Witnesses, Civil Parties and Experts Proposed to be Heard during Case 002/02, 18 July 2017, E459.

conducive to ascertaining the truth.[1719] To be admitted, evidence needed to be *prima facie* relevant and reliable. The parties must also have had an opportunity to subject evidence to adversarial debate and to object to the admission of evidence, even if they did not avail themselves of this opportunity.[1720]

Any evidence not available at the time of the opening of the trial was considered "new evidence". Under Internal Rule 87(4), the moving parties had to demonstrate that the new evidence was not available prior to the opening of the trial and/or could not have been discovered earlier with the exercise of reasonable diligence. If a request for admission of evidence was untimely, the Trial Chamber could nonetheless admit the requested evidence in the interest of justice.[1721]

The Trial Chamber based its findings on the evidence put before it and subjected to adversarial debate. It considered objections to the probative value of evidence, particularly those that went beyond the *prima facie* relevance and reliability of the proposed evidence. Factors relevant to the probative value of evidence included (1) the criteria set out Internal Rule 87(3), (2) the circumstances surrounding the creation or recording of evidence, (3) whether the original or a copy was admitted, (4) legibility, (5) discrepancies with other versions, (6) credibly alleged deficiencies, (7) whether the parties had the opportunity to challenge the evidence, and (8) other indicia of reliability including chain of custody and provenance.[1722] The following paragraphs set out the Trial Chamber's and Supreme Court Chamber's holdings and assessment of various types of evidence.

Documentary evidence. As a general rule, documentary evidence had to be available in all three ECCC working languages (Khmer, French, and English) to be considered put before the Chamber.[1723] An exception applied to certain categories of evidence which self-evidently did not require translation. In the interest of justice, the Trial Chamber considered un-translated evidence in reaching its judgment, but only where it was corroborated by another reliable source. Additionally, the Trial Chamber considered whether the Accused demonstrated an understanding of the evidence or relied on such evidence in their submissions.[1724] Documentary evidence also needed to be authentic, meaning that it is "what it professes to be in origin or

[1719] Internal Rules, rule 87(4).
[1720] See Case 002/01, Judgment, para. 26.
[1721] See Case 002/02, Judgment, para. 43; Case 002/01, Judgment, para. 25.
[1722] Case 002/02, Judgment, para. 61; Case 002/01, Judgment, para. 34. See also Case 001, Judgment, para. 42.
[1723] Case 001, Judgment, para. 57.
[1724] Case 002/01, Judgment, para. 36.

authorship".[1725]

Document lists. In Case 002/01, the Trial Chamber required the parties to file a list of documents they intended to put before the Chamber.[1726] The Supreme Court Chamber upheld this practice, holding that Internal Rule 80(3) was "a managerial tool" that imposed a degree of discipline on the parties, necessary in view of the massive case files in ECCC proceedings.[1727] In Case 002/02, the Trial Chamber directed the parties to provide updated lists of documents previously filed and updated lists of intended exhibits for Case 002/02 including a description of their nature and contents as well as the relevant points of the Closing Order. The Trial Chamber subsequently granted the parties the opportunity to submit written objections to documents on the other parties' updated lists and to rebut the presumption of relevance and reliability accorded to documents cited in the Closing Order. These written submissions served as the basis for the Trial Chamber's determination of the admissibility of documentary evidence in Case 002/02, in lieu of holding document admissibility hearings, which was the practice in Case 002/01.[1728]

Key document hearings. The Trial Chamber in Cases 002/01 and 002/02 provided the parties an opportunity to present key documents they considered to be particularly relevant to each trial topic. These hearings recognised that documentary evidence did not need to be presented during witness examinations and aimed to make the trial's documentary evidence more accessible to the public.[1729]

Evidence of the Accused. The Trial Chamber repeatedly held that the Accused's statements constitute evidence.[1730] In Case 001, the Trial Chamber questioned the Accused in relation to seven thematic areas of relevance to the proceedings.[1731] In Cases 002/01 and 002/02, the Trial Chamber explained that after opening statements, the substantive hearing commenced with statements by and questioning of the Accused in the order named in the Closing Order. Pursuant to Internal Rules 21(1)(d) and 90(1), the President informed each Accused, prior to their opening statement, of their fundamental right to be silent. In addition to statements foreseen in the Internal Rules, when the Accused were willing to respond, the Chamber put all

[1725] Case 002/02, Appeal Judgment, para. 430.
[1726] Case 002/01, Order to File Material in Preparation for Trial, 17 January 2011, E9.
[1727] Case 002/01, Appeal Judgment, paras 174-175.
[1728] Case 002/02, Judgment, para. 55. *Cf.* Case 002/01, Judgment, para. 66.
[1729] See Case 002/02, Judgment, para. 58.
[1730] Case 002/01, Judgment, para. 27; Case 001, Judgment, para. 50.
[1731] See Case 001, Judgment, para. 51.

questions it considered pertinent, whether or not they tended to prove or disprove the guilt of the Accused. The parties were also provided an opportunity to question the Accused.[1732]

Witness and Civil Party evidence. Witnesses were informed of their right not to self-incriminate and, upon request, were assisted by counsel. By virtue of their special status, Civil Parties were not required to take an oath. The Trial Chamber approached witness and Civil Party evidence on a case-by-case basis in light of the credibility of the testimony and in conjunction with such factors such as the demeanour of the person testifying, consistencies and inconsistencies in relation to material facts, possible ulterior motivations, corroboration, and all of the circumstances of the case.[1733] The Trial Chamber considered that the reliability of a witness's testimony was contingent on their "ability to perceive, remember and articulate accurately", which could be impacted by factors such as (1) the health, age, and mental status of a witness at the time of the incident and the time of the testimony, and (2) potential bias arising from issues such as a desire to avoid self-incrimination or public embarrassment, and attempts to protect another person.[1734]

Expert evidence. The Trial Chamber heard expert evidence, which was "designed to provide specialised knowledge, be it a skill, or knowledge acquired through training or research, which assist[ed] the Chamber in understanding the evidence presented".[1735] The Trial Chamber was required to carefully examine the sources used by experts to make their conclusions. When the Chamber based its findings on an expert's work, it needed to specify the exact and verifiable sources supporting the expert's opinion. If the sources were not fully accessible and verifiable, the expert's evidence was given less weight.[1736]

Written statements. The Trial Chamber admitted written witness, expert, and Civil Party statements and transcripts from prior proceedings in conjunction with or in place of oral evidence.[1737] The written evidence of witnesses who did not appear before the Trial Chamber and who were not subject to examination was "afforded lower probative value than the evidence of a witness testifying before the Chamber".[1738] In Cases 002/01 and 002/02, in the interests of expeditiousness, the President of the Trial Chamber asked witnesses and Civil

[1732] Case 002/02, Judgment, para. 47; Case 002/01, Judgment, para. 27. See also Case 001, Judgment, para. 51.
[1733] Case 002/02, Judgment, paras 49-50.
[1734] Ibid, para. 62.
[1735] Case 001, Judgment, para. 55. See also Case 002/02, Judgment, para. 50; Case 002/01, Judgment, para. 30.
[1736] Case 002/02, Judgment, para. 66.
[1737] Ibid, para. 51; Case 002/01, Judgment, para. 31.
[1738] Case 002/02, Appeal Judgment, para. 439; Case 002/01, Appeal Judgment, para. 296.

Parties appearing in court to affirm the accuracy of their prior statements made to the OCIJ, and as reflected in the written records of interview. Upon affirmation, while noting that the parties had the right to test witness credibility on areas within or beyond prior statements, the Trial Chamber invited the parties to ask further questions only where there was a need for clarification relevant to matters that were insufficiently covered by those statements or not dealt with during questioning before the Co-Investigating Judges.[1739] In the Case 002/01 Appeal Judgment, the Supreme Court Chamber held that, although the Trial Chamber could have adopted a procedure more consistent with Cambodian procedure, it did not abuse its discretion.[1740]

Written statements not collected by the ECCC. Statements taken outside the framework of a judicial process, such as statements recorded by the Documentation Center of Cambodia, Civil Party applications, reports, unsworn refugee accounts, and newspaper articles were "of inherently low probative value".[1741] Civil Party applications in particular enjoyed "no presumption of reliability and, where the circumstances in which they were recorded [were] unknown", they were accorded "little, if any, probative weight".[1742] Where a finding relied in part on such statements, the reasons for the finding had to be clearly explained, particularly if a conviction depended wholly or decisively on such evidence. The Trial Chamber also had discretion to consider "whether the statement [was] corroborated by other evidence and, if so, the nature of that evidence", as well as internal consistencies and external consistencies with other evidence.[1743]

Written statements relating to the Accused's acts and conduct. Absent the opportunity for examination, the Trial Chamber excluded statements going to proof of the Accused's acts and conduct.[1744] However, according to the Supreme Court Chamber, a conviction could not be based "solely or to a decisive degree on evidence by a witness whom the defence [] had no opportunity to examine, unless there [were] sufficient counterbalancing factors in place, so that an accused [was] given an effective opportunity to challenge the evidence against [them]".[1745]

[1739] Case 002/02, Judgment, para. 52; Case 002/01, Judgment, para. 31.
[1740] Case 002/01, Appeal Judgment, para. 269.
[1741] Ibid, para. 90.
[1742] Ibid, paras 296-297; Case 002/02, Judgment, para. 73.
[1743] Case 002/02, Judgment, para. 69. The Co-Investigating Judges followed the Trial Chamber and Supreme Court Chamber jurisprudence on this point, while the Pre-Trial Chamber considered that there is no hierarchy of evidence based on formal provenance, rather than the substance of the evidence. See section 7.2.5.
[1744] Case 002/02, Judgment, paras 71-72; Case 002/01, Judgment, para. 31.
[1745] Case 002/02, Appeal Judgment, para. 439. See also Case 002/02, Judgment, para. 71.

Evidence of unavailable witnesses. The Trial Chamber admitted written statements or transcripts of deceased or unavailable witnesses only when it was satisfied that the witness was truly unavailable, the evidence was reliable, and the probative value of the evidence was not outweighed by the need to ensure the fairness of the trial.[1746] In Case 002/02, the Trial Chamber recalled that relevant rules and practice at the international level permitted reliance on evidence of witnesses who (1) had died subsequent to giving their statements, (2) could no longer with reasonable diligence be traced, or (3) "by reason of bodily or mental condition [were] unable to testify orally".[1747] The Supreme Court Chamber held that the fact that evidence related to the Accused's acts and conduct was not a bar as such but impacted on the weight afforded to the evidence.[1748]

Hearsay evidence. Hearsay evidence was approached with caution. In assessing the probative value of hearsay evidence, the Trial Chamber considered the fact that the source of the hearsay had not been cross-examined as well as "the infinitely variable circumstances which surround [the] hearsay evidence".[1749]

Circumstantial evidence. To convict based on circumstantial evidence, all reasonable inferences that could be drawn from the evidence had to be consistent with the Accused's guilt. Generalised inferences could be drawn from the specific evidence of a limited number of witnesses, but "only where the generalised finding [was] established beyond reasonable doubt". Before drawing any adverse inferences from the evidence, the Trial Chamber had to consider alternative explanations that might favour the Accused. For instance, statements made for propaganda purposes might be less reliable. Additionally, the Chamber needed to identify and consider exculpatory evidence alongside evidence that could be inculpatory on any particular issue.[1750]

Torture-tainted evidence. The Trial Chamber granted – with certain limitations – requests to admit documents that may have been tainted by torture, such as S-21 confessions and prison notebooks. Torture-tainted evidence could only be used as evidence that the statement was made, not as evidence of the truth of its contents. Where the Trial Chamber determined there was a real risk that evidence was obtained through the use of torture, such evidence was

[1746] Case 002/02, Judgment, para. 72. See also Case 002/01, Judgment, para. 31.
[1747] Case 002/02, Judgment, para. 72.
[1748] Case 002/01, Appeal Judgment, paras 289, 296-299. See also Case 002/02, Judgment, para. 72.
[1749] Case 002/02, Judgment, para. 63. See also Case 002/01, Appeal Judgment, paras 302-304.
[1750] Case 002/02, Judgment, paras 64-65. See also Case 002/01, Judgment, para. 35.

excluded from the proceedings unless (1) a party rebutted this presumption by reference to other evidence, or (2) the use of the evidence fell within the exception noted in Article 15 of the Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment ("CAT"). The exception in Article 15 of the CAT allowed torture-tainted evidence to be used only against a person Accused of torture, to prove that the statement was made.[1751]

Evidence derived from torture tainted evidence. Reliance on evidence derived from torture-tainted evidence was permissible so long as it did not circumvent the rule against using the contents of such confessions to prove their truth. By contrast, evidence obtained by ill-treatment or coercion, although not prohibited by Article 15 of CAT, was not relied on pursuant to Article 321 of the Code of Criminal Procedure, which provides that "[d]eclaration[s] given under physical or mental coercion shall have no evidentiary value".[1752] Finally, the Trial Chamber in Case 002/02 held, Judge Fenz dissenting, that information contained within torture-tainted evidence could be used to establish facts other than the truth of the statement under the exception in Article 15 of the CAT, but only for the purpose of determining what action resulted based on the fact that a statement was made. This permitted the Trial Chamber to consider whether arrests of certain individuals made subsequent to a confession in which these individuals were named could be proof of a governmental policy.[1753] In her dissent, Judge Fenz considered that the Majority's broad interpretation of the exception risked undermining the integrity of ECCC proceedings and the deterrent purpose of the CAT.[1754]

5.6.4. Preliminary objections

Internal Rule 89 provided the parties the opportunity, no later than 30 days after the Closing Order became final, to submit any preliminary objection concerning: (1) the jurisdiction of the Chamber; (2) any issues which required termination of prosecution; or (3) nullity of procedural acts made after the Indictment was filed.

The Supreme Court Chamber assessed whether an objection based on personal jurisdiction was admissible, even though it was not raised at the appropriate stage of the proceedings before the

[1751] Case 002/02, Judgment, para. 74.
[1752] Ibid, para. 75.
[1753] Ibid, para. 77.
[1754] Case 002/02, Decision on Evidence Obtained Through Torture, Reasons for Partially Dissenting Opinion of Judge Claudia Fenz, 11 March 2016, E350/8.1.

Trial Chamber, as required by Rule 89(1)(a).[1755] The Supreme Court Chamber emphasised that the rule's primary purpose was to address jurisdictional issues before trial to avoid unnecessary proceedings. However, it recognised that some jurisdictional objections may be dependent on the Trial Chamber's findings of fact. It held that Internal Rule 89(1)(a) could "thus be utilised to deal with an alleged lack of jurisdiction that is patent, but not with an alleged lack of jurisdiction that is latent". A patent lack of jurisdiction referred to a lack of jurisdiction that was apparent on the face of the proceedings before the deadline in Internal Rule 89(1). A latent lack of jurisdiction referred to a lack of jurisdiction that was not apparent on the face of the proceedings and therefore not discoverable before the deadline.[1756] The Supreme Court Chamber concluded that if the alleged want of jurisdiction would, if successful, nullify the proceedings, the parties could raise it at any time, including for the first time on appeal.[1757] It further emphasised the Trial Chamber's inherent duty to satisfy itself at all times that it has jurisdiction to try an Accused, and the Accused's entitlement to appeal against (and the Supreme Court Chamber's inherent power to correct) any alleged error of fact or law that may invalidate the trial judgment or constitute a miscarriage of justice.[1758]

In the early phases of Case 002/01, the Trial Chamber heard submissions on numerous preliminary objections regarding jurisdiction. Those considered to constitute a barrier to the commencement of the trial – such as objections concerning the constitutional character of the Internal Rules, the fairness of the judicial investigation, the applicability of joint criminal enterprise ("JCE"), *ne bis in idem* and amnesty and pardon – were decided over the months that followed.[1759] The Trial Chamber considered other preliminary objections as more appropriate for resolution in the judgment or deferred to future trials in Case 002 insofar as they concerned matters beyond the scope of Case 002/01.[1760] In the interests of effective trial

[1755] Case 001, Appeal Judgment, paras 28-38. During closing arguments, the defence made submissions alleging the lack of jurisdiction on the ground that the Accused was not a senior leader or one of those most responsible for the crimes committed during the Democratic Kampuchea regime. See *Guide to the ECCC (Volume I)*, section 5.1.5.2.3.
[1756] Case 001, Appeal Judgment, paras 28-30.
[1757] Ibid, para. 31. Examples of this include absolute jurisdictional elements such as whether an Accused falls within the ECCC's personal jurisdiction, and objections to the subject matter, territorial, and temporal jurisdiction of the ECCC.
[1758] Ibid, paras 35, 37.
[1759] See Case 002/01, Decision on Nuon Chea's Preliminary Objection Alleging the Unconstitutional Character of the ECCC Internal Rules, 8 August 2011, E51/14; Case 002/01, Decision on Nuon Chea Motions Regarding Fairness of Judicial Investigation, 9 September 2011, E116; Case 002/01, Decision on the Applicability of Joint Criminal Enterprise, 12 September 2011, E100/6; Case 002/01, Decision on Ieng Sary's Rule 89 Preliminary Objections (*Ne bis in idem* and Amnesty and Pardon), 3 November 2011, E51/15.
[1760] Case 002/01, Response to Issues Raised by Parties in Advance of Trial and Scheduling of Informal Meeting with Senior Legal Officer on 18 November 2011, 17 November 2011, E141.

management and given that a number of preliminary objections pertained to subjects previously adjudicated before the Pre-Trial Chamber, several memoranda to the parties provided supplementary guidelines concerning scheduling, page limits, the avoidance of repetition, translation, and related matters.[1761] For more on the preliminary objections raised in Case 002/01, see *Guide to the ECCC (Volume I)*, section 5.2.5.1.

5.6.5. Severance

Internal Rule 89 *ter* provided that where the interest of justice so requires, the Trial Chamber could order the separation of proceedings in relation to one or several Accused and concerning part or the entirety of the charges contained in the Indictment. The Supreme Court Chamber has provided guidelines on several legal and procedural considerations which govern whether severance is appropriate under Rule 89 *ter*.

Whether severance occurred in relation to Accused or to charges, the procedural consequences were the same. The language of Internal Rule 89 *ter* informed that "severance denotes a separation (or split) of proceedings, consequent to which, instead of one criminal case, there are two or more criminal cases". The separation of proceedings against Ieng Thirith from Case 002 resulted precisely in this consequence; her case was dissected from that against the Co-Accused and thereby took on a life of its own.[1762]

Whether severance was ordered before or after the main hearing began, it was important that the decision clearly specified when it took effect and outlined the scope of the separated case. Issues related to the duration of proceedings and pre-trial detention needed to be assessed separately for each new case created by the severance. No part of the charges could be left unattended.[1763]

Decisions on severance involved balancing different legitimate interests by comparing the benefits and disadvantages of holding a single trial on all charges contained in the Indictment, as opposed to those of holding multiple trials on the same charges.[1764] Before ordering severance, the Trial Chamber was required to first invite the parties' submissions on the terms

[1761] See *e.g.*, Case 002/01, Directions to Parties Concerning Preliminary Objections and Related Issues, 5 April 2011, E51/7; Case 002/01, Trial Chamber's Amended Procedures for the Filing of Preliminary Objections and Clarification of Envisaged Response Deadlines", 14 February 2011, E51.
[1762] Case 002/02, Decision on Khieu Samphan's Immediate Appeal Against the Trial Chamber's Decision on Additional Severance of Case 002 and Scope of Case 002/02, 29 July 2014, E301/9/1/1/3, para. 42.
[1763] Ibid, para. 44.
[1764] Ibid, para. 49.

and only proceed after balancing the parties' respective interests against all relevant factors.[1765] The Supreme Court Chamber noted that international jurisprudence for such analyses consider factors including the potential prejudice to the Accused's rights, the efficiency and manageability of the proceedings, the desire to avoid inconsistencies between separate trials, and the potential burden on witnesses. Also of relevance was the impact of severance of charges on the Accused's ability to participate in the preparation of their defence for the second trial, as it would require the Accused's simultaneous involvement in two cases.[1766]

The Supreme Court Chamber considered that there was a factual presumption that severed trials take longer to adjudicate than a single joint trial, which was not only borne out by international jurisprudence, but was also a matter of common sense.[1767] However, it emphasised that the relevant concern was not whether there could be any delay at all, but whether the delay was *undue*, and whether there were nevertheless other equally if not more important factors weighing in favour of severance.[1768]

If the Trial Chamber considered severance to be in the "interest of justice", it had to "give due consideration to reasonable representativeness of the Indictment within the smaller trial(s)".[1769] Internal Rule 89 *ter* provided that a decision to sever proceedings had to be justified by the "interest of justice", and was thus not purely discretionary. However, the Supreme Court Chamber noted that the Internal Rules offered no guidance as to what circumstances would satisfy that requirement. The Supreme Court Chamber interpreted "interest of justice" as requiring that separating the accused and/or charges should "better serve the objectives of the criminal proceedings and principles on which they are premised". Thus the "interest of justice" to sever lay in a variety of factors, to be determined on a case-by-case basis, upon consideration of which the Trial Chamber could decide to sever a case. However, the "interest of justice" needed to be demonstrated with adequate reasoning pointing to concrete and relevant circumstances and explaining their common effect on the severed case as a whole.[1770]

Applying this criterion in Case 002, the Supreme Court Chamber considered the Trial Chamber

[1765] Ibid, para. 50.
[1766] Case 002/02, Decision on Immediate Appeals Against the Trial Chamber's Second Decision on Severance of Case 002, 25 November 2013, E284/4/8, para. 38.
[1767] Case 002/02, Decision on Khieu Samphan's Immediate Appeal Against the Trial Chamber's Decision on Additional Severance of Case 002 and Scope of Case 002/02, 29 July 2014, E301/9/1/1/3, para. 51.
[1768] Ibid, para. 53.
[1769] Case 002/01, Decision on the Co-Prosecutors' Immediate Appeal of the Trial Chamber's Decision Concerning the Scope of Case 002/01, 8 February 2013, E163/5/1/13, para. 50.
[1770] Ibid, para. 35.

balanced certain factors only to "quite a limited extent", namely: (1) the advanced age and physical frailty of the remaining Case 002 Co-Accused, (2) the public interest in achieving a verdict in relation to at least a portion of the Case 002 Closing Order, (3) judicial manageability of Case 002/01 in the light of the late stage of trial, including possible prejudice to the Co-Accused that may stem from further expansion of its scope, (4) the uncertain impact upon the length of proceedings in Case 002/01 should S-21 be added to its scope, and (5) uncertainty regarding the duration of financial support to the ECCC.[1771] Factors that were not discussed at all were the potential burden on witnesses and the desire to avoid inconsistencies between separate trials.[1772] The Supreme Court Chamber also found that consideration of factor (5) above, being the uncertain availability of donor funding to the ECCC, was inappropriate and irrelevant to consider in the judicial decision-making process.[1773]

The Supreme Court Chamber noted that the Trial Chamber, in its decision on severance, repeatedly stated its goal to be preserving its ability to reach "any timely verdict" in view of the advanced age and physical frailty of the Co-Accused. The Supreme Court Chamber acknowledged that this goal was not excluded by the notion of the "interest of justice". It recognised that having already lost Ieng Thirith and Ieng Sary to dementia and death, respectively, and the pace at which the Trial Chamber was capable of proceeding, faced with numerous disruptions of the trial due to health and age-related concerns of the remaining Co-Accused, created a situation which "inherently require[d] a great deal of discretion". It thus concluded that resorting to severance of the Indictment in order to ensure that at least a portion was adjudicated within the lifespan of the Co-Accused was "not unreasonable". For that reason, it declined Nuon Chea's request that the second severance of Case 002 be annulled.[1774]

The Supreme Court Chamber did, however, consider that the Trial Chamber erred in law and in the exercise of its discretion by dismissing the criterion of reasonable representativeness of the Indictment as inapplicable.[1775] It found that the goal of reaching "any timely verdict" within the Co-Accused's lifespan did not relieve the Trial Chamber from its obligation to balance the interest of a fair and expeditious trial and the need for a trial that is reasonably representative of the whole Closing Order in Case 002. The Supreme Court Chamber therefore exercised its

[1771] Case 002/01, Decision on Immediate Appeals Against the Trial Chamber's Second Decision on Severance of Case 002, 25 November 2013, E284/4/8, paras 45-57.
[1772] Ibid, para. 48.
[1773] Ibid, para. 49.
[1774] Ibid, paras 50-53.
[1775] Ibid, paras 54, 65.

corrective jurisdiction to ensure an irreducible minimum of the remaining charges in the Closing Order were adjudicated, ordered the evidentiary hearings in Case 002/02 to start as soon as possible, and determined that Case 002/02 comprise at minimum the charges related to S-21, a worksite, a cooperative, and genocide.[1776]

Finally, the Supreme Court Chamber considered that the Trial Chamber, by staying silent on the fate of the remaining charges, erred in failing to provide a tangible plan for the cases to be tried after Case 002/02, recalling the necessity for a tangible plan for the adjudication of the entirety of the charges in the Indictment.[1777] These issues received fuller consideration in the Final Appeal Decision on Severance, where the Supreme Court Chamber ultimately considered that deferral of decisions on the remaining charges beyond Case 002/02 created a situation where the remaining portions of the Closing Order were effectively stayed.[1778] Finding a lack of legal certainty, the Supreme Court Chamber "urge[d] the Trial Chamber to fulfil its duty to bring closure to the entirety of the cases before it" and declared the stay of those proceedings remaining outside the scope of Cases 002/01 and 002/02 "pending appropriate disposal by the Trial Chamber".[1779]

For more on the Trial Chamber's and Supreme Court Chamber's individual decisions on severance, see *Guide to the ECCC (Volume I)*, section 5.2.5.2.

5.6.6. Additional investigations during the trial

Internal Rule 93 empowered the Trial Chamber to order additional investigations that it considered necessary during the trial phase. Under Internal Rule 93(2), the Trial Chamber Judges could, under the same conditions as the Co-Investigating Judges, interview witnesses, conduct searches, seize any evidence, or order expert opinions.

Parties requesting additional investigations under Internal Rule 93 had to demonstrate their necessity.[1780] Merely exposing procedural defects in the investigation was insufficient to establish necessity and could not be invoked to "circumvent the finality of the Co-Investigating Judges' or Pre-Trial Chamber's decisions".[1781] That said, the Trial Chamber had a separate

[1776] Ibid, paras 69-71.
[1777] Ibid, para. 69.
[1778] Case 002/02, Decision on Khieu Samphan's Immediate Appeal Against the Trial Chamber's Decision on Additional Severance of Case 002 and Scope of Case 002/02, 29 July 2014, E301/9/1/1/3, paras 19, 30-36.
[1779] Ibid, paras 90-91.
[1780] Case 002/01, Appeal Judgment, para. 251.
[1781] Ibid, para. 252.

obligation, independent of the Co-Investigating Judges and Pre-Trial Chamber, to determine all circumstances relevant for the adjudication of the case. Therefore, parties were permitted to request the Trial Chamber to take further investigative action to undermine findings made at the pre-trial stage. In such a situation, however, the investigation was not undertaken to challenge findings by the Co-Investigating Judges or Pre-Trial Chamber, but rather to establish facts that could differ from the findings made at the pre-trial phase.[1782]

The Trial Chamber had broad discretion to admit any new evidence that it deemed conducive to ascertaining the truth, where that evidence also satisfied the *prima facie* standards of relevance, reliability, and authenticity required under Internal Rule 87(3).[1783] Ordinarily, the requesting party had to also satisfy the Trial Chamber that the proposed evidence was either not available before the opening of the trial or could not have been discovered with the exercise of due diligence. However, the Chamber occasionally admitted documents which did not meet this criterion, including in instances where a document related closely to material already on the cases file and where the interests of justice required the sources to be evaluated together, where the proposed documents were exculpatory and required evaluation to avoid a miscarriage of justice, or where the other parties did not object to the documents.

Requests were determined on the individual merits and facts of each case. They were denied in circumstances where the request was moot, where the material sought was already on the case file, or where the proposed witness or document in question lacked probative value. For example, the Trial Chamber was not persuaded, at a late phase of the trial, of the value of calling a witness who spoke little Khmer, who was not present during most of the relevant interviews of the Accused, and who had previously shown reluctance to assist the court.[1784] Under Internal Rule 93, the Trial Chamber had to be conscious of its duty to balance the fairness of proceedings with an expeditious trial, and the potential value of admitting evidence had to be weighed against concerns regarding undue delay.[1785]

When ruling on requests for additional investigations, the Trial Chamber also considered the distinction between the judicial investigation and trial phases. In Case 002/01, the Trial

[1782] Ibid, para. 253.
[1783] Case 002/01, Decision on Nuon Chea Request to Admit New Documents, to Initiate an Investigation and to Summons Mr Rob Lemkin, 24 July 2013, E294/1, para. 10; Case 002/02, Decision on the Nuon Chea Internal Rule 87(4) Request to Admit Documents Related to Robert Lemkin (2-TCW-877) and on Two Related Internal Rule 93 Requests, 28 December 2016, E416/4, para. 13.
[1784] Case 002/01, Decision on Nuon Chea Request to Admit New Documents, to Initiate an Investigation and to Summons Mr Rob Lemkin, 24 July 2013, E294/1, paras 15-16.
[1785] Ibid, para. 19.

Chamber rejected Nuon Chea's request to have the Trial Chamber consider the twenty Requests for Investigative Action under Internal Rule 93 that were rejected by the Co-Investigating Judges. It considered that the Accused had had ample opportunity during the judicial investigation spanning almost two-and-a-half years to request all investigative actions considered to be relevant, and to challenge any refusal of these requests to the Pre-Trial Chamber.[1786]

The parties were permitted to take actions "aimed at discovering relevant evidence, as long as such conduct [did] not lead to witness tampering or any other distortion of evidence". However, they were not permitted to assume the Trial Chamber's investigative powers. In Case 002/01, the Supreme Court Chamber considered that the defence should be allowed to carry out limited actions required to satisfy the first prong of the admissibility standards for requests for investigative action before the Co-Investigating Judges – namely, that the action requested be "identif[ied] with sufficient precision" – such as identifying witnesses.[1787]

5.6.7. Legal recharacterisation

Internal Rule 98(2) provided that "[t]he judgment shall be limited to the facts set out in the Indictment". However, it permitted the Trial Chamber to "change the legal characterisation of the crime as set out in the Indictment, as long as no new constitutive elements are introduced".

The Trial Chamber was not bound by the legal characterisations adopted by the Co-Investigating Judges or the Pre-Trial Chamber in the Closing Order. The Trial Chamber could change the legal characterisation of facts contained in the Closing Order or Amended Closing Order at any time to accord with any other applicable crime *or* mode of liability up to and including the verdict. This was subject only to the overriding requirements of a fair trial: (1) the Chamber had to "remain within the confines of the facts set out in the Closing Order", and (2) the Accused had to be "put on notice of a possible recharacterisation".[1788]

The Trial Chamber's power to recharacterise under Internal Rule 98(2) was not limited by the specific legal elements of crimes listed in the Closing Order. Thus, even if the Closing Order could be interpreted as allowing only extermination with direct intent (*dolus directus*), the facts

[1786] Case 002/01, Decision on Nuon Chea Motions Regarding Fairness of Judicial Investigation, 9 September 2011, E116, paras 13-14, 19-20.
[1787] Case 002/01, Appeal Judgment, para. 249.
[1788] Case 002/02, Judgment, para. 153; Case 001, Judgment, para. 496. See also Case 002/02, Appeal Judgment, paras 95, 99-109.

described in the Closing Order could still support a characterisation of indirect intent (*dolus eventualis*).[1789] In Case 002/02, the Supreme Court Chamber disagreed with the argument that the Trial Chamber introduced a new constitutive element when it recharacterised the facts from extermination to murder, since murder and extermination contain different legal ingredients.[1790] It considered that the issue before it was whether the facts before the Trial Chamber supported a possible charge of murder with *dolus eventualis* rather than extermination with direct intent. It concluded that where the Trial Chamber found that the facts included in the Closing Order supported a finding of murder with *dolus eventualis* as well as extermination, recharacterisation was lawful. However, if the Trial Chamber included facts not found in the Closing Order, the recharacterisation would have been unlawful.[1791]

When changes were made, including by recharacterisation, the parties had to be informed of such an eventuality so they could make timely and effective submissions. The information had to be "full" and "detailed", although each factual situation was to be assessed on a case-by-case basis. The right to be informed of the nature and cause of the accusation was part of an Accused's right to prepare a defence.[1792] In Case 002/02, the Supreme Court Chamber considered the Trial Chambers rulings "holistically" and found that the largely identical conclusions in Case 002/01 effectively put the parties on notice that such a recharacterisation was possible in Case 002/02. Special trial management meetings were also held to discuss recharacterisation and other issues.[1793] The Supreme Court Chamber in Case 002/01 endorsed the Trial Chamber's recharacterisation of certain facts in the Closing Order (from extermination to the crime of murder) but did not expressly consider the notice requirement.[1794]

When recharacterising, the Trial Chamber had to ensure that (1) the Accused's rights would not be violated, and (2) the mode of liability in question was applicable at the ECCC.[1795] The Trial Chamber in Case 001 rejected the argument that the Chamber was obliged to decide on the applicability of JCE prior to its deliberations and provide the Accused with a further opportunity to respond, before recharacterising individual modes of liability to JCE. It found that the Accused was repeatedly made aware of, and provided with a timely opportunity to

[1789] Case 002/02, Appeal Judgment, para. 101.
[1790] Ibid, paras 95-109.
[1791] Ibid, para. 101.
[1792] Ibid, para. 107. For more on the fair trial rights of the Accused, and specifically, the right to be informed of the nature and cause of the charges, see section 4.6.
[1793] Case 002/02, Appeal Judgment, para. 108.
[1794] Case 002/01, Appeal Judgment, para. 562.
[1795] Case 001, Judgment, para. 496.

address, the specific possibility that JCE could be held applicable to the charges against him.[1796] It then analysed the applicability of JCE at the ECCC, holding that it formed part of customary international law between 1975 and 1979.[1797]

5.6.8. Burden and standard of proof

Internal Rule 87(1) enshrined the burden and standard of proof. All Accused were presumed innocent until proved guilty. The Co-Prosecutors bore the burden of proof. The Khmer and English version of Internal Rule 87(1) provided that for a conviction, the Chamber must be convinced of the guilt of the accused "beyond a reasonable doubt", while the French version retained the notion of the Judge's "*intime conviction*". Despite these differences, the Trial Chamber adopted a common approach that "evaluated, in all circumstances, the sufficiency of the evidence",[1798] where (1) "the proof of each element of the crime, the mode of liability and any fact which is decisive of guilt is subject to a reasoned assessment of evidence",[1799] and (2) "any doubt as to guilt was accordingly interpreted in the Accused's favour".[1800] The Supreme Court Chamber interpreted this standard as requiring proof beyond reasonable doubt.[1801]

In Case 001, the Supreme Court Chamber considered that "the guilt of an accused must be established at trial beyond reasonable doubt" when elaborating on its standard of review for errors of facts and interpreted the Trial Judgment in Case 001 as requiring proof beyond reasonable doubt.[1802] The Trial Chamber in Case 001 observed that it "adopted a common approach that has evaluated, in all circumstances, the sufficiency of the evidence. Upon a reasoned assessment of evidence, any doubt as to guilt was accordingly interpreted in the Accused's favour".[1803]

In Case 002/01, the Supreme Court Chamber dismissed argument that the Trial Chamber applied the civil law concept of "*intime conviction*" rather than the common law standard of "proof beyond a reasonable doubt". It found the Trial Chamber "clearly stated that it would adopt the standard of proof beyond reasonable doubt", noting that the French version of the Judgment reflected that the Trial Chamber never used the term "*intime conviction*" when

[1796] Ibid, para. 502.
[1797] Ibid, paras 504-512.
[1798] Ibid, para. 45.
[1799] Case 002/02, Judgment, para. 39.
[1800] Case 001, Judgment, para. 45. See also Case 002/01, Appeal Judgment, para. 379; Case 002/01, Judgment, para. 22. See *e.g.*, Case 001, Appeal Judgment, paras 18, 36.
[1801] See Case 002/02, Appeal Judgment, paras 302-304.
[1802] Case 001, Appeal Judgment, paras 18, 36.
[1803] Case 001, Judgment, para. 45.

reaching its conclusions, but rather terms such as "*il ne fait aucun doute*".[1804]

In Case 002/02, the Supreme Court Chamber found that the Trial Chamber "correctly understood the applicable burden and standard of proof" as requiring proof of an Accused's guilt beyond reasonable doubt. The Supreme Court Chamber reasoned that whatever the Trial Chamber's understanding of the civil law concept of *intime conviction*, it correctly emphasised that "[a]ll facts underlying the elements of the crime or the form of responsibility alleged, as well as all facts which are indispensable for entering a conviction, […] must be established beyond reasonable doubt". It further noted that the Trial Chamber correctly understood that this "must be supported by a reasoned opinion on the basis of the entire body of evidence, without applying the standard of proof 'beyond reasonable doubt' in a piecemeal fashion".[1805]

5.7. Appeal phase

Internal Rules 104-112 regulated the procedure applicable for appeals of judgments and decisions of the Trial Chamber. This section addresses several discrete aspects of ECCC appeal procedure, namely: (1) jurisdiction and admissibility before the Supreme Court Chamber, (2) the appellate standard of review; (3) the procedure on appeal to the Supreme Court Chamber, and (4) additional investigations on appeal.

5.7.1. Jurisdiction and admissibility

Internal Rules 104(1) and 105(2) permitted appeals to the Supreme Court Chamber from Trial Chamber judgments or decisions based on (1) errors of law "invalidating the judgment", (2) errors of fact which "occasioned a miscarriage of justice", and/or (3) discernible errors in the Trial Chamber's exercise of discretion "which resulted in prejudice to the appellant". Internal Rule 104(4) subjected the following Trial Chamber decisions to immediate appeal, whereas other decisions could only be appealed when appealing the Trial Judgment:

i. decisions which have the effect of terminating the proceedings;

ii. decisions on detention and bail under Internal Rule 82;

iii. decisions on protective measures under Internal Rule 29(4)(c); and

iv. decisions on interference with the administration of justice under Internal Rule

[1804] Case 002/01, Appeal Judgment, paras 377, 379-380.
[1805] Case 002/02, Appeal Judgment, paras 302-304.

35(6).

Internal Rules 104 and 105 required a "decision" or "judgment" from the Trial Chamber for an appeal to be admissible. The Supreme Court Chamber in Case 004/02 found that a statement by the Judges of the Trial Chamber – which stated that the Chamber had no access to the case file following the Pre-Trial Chamber's considerations on the appeals against the Closing Orders – did not constitute a "decision" for the purposes of Internal Rule 104(4)(a). In finding the International Co-Prosecutor's appeal against the Trial Chamber's effective termination of Case 004/02 inadmissible, the Supreme Court Chamber "reiterated that the Trial Chamber could not effectively terminate the proceedings since it was not formally seised of the Case File", and thus could not "make any lawful orders".[1806]

The Supreme Court Chamber interpreted Internal Rule 104(4)(a) as permitting appeals against "decisions to stay proceedings that do not carry a tangible promise of resumption, thereby barring arrival at a judgment on the merits".[1807] It reasoned that "[t]hese disruptive consequences of a stay for the course of proceedings are grave enough to conclude that such a decision on stay must be subject to appeal". It considered that this interpretation was confirmed by the specific choice of the words in Internal Rule 104(4) – "the *effect* of terminating the proceedings" – as opposed to decisions simply "terminating the proceedings", as well as jurisprudence from other international(ised) criminal courts that allow interlocutory appeals against a stay of proceedings.[1808] By contrast, the Supreme Court Chamber held that challenges to the contours of the applicable crimes, for instance, whether crimes against humanity required a nexus to an armed conflict, did not have the effect of terminating the proceedings.[1809]

The Accused could appeal all Trial Chamber decisions concerning provisional detention. Thus, if an impugned decision was rendered under Internal Rule 82, it was appealable under Internal

[1806] Case 004/02, Decision on International Co-Prosecutors' Immediate Appeal of the Trial Chamber's Effective Termination of Case 004/02, 10 August 2020, E004/2/1/1/2, para. 57. For more on the Co-Investigating Judges' opposing Closing Orders in Cases 004/02, 003 and 004, the Pre-Trial Chamber's considerations on the appeals against the Closing Orders, and the Supreme Court Chamber's termination of these cases, see *Guide to the ECCC (Volume I)*, section 5.3.
[1807] Case 004/02, Decision on International Co-Prosecutors' Immediate Appeal of the Trial Chamber's Effective Termination of Case 004/2, 10 August 2020, E004/2/1/1/2, para. 47. See also Case 002/02, Decision on Khieu Samphan's Immediate Appeal Against the Trial Chamber's Decision on Additional Severance of Case 002 and Scope of Case 002/02, 29 July 2014, E301/9/1/1/3, para. 36; Case 002/01, Decision on Immediate Appeal Against the Trial Chamber's Order to Release the Accused Ieng Thirith, 13 December 2011, E138/1/7, para. 15.
[1808] Case 002/01, Decision on Immediate Appeal Against the Trial Chamber's Order to Release the Accused Ieng Thirith, 13 December 2011, E138/1/7, para. 15.
[1809] See Case 002/01, Decision on Ieng Sary's Appeal Against Trial Chamber's Decision on Co-Prosecutors' Request to Exclude Armed Conflict Nexus Requirement from the Definition of Crimes Against Humanity, 19 March 2012, E95/8/1/4, paras 8-10.

Rule 104(4)(b).[1810] No decision was issued concerning Internal Rule 104(4)(c).

Internal Rule 104(4)(d) contemplated "decisions *on*" Internal Rule 35(6). The Supreme Court Chamber held that although the rule did not require that an impugned decision "refer to itself" as a "decision on interference with the administration of justice", a request could not "present […] allegations to which Internal Rule 35 is manifestly inadmissible". Further, "an erroneous judicial holding [was] not, by itself, legally sufficient to satisfy the Internal Rule 35 standard.[1811]

Internal Rules 105(2) and 105(3) required appellants to identify alleged errors, substantiate each basis with arguments and sources, and demonstrate how the error invalidated the judgment or occasioned a miscarriage of justice. Appeals had to identify the finding or ruling challenged with specific references to page and paragraph numbers in the Trial Chamber's decision.[1812] The Supreme Court Chamber required a "clear, logical and cohesive presentation of the appellant's grounds of appeal". Obscure, contradictory, vague, or otherwise insufficient appeal submissions were not considered.[1813]

Appellants could not re-litigate trial arguments *de novo* or advance claims that a given direction or Trial Chamber finding was erroneous unless they could demonstrate that rejection of an argument constituted an error of law warranting the Supreme Court Chamber's intervention. The Supreme Court Chamber dismissed, without consideration of the merits, arguments that did not have the potential to cause the impugned decision to be reversed. The Supreme Court Chamber also had inherent discretion in selecting which submissions merit a detailed reasoned opinion in writing. It could dismiss arguments that were evidently unfounded without providing detailed reasoning.[1814]

The Supreme Court Chamber could confirm, annul, or amend decisions in whole or part. All

[1810] See *e.g.*, Case 002/01, Decision on Immediate Appeal Against the Trial Chamber's Decision on Khieu Samphan's Application for Immediate Release, 22 August 2013, E275/2/3, paras 18-20; Case 002/01, Decision on Immediate Appeal by Khieu Samphan on Application for Release, 6 June 2011, E50/3/1/4, para. 21.
[1811] Case 002/01, Decision on Ieng Sary's Appeal Against the Trial Chamber's Decision on its Senior Legal Officer's Ex Parte Communications, 25 April 2012, E154/1/1/4, para. 13.
[1812] Internal Rules, rule 105(4).
[1813] Case 002/02, Appeal Judgment, para. 19. See also Case 002/01, Appeal Judgment, para. 101; Case 001, Appeal Judgment, para. 20.
[1814] Case 001, Appeal Judgment, para. 20. See also Case 002/02, Appeal Judgment, para. 20; Case 002/01, Appeal Judgment, para. 101.

Supreme Court Chamber decisions were final.[1815]

5.7.2. Standard of review

Pursuant to Internal Rules 104(1) and 105(2), appeals could be based on one or more of the following three grounds: (1) an error of law "invalidating the judgment", (2) an error of fact which "occasioned a miscarriage of justice", or (3) a discernible error in the Trial Chamber's exercise of discretion which "resulted in prejudice to the appellant". The Supreme Court Chamber developed standards of review in accordance with each ground.

Errors of law. When an appellant alleged an error of law, the Supreme Court Chamber, as the "final arbiter of the law applicable before the ECCC", was bound to determine whether an error of law was in fact committed on a substantive or procedural issue. The Supreme Court Chamber reviewed the Trial Chamber's legal findings to determine "whether they [were] correct, not merely whether they [were] reasonable".[1816] Even where a party's arguments were insufficient, the Supreme Court Chamber could consider other reasons to find that a legal error occurred.[1817] When the Trial Judgment contained a legal error due to the application of the wrong legal standard, the Supreme Court Chamber identified the correct legal standard and reviewed the Trial Chamber's factual findings. The Supreme Court Chamber then corrected the legal errors, applied the correct legal standard to the evidence, and determined whether the factual findings met the standard of proof before confirming the judgment on appeal.[1818] This standard of review was high: the error of law had to invalidate the judgment or decision. A judgment or decision was "invalidated" by a legal error when it was "proven that in the absence of such an error, a different verdict – in whole or part – would have been entered".[1819]

Errors of fact. The Supreme Court Chamber applied the standard of reasonableness to review impugned factual findings, rather than assessing whether the finding was correct. Under this standard, the Supreme Court Chamber only overturned the Trial Chamber's factual findings if "no reasonable trier of fact" could have reached the finding in question. In this regard, the Supreme Court Chamber agreed with the International Criminal Tribunal for the former

[1815] Internal Rules, rules 104(2), 104(3). See also Case 002/02, Appeal Judgment, para. 21.
[1816] Case 002/02, Appeal Judgment, para. 23; Case 002/01, Appeal Judgment, para. 85; Case 001, Appeal Judgment, para. 14.
[1817] Case 002/02, Appeal Judgment, para. 23; Case 001, Appeal Judgment, para. 15.
[1818] Case 002/02, Appeal Judgment, para. 24; Case 002/01, Appeal Judgment, para. 86; Case 001, Appeal Judgment, para. 16.
[1819] Case 002/02, Appeal Judgment, para. 25. See also Case 002/01, Appeal Judgment, para. 99; Case 001, Appeal Judgment, para. 15.

Yugoslavia ("ICTY") Appeals Chamber's general approach to the Trial Chamber's findings, under which the Appeals Chamber (1) applied a margin of deference to the Trial Chamber's findings of fact, and (2) only replaced the Trial Chamber's findings if no reasonable trier of fact could have accepted the evidence relied on or where the evaluation of the evidence was "wholly erroneous". The reason for this deferential standard of review was that the Trial Chamber had the advantage of observing witnesses in person and was better positioned than the appellate chamber to assess the reliability and credibility of the evidence.[1820] Accordingly, the starting point for the Supreme Court Chamber's assessment of the reasonableness of the Trial Chamber's factual findings was the reasoning provided for the factual analysis. As a general rule, where the underlying evidence for a factual conclusion appeared weak on its face, more reasoning was required. However, arguments limited to disagreeing with the Trial Chamber's conclusions based on unsubstantiated alternative interpretations of the same evidence were insufficient to overturn factual findings.[1821] Only those facts occasioning a miscarriage of justice could result in the Supreme Court Chamber overturning the Trial Chamber's judgment or decision in whole or part. A miscarriage of justice was defined as "a grossly unfair outcome in judicial proceedings". For an error of fact to occasion a miscarriage of justice, it must have been "critical to the verdict reached". A party had to demonstrate how the error of fact had actually occasioned a miscarriage of justice.[1822]

An appeal against a conviction had to show that the Trial Chamber's factual errors created a reasonable doubt as to an Accused's guilt. An appeal against an acquittal had to show that, when considering the errors of fact committed by the Trial Chamber, all reasonable doubt of the Accused's guilt had been eliminated. However, in the case of an appeal by the Co-Prosecutors or Civil Parties against an acquittal, the Supreme Chamber could only modify the Trial Chamber's findings of fact if it considered the judgment erroneous but could not modify the disposition of the Trial Chamber's judgment.[1823]

Procedural errors. The Trial Chamber had broad discretion with respect to procedural matters. Accordingly, the Supreme Court Chamber adopted a deferential approach to reviewing discretionary decisions and only intervened in the Trial Chamber's exercise of discretion if it was "tainted by 'discernible error […] which resulted in prejudice to the appellant'". The

[1820] Case 002/02, Appeal Judgment, para. 27; Case 002/01, Appeal Judgment, para. 89; Case 001, Appeal Judgment, para. 17.
[1821] Case 002/01, Appeal Judgment, para. 90. See also Case 002/02, Appeal Judgment, paras 27-28.
[1822] Case 002/01, Appeal Judgment, para. 99; Case 001, Appeal Judgment, para. 19.
[1823] Case 001, Appeal Judgment, para. 18.

Supreme Court Chamber noted that the Appeals Chambers of the ICTY, ICTR, and the ICC had each adopted a similar deferential standard of review for discretionary decisions and considered this standard "equally appropriate in the context of the ECCC". Under this standard, the Supreme Court Chamber would interfere with the Trial Chamber's exercise of discretion only if: (1) it was "based on an erroneous interpretation of the law"; (2) it was exercised on a "patently incorrect conclusion of fact"; or (3) the decision was "so unfair and unreasonable as to constitute an abuse of discretion".[1824] If an interlocutory decision was challenged on appeal from a Trial Judgment, the appellant had to also demonstrate a "lasting gravamen" in order to establish a clear link between the interlocutory decision being challenged and the Trial Judgment itself.[1825]

Issues of general significance. In exceptional circumstances, the Supreme Court Chamber could raise questions *ex proprio motu* or hear appeals where a party raised a legal issue that would not lead to the invalidation of the judgment but was nevertheless of general significance to the ECCC's jurisprudence.[1826] In Case 002/01, the Supreme Court Chamber rejected the Co-Prosecutor's request for declaratory relief on whether JCE III was applicable before the ECCC as procedurally defective. While it considered the request "of relevance, both to current and future proceedings", as JCE III had been frequently used in cases before the *ad hoc* tribunals and could be relevant in ECCC proceedings, it found no reason to consider the Co-Prosecutors' appeal on an exceptional basis. It reasoned that the Accused's appeals provided it with an opportunity to analyse JCE, including aspects relevant to the questions raised by the Co-Prosecutors, which it considered sufficient to provide guidance for future proceedings.[1827] In Case 002/02, the Supreme Court Chamber *proprio motu* raised the issue of whether JCE liability applied to *dolus eventualis crimes*, where the perpetrator is aware of the risk that the objective elements of the crime may result from their actions or omissions and accepts such an outcome. The Supreme Court Chamber considered it necessary to address this "issue of general significance to the ECCC's jurisprudence" arising from the Trial Chamber's judgment.[1828]

[1824] Case 002/01, Appeal Judgment, paras 97-98.
[1825] Case 002/02, Appeal Judgment, para. 31; Case 002/01, Appeal Judgment, paras 100, 1134. See *e.g.*, Case 002/01, Decision on Motions for Extensions of Time and Page Limits for Appeal Briefs and Responses, 31 October 2014, F9, para. 16.
[1826] Case 002/02, Appeal Judgment, para. 32. See also Case 001, Appeal Judgment, para. 15.
[1827] Case 002/01, Appeal Judgment, paras 1142-1143.
[1828] Case 002/02, Appeal Judgment, paras 1946-1947.

5.7.3. Procedure on appeal to the Supreme Court Chamber

Internal Rule 106 and 107 governed the procedure on appeal before the Supreme Court Chamber. Notices of appeal and immediate appeal had to be filed with the Trial Chamber Greffier and noted in the Trial Chamber's appeal register.[1829] Appeal briefs of judgments and any subsequent related documents had to be filed with the Supreme Court Chamber Greffier.[1830] Internal Rule 107 set out the deadlines for certain types of appeals:

i. Immediate appeals against decisions which had the effect of terminating the proceedings or decisions on interference with the administration of justice had to be filed within 30 days of the date of the decision or its notification.[1831]

ii. Immediate appeals relating to detention, bail, or protective measures had to be filed within 15 days of the decision or its notification.[1832]

iii. Immediate appeals against a Trial Chamber order of release from provisional detention had to be filed within 24 hours of the notification of the decision to release.[1833]

iv. Notices of appeals against a Trial Chamber judgment had to be filed within 30 days of the date of pronouncement of the judgment or its notification. Appeal briefs had to be filed within 60 days of the notice of appeals.[1834]

v. When a party appealed the Trial Judgment, the other parties had 15 days to file their notices of appeal, the additional time beginning from the expiration of the initial time limit for filing the notice of appeal.[1835]

All written submissions were required to be filed in Khmer and either English or French[1836] and to respect the page limits provided for in the Practice Direction on the Filing of Documents before the ECCC.[1837] In exceptional circumstances, the Supreme Court Chamber could grant

[1829] Internal Rules, rule 106(2).
[1830] Internal Rules, rule 106(5).
[1831] Internal Rules, rule 107(1).
[1832] Internal Rules, rule 107(2).
[1833] Internal Rules, rule 107(3).
[1834] Internal Rules, rule 107(4).
[1835] Internal Rules, rule 107(4).
[1836] Practice Direction on the Filing of Documents, article 7.1.
[1837] Ibid, article 5.2.

the parties' requests for an extension of time[1838] and pages,[1839] as well as authorise them to file their written submissions in one language first, with translation to follow.[1840] The Supreme Court Chamber repeatedly stated that it was cognisant that extensions would be necessary in light of the size and complexity of the case and Trial Judgment, and granted such extensions for appeals of the Trial Judgment.[1841] The Supreme Court Chamber did not permit replies to any responses for appeals of the Trial Judgment, given that it held public hearings to hear oral arguments.[1842]

5.7.4. Additional investigations on appeal

Under Internal Rule 108(7), the parties could request the Supreme Court Chamber for additional evidence provided it was unavailable during the trial and could have been a decisive factor in reaching the verdict. The request had to "clearly identify the specific findings of fact made by the Trial Chamber to which the additional evidence [was] directed". The other parties affected by the request had to respond within 15 days of the receipt of notification of the request.[1843] Internal Rule 104(1) also permitted the Supreme Court Chamber to "itself examine evidence and call new evidence to determine the issue".

In order to show that a proposed piece of evidence could have been a decisive factor, the party proposing the evidence had to demonstrate a "realistic possibility that the evidence, had it been put before the Trial Chamber, could have led the Trial Chamber to enter a different verdict, in whole or in part". The party proposing new evidence had to demonstrate its impact on the crucial factual finding(s) that led to the conviction or sentence, considering the evidence already presented to the Trial Chamber.[1844]

The "decisiveness" requirement did not apply to the Supreme Court Chamber's calling of new evidence under Internal Rule 104(1). In exercising its discretion under Internal Rule 104(1) to call new evidence, the Supreme Court Chamber considered whether the calling of new evidence was "in the interests of justice" in the sense of being "conducive to ascertaining the

[1838] Ibid, article 8.1; Internal Rules, rule 39(4)(a).
[1839] Practice Direction on the Filing of Documents, articles 5.4.
[1840] Ibid, article 7.2.
[1841] See *e.g.*, Case 002/01, Decision on Motions for Extensions of Time and Page Limits for Appeal Briefs and Responses, 31 October 2014, F9, para. 13; Case 002/01, Decision on Defence Motion for Extension of Time and Page Limits on Notices of Appeal and Appeal Briefs, 29 August 2014, F3/3.
[1842] See Case 002/01, Decision on Motions for Extensions of Time and Page Limits for Appeal Briefs and Responses, 31 October 2014, F9, para. 22.
[1843] Internal Rules, rule 108(7).
[1844] Case 002/01, Appeal Judgment, para. 30.

truth".[1845] This included instances where the Chamber was confronted with potentially exculpatory evidence, the admission of which was necessary to avoid a miscarriage of justice, or where the defence raised serious doubts as to the propriety of the recording of a key piece of evidence.[1846] Nevertheless, when exercising its discretion, the Supreme Court Chamber bore in mind its role, which was primarily "to ascertain whether the Trial Chamber's judgment [was] tainted by errors that invalidate it or lead to a miscarriage of justice, not to conduct a second trial". Accordingly, unless there were specific circumstances justifying otherwise, the Supreme Court Chamber called evidence on appeal under Internal Rule 104(1) primarily in circumstances where there was "a realistic possibility that the evidence, had it been put before the Trial Chamber, could have led the Trial Chamber to enter a different verdict, in whole or in part". Thus, the proposed evidence had to be "assessed in the context of the evidence that was put before the Trial Chamber in relation to a factual finding that was crucial or instrumental to the conviction".[1847]

The Supreme Court Chamber noted that its interpretation of Internal Rule 104(1) could be interpreted as overlapping with Internal Rule 108(7) but found that Internal Rule 104(1) was not rendered redundant. Notably, Internal Rule 108(7) could be relied upon to admit evidence on appeal that was available at trial but was not called, whereas the Supreme Court Chamber could use Internal Rule 104(1) as the basis to call evidence on its own motion, in the absence of a request by a party.[1848]

[1845] Ibid, para. 31.
[1846] Ibid, para. 31. See *e.g.*, Case 002/01, Decision on Part of Nuon Chea's Requests to Call Witnesses on Appeal, 29 May 2015, F2/5, paras 17, 23, 25.
[1847] Case 002/01, Appeal Judgment, para. 32.
[1848] Ibid, para. 33.

6. Sentencing

6.1. Sources of sentencing law

Internal Rule 98(5) stipulated that if the Accused were found guilty, the Trial Chamber must "sentence him or her in accordance the Agreement, the ECCC Law, and these [Internal Rules]". These founding documents did not differentiate between national and international crimes in terms of sentencing. Article 10 of the UN-RGC Agreement provided that the maximum penalty for crimes falling within the ECCC's jurisdiction was life imprisonment. Article 39 (new) of the ECCC Law supplemented this provision as follows:

> Those who committed any crime as provided in Articles 3 new, 4, 5, 6, 7 and 8 [of the ECCC Law] shall be sentenced to a prison term from five years to life imprisonment.
>
> In addition to imprisonment, the [Trial Chamber] may order the confiscation of personal property, money, and real property acquired unlawfully or by criminal conduct.
>
> The confiscated property shall be returned to the State.[1849]

The ECCC Law and UN-RGC Agreement also provided that the Trial Chamber was required to exercise its jurisdiction in accordance with Articles 14 and 15 of the International Covenant on Civil and Political Rights ("ICCPR").[1850] Under Article 15(1) of the ICCPR: (1) a heavier penalty than the one applicable at the time the criminal offence was committed could not be imposed, and (2) if a lighter penalty was provided by law after the commission of the offence, the offender must benefit from it. The Trial Chamber reviewed relevant international sentencing guidelines for crimes against humanity and grave breaches of the Geneva Conventions, finding that they "indicate[d] that the penalties before the ECCC for those crimes do not contravene Article 15(1) of the ICCPR".[1851]

The ECCC framework was *lex specialis*, governing the range of penalties in proceedings before the ECCC. In Case 001, the Supreme Court Chamber was confronted with the issue of whether Articles 10 and 95 of the Cambodian Criminal Code were applicable in the determination of sentence and provide for a lesser maximum sentence than the ECCC framework.[1852] It held that the relationship between Article 39 of the ECCC Law and the 2009 Criminal Code must be

[1849] See also ECCC Law, article 38 ("All penalties shall be limited to imprisonment").
[1850] See ECCC Law, article 33 (new); UN-RGC Agreement, article 12(2).
[1851] Case 001, Judgment, para. 573.
[1852] Case 001, Appeal Judgment, paras 345-348.

considered "in light of the principle of *lex specialis*". It reasoned that whereas the 2009 Criminal Code is law of general application binding on regular Cambodian courts, the ECCC Law "was legislated specifically for the unique purposes of the ECCC under its mandate, jurisdiction, character and structure".[1853]

The Supreme Court Chamber further reasoned that this interpretation was supported by Articles 8 and 668 of the 2009 Criminal Code. Under Article 668, the general provisions of the Criminal Code prevail in the event of a conflict between other criminal legislation, except for "special criminal legislation".[1854] Article 8 indicates that "violations of international humanitarian law, international custom, or international conventions recognized by the Kingdom of Cambodia" are "serious offences" under "special legislation".[1855] Accordingly, the Supreme Court Chamber considered that the ECCC Law was "special criminal legislation" within the meaning of Article 668(3) of the 2009 Criminal Code. It noted a conflict between Article 39 of the ECCC Law, which did not restrict the ECCC from imposing a fixed-term sentence of more than 30 years of imprisonment and Article 46 of the 2009 Criminal Code, which precludes such a sentence. However, considering that Article 46 of the 2009 Criminal Code was not applicable at the ECCC, the Supreme Court Chamber found that the issue of *lex mitior* did not arise.[1856]

The Trial Chamber clarified that in instances where no real or personal property or assets are identified as having been acquired unlawfully or by criminal conduct, there can be no confiscation pursuant to Article 39 (new) of the ECCC Law.[1857]

6.2. Purposes of sentencing

The ECCC framework and Cambodian law did not set out sentencing aims or purposes.[1858] The Trial Chamber considered that sentencing at the ECCC "serve[d] the purposes of deterrence, both to the accused and more generally, and punishment, though not revenge".[1859] In addition to these purposes, the Trial Chamber referred to "[i]ndividual and general affirmative prevention": *i.e.*, the importance of reassuring the surviving victims, their families, the witnesses and the general public that the law is effectively implemented and enforced, and

[1853] Case 001, Appeal Judgment, para. 348.
[1854] Ibid, para. 349. See also Cambodian Criminal Code, article 668.
[1855] Case 001, Appeal Judgment, para. 350. See also Cambodian Criminal Code, article 8.
[1856] Case 001, Appeal Judgment, para. 351.
[1857] Case 002/01, Judgment, para. 1108.
[1858] Case 002/02, Appeal Judgment, para. 1983.
[1859] Case 002/02, Judgment, para. 4348. See also Case 002/01, Judgment, para. 1067; Case 002/02, Appeal Judgment, para. 1983; Case 001, Judgment, para. 579.

applies to all regardless of status or rank.[1860] Rehabilitation was not considered a primary purpose of sentencing, but it was recognised as a mitigating factor.[1861]

The Supreme Court Chamber noted that the *ad hoc* tribunals had considered the following sentencing purposes: retribution, deterrence, affirmative prevention, public reprobation, stigmatisation by the international community, and rehabilitation.[1862] It pointed to the to the International Criminal Tribunal for the former Yugoslavia's ("ICTY") explanation of "affirmative prevention" as:

> One of the most important purposes of a sentence imposed by the International Tribunal is to make it abundantly clear that the international legal system is implemented and enforced. This sentencing purpose refers to the educational function of a sentence and aims at conveying the message that rules of humanitarian international law have to be obeyed under all circumstances. In doing so, the sentence seeks to internalise these rules and the moral demands they are based on in the minds of the public.[1863]

In both Cases 002/01 and 002/02, the Supreme Court Chamber rejected the argument that the Trial Chamber erroneously downplayed the importance of retribution and individual deterrence in setting out the affirmative prevention principle, along with the purposes of punishment and deterrence. The Supreme Court Chamber considered that there was no indication that the Trial Chamber's statement of these purposes constituted an expression of bias against the Accused.[1864]

The Trial Chamber considered that while an obvious function of sentencing is to punish, its goal is not revenge.[1865] The Supreme Court Chamber considered that "retribution and deterrence" were particularly relevant to Case 001 given the gravity of Duch's crimes, holding that the penalty "must be sufficiently harsh to respond to the crimes committed and prevent the recurrence of similar crimes".[1866] It considered that the necessity of deterrence in punishing crimes against humanity "call[ed] for a statement that the passage of time neither leads to impunity nor undue leniency".[1867]

[1860] Case 002/02, Judgment, para. 4348; Case 002/01, Judgment, para. 1067; Case 001, Judgment, para. 579.
[1861] Case 001, Judgment, para. 611.
[1862] Case 002/02, Appeal Judgment, para. 1985.
[1863] Ibid, para. 1984 (internal citation omitted).
[1864] Ibid, para. 2046; Case 002/01, Appeal Judgment, para. 1110.
[1865] Case 001, Judgment, para. 580.
[1866] Case 001, Appeal Judgment, para. 380.
[1867] Ibid, para. 382.

6.3. Sentencing principles and factors

The UN-RGC Agreement, the ECCC Law, and Internal Rules were "silent as regards the principles and factors to be considered at sentencing". They also did not indicate whether sentencing before the ECCC was "governed by international or Cambodian legal rules, or some combination of each". Furthermore, there was no "single international sentencing regime directly applicable before the ECCC", given the lack of a uniform approach before other intentional tribunals.[1868] Consequently, the Trial Chamber exercised its discretion in fashioning the appropriate sentences, seeking guidance from a number of relevant international and Cambodian sentencing principles and factors, including: (1) the principle of legality; (2) the principles of equality, proportionality, and individualisation of sentence; (3) the gravity of the crimes and the Accused's participation; (4) mitigating factors; (5) and aggravating factors.[1869]

6.3.1. Principle of legality

The principle of legality requires that the crimes existed in law before the charged conduct was committed (*nullum crimen sine lege*), and that the punishment for those crimes was established before their commission (*nulla poena sine lege*).[1870] The purpose of this requirement is to ensure a minimum degree of certainty with regard to punishment and awareness of penalty if convicted. Legality also requires that if current law imposes a lighter penalty than the penalty existing at the time of the offences, the lighter penalty will be applied (*lex mitior*).[1871] The principle of legality, itself, was part of Cambodian and international law prior to 1975-1979.[1872]

The Supreme Court Chamber held that even though penalties for genocide, crimes against humanity, and war crimes were not explicitly stated in Cambodian law, the *nulla poena sine lege* principle was not violated.[1873] It considered that although genocide, crimes against humanity, and war crimes were not part of pre-1975 Cambodian law, they existed in international criminal law, and that Article 21 of the 1956 Penal Code provided for penalties of death or forced labour "for the most serious crimes".[1874] It also considered Principle II of the Nuremberg Principles under which "[t]he fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who

[1868] Case 001, Judgment, paras 575-576.
[1869] Ibid, paras 578-585.
[1870] Case 002/02, Appeal Judgment, para. 1987.
[1871] Ibid, paras 1987, 1993.
[1872] Ibid, para. 1987.
[1873] Ibid, para. 1992.
[1874] Ibid, para. 1988.

committed the act from responsibility under international law" and European Court of Human Rights ("ECtHR") jurisprudence holding that "the law" for the purposes of legality includes "unwritten laws".[1875]

6.3.2. Principles of equality, proportionality, and individualisation of sentences

The principle of equality requires that sentences be meted out to offenders equally.[1876] Article 31 of the Cambodian Constitution provides that "[e]very Khmer citizen shall be equal before the law, enjoying the same rights, freedom and fulfilling the same obligations regardless of race, colour, sex, language, religious belief, political tendency, birth origin, social status, wealth or other status".[1877] Internal Rule 21(1)(b) likewise required that "[p]ersons who find themselves in a similar situation and prosecuted for the same offences […] be treated according to the same rules".

Proportionality in sentencing, a fundamental principle in both human rights and international humanitarian law, requires the punishment to be proportionate to the gravity of the crime and the offender's circumstances.[1878] However, the Supreme Court Chamber considered that while a sentence may be capricious or excessive if it is out of proportion with a line of sentences passed in similar circumstances for the same offences, guidance provided by sentences issued by other tribunals is very limited. It reasoned that such a comparison requires that the offences be the same and that they were committed in substantially similar circumstances in other tribunals. Consequently, differing sentences may be justified when the differences are more significant than the similarities or where aggravating or mitigating factors differ.[1879] The Supreme Court Chamber concluded that the sentencing practices of other tribunals in cases involving similar circumstances is just "one factor a chamber must consider when exercising its discretion in imposing a sentence".[1880]

The principle of individualisation at the ECCC required that the convicted person's individual circumstances be considered during sentencing.[1881] Article 96 of the Criminal Code set out that "in imposing penalties, the court shall take into account the seriousness and circumstances of

[1875] Ibid, para. 1988, 1990.
[1876] Ibid, para. 1994.
[1877] Ibid.
[1878] Ibid, para. 1995.
[1879] Ibid, para. 1996.
[1880] Ibid.
[1881] Ibid, paras 1997, 2003.

the offence, the character of the accused, his or her psychological state, his or her means, expenses and motives, as well as his or her behaviour after the offence, especially towards the victim".[1882]

The Supreme Court Chamber noted that these principles informed the *ad hoc* tribunals' jurisprudence. In particular, the Supreme Court Chamber observed how the trial chambers of the *ad hoc* tribunals determined sentences by considering the totality of the circumstances, "including the gravity of the crime and the individual circumstances of the accused, but without having to refer to any external and predetermined scale of penalties or to a predetermined list of aggravating and mitigating factors".[1883] This was unlike in the United Kingdom, where guidelines specify the range of appropriate sentence for each offence, and more akin to the practice in France, where Judges do not use sentencing guidelines.[1884]

6.3.3. Gravity of and participation in the crimes

The Supreme Court Chamber consistently held that the primary factor to be weighed in sentencing is "the gravity of the convicted person's crimes, and that in assessing the gravity of the crime, the particular circumstances of the case together with the form and degree of participation of the convicted person".[1885] Factors to consider in this regard include:

i. The number and vulnerability of the victims;

ii. The impact of the crimes upon them and their relatives;

iii. The convicted person's discriminatory intent when it is not already an element of the crime;

iv. The scale and brutality of the offences; and

v. The role played by the convicted person.[1886]

International tribunals rendered heightened sentences for cases involving particularly grave crimes and issued sentences of life imprisonment in cases in which the convicted person abused a position of leadership by planning or ordering the crimes, or by exhibiting particular cruelty

[1882] Cambodian Criminal Code, article 96.
[1883] Case 002/02, Appeal Judgment, para. 1999.
[1884] Ibid, para. 2000.
[1885] Ibid, para. 2004; Case 002/01, Appeal Judgment, para. 1118; Case 001, Appeal Judgment, para. 375.
[1886] Case 002/02, Appeal Judgment, para. 2004; Case 002/01, Appeal Judgment, para. 1118; Case 001, Appeal Judgment, para. 375.

or zeal in their commission.[1887]

The Trial Chamber consistently explained how the gravity of the crimes committed is the "litmus test for the appropriate sentence", requiring "consideration of the particular circumstances of the case", as well as the form and degree of the convicted person's participation in the crime.[1888] It noted that Rule 145(1)(c) of the ICC Rules of Procedure and Evidence similarly emphasises:

> the extent of the damage caused, in particular the harm caused to the victims and their families, the nature of the unlawful behaviour and the means employed to execute the crime; the degree of participation of the convicted person; the degree of intent; the circumstances of manner, time and location; and the age, education, social and economic condition of the convicted person.[1889]

6.3.4. Mitigating factors

In defining mitigating factors for sentencing purposes, the ECCC adopted the factors set out in Rule 145(2)(a) of the ICC's Rules of Procedure and Evidence: (1) "circumstances falling short of constituting grounds for exclusion of criminal responsibility, such as substantially diminished mental capacity or duress"; and (2) "[t]he convicted person's conduct after the act, including any efforts by the person to compensate the victims and any cooperation with the Court".[1890] The Supreme Court Chamber outlined that mitigating factors could also include:

i. Good conduct during the commission of the crimes (*e.g.*, if the convicted person tried to prevent the crimes but was forced to participate, or provided assistance to the victims);

ii. Good conduct in the UN Detention Unit;

iii. Voluntary surrender (as opposed to his hiding out to abscond from justice);

iv. Prior criminal records relevant to the international war crimes charges;

v. Substantial co-operation with the Prosecution;

[1887] Case 001, Appeal Judgment, para. 375.
[1888] Case 001, Judgment, para. 582; Case 002/01, Judgment, para. 1068; Case 002/02, Judgment, para. 4349.
[1889] See Case 001, Judgment, para. 582.
[1890] Case 002/02, Appeal Judgment, para. 2005; Case 002/01, Judgment, paras 1069-1070; Case 001, Judgment, para. 584.

vi. Age and health condition;

vii. Expression of remorse;

viii. Guilty plea and his willingness to tell the truth (if indeed the convicted person pleaded guilty);

ix. The time spent in pretrial detention (unless the convicted person deliberately dragged it out); and

x. The convicted person's family situation.[1891]

The convicted person had the burden of proving mitigating factors.[1892] This burden was lower than the Co-Prosecutors' burden for aggravating factors. Unlike aggravating factors, mitigating factors could be considered regardless of whether they were directly related to an alleged offence.[1893]

The coercive climate in Democratic Kampuchea was considered as a mitigating factor in the determination of sentence but only "of a minimal degree".[1894] The core rationale of the "coercive climate" as a mitigating factor was shared by the factor of duress, though to a lesser degree, "that the sentence should be adjusted to reflect [the convicted person's] diminished ability to effectuate a different moral choice, since refusal to commit the crime would have resulted in threat to [the convicted person's] life".[1895] Failure by a convicted person to demonstrate that they had no choice in the committing crimes, being personally threatened, or an attempted to dissociate the criminal conduct, rendered mitigation on this ground minimal.[1896]

A subordinate who establishes the existence of superior orders could "be subject to a less severe sentence only in cases where the order of the superior effectively reduces the degree of guilt".[1897] However, if the convicted person knew the orders were unlawful and were not "accompanied by threats causing duress", there was no mitigating effect.[1898] The mitigating

[1891] Case 002/02, Appeal Judgment, para. 2007.
[1892] Case 001, Judgment, para. 584.
[1893] Ibid.
[1894] Case 001, Appeal Judgment, para. 364.
[1895] Ibid.
[1896] Ibid.
[1897] Case 001, Judgment, para. 607.
[1898] Case 001, Appeal Judgment, para. 365.

effect of a subordinate position must be evaluated in light of the superior orders received.[1899] There was no rule at the ECCC that the highest penalty was reserved for those at the top of the chain of command, and the fact that a convicted person was not at the top of the chain of command did not justify a lighter sentence.[1900]

Expressions of remorse could constitute a mitigating factor, so long as they were "real and sincere".[1901] Remorse requires an acceptance of some moral responsibility for personal wrongdoing, not simply regrets about participating in crimes. In Case 001, the Supreme Court Chamber held that "limited weight only" should have been given to remorse as a mitigating factor, observing that Duch spent almost the entire time given to him for final statements seeking to minimise his responsibility by placing it on the "senior leaders".[1902] The Trial Chamber in Case 001 similarly found that the mitigating impact of Duch's remorse was undermined by his failure to offer a full and unequivocal admission of his responsibility.[1903] In Cases 002/01 and 002/02, the Trial Chamber found that Nuon Chea's apology was undermined by his failure to accept responsibility for his own wrongdoing.[1904] Similarly, in both cases the Trial Chamber found that Khieu Samphan did not express any remorse or sympathy toward the victims or accept any responsibility for the events that would justify mitigation of his sentence.[1905]

Conduct considered to be cooperative included clarifying areas of investigative doubt, providing information on crimes previously unknown to the prosecutor, admitting facts, helping organise operations leading to the arrest of other suspects, and agreeing to testify as a witness in other proceedings.[1906] Factors relating to the sufficiency of cooperation included presenting a complete picture of factual knowledge, efforts to minimise one's role, avoiding responding in full when confronted with allegations of personal involvement, seeking to attribute responsibility to others, and making statements inconsistent with available evidence.[1907] Where cooperation failed to provide substantial information either in quantity or quality, it was afforded little weight.[1908] Likewise, cooperation that was short-lived held little

[1899] Case 001, Appeal Judgment, para. 365; Case 001, Judgment, para. 607.
[1900] Case 001, Appeal Judgment, para. 377.
[1901] Case 002/01, Judgment, para. 1093; Case 001, Judgment, para. 610.
[1902] Case 001, Appeal Judgment, para. 369.
[1903] Case 001, Judgment, para. 610.
[1904] Case 002/01, Judgment, para. 1096; Case 002/02, Judgment, para. 4393.
[1905] Case 002/02, Judgment, para. 4396.
[1906] Case 001, Appeal Judgment, para. 366.
[1907] Ibid, para. 368.
[1908] Ibid.

sway as a mitigating factor.[1909] Merely attending every hearing, which does not exceed the legally required minimum participation in court hearings, did not amount to cooperation amounting to a mitigating factor.[1910] The fact that a convicted person testified about their personal background and answered questions put by Civil Parties, while having "some impact in facilitating reconciliation", was accorded "little weight as a mitigating factor".[1911]

The convicted person's propensity for rehabilitation was also considered at the ECCC, though accorded minimal weight. Both the Trial Chamber and Supreme Court Chamber relied on ICTY Appeals Chamber jurisprudence holding that rehabilitation should not be given undue weight.[1912]

The Trial Chamber declined to consider ill-health as a mitigating factor, considering that it "will only be considered mitigating in exceptional circumstances". While the Trial Chamber acknowledged that advanced age is a relevant mitigating factor, it accorded minimal weight to this factor in Case 002/01.[1913]

Testimony concerning the convicted person's good character and conduct before and after the crimes charged was admissible at the ECCC and considered for the purposes of sentencing.[1914] Testimony that a convicted person treated a spouse well, or had been kind to people in specific instances did not play a significant role in mitigating severe crimes and were accorded only limited weight as a mitigating factor in sentencing.[1915] The Supreme Court Chamber in Case 002/01 found no error in the Trial Chamber's consideration of Khieu Samphan's character evidence. It rejected the argument that the Trial Chamber contradicted itself because it spoke about Khieu Samphan's "purported good character" while finding elsewhere in the judgment that his character was "trusted and respected", considering that "a person may be trusted and respected and still not be of good character.[1916]

6.3.5. Aggravating factors

In defining aggravating factors, the ECCC adopted the factors set out in Rule 145(2)(b) of the

[1909] Case 002/01, Judgment, para. 1094.
[1910] Case 002/02, Judgment, para. 4397.
[1911] Case 002/01, Judgment, para. 1097.
[1912] Case 001, Appeal Judgment, para. 370; Case 001, Judgment, para. 611.
[1913] Case 002/01, Judgment, para. 1095.
[1914] See Case 002/01, Judgment, paras 1099-1104; Case 001, Judgment, paras 617-622. See also Case 002/02, Judgment, para. 4399.
[1915] Case 002/01, Judgment, para. 1103; Case 002/01, Appeal Judgment, para. 1115; Case 002/02, Judgment, para. 4354.
[1916] Case 002/01, Judgment, para. 1103; Case 002/01, Appeal Judgment, para. 1115.

ICC's Rules of Procedure and Evidence:

i. Any relevant prior criminal convictions for crimes under the court's jurisdiction, or of a similar nature;

ii. Abuse of power or official capacity;

iii. Commission of the crime where the victim is particularly defenceless;

iv. Commission of the crime with particular cruelty or where there were multiple victims;

v. Commission of the crime for any motive involving discrimination on any of the following grounds: gender, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status;

vi. Other circumstances which, although not enumerated above, by virtue of their nature are similar to those mentioned.[1917]

Additionally, the Supreme Court Chamber considered that although the *ad hoc* tribunals' Rules of Procedure and Evidence did not specify mitigating and aggravating factors, jurisprudence on aggravating factors included:

i. The convicted person's level of involvement as a direct perpetrator or as a collaborator or an aider or abettor;

ii. The convicted person's voluntary, willing, or enthusiastic role in the commission of the crimes;

iii. The convicted person's rank or position;

iv. The number and vulnerability of the victims and the impact of the crimes upon them;

v. The scale and duration of the criminal conduct;

vi. The recklessness, cruelty or depravity of the crimes;

vii. The degree of premeditation of the offences; and

[1917] Case 002/01, Judgment, para. 1069; Case 001, Judgment, para. 583.

viii. The discriminatory intent with which the convicted person perpetrated the crimes.[1918]

The Co-Prosecutors had the burden of proving aggravating factors under the same standard required for a conviction: *i.e.*, beyond a reasonable doubt.[1919] Only factors directly related to commission of the offence for which there had been a conviction could be considered aggravating. In accordance with established international jurisprudence, the convicted person's decision to remain silent during the trial was not considered an aggravating factor.[1920]

When a particular factor was an element of an underlying offence, it could not be considered as an aggravating factor. The Supreme Court Chamber held that such "double-counting" amounts to legal error.[1921] Further, the same fact could not be used both to demonstrate the gravity of the crime and as an aggravating factor.[1922] However, the Trial Chamber had discretion to decide whether it is more appropriate to consider certain factors as contributing to the gravity of the crime or as aggravating factors.[1923] In Case 002/01, the Trial Chamber considered the vulnerability of the victims was more appropriately addressed as an aggravating factor, rather than as contributing to the gravity of the crimes.[1924]

A senior rank or position of leadership did not *per se* constitute an aggravating factor.[1925] Nevertheless, the Trial Chamber had discretion to consider, "the seniority, position of authority, or high position of leadership held by a person" as aggravating factors.[1926] What mattered was the manner in which the authority was exercised. Thus, while an official position itself would not generally constitute an aggravating factor for purposes of sentencing, abuse of position could be considered as an aggravating factor.[1927]

In Case 001, the Supreme Court Chamber considered the Duch's abuse of power or official capacity as an aggravating factor since he held a central leadership role at S-21 which was "abused by training, ordering, and supervising staff in the systematic torture and execution of prisoners deemed to be enemies of the DK, and showed 'dedication to refining the operations'"

[1918] Case 002/02, Appeal Judgment, para. 2006.
[1919] Case 002/01, Judgment, para. 1069; Case 001, Judgment, para. 583.
[1920] Case 002/01, Judgment, para. 1071; Case 002/02, Judgment, para. 4355.
[1921] Case 002/02, Appeal Judgment, paras 2059-2064.
[1922] Case 002/01, Judgment, paras 1069, 1078; Case 001, Judgment, para. 583.
[1923] Case 002/01, Judgment, para. 1078.
[1924] Ibid.
[1925] Case 002/01, Appeal Judgment, para. 1113.
[1926] Ibid (internal quotations omitted).
[1927] Case 002/02, Appeal Judgment, para. 2057.

of the facility.[1928] The Trial Chamber in Cases 002/01 and 002/02 mentioned this aggravating factor, but did not analyse whether it could be applied to Nuon Chea and Khieu Samphan.

A leadership role and particular enthusiasm in commission of crimes were considered aggravating factors that should be given significant weight in determination of a sentence.[1929] However, conscious voluntariness and dedication of a convicted person to carrying out their role in the commission of the charged crimes do not necessarily translate into zeal or enthusiasm as an aggravating factor.[1930] Contribution to the crimes committed undertaken in a very senior position constituted an abuse of authority and influence, aggravating the convicted person's culpability.[1931]

The cruelty with which the crimes were committed were also considered an aggravating factor. In Case 001, the Trial Chamber considered the brutal torture techniques that detainees were subjected to and that no fewer than 12,273 individuals died as an aggravating factor.[1932]

In Case 002/01, the Trial Chamber found an aggravating factor of vulnerability and defencelessness of the victims. It considered that: (1) many vulnerable victims, including children, the elderly, sick and injured, pregnant mothers and those who had recently given birth, were subject to the crimes charged; and (2) that those forced to transfer were rendered helpless, weak, tired, injured and ill as result of inadequate food, accommodations, assistance or hygiene facilities.[1933] However, since the number of victims had been considered in assessing the gravity of the crimes, it was not considered as an aggravating factor.[1934] In Case 002/002 the Trial Chamber considered the number and vulnerability of the victims, along with the scale and brutality of the crimes in assessing the gravity of the crimes.[1935] Accordingly, these were not considered aggravating factors,[1936] since to do so would have violated the precept that "the same fact cannot be used both to demonstrate the gravity of the crime and as an aggravating factor".[1937]

If discriminatory intent is considered in assessing the gravity of the crimes, it could not also be

[1928] Case 001, Appeal Judgment, para. 377.
[1929] Ibid, para. 378.
[1930] Case 002/01, Judgment, paras 1085, 1088.
[1931] Ibid, paras 1084, 1087.
[1932] Case 001, Judgment, para. 603; Case 001, Appeal Judgment, paras 360, 375.
[1933] Case 002/01, Judgment, para. 1082.
[1934] Ibid, para. 1083.
[1935] Ibid, para. 4386.
[1936] Ibid, disposition.
[1937] Ibid, para. 1069; Case 001, Judgment, para. 583.

an aggravating factor.[1938] Likewise, where discriminatory intent was an element of the crime, such as in the crime of persecution, it could not be considered as an aggravating factor as to that crime. Discriminatory intent could, however, be conserved as an aggravating factor in relation to other crimes where it was not a legal ingredient of those offences.[1939]

The Trial Chamber and the Supreme Court Chamber considered that where a convicted person was a "well-educated individual who well understood the import and consequences of his action", those facts could constitute an aggravating factor.[1940] The Supreme Court Chamber in Case 002/02 confirmed that a sentencing chamber is entitled to look at a person's education and background, privileges, and disadvantages as relevant factors.[1941]

6.4. Effect of multiple convictions in the same proceedings

There were no provisions in the UN-RGC Agreement, the ECCC Law, or the Internal Rules indicating whether the Trial Chamber could impose a single sentence following conviction for multiple offences, where each conviction is based on distinct criminal conduct. However, the Trial Chamber considered that a single sentence could be imposed which "reflects the totality of the criminal conduct where an accused is convicted of multiple offences".[1942]

In Case 001, the Trial Chamber analysed whether the ECCC legal framework permitted it to impose a single sentence following convictions for multiple offences, where each conviction is based on distinct criminal conduct.[1943] It observed that the practice at the Nuremberg and Tokyo Tribunals was to impose a single global sentence, even for convictions for several offences, and that the *ad hoc* tribunals left the matter to the individual trial chambers' discretion. It noted that to the contrary, article 78(3) of the Rome Statute requires the ICC Trial Chamber to pronounce a sentence for each crime *and* a joint sentence specifying the total period of imprisonment. Finally, the Trial Chamber considered Article 137 of the 2009 Criminal Code, under which a single penalty may be imposed "if several penalties of a similar nature are incurred".[1944] The Supreme Court Chamber did not examine this particular issue, but noted that under Cambodian procedure, eligibility for early release is determined by "looking at the

[1938] Case 002/01, Judgment, paras 1069, 1078; Case 001, Judgment, para. 583.
[1939] Case 001, Judgment, para. 605.
[1940] Case 002/01, Judgment, paras 1086, 1089; Case 002/01, Appeal Judgment, para. 1114; Case 002/02, Judgment, para. 4352.
[1941] Case 002/02, Appeal Judgment, para. 2048.
[1942] Case 002/02, Judgment, para. 4356; Case 002/01, Judgment, para. 1072; Case 001, Judgment, para. 590.
[1943] Case 001, Judgment, para. 586.
[1944] Ibid, para. 586-589.

duration of the single sentence pronounced and not the multiplicity of counts in concurrence".[1945]

The Trial Chamber in Cases 002/01 and 002/02 applied its previous approach in Case 001 that it may impose a single sentence reflecting the totality of the criminal conduct.[1946]

6.5. Effect of multiple convictions in the subsequent proceedings

There were no provisions in the UN-RGC Agreement, the ECCC Law, or Internal Rules applicable to a situation where an Accused is convicted in two trials resulting from the severance of proceedings and is already serving the maximum allowed penalty – a life sentence.[1947]

In Case 002/02, the Trial Chamber, noting that the convicted persons were already serving life sentences from Case 002/01, considered "whether it must impose a separate sentence for the Accused's convictions in Case 002/02".[1948] It examined Article 138 of the 2009 Criminal Code, under which sentences imposed for several concurrent offences in separate prosecutions "shall run cumulatively to the extent of the highest maximum penalty allowed by the law" and "the last court dealing with the matters may order that all or part of the sentences of a similar nature shall run concurrently".[1949] It also considered the French legal concept of "*confusion des peines*", concluding that where a life sentence has already been imposed and is final, any additional sentence for concurrent offences in subsequent proceedings should merge with the first. Thus, the Trial Chamber determined that the crimes in both Case 002/01 and Case 002/02 were concurrent offences under Cambodian law. Considering the gravity of the crimes along with aggravating and mitigating factors, the Trial Chamber decided to impose another life sentence for the additional crimes in Case 002/02 but merged this with the existing life sentences from Case 002/01 into a single life sentence. This decision was intended to ensure that the sentencing reflected the totality of the convicted persons' criminal actions across both cases without redundantly imposing multiple life sentences.[1950]

The Supreme Court Chamber considered that imposing a life sentence and merging it with the life sentence imposed in Case 002/01, such that they form a *single* sentence covering the

[1945] Case 001, Appeal Judgment, para. 328.
[1946] Case 002/02, Judgment, para. 4356; Case 002/01, Judgment, para. 1072.
[1947] Case 002/02, Judgment, paras 4357-4358.
[1948] Ibid, para. 4357.
[1949] Cambodian Criminal Code, article 138. See also Case 002/02, Judgment, para. 4359.
[1950] Case 002/02, Judgment, paras 4360, 4402.

convicted persons' conduct in both cases, was appropriate. However, it found that the Trial Chamber "confused matters by referring to concurrent sentences, or two sentences served at the same time as one another, by equating the situation before it with the situation addressed in domestic Cambodian law by Article 138 of the Criminal Code of Cambodia".[1951] The Supreme Court Chamber considered that the situation more closely resembled the "single prosecution" referred to in Article 137 of the Criminal Code. Nonetheless, it considered that merging the two sentences into a single life sentence allowed the Trial Chamber to avoid the unfairness that would result by imposing separate concurrent sentences while also ensuring that the single sentence reflected the convicted persons' total criminal conduct.[1952]

6.6. Impact of prior violations of rights on the sentence

There were no provisions in the UN-RGC Agreement, the ECCC Law, or the Internal Rules regarding a remedy for violations of a convicted person's human rights.[1953] The Supreme Court Chamber held that the ECCC could not redress violations of a convicted person's rights in the absence of violations attributable to the ECCC and in the absence of abuse of process.[1954]

In Case 001, the Trial Chamber reduced Kaing Guek Eav *alias* Duch's sentence by five years and credited him for time served under the Cambodian Military Court as a remedy for his unlawful detention by the Military Court.[1955] While it found that there was no established formula for quantifying a reduction in an Accused's sentence at the ECCC based upon prior violations of their rights, it found that International Criminal Tribunal for Rwanda ("ICTR") jurisprudence was instructive.[1956] It further reasoned that neither the gravity of the crimes of which he was suspected nor the constraints under which the Cambodian legal system was operating at the time justified these breaches of Duch's rights.[1957]

Although the Co-Prosecutors neither objected to nor appealed this decision, the Supreme Court Chamber examined, *proprio motu*, whether this remedy could be maintained as a question of law.[1958] Finding no remedy for violations of a convicted person's human rights in the UN-RGC Agreement, the ECCC Law, or the Internal Rules, and that such remedy was foreign to the law

[1951] Case 002/02, Appeal Judgment, para. 2029.
[1952] Ibid, paras 2031-2032.
[1953] Case 001, Appeal Judgment, para. 391; Case 001, Judgment, para. 625.
[1954] Case 001, Appeal Judgment, para. 390.
[1955] Case 001, Judgment, para. 623-627.
[1956] Ibid, para. 625.
[1957] Ibid, para. 627.
[1958] Case 001, Appeal Judgment, para. 389.

and practice of the Cambodian legal system, the Supreme Court Chamber looked to international jurisprudence.[1959] The Supreme Court Chamber found that the Trial Chamber misinterpreted relevant international jurisprudence to mean that violations of Duch's rights by another body should be remedied by the ECCC.[1960] Rather, it found that international jurisprudence clearly affirmed that before being able to obtain a remedy, the convicted person must be able to attribute the infringement of their rights to one of the organs of the tribunal or show that at least some responsibility for that infringement lies with that tribunal.[1961] Since Duch's detention by the Cambodian Military Court was not attributable to the ECCC, the Supreme Court Chamber held that the Trial Chamber should have rejected Duch's request for a remedy.[1962]

Judges Klonowiecka-Milart and Jayasinghe partially dissented from the Supreme Court Chamber majority on this issue. While they agreed that life imprisonment was warranted, they disagreed with the majority's decision to deny a remedy for the "severe violation" of Duch's fundamental rights during his lengthy pre-trial detention.[1963] Specifically, they disagreed with the majority's "mechanistic application of the ICTY and ICTR approach to the facts of this case", finding this approach inappropriate in light of the "obvious differences regarding the position held by the ECCC, as compared with the *ad hoc* criminal tribunals, *vis a vis* the national systems that occasioned the violations". Unlike the ECCC, which was "established by and within the domestic system", the ICTY and ICTR were not created based on any agreement with the Rwandan or former Yugoslavian governments or their legislation.[1964] In "stark contrast" to the *ad hoc* jurisprudence, the State of Cambodia held Duch "for eight years without any substantive proceedings while it negotiated the creation of the ECCC, and then transferred him to a court of its own creation for investigation into 'broadly similar' allegations", thus providing a "clear nexus" between the prior detention and ECCC case.[1965]

6.7. Credit for pre-trial detention

The UN-RGC Agreement, the ECCC Law, and the Internal Rules were silent on the issue of

[1959] Ibid, para. 391.
[1960] Ibid, para. 390.
[1961] Ibid, para. 392.
[1962] Ibid, para. 396.
[1963] Case 001, Appeal Judgment, Partially Dissenting Opinion of Judges Agnieszka Klonowiecka-Milart and Chandra Nihal Jayasinghe, para. 1.
[1964] Ibid, paras 4-6, 9.
[1965] Ibid, para. 13.

credit for pre-trial detention.[1966] However, Article 503 of the 2007 Code of Criminal Procedure provide for deduction of provisional detention for the sentence or total consolidated sentences, and Article 51 of the 2009 Criminal Code similarly provides that time spent in pre-trial detention shall be wholly deducted from the term of imprisonment to be served.[1967] The Supreme Court Chamber also observed that applying time credit to both fixed and life imprisonment sentences is established Cambodian and international practice.[1968]

Since remedy for violations of rights is a separate issue from credit for time served, the Supreme Court Chamber analysed whether it could credit Duch's detention under the Cambodian Military Court, even though it had quashed the Trial Chamber's remedy.[1969] It agreed with the Trial Chamber in finding that the allegations that were "broadly similar" to those giving rise to proceedings before the ECCC. It noted that the *ad hoc* tribunals' case law confirmed that in such circumstances, the entire time spent by an Accused in provisional detention under the sole authority of domestic courts is to be deducted from the final sentence imposed by the tribunal. In light of Cambodian and international law and practice, the Supreme Court Chamber unanimously found that Duch was entitled to credit for the entirety of his time spent in detention from 10 May 1999 through to and excluding the date of issuance of the Case 001 Appeal Judgment.[1970]

6.8. Parole

Article 512 of the 2007 Code of Criminal Procedure provides that any convicted person who is serving one or more imprisonment sentences may be paroled, provided that they have shown good behaviour during imprisonment and appear to be able to reintegrate into society. However, the Supreme Court Chamber found that the lack of special provisions on parole in the ECCC framework indicated that the issue should be decided according to the procedures in force "at the time when parole is to be considered for a particular convicted person, a time at which the ECCC may well have dissolved" following the conclusion of proceedings.[1971]

6.9. Standard of appellate review for sentencing

Internal Rule 104(1) provided that the Supreme Court Chamber decides appeals against

[1966] Case 001, Appeal Judgment, para. 401.
[1967] Ibid.
[1968] Ibid, paras 401, 403.
[1969] Ibid, para. 403.
[1970] Ibid, paras 403-404.
[1971] Ibid, para. 387.

judgments or decisions of the Trial Chamber based on two grounds: (1) "an error on a question of law invalidating the judgment or decision"; or (2) "an error of fact which has occasioned a miscarriage of justice". However, there was no guidance in the UN-RGC Agreement, the ECCC Law, the Internal Rules, or Cambodian law and jurisprudence on the application of this rule to appeals of sentences.[1972] The Supreme Court Chamber accordingly sought guidance at the international level, adopting a "standard articulated by the ICTY Appeals Chamber as an interpretation of the proper application of Internal Rule 104(1)(a)-(b) with respect to appeals against sentence". Under this standard:

i. Trial chambers were vested with broad discretion in determining the appropriate sentence, including the determination of the weight given to mitigating and aggravating circumstances;

ii. As a general rule, the Supreme Court Chamber would not reverse a sentence unless the Trial Chamber "committed a discernible error in exercising its discretion or has failed to follow the applicable law"; and

iii. The appellants had the burden of demonstrating that the Trial Chamber gave weight to extraneous or irrelevant considerations, failed to give weight or sufficient weight to relevant considerations, made a clear error as to the facts upon which it exercised its discretion, or that the Trial Chamber's decision was so unreasonable or plainly unjust that the Supreme Court Chamber is able to infer that the Trial Chamber must have failed to exercise its discretion properly.[1973]

A comparison of sentences imposed by other tribunals in other cases was considered "inapt to show an error on the part of the Trial Chamber in its exercise of discretion in imposing an appropriate sentence". Rather, the appropriate sentence "will always have to be determined based on the facts of the specific case and the level of culpability of the individual accused".[1974]

The Supreme Court Chamber held that if a Trial Chamber's sentence "cannot be reconciled with the principles governing sentencing", it is under a duty to substitute a new penalty.[1975] In Case 001, the Supreme Court Chamber found an error of law and abuse of discretion where the Trial Chamber "attached undue weight to mitigating circumstances and insufficient weight to

[1972] Ibid, para. 354.
[1973] Case 002/01, Appeal Judgment, para. 1107; Case 001, Appeal Judgment, para. 354.
[1974] Case 002/01, Appeal Judgment, para. 1112.
[1975] Case 001, Appeal Judgment, para. 379 (internal quotation omitted).

the gravity of the crimes and aggravating circumstances", and thus "erred in imposing an arbitrary and manifestly inadequate sentence" that did not appropriately reflect the gravity of the crimes and the individual circumstances of Duch.[1976] Accordingly, the Supreme Court Chamber amended the sentence to life imprisonment.[1977]

When the Supreme Court Chamber overturned one or more convictions on which the Trial Chamber had based a single sentence, the Supreme Court Chamber considered itself competent to impose a single sentence – or concurrent sentences – for the remaining convictions. In doing so, the Supreme Court Chamber could alter the Trial Chamber's sentence.[1978]

Where any errors found on appeal, including as to sustaining specific crimes, did not affect the findings upon which sentence was based, the Supreme Court Chamber found that the sentence imposed should not be altered.[1979] Even where the Supreme Court found errors on appeal which affected the findings upon with sentence was based, it concluded that in the circumstances of the case, the erroneous consideration did not render the ultimate sentence inappropriate or unfair.[1980]

[1976] Case 001, Appeal Judgment, paras 373, 383.
[1977] Ibid, disposition. For more on the appeal proceedings in Case 001, see *Guide to the ECCC (Volume I)*, section 5.1.6.2.
[1978] Case 002/01, Appeal Judgment, para. 1109.
[1979] Ibid, paras 1119-1121.
[1980] Case 002/02, Appeal Judgment, para. 2069.

7. Civil Party action

The ECCC was established with the guiding principles of "justice and national reconciliation, stability, peace and security".[1981] The inclusion of Civil Parties in the proceedings was considered a means of national reconciliation.[1982]

The adoption of the Internal Rules in 2007 formally incorporated victims as Civil Parties into the proceedings, granting them various participatory rights.[1983] Since the focus of the ECCC was sufficiently different to the regular Cambodian courts to warrant a specialised system, the ECCC Civil Party framework was not identical to that provided in Cambodian criminal procedure.[1984]

Internal Rule 21(1) required that the ECCC framework "be interpreted so as to always safeguard the interests of Suspects, Charged Persons, Accused and Victims". The ECCC was accordingly required to respect victims' rights throughout the proceedings, and ensure they are conducted in a fair and adversarial manner, preserving a balance between the rights of the parties.[1985] Additionally, Internal Rule 23(1) defined the purpose of Civil Party participation; namely, to: (1) "participate in criminal proceedings against those responsible for crimes within the jurisdiction of the ECCC by supporting the prosecution"; and (2) "seek collective and moral reparations".

The role of Civil Parties in supporting the prosecution was progressively clarified.[1986] While the Civil Parties and the Co-Prosecutors had a shared interest in obtaining a decision on the criminality of the Accused's actions, Civil Parties were not to act as additional prosecutors and did not have equal participation rights with the Co-Prosecutors.[1987] Furthermore, the rights of

[1981] UN-RGC Agreement, preamble; Internal Rules, preamble.
[1982] Case 002, Decision on Civil Party Participation in Provisional Detention Appeals, 20 March 2008, C11/53, para. 37; Case 002, Decision on Appeals against Orders on the Admissibility of Civil Party Applications, 24 June 2011, D404/2/4, paras 64-65.
[1983] Internal Rules (Rev. 0), rule 23; Case 001, Appeal Judgment, para. 488. See also Code of Criminal Procedure, articles 2, 13, 22.
[1984] Case 002, Decision on Nuon Chea's Appeal against Order Refusing Request for Annulment, 26 August 2008, D55/I/8, para. 14; Case 001, Decision on Civil Party Co-Lawyers' Joint Request for a Ruling on the Standing of Civil Party Lawyers to make Submissions on Sentencing and Directions concerning the Questioning of the Accused, Experts and Witnesses Testifying on Character, 9 October 2009, E72/3, para. 12.
[1985] Internal Rules, rule 21(1).
[1986] For more on the role of Civil Parties, see section 7.2.
[1987] Case 001, Decision on Civil Party Co-Lawyers' Joint Request for a Ruling on the Standing of Civil Party Lawyers to make Submissions on Sentencing and Directions concerning the Questioning of the Accused, Experts and Witnesses Testifying on Character, 9 October 2009, E72/3, paras 25-26.

the Civil Parties differed from those of the defence and the Co-Prosecutors.[1988] For instance, the Civil Parties were responsible for seeking reparations, whereas the Co-Prosecutors had sole responsibility for exercising public action, conducting preliminary investigations, and opening judicial investigations.[1989]

Since 2007, the ECCC Plenary revised the Internal Rules ten times, resulting in a set of rules delineating the various aspects of Civil Party actions.[1990]

7.1. Civil Party admissibility

The Internal Rules defined a "victim" as a "natural person or legal entity that has suffered harm as a result of the commission of any crime within the jurisdiction of the ECCC".[1991] For a victim to be admitted as a Civil Party under Internal Rule 23 *bis* (1), four cumulative requirements needed to be met: (1) an injury, (2) a causal link between the crimes and the injury, (3) evidence meeting the required standard of proof, and (4) proof of identification.[1992]

7.1.1. Injury

To be admitted as a Civil Party, the applicant had to sustain an injury, which could have been physical, material, or psychological.[1993] The concept of "injury" meant hurt, damage or harm.[1994] Although a violation of a right did not in itself always presuppose injury, an injury

[1988] Case 001, Decision on the Request of the Co-Lawyers for Civil Parties Group 2 to make an Opening Statement during the Substantive Hearing, 27 March 2009, E23/4, para. 6; Case 001, Decision on Civil Party Co-Lawyers' Joint Request for a Ruling on the Standing of Civil Party Lawyers to make Submissions on Sentencing and Directions concerning the Questioning of the Accused, Experts and Witnesses Testifying on Character, 9 October 2009, E72/3, para. 25.
[1989] Case 002, Decision on Appeals against the CIJs' Combined Order on Admissibility of Civil Party Application, 27 April 2010, D250/3/2/1/5, paras 30, 51.
[1990] Internal Rules, rules 23 (general principles of Civil Party participation), 23 *bis* (application and admissibility), 23 *ter* and 23 *quater* (legal representation), 23 *quinquies* (reparation), 12, 12 *bis* and 12 *ter* (support structures). For more on the amendments to the Internal Rules, see *Guide to the ECCC (Volume I)*, sections 3.2.3 (generally), 4.4.3 (relating to Civil Party representation).
[1991] Internal Rules, glossary. See also Practice Direction on Victim Participation, article 3.2(a).
[1992] Case 002, Decision on Appeals against Orders on the Admissibility of Civil Party Applications, 24 June 2011, D404/2/4, para. 57. See also Case 004/02, Considerations on Appeal Against Order on the Admissibility of Civil Party Applications, 30 June 2020, D362/6, para. 33; Case 003, Considerations on Appeal against Order on the Admissibility of Civil Party Applicants, 10 June 2021, D269/4, para. 36; Case 004, Considerations on Appeal Against Order on the Admissibility of Civil Party Applicants, 29 September 2021, D384/7, para. 34.
[1993] Internal Rules, rule 23 *bis* (1)(b). See also Practice Direction on Victim Participation, article 3.2; Case 001, Appeal Judgment, para. 416; Case 004/02, International Co-Investigating Judge's Order on Admissibility of Civil Party Applicants, 16 August 2018, D362, para. 22; Case 003, Order on Admissibility of Civil Party Applications, 28 November 2018, D269, para. 21; Case 004, Order on Admissibility of Civil Party Applications, 28 June 2019, D384, para. 22.
[1994] Case 001, Appeal Judgment, para. 415.

was considered contingent, or more likely to occur, when there was a violation of a right.[1995]

7.1.1.1. Personal nature of the injury

The injury must have been personal to the applicant.[1996] In the case of systematic and widespread mass atrocities committed throughout the country, "it is likely that persons have *also* suffered injury collectively". In such cases, an injury could be measured in the context of collective damage caused to the whole society or directed at parts thereof, rather than in respect of individuals alone.[1997]

Although the injury must be personal, it need not be direct.[1998] The relevant link had to exist between the alleged crime and the injury suffered, rather than the intended target of the criminal act.[1999] This meant that the Accused could be held responsible for injuries caused directly by their criminal actions, even if those injured were not the specific targets of the crime.[2000]

ECCC jurisprudence distinguished between two categories of victims: direct and indirect victims. Direct or immediate victims referred to "the category of persons whose rights were violated or endangered by the crime charged". Indirect victims included persons who "personally suffered injury as a direct result of the crime committed against the direct victim". Indirect victims encompassed, for instance, those who actually suffered psychological injury as a result of the harm inflicted on their loved ones.[2001]

[1995] Ibid, paras 415-416.
[1996] Practice Direction on Victim Participation, article 3.2(b)(ii); Case 001, Appeal Judgment, para. 418; Case 001, Judgment, paras 639-641; Case 002, Decision on Appeals against Orders on the Admissibility of Civil Party Applications, 24 June 2011, D404/2/4, paras 47, 83; Case 004/02, International Co-Investigating Judge's Order on Admissibility of Civil Party Applicants, 16 August 2018, D362, paras 13, 20; Case 003, Order on Admissibility of Civil Party Applications, 28 November 2018, D269, paras 12, 19; Case 004, Order on Admissibility of Civil Party Applications, 28 June 2019, D384, paras 13, 20.
[1997] Case 002, Decision on Appeals against Orders on the Admissibility of Civil Party Applications, 24 June 2011, D404/2/4, paras 49, 68 (emphasis added); Case 004/02, International Co-Investigating Judge's Order on Admissibility of Civil Party Applicants, 16 August 2018, D362, para. 32; Case 003, Order on Admissibility of Civil Party Applications, 28 November 2018, D269, para. 31; Case 004, Order on Admissibility of Civil Party Applications, 28 June 2019, D384, para. 32.
[1998] Case 001, Appeal Judgment, paras 417-418, 422; Case 001, Judgment, paras 642-643; Case 004/02, Considerations on Appeal Against Order on the Admissibility of Civil Party Applications, 30 June 2020, D362/6, para. 35; Considerations on Appeal against Order on the Admissibility of Civil Party Applicants, 10 June 2021, D269/4, para. 38; Case 004, Considerations on Appeal Against Order on the Admissibility of Civil Party Applicants, 29 September 2021, D384/7, para. 36.
[1999] Case 001, Judgment, para. 642. For more on the causal link between injury and the crimes, see section 7.1.2.
[2000] Case 001, Judgment, para. 642. See also Case 001, Appeal Judgment, paras 418, 422.
[2001] Case 001, Appeal Judgment, paras 416-417; Case 001, Judgment, para. 643; Case 004/02, Considerations on Appeal Against Order on the Admissibility of Civil Party Applications, 30 June 2020, D362/6, para. 35; Case 003 Considerations on Appeal against Order on the Admissibility of Civil Party Applicants, 10 June 2021, D269/4, para. 38; Case 004, Considerations on Appeal Against Order on the Admissibility of Civil Party Applicants, 29 September 2021, D384/7, para. 36.

The applicable law did not restrict the category of indirect victims to a specific class of persons and could include close family members, distant relatives, spouses, friends, and *de facto* adopters and adoptees, provided they could demonstrate their injury. The rights of indirect victims to participate in the proceedings could be exercised independently from the right of direct victims, allowing the former to be granted status of Civil Parties even when the direct victim was alive and did not personally pursue Civil Party action.[2002]

Civil Party applications of persons who contributed to the perpetration of the offence they claimed to be victims of were declared inadmissible. While recognising that perpetrators may suffer trauma as a result of their own participation in international crimes, the International Co-Investigating Judge considered that such victim-perpetrators "cannot be admitted to file a Civil Party application against other alleged perpetrators of the same offences", especially when the circumstances were not beyond their control.[2003]

The only exception to the personal injury requirement allowed successors to initiate or continue a civil action at the ECCC *on behalf* of a deceased victim. Successor eligibility was not dependent on the direct victim having submitted a Civil Party application before their death.[2004]

7.1.1.2. Physical, material, and psychological injuries

Physical injury referred to biological, anatomical or functional damage which could be described as a wound, mutilation, disfiguration, disease, loss or dysfunction of organs, or death. Physical injury "involv[es] the body" and "ordinarily requir[es] a degree of medical treatment for the victim". It may also result from grave, serious, and prolonged psychological injury that causes various ailments.[2005]

Material injury referred to a material object's loss of value, encompassing the complete or

[2002] Case 001, Appeal Judgment, para. 418; Case 004/02, International Co-Investigating Judge's Order on Admissibility of Civil Party Applicants, 16 August 2018, D362, para. 20; Case 003, Order on Admissibility of Civil Party Applications, 28 November 2018, D269, para. 19; Case 004, Order on Admissibility of Civil Party Applications, 28 June 2019, D384, para. 20.
[2003] Case 004/02, International Co-Investigating Judge's Order on Admissibility of Civil Party Applicants, 16 August 2018, D362, para. 21; Case 003, Order on Admissibility of Civil Party Applications, 28 November 2018, D269, para. 20; Case 004, Order on Admissibility of Civil Party Applications, 28 June 2019, D384, para. 21.
[2004] Case 001, Appeal Judgment, paras 419-421. See also Case 004/02, International Co-Investigating Judge's Order on Admissibility of Civil Party Applicants, 16 August 2018, D362, paras 18-19; Case 003, Order on Admissibility of Civil Party Applications, 28 November 2018, D269, paras 17-18; Case 004, Order on Admissibility of Civil Party Applications, 28 June 2019, D384, paras 18-19.
[2005] Case 001, Appeal Judgment, paras 415, 417; Case 004/02, International Co-Investigating Judge's Order on Admissibility of Civil Party Applicants, 16 August 2018, D362, paras 24-25; Case 003, Order on Admissibility of Civil Party Applications, 28 November 2018, D269, paras 23-24; Case 004, Order on Admissibility of Civil Party Applications, 28 June 2019, D384, paras 24-25 (internal citation omitted).

partial destruction of personal property, or loss of income. This form of injury extended to a familial context. Material injury could result from, or be a material consequence of, damage to the family's patrimony. Regarding indirect victims, material injury could also have been inflicted on those whom the immediate victim was supporting at the time, or would likely have supported in the future, such as in the relationship between parents and children. Material injury in this context could "have its source in a contractual or statute-based claim toward the direct victim which the crime prevented from being satisfied".[2006]

The Co-Investigating Judges and chambers considered that psychological harm included distress, mental disorders, psychological or psychiatric trauma including, but not limited to, post-traumatic stress disorder.[2007] The International Co-Investigating Judge considered that psychological harm could "also result from the mere witnessing of shocking or violent events, or even the emotional distress from recalling such events, even if they occurred thirty years before".[2008] Judge Marchi-Uhel considered that witnesses of events underlying the crimes charged should have qualified as Civil Parties even if the events were not exceedingly violent or shocking nature, provided they produced evidence establishing that they suffered psychological harm as a direct consequence of the crime committed.[2009]

The psychological injury of indirect victims could stem from the death of kin, the uncertainty and fear about the direct victim's fate, the knowledge of their suffering, or the loss of the sense of safety and moral integrity. Psychological injury could also be established in situations where vulnerable individuals have been separated from their caregivers.[2010]

In order to demonstrate psychological harm for indirect victims, the Co-Investigating Judges and chambers required evidence of kinship or "special bonds of affection or dependence"

[2006] Case 001, Appeal Judgment, paras 415, 417. See also Case 004/02, International Co-Investigating Judge's Order on Admissibility of Civil Party Applicants, 16 August 2018, D362, paras 26-27; Case 003, Order on Admissibility of Civil Party Applications, 28 November 2018, D269, paras 25-26; Case 004, Order on Admissibility of Civil Party Applications, 28 June 2019, D384, paras 26, 27.
[2007] Case 001, Appeal Judgment, para. 415; Case 001, Judgment, para. 641; Case 002, Decision on Appeals against Orders on the Admissibility of Civil Party Applications, 24 June 2011, D404/2/4, para. 83; Case 003, Considerations on Appeal against Order on the Admissibility of Civil Party Applicants, 10 June 2021, D269/4, para. 39; Case 004, Considerations on Appeal Against Order on the Admissibility of Civil Party Applicants, 29 September 2021, D384/7, para. 37.
[2008] Case 004/02, International Co-Investigating Judge's Order on Admissibility of Civil Party Applicants, 16 August 2018, D362, para. 29; Case 003, Order on Admissibility of Civil Party Applications, 28 November 2018, D269, para. 28; Case 004, Order on Admissibility of Civil Party Applications, 28 June 2019, D384, para. 29.
[2009] Case 002, Decision on Appeals against Orders on the Admissibility of Civil Party Applications, 24 June 2011, D404/2/4, D411/3/6, Separate and Partially Dissenting Opinion of Judge Catherine Marchi-Uhel, paras 38-39.
[2010] Practice Direction on Victim Participation, article 3.2(c); Case 001, Appeal Judgment, para. 417, fn. 879; Case 002, Order on the Admissibility of Civil Party Applications Related to Request D250/3, 13 January 2010, D250/3/2, para. 12.

connecting the applicant with the direct victim.[2011] The Supreme Court Chamber reasoned that absent "prior bonds tying the claimants emotionally, physically or economically to the direct victim, no injury would have resulted to them from the commission of the crime".[2012] Special bonds of affection did not exist if the applicant was born after the direct victim's death.[2013] However, young age did not necessarily prevent the indirect victim from having special ties of affection with the direct victim.[2014]

The Pre-Trial Chamber acknowledged the possibility of bonds of dependence forming during the implementation of the Khmer Rouge policies, even among individuals who never met before, as they shared a common fate and fears. For example, the Chamber referred to bonds between prisoners who shared a cell. Psychological harm could also result from the harm suffered by people belonging to the same targeted group or community.[2015]

7.1.2. Causal link between the injury and crimes under investigation

The claimant must have demonstrated their injury was the direct consequence of "at least one of the crimes alleged against the Charged Person".[2016] Conversely, extending the Civil Party action against the accused beyond the alleged crimes forming the basis of the case was considered "improper and unfair".[2017] This causal requirement was in addition to Internal Rule 23(1)(a), which limited participation to victims of crimes falling under the ECCC's jurisdiction.[2018]

Distinctively, and unlike the Code of Criminal Procedure, a victim who sought Civil Party status at the ECCC could "only do so by way of intervention". In other words, an applicant could not launch a judicial investigation simply by joining as a Civil Party. Rather, they could join ongoing proceedings through an application that fell within the scope of the crimes the

[2011] Case 001, Appeal Judgment, paras 446-447; Case 001, Judgment, para. 643.
[2012] Case 001, Appeal Judgment, para. 447.
[2013] Ibid, para. 584.
[2014] Ibid, paras 563, 590.
[2015] Case 002, Decision on Appeals against Orders on the Admissibility of Civil Party Applications, 24 June 2011, D404/2/4, paras 86-89.
[2016] Internal Rules, rule 23 *bis* (1)(b); Practice Direction on Victim Participation, articles 3.2(a), (b)(ii).
[2017] Case 004/02, Considerations on Appeal Against Order on the Admissibility of Civil Party Applications, 30 June 2020, D362/6, Opinion of Judges Olivier Beauvallet and Kang Jin Baik, para. 55; Case 003, Considerations on Appeal against Order on the Admissibility of Civil Party Applicants, 10 June 2021, D269/4, Opinion of Judges Olivier Beauvallet and Kang Jin Baik, para. 64.
[2018] Case 002, Decision on Appeals against the CIJs' Combined Order on Admissibility of Civil Party Application, 27 April 2010, D250/3/2/1/5, paras 28, 51.

Co-Prosecutors elected to prosecute.[2019]

Internal Rule 23 *bis* (1)(b) did not require a causal link between the injury and the material facts under investigation. Rather, the causation had to lie between the injury and any of the crimes alleged because a crime is the legal characterisation of the investigated facts.[2020]

While facts investigated were limited to certain areas or sites, the legal characterisation of the facts included "crimes which represent mass atrocities allegedly committed by the Charged Persons by acting in a joint criminal enterprise […] against the population and '*throughout* the country'". In such context, the Pre-Trial Chamber held that the sites identified in the Closing Order "serve[d] only as examples in order to demonstrate how all these centres and sites functioned *throughout* Cambodia". Since the crimes and underlying CPK policies forming the basis of the indictments "were allegedly implemented throughout Cambodia", Civil Party applicants did not necessarily have to relate their injury to the specific crime sites identified in the factual findings part of the Closing Order.[2021]

In her partially dissenting opinion, Judge Marchi-Uhel considered that the Pre-Trial Chamber's interpretation was contrary to both the spirit and the letter of the Internal Rules by admitting victims who were not alleging harm related to the specific crime sites mentioned in the Indictment. She considered that the Accused were not indicted "for each and every crime allegedly committed by the Khmer Rouge during the CPK regime, even as part of the […] policies and/or against members of the targeted groups".[2022]

In Case 001, the victims were required to relate their claims to specific crime sites and events because the Accused was not indicted for crimes throughout the country. Victims therefore had to relate their claim to S-21 Security Centre or one of its satellite facilities.[2023]

In Cases 004/02, 003 and 004, the Pre-Trial Chamber did not reach the requisite majority to decide on the appeals against the order on the admissibility of Civil Party applicants. In Case

[2019] Case 002, Decision on Appeals against the CIJs' Combined Order on Admissibility of Civil Party Application, 27 April 2010, D250/3/2/1/5, paras 30, 52; Case 002, Order on the Admissibility of Civil Party Applicants from Current Residents of Svay Rieng Province, 9 September 2010, D409, para. 17.
[2020] Case 002, Decision on Appeals against Orders on the Admissibility of Civil Party Applications, 24 June 2011, D404/2/4, para. 42; Case 002, Decision on Appeals against Orders on the Admissibility of Civil Party Applications, 24 June 2011, D411/3/6, para. 42.
[2021] Case 002, Decision on Appeals against Orders on the Admissibility of Civil Party Applications, 24 June 2011, D404/2/4, paras 42, 72, 75.
[2022] Ibid, Separate and Partially Dissenting Opinion of Judge Catherine Marchi-Uhel, para. 3.
[2023] Case 001, Judgment, para. 644; Case 002, Decision on Appeals against Orders on the Admissibility of Civil Party Applications, 24 June 2011, D404/2/4, paras 69, 72.

004/02, the International Pre-Trial Chamber Judges opined that the order appropriately limited the scope of potentially admissible Civil Party applicants to specific areas and events. They reasoned that the circumstances in Case 002 were not applicable in this case since the crimes alleged against the Charged Person were limited to several specific sites and contexts or limited to geographical areas.[2024] In Case 003, the International Pre-Trial Judges considered that applicants should have been admitted if they alleged harm from a charged crime linked to the implementation of CPK policies within the Charged Person's area of authority, even if the crime did not happen at a specific site mentioned in the Indictment. They considered that while the harm suffered by a Civil Party applicant should be linked to a crime in the Indictment, it need not be connected to a specific crime site in the Indictment.[2025]

7.1.3. Burden of proof

To be admissible, Civil Party applications required sufficient information to allow verification of their compliance with the Internal Rules.[2026] Rule 23 *bis* (4) specifically required the application to "provide details of the status as a Victim, specify the alleged crime and attach evidence of the harm suffered, or tending to show the guilt of the alleged perpetrator". When considering Civil Party applications, the Co-Investigating Judges and chambers had to be satisfied that the "facts alleged in support of the application [were] more likely than not to be true".[2027]

The "more likely than not to be true" standard of proof was specific to Civil Party admissibility and distinct from the sufficiency of evidence test required for an Indictment.[2028] This standard presupposed that Civil Party applicants had substantiated their applications, but also required a degree of completeness, authenticity and credibility. Accordingly, claimants were required to provide proof to support or corroborate their victim information forms and statements.[2029]

[2024] Case 004/02, Considerations on Appeal Against Order on the Admissibility of Civil Party Applications, 30 June 2020, D362/6, Opinion of Judges Olivier Beauvallet and Kaing Jin Baik, paras 55-58.
[2025] Case 003, Considerations on Appeal against Order on the Admissibility of Civil Party Applicants, 10 June 2021, D269/4, Opinion of Judges Olivier Beauvallet and Kaing Jin Baik, paras 73-74, 77.
[2026] Internal Rules, rule 23 *bis* (4). See also Practice Direction on Victim Participation, article 3.5.
[2027] Internal Rules, rule 23 *bis* (1). See also Case 001, Appeal Judgment, para. 531.
[2028] See *e.g.*, Case 002, Order on the Admissibility of Civil Party Applicants from Current Residents of Svay Rieng Province, 9 September 2010, D409, para. 9; Case 002, Order on the Admissibility of Civil Party Applicants from Current Residents of Ratanakiri Province, 26 August 2010, D394, para. 8.
[2029] Case 001, Appeal Judgment, paras 508, 526, 536, 597; Case 004/02, International Co-Investigating Judge's Order on Admissibility of Civil Party Applicants, 16 August 2018, D362, para. 40; Case 003, Order on Admissibility of Civil Party Applications, 28 November 2018, D269, para. 40; Case 004, Order on Admissibility of Civil Party Applications, 28 June 2019, D384, para. 40.

Applications were rejected in instances where there was a lack of objective proof, documentation, attestation, or explanation demonstrating victim status, the existence of the direct victim, bonds of affection or dependence, kinship, or injury.[2030] By the same token, Civil Party statements based on hearsay from a source not clearly identified or whose credibility was highly dubious failed to meet the requisite standard of proof.[2031] Nonetheless, the addition of statements from identified third parties attesting to the existence of the immediate victim, kinship, or special bonds could satisfy the requisite standard of proof.[2032] The veracity of applicant's documents and statements were also accepted where the Accused had acknowledged their truthfulness.[2033]

The Co-Investigating Judges and chambers adopted a flexible approach to evidence, accepting a diverse range of means of proof to establish the various admissibility criteria.[2034] The Supreme Court Chamber considered that while minor inconsistencies or contradictions could be explained on account of the fallibility of human perception and memory, especially with the passage of time, it was still necessary for applicants to recount the events "in acceptable detail".[2035] The International Co-Investigating Judge considered that certain factors could "mitigate the required degree of proof of harm", such as:

i. The passage of time, and the effect that this may have on an applicant's ability to provide documentary evidence, such as medical records;

ii. The capacity, following the Democratic Kampuchea ("DK") period, to extensively and accurately identify, respond, or record the impact that the conditions of the DK period had on the psychological health on the population; and

iii. The evacuation, movement, and resettlement of the population in different regions, and the effect that this had on an applicant's ability to provide proof of ownership or income where such losses were alleged.[2036]

[2030] See *e.g.*, Case 001, Judgment, paras 647-649, fn. 1079; Case 001, Appeal Judgment, paras 508, 546-547; 564-566, 600-603, 608-612, 613-615.
[2031] Case 001, Appeal Judgment, paras 547, 557.
[2032] See *e.g.*, ibid, paras 544, 569-570, 574-575, 579-580, 588, 618-619.
[2033] Case 001, Judgment, fn. 1079.
[2034] See *e.g.*, Case 001, Appeal Judgment, paras 526-527 (referring to Case 001, Judgment, fns 1079, 1122, 1125-1127, 1129-1132).
[2035] Case 001, Appeal Judgment, para. 597.
[2036] Case 004/02, International Co-Investigating Judge's Order on Admissibility of Civil Party Applicants, 16 August 2018, D362, paras 41-42; Case 003, Order on Admissibility of Civil Party Applications, 28 November

7.1.4. Discretionary presumptions for indirect victims

Specific categories of indirect victims could benefit from a presumption of psychological harm. The presumption did not remove the requisite elements of the definition (*e.g.*, the existence of direct, personal injury), but under certain conditions, could "relieve the burden of proving it".[2037] Persons exempted from the burden of proof of psychological harm included:

i. Immediate family members of the direct victim, encompassing parents, children, spouses and siblings.

ii. Extended family members of the direct victim, encompassing grand-parents, aunts and uncles, nieces and nephews, cousins, in-laws, and other indirect kin.

iii. Members of the same targeted group or community as the direct victim. This "presumption of collective injury" derived from the societal and cultural context, the social restructuring resulting from the Khmer Rouge policies, and the inherent nature of crimes charged such as genocide or crimes against humanity, which, by definition, target groups or the population.[2038]

7.1.5. Proof of identity

Internal Rule 23 *bis* (1)(a) required the applicant to be clearly identified when submitting their application.[2039] Considering the participatory rights granted to Civil Parties and the potential impact of an admission on the expeditiousness of proceedings, it was imperative that the applicant's identity be "unequivocal".[2040] A certification not issued by an official authority or an electoral card number without the card itself was insufficient to prove identity.[2041]

The Co-Investigating Judges and chambers could not derogate from the requirement to prove

2018, D269, paras 41-42; Case 004, Order on Admissibility of Civil Party Applications, 28 June 2019, D384, paras 41-42.

[2037] Case 001, Appeal Judgment, para. 425.

[2038] Ibid, paras 448-449; Case 001, Judgment, para. 643; Case 002, Decision on Appeals against Orders on the Admissibility of Civil Party Applications, 24 June 2011, D404/2/4, paras 49, 86-87, 93; Case 004/02, International Co-Investigating Judge's Order on Admissibility of Civil Party Applicants, 16 August 2018, D362, para. 45; Case 003, Order on Admissibility of Civil Party Applications, 28 November 2018, D269, para. 45; Case 004, Order on Admissibility of Civil Party Applications, 28 June 2019, D384, para. 45.

[2039] See also Practice Direction on Victim Participation, article 3.5(a).

[2040] Case 001, Decision of the Trial Chamber Concerning Proof of Identity for Civil Party Applications, 26 February 2009, E2/94, para. 6; Case 001, Decision on Request to Reconsider Decision on Proof of Identity for Civil Party Application, 10 August 2009, E2/94/4, para. 4.

[2041] Case 001, Decision of the Trial Chamber Concerning Proof of Identity for Civil Party Applications, 26 February 2009, E2/94, para. 7; Case 001, Decision on the Civil Party Status of Applicants E2/36, E2/51 and E2/69, 4 March 2009, E2/94/2, p. 2.

identity.[2042] Nevertheless, acknowledging Cambodia's specific context and the potential practical challenges in providing identity evidence, the ECCC adopted a flexible, case-by-case approach, whereby various types of documents issued by different authorities could serve as proof of identity. Aligning with common practices of Cambodian courts, the Pre-Trial Chamber and International Co-Investigating Judge accepted statements from village elders or communal chiefs as proof of identity.[2043]

7.2. Role of Civil Parties in the proceedings

Under Internal Rule 23(1)(a), Civil Party status allowed victims to participate in criminal proceedings against those most responsible for crimes within the ECCC's jurisdiction by supporting the prosecution. This supporting role reflected the common interest of "both […] the Cambodian community, as represented by the Co-Prosecutors, and […] the Civil Parties themselves to obtain a decision on the criminality of the actions of the Accused".[2044] The acceptance of a Civil Party application automatically entailed numerous procedural and participatory rights enumerated in the Internal Rules, which extended to all stages of proceedings.[2045]

During the judicial investigation, Civil Parties could request investigative action,[2046] lodge appeals against certain orders issued by the Co-Investigating Judges,[2047] and participate in proceedings before the Pre-Trial Chamber.[2048] They also had the right to request the Co-Investigating Judges to interview them, to question witnesses, visit sites, order expertise, collect other evidence on their behalf,[2049] or appoint additional experts to conduct new examinations or re-examine a matter that was already the subject of a report.[2050] If the Co-Investigating Judges decided to confront the Charged Person with any other party or witness,

[2042] Case 001, Decision of the Trial Chamber Concerning Proof of Identity for Civil Party Applications, 26 February 2009, E2/94, para. 8.
[2043] Case 002, Decision on Appeals against Orders on the Admissibility of Civil Party Applications, 24 June 2011, D404/2/4, para. 95; Case 004/02, International Co-Investigating Judge's Order on Admissibility of Civil Party Applicants, 16 August 2018, D362, paras 47-48; Case 003, Order on Admissibility of Civil Party Applications, 28 November 2018, D269, paras 47-48; Case 004, Order on Admissibility of Civil Party Applications, 28 June 2019, D384, paras 47-48.
[2044] Case 001, Decision on Civil Party Co-Lawyers' Joint Request for a Ruling on the Standing of Civil Party Lawyers to make Submissions on Sentencing and Directions concerning the Questioning of the Accused, Experts and Witnesses Testifying on Character, 9 October 2009, E72/3, para. 25.
[2045] Case 001, Appeal Judgment, paras 478, 488.
[2046] Internal Rules, rule 55(10).
[2047] Internal Rules, rule 74(4).
[2048] Internal Rules, rules 74(4), 77(3)(b).
[2049] Internal Rules, rule 59(5).
[2050] Internal Rules, rule 31(10).

the Civil Party's lawyers could ask questions with the permission of the Co-Investigating Judges.[2051]

During the trial phase, Civil Parties could submit a list of witnesses prior to the initial hearing,[2052] request the Trial Chamber to summon any witnesses or admit any new evidence during the trial,[2053] examine and obtain copies of the case file through their lawyers,[2054] respond to preliminary objections,[2055] or question the Accused, witnesses, other Civil Parties, and experts.[2056] They also had the right to audience,[2057] and to make written submissions,[2058] closing statements, and rebuttal statements.[2059]

With respect to the trial judgment, Civil Parties could appeal the decision on reparations. Where the Co-Prosecutors appealed, they could appeal the verdict. However, Civil Parties could not appeal the sentence.[2060] In the course of the appeal procedure before the Supreme Court Chamber, Civil Parties could submit a request for additional evidence provided that it was unavailable at trial and could have been a decisive factor in reaching the decision at trial.[2061] Additionally, Civil Parties could appeal a Trial Chamber's decision that was subject to immediate appeal.[2062]

Over the course of the proceedings, the scope of the Civil Parties' role and participation was clarified in light of Internal Rule 21(1)(a). This jurisprudence is laid out in the sections that follow.

7.2.1. Right to make submissions

Civil Parties had the right to participate at "all stages of the proceedings". Contrary to the International Criminal Court ("ICC") framework, Civil Parties at the ECCC did not need "to express a particular interest at any stage of the proceedings". Civil Parties were therefore permitted to make submissions before the Pre-Trial Chamber, including appeals against a

[2051] Internal Rules, rule 58(4)-(5).
[2052] Internal Rules, rule 80(2).
[2053] Internal Rules, rule 87(4).
[2054] Internal Rules, rule 86. During the appeal phase, the lawyers for the parties may also examine the case file at any time before the hearing. See Internal Rules, rule 108(6).
[2055] Internal Rules, rule 89(2).
[2056] Internal Rules, rules 90(2), 91(2).
[2057] Internal Rules, rule 91(1).
[2058] Internal Rules, rule 92.
[2059] Internal Rules, rules 94(1)(a), 94(2).
[2060] Internal Rules, rule 105(1)(c).
[2061] Internal Rules, rule 108(7).
[2062] Internal Rules, rule 105(2).

provisional detention order. The Pre-Trial Chamber considered that the Charged Person's ability to respond to submissions made by any Civil Parties preserved their right to a fair trial and ensured a balance with Civil Party rights to written and oral participation.[2063]

Civil Parties could establish the truth with regard to "facts or factors relevant to the determination of the guilt or innocence of the Accused".[2064] However, Civil Parties were not permitted to make submissions on issues pertaining to sentencing.[2065] This included submissions on, or the evaluation of, facts underlying a decision on sentencing, unless such facts referred to the Accused's guilt or innocence or a claim of the Civil Party for reparations.[2066]

Civil Parties could not question the Accused, witnesses, or experts regarding the Accused's character. Such evidence was relevant to sentencing (and not guilt or innocence) unless there was clear evidence of mental disability which could impact on Accused's actions or bear on their ability to form the intent necessary to be convicted.[2067] Dissenting from the majority in Case 001, Judge Lavergne considered that an analysis of the Accused's personality and the particulars of their background could bear relevance to the question of criminal responsibility. He considered that denying the right to question witnesses or experts on the Accused's character was inconsistent with the adversarial principle, adding that in some instances, Civil Parties could offer crucial information due to their personal knowledge of the Accused.[2068]

The time allocated for oral submissions was based on the need to balance the rights of the parties. The Civil Parties were not entitled to equal time for oral submissions, having the role to "support" the prosecution. Additional time could be allocated if deemed necessary, or curtailed where submissions were irrelevant or repetitive.[2069]

[2063] Case 002, Decision on Civil Party Participation in Provisional Detention Appeals, 20 March 2008, C11/53, paras 36, 43-44, 46, 49, disposition.
[2064] Case 001, Decision on Civil Party Co-Lawyers' Joint Request for a Ruling on the Standing of Civil Party Lawyers to make Submissions on Sentencing and Directions concerning the Questioning of the Accused, Experts and Witnesses Testifying on Character, 9 October 2009, E72/3, paras 32-34.
[2065] Case 002/01, Judgment, para. 1064.
[2066] Case 001, Decision on Civil Party Co-Lawyers' Joint Request for a Ruling on the Standing of Civil Party Lawyers to make Submissions on Sentencing and Directions concerning the Questioning of the Accused, Experts and Witnesses Testifying on Character, 9 October 2009, E72/3, paras 1, 36, 40.
[2067] Ibid, paras 45-47.
[2068] Ibid, Dissenting Opinion of Judge Jean-Marc Lavergne, paras 17, 27, 35-36.
[2069] Case 002, Decision on Admissibility of Civil Party General Observations, 24 June 2008, C22/I/41, para. 6.

7.2.2. Right to personal appearance

Civil Parties could not directly address the chambers other than through their representatives, except in specific circumstances. As originally formulated, Internal Rule 23 did not contain restrictions on Civil Parties speaking for themselves, nor required Civil Parties to be represented by a lawyer in order to participate in the proceedings.[2070] The Pre-Trial Chamber considered that to ensure "expeditious proceedings", "relevant submissions", and to "avoid disruption", the Internal Rules should be read to require Civil Parties, who elected to be represented by a lawyer, to "make their brief observations related to the application or appeal through their lawyer".[2071] The Pre-Trial Chamber interpreted Internal Rule 77(10) as prescribing that all oral submissions on behalf of the Civil Parties "be made by the lawyers for the civil parties".[2072]

In ruling on a subsequent request filed by an unrepresented Civil Party to address the chambers in person, a supermajority of Pre-Trial Chamber Judges held that only the Civil Party lawyers had the right to make brief oral observations and that individual Civil Parties were "not permitted to address the Court in person".[2073] In his dissenting opinion, Judge Downing, considered that a conflict existed between Rule 23, which granted a "general right of appearance", and Rule 77(10), which limited Civil Parties' observations before the Pre-Trial Chamber to their lawyers. Where the Civil Party had dismissed her lawyer and was no longer represented, Judge Downing would have allowed the Civil Party to appear for herself and address the Chamber on jurisdictional issues.[2074]

The Pre-Trial Chamber supermajority's interpretation was codified in the 6 March 2009 amendments (Revision 3) with Rule 23 *ter*, which provided that "[w]hen the Civil Party is represented by a lawyer, his or her rights are exercised through the lawyer".[2075] This Rule did not, however, apply where a Civil Party was being interviewed by the Co-Investigating Judges

[2070] Internal Rules (Rev. 0), rule 23(7). See also Case 002, Directions on Civil Party Oral Submissions during the Hearing of the Appeal against Provisional Detention Order, 20 May 2008, C20/I/21, para. 3.
[2071] Case 002, Directions on Civil Party Oral Submissions during the Hearing of the Appeal against Provisional Detention Order, 20 May 2008, C20/I/21, paras 1, 5.
[2072] Ibid, disposition. See also Case 002, Written Version of Oral Decision of 1 July 2008 on the Civil Party's Request to address the Court in Person, 3 July 2008, C22/I/54, para. 3; Case 002, Decision on Matters Raised by Lawyers for the Civil Parties, 1 July 2008, C22/I/46, para. 8.
[2073] Case 002, Written Version of Oral Decision of 1 July 2008 on the Civil Party's Request to address the Court in Person, 3 July 2008, C22/I/54, paras 2-3.
[2074] Ibid, Dissenting Opinion of Judge Rowan Downing, paras 1-4.
[2075] Internal Rules (Rev. 3), rule 23 (7)(i) (now contained in Internal Rules (Rev. 10), rule 23 *ter* (2)).

during the investigation or questioned before the Trial Chamber during the hearing.[2076]

Legitimately unrepresented Civil Parties could nevertheless address the chambers in person when their interests were different to those of the Co-Prosecutors, *i.e.*, where the possible effect of a decision might be that the Civil Parties had no possibility left to claim damages.[2077] An unrepresented Civil Party claiming a right to address the chambers at a scheduled hearing was required to provide an advanced notice by making a written request explaining the content and relevance of their submissions at least ten days prior to the hearing.[2078]

Since the February 2010 amendments (Revision 5), Civil Parties were required to: (1) be represented by a Civil Party lawyer in order to participate in proceedings;[2079] and (2) comprise a single, consolidated group, whose interests were represented by the Civil Party Lead Co-Lawyers.[2080] Consequently, from the trial stage, the Civil Party Lead Co-Lawyers bore the "ultimate responsibility to the court for the overall advocacy, strategy and in-court presentation of the interests of the consolidated group".[2081] In order to ensure the efficiency of the procedure, the chambers could also restrict the number of Civil Party lawyers who could speak.[2082]

While the Lead Co-Lawyers were required to seek the views of the Civil Party lawyers and endeavour to reach consensus in order to coordinate representation, the Trial Chamber held that they were not required "to obtain the consensus of the Civil Party lawyers *in all circumstances*". In particular, they were not required to do so where this would conflict with the Lead Co-Lawyers' obligation under Internal Rule 12 *ter* (1) to "ensure the effective organisation of Civil Party representation during the trial stage […] whilst balancing the rights of all parties and the need for an expeditious trial within the unique ECCC context".[2083] In his dissenting opinion, Judge Lavergne considered that the initial consultative phase – wherein the Lead Co-Lawyers would "seek the views of the Civil Party lawyers" – was not optional. According to him, the "ultimate responsibility" arose when the Lead Co-Lawyers were unable

[2076] Internal Rules, rule 23 *ter* (2), to be read in conjunction with Internal Rules 59 and 91(1).
[2077] Case 002, Public Directions on Unrepresented Civil Parties' Right to Address the Pre-Trial Chamber in Person, 29 August 2008, C22/I/69, paras 9-10, disposition.
[2078] Ibid, para. 11, disposition.
[2079] Internal Rules (Rev. 5), rule 23 *ter* (1), now contained in the same rule of Internal Rules (Rev. 10).
[2080] Internal Rules (Rev. 5), rule 23 (5), now contained in Internal Rules (Rev. 10), rule 23(3).
[2081] Internal Rules, rule 12 *ter* (5)(b).
[2082] See *e.g.*, Case 002, T. 29 June 2011, E1/6.1, pp. 69-70.
[2083] Case 002, Decision on Lead Co-Lawyer's "Urgent Request for the Trial Chamber to Amend Memorandum E62/3/10 (formerly E106)" (E62/3/10/1), 29 July 2011, E62/3/10/4, p. 2 (quoting Internal Rules (Rev. 7), rule 12 *ter* (1)).

to reach a consensus.[2084]

7.2.3. Right to make opening and closing statements

Civil Parties were not permitted to make opening statements. However, they had the opportunity to make closing statements and rebuttal statements.[2085]

The Trial Chamber rejected Civil Party representatives' requests to make opening statements or preliminary remarks in Cases 001 and 002, holding that neither Internal Rule 89 *bis* nor the CCP provided the Civil Parties such a right.[2086] It ruled that Civil Parties did "not have identical rights to those enjoyed by the defence or the Co-Prosecutors". Considering that an opening statement is a brief explanation of the charges against the Accused, the Trial Chamber held that Civil Parties had "no autonomous role to play at this stage of the proceedings". Accordingly, this exclusion did not violate the Chamber's obligation to safeguard the victims' interests and balance the parties' rights under Internal Rule 21(1).[2087]

7.2.4. Scope of Civil Party testimony

Civil Parties could not be questioned as simple witnesses in the same case. They could only be interviewed under the same conditions as a Charged Person or Accused.[2088]

In Cases 002/01 and 002/02, the Trial Chamber scheduled 'victim impact hearings' to enable the presentation of "evidence of the suffering of Civil Parties, and hence, the impact of the crimes" on the victims.[2089] The parties were permitted to examine the Civil Parties during the

[2084] Case 002, Dissenting Opinion of Judge Jean-Marc Lavergne concerning the Trial Chamber Decision in Memorandum E62/3/10/4, 23 August 2011, E62/3/10/4.1, para. 14 (quoting Internal Rules (Rev. 8), rule 12 *ter* (3)).
[2085] Internal Rules, rules 94(1)(a), 94(2). See Case 001, Decision on the Request of the Co-Lawyers for Civil Parties Group 2 to make an Opening Statement during the Substantive Hearing, 27 March 2009, E23/4, paras 4, 7, 9. See also Case 002, Scheduling Order for Opening Statements and Hearing on the Substance in Case 002, 18 October 2011, E131, p. 3; Case 002, Trial Chamber Response to Lead Co-Lawyers and Civil Party Lawyers' Request to make Brief Preliminary Remarks on behalf of Civil Parties, 15 November 2011, E131/4/1, p. 1.
[2086] Case 001, Decision on the Request of the Co-Lawyers for Civil Parties Group 2 to make an Opening Statement during the Substantive Hearing, 27 March 2009, E23/4, paras 4, 7, 9; Case 002, Trial Chamber Response to Lead Co-Lawyers and Civil Party Lawyers' Request to make Brief Preliminary Remarks on behalf of Civil Parties, 15 November 2011, E131/4/1, p. 1.
[2087] Case 001, Decision on the Request of the Co-Lawyers for Civil Parties Group 2 to make an Opening Statement during the Substantive Hearing, 27 March 2009, E23/4, paras 5-6, 9.
[2088] Internal Rules, rule 23(4).
[2089] Case 002/01, Scheduling of Trial Management Meeting, 3 August 2012, E218, paras 16, 18. See also Case 002/01, Further Information regarding Trial Scheduling, 7 February 2013, E236/5, paras 2, 4; Case 002/02, Information on (1) Key Document Presentation Hearings in Case 002/02 and (2) Hearings on Harm Suffered by the Civil Parties in Case 002/02", 17 December 2012, E315/1, paras 7, 9.

hearing.[2090]

Civil Parties also were offered the opportunity to make a "statement of suffering" at the conclusion of their testimony during the substantive hearing in order to express the full scope of the harm they suffered during the DK period in general.[2091] The Trial Chamber distinguished between testimony on the facts at issue, which were confined to the scope of the trial and subject to adversarial argument, and general statements of suffering.[2092] Civil Parties were not required to differentiate in their statements between harm suffered as a result of facts within the scope of the case and overall harm suffered during the DK period.[2093] Nevertheless, the parties were permitted to make comments and address the elements of the statement that seem irrelevant after the departure of the Civil Party from the courtroom.[2094] The defence had the opportunity to object where the rights of the Accused were deemed to be infringed upon.[2095] Furthermore, if a Civil Party statement of suffering introduced new facts or allegations against the Accused, the defence could request to recall the Civil Party for further questioning. The Trial Chamber would grant such requests to ensure any new information potentially affecting the Accused's guilt could be thoroughly examined.[2096]

Civil Parties were not prevented from testifying on issues pertaining to the guilt of an Accused.[2097] On the contrary, the Internal Rules were based on the assumption that Civil Parties could provide information relating to these matters.[2098] The Supreme Court Chamber affirmed that Civil Party testimony may form part of the evidence relied upon to determine guilt.[2099] It reasoned that Civil Parties were mentioned together with witnesses and experts in Internal Rule 91(1) as sources truth. Similarly, the interview of Civil Parties by the Co-Investigating Judges

[2090] Case 002/01, Appeal Judgment, paras 317, 321.
[2091] Case 002/01, Decision on Request to Recall Civil Party TCCP-187, 2 May 2013, E267/3, para. 14. See also Case 002/01, Appeal Judgment, paras 317, 320.
[2092] Case 002/01, Decision on Request to Recall Civil Party TCCP-187, 2 May 2013, E267/3, para. 14; Case 002/02, Information on (1) Key Document Presentation Hearings in Case 002/02 and (2) Hearings on Harm Suffered by the Civil Parties in Case 002/02", 17 December 2012, E315/1, para. 8. See also Case 002/01, Appeal Judgment, para. 320.
[2093] Case 002/01, Decision on Request to Recall Civil Party TCCP-187, 2 May 2013, E267/3, paras 15, 17 and disposition; Case 002/02, Information on (1) Key Document Presentation Hearings in Case 002/02 and (2) Hearings on Harm Suffered by the Civil Parties in Case 002/02, 17 December 2012, E315/1, para. 8.
[2094] Case 002/01, Appeal Judgment, para. 317.
[2095] Ibid. 320.
[2096] Ibid. See also Case 002/02, Information on (1) Key Document Presentation Hearings in Case 002/02 and (2) Hearings on Harm Suffered by the Civil Parties in Case 002/02, 17 December 2012, E315/1, para. 8.
[2097] Case 002/01, Appeal Judgment, paras 312-313. See also Case 002/02, Appeal Judgment, para. 1415; Case 002/02, Judgment, para. 67.
[2098] Case 002/01, Appeal Judgment, para. 313.
[2099] Case 002/02, Appeal Judgment, paras 1415, 1418; Case 002/01, Appeal Judgment, para. 313. See also Case 002/02, Judgment, para. 67.

pursuant to Internal Rule 59 may address matters relevant to the guilt of the Suspects.[2100]

7.2.5. Probative value of Civil Party testimony

Although the Civil Parties were exempt from testifying under oath, their evidence was not excluded *per se*.[2101] Rather, their statements were assessed as evidence where relevant and probative.[2102] Nonetheless, their status as Civil Parties was relevant to the probative value and/or credibility of their testimony.[2103]

When making factual findings regarding the guilt of the Accused, the Trial Chamber could rely on Civil Party testimony, statements of suffering made by Civil Parties after their in-court testimony, and victim impact testimonies.[2104] The Supreme Court Chamber held that although "it would be unusual for a finding at the heart of individual criminal responsibility [to] rest solely upon civil party evidence […] it does not exclude the possibility that a finding of individual criminal responsibility could rest *primarily* upon civil party evidence".[2105]

The chambers assessed the weight given to Civil Party testimony on a "case-by-case basis" in the light of factors such as "the demeanour of the person testifying, consistencies or inconsistencies with material facts, ulterior motivations, corroboration, and all the circumstances of the case".[2106] Consideration was also given to factors associated to the status of Civil Parties, such as the absence of oath, their interest in seeking reparations, the lack of sanctions for false testimony, and their ability to consult with counsel during proceedings.[2107] Nevertheless, Civil Party evidence was not deemed of inherently lower probative value than other forms of evidence.[2108]

Greater weight was attributed to Civil Parties' in-court statements than to their Civil Party applications.[2109] The chambers repeatedly noted that Civil Party applications, which were

[2100] Case 002/01, Appeal Judgment, para. 313.
[2101] Ibid. See also Case 002/02, Appeal Judgment, para. 1417; Case 002/02, Judgment, para. 67.
[2102] Case 002/02, Appeal Judgment, paras 1415, 1417; Case 001, Judgment, para. 52; Case 002/01, Decision on Request to Recall Civil Party TCCP-187, 2 May 2013, E267/3, para. 21. See also Case 002/02, Judgment, para. 67.
[2103] Case 002/01, Appeal Judgment, para. 313. See also Case 002/02, Appeal Judgment, para. 1417; Case 002/02, Judgment, para. 67.
[2104] Case 002/01, Appeal Judgment, paras 305, 318, 320-322, 324. See also Case 002/02, Judgment, para. 67.
[2105] Case 002/02, Appeal Judgment, para. 1418 (emphasis added).
[2106] Case 002/01, Appeal Judgment, para. 314; Case 002/02, Judgment, paras 49, 3528. See also Case 002/02, Appeal Judgment, para. 1415; Case 001, Judgment, paras 42, 53.
[2107] Case 002/01, Appeal Judgment, para. 315; Case 002/02, Appeal Judgment, para. 1417.
[2108] Case 002/02, Appeal Judgment, para. 1415 (referring to Case 002/01, Appeal Judgment, para. 313); Case 002/02, Judgment, para. 67.
[2109] Case 002/02, Judgment, paras 69, 3528.

collected without judicial supervision, did not enjoy a presumption of reliability and was afforded little, if any, weight where the circumstances in which they were recorded were unknown.[2110] The Supreme Court Chamber held that the majority of Civil Party applications and victim complaints offered "only general conclusions or cursory statements without explaining the source of the knowledge of the authors and, as such, might represent 'collective memory' or 'common narrative' rather than personal experiences, which, by itself, is inapt to establish relevant facts".[2111] More generally, out-of-court statements by Civil Parties and evidence that was not collected for the purpose of a criminal trial were considered of inherently lower probative value.[2112]

The Co-Investigating Judges in Case 004/01, and the International Co-Investigating Judge in Cases 004/02, 003, and 004 adopted and maintained this methodology, recalling that statements or evidence collected without judicial supervision by entities external to the ECCC were not produced with the judicial guarantees and formality that characterise evidence generated by the Co-Investigating Judges.[2113]

Despite not having reached the required majority to decide on appeals against the Closing Orders, the Pre-Trial Chamber in Cases 004/01 unanimously held that the Co-Investigating Judges erred in "creating a hierarchy of evidence based on the formal provenance, rather than the substance of the evidence". They reasoned that the gathering of evidence at the ECCC was governed by the principle of freedom of evidence, under which all evidence is admissible and generally should have the same legal presumption of probative value. They held that "the only relevant criterion" should be "the impact that the substance of the evidence may have on the personal conviction of the Co-Investigating Judges regarding whether there is sufficient evidence for the charges". Consequently, the Pre-Trial Chamber held that the credibility of Civil Party applicant evidence should be assessed on a case-by-case basis and not automatically regarded as intrinsically unreliable.[2114] The Pre-Trial Chamber held that the International Co-

[2110] Case 002/01, Decision on Co-Prosecutors' Rule 92 Submission, 20 June 2012, E96/7, para. 29. See also Case 002/02, Appeal Judgment, paras 455, 462, 475; Case 002/01, Appeal Judgment, para. 296; Case 002/02, Judgment, paras 69, 73, 3528.
[2111] Case 002/01, Appeal Judgment, para. 457.
[2112] Case 002/02, Appeal Judgment, para. 462; Case 002/01, Appeal Judgment, paras 296, 550; Case 002/02, Judgment, para. 69.
[2113] Case 004/01, Dismissal Order, paras 103-104, 107; Case 004, Closing Order (Indictment), paras 117-118, 120; Case 004, Dismissal Order, paras 591-592, 594; Case 003, Closing Order (Indictment), paras 118-119, 121; Case 003, Dismissal Order, paras 354-355; Case 004/02, Closing Order (Indictment), paras 123-124, 126; Case 004/02, Dismissal Order, paras 485-486, 488.
[2114] Case 004/01, Considerations on Closing Order Appeal, paras 41-59.

Investigating Judge made the same legal error in Case 004/02.[2115] Although the Pre-Trial Chamber did not make these unanimous holdings in Cases 003 and 004, the International Pre-Trial Chamber Judges repeated them in their separate opinion.[2116]

7.3. Reparations

The purpose of Civil Party action included seeking "collective and moral reparations".[2117] By contrast to the ICC framework, where victim status for trial participation does not guarantee eligibility for reparations and may be reassessed upon conviction, Civil Parties at the ECCC were able to seek reparations without such a reassessment.[2118] Accordingly, once the victim obtained Civil Party status, their participation included the right to be a party in the criminal trial of the Accused and to pursue collective and moral reparations.[2119]

7.3.1. Right to reparation

The ECCC's reparation mechanism drew from both Cambodian criminal procedure and international human rights law.[2120] However, the relevance of these sources was limited as the reparation scheme envisaged by Internal Rule 23 *quinquies* was "tailored to the ECCC's *sui generis* mechanism and mandate".[2121] Departures from domestic law were considered "necessary in view of the large number of Civil Parties expected before the ECCC and the inevitable difficulties of quantifying the full extent of losses suffered by an indeterminate class of victims".[2122]

7.3.1.1. Collective and moral reparation scheme

Unlike the CCP, the ECCC's framework did not provide the chambers authority to award individual and financial compensations, but only collective and moral reparations.[2123]

[2115] Case 004/02, Considerations on Closing Order Appeals, paras 73-83.
[2116] Case 003, Considerations on Closing Order Appeals, Opinion of Judges Olivier Beauvallet and Kaing Jin Baik, paras 154-155. See also Case 004, Considerations on Closing Order Appeals, Opinion of Judges Kaing Jin Baik and Olivier Beauvallet, para. 235.
[2117] Internal Rules, rule 23(1)(b).
[2118] Case 001, Appeal Judgment, paras 483-484; Case 001, Judgment, para. 660.
[2119] Case 001, Appeal Judgment, para. 639; Case 001, Judgment, para. 660.
[2120] Case 001, Appeal Judgment, paras 641, 645-652.
[2121] Ibid, paras 639, 641, 644, 667.
[2122] Case 001, Judgment, fn. 1144.
[2123] Code of Criminal Procedure, article 14; Internal Rules, rule 23 *quinquies* (1); Case 001, Appeal Judgment, para. 658; Case 002/02, Judgment, paras 4408, 4464; Case 002/01, Judgment, para. 1115; Case 001, Judgment, para. 670, fn. 1144.

"Moral reparation" meant repairing moral damages rather than material ones.[2124] The measures were designed to serve a symbolic purpose, providing official recognition to victims, helping to restore their dignity, and preserving the collective memory.[2125]

The "collective" nature of the measures meant that individual awards were unavailable.[2126] As long as an award was available for Civil Parties as a collective, moral reparations could also "entail individual benefit for the members of the collective".[2127] Although moral and collective reparations could not "reinstate the victims of human rights abuses either physically or economically", other reparative aims were fulfilled to the extent the measures responded to "the psychological, moral, and symbolic elements of the violation".[2128]

The reparative measures sought required acknowledgement of the harm suffered by Civil Parties as a result of the commission of the crimes for which an Accused was convicted. In other words, reparation claims were to be linked to the harm suffered and limited to crimes that form the basis of the case.[2129]

Reparations were required to provide benefits to the Civil Parties which could address this harm.[2130] Irrespective of the other requirements, the following categories were recognised as meeting this specific condition:

i. Projects relating to documentation, public education or aimed at guaranteeing non-repetition;[2131]

[2124] Case 002/02, Judgment, paras 4409, 4464; Case 002/01, Judgment, para. 1115; Case 001, Appeal Judgment, para. 658; Case 002, Decision on Appeals against Orders on the Admissibility of Civil Party Applications, 24 June 2011, D404/2/4, para. 70.
[2125] Case 001, Appeal Judgment, para. 644; Case 001, Judgment, fn. 1144.
[2126] Case 001, Appeal Judgment, paras 658-659; Case 002/02, Judgment, para. 4409; Case 002/01, Judgment, para. 1115.
[2127] Case 001, Appeal Judgment, para. 658.
[2128] Ibid, para. 661.
[2129] Internal Rules, rule 23 *quinquies* (1)(a).
[2130] Internal Rules, rule 23 *quinquies* (1)(b).
[2131] Case 001, Appeal Judgment, para. 708-709 (production and dissemination of audio and video material about Case 001); Case 002/02, Judgment, paras 4454-4460 (app-learning on Khmer Rouge history; Khmer Rouge history education through teacher and university lecturer training and workshops; media project promoting historical awareness and civil courage in Cambodia; community media project on the experiences of the Cham during the Khmer Rouge era; dance performance and exhibition addressing the regulation of marriage during the DK period; documentation and intergenerational dialogue about the treatment of the Cham and Vietnamese during the Khmer Rouge regime); Case 002/01, Judgment, paras 1156-1160 (permanent and mobile exhibitions and education projects; inclusion of a chapter on forced population movement and executions at Tuol Po Chrey within the Cambodian school curriculum; construction of a peace learning centre; booklet on facts adjudicated in Case 002/01 and Civil Party Participation; two editions of the verdict in Case 002/01; inclusion of Civil Party names on the ECCC website); Case 001, Judgment, paras 667, 669 (inclusion of Civil Party names and their relatives in the final Judgment; publication of the Judgment and outreach).

ii. Projects concerning commemoration, remembrance, and memorialisation;[2132]

iii. Projects serving rehabilitation, therapy or psychological assistance;[2133] and

iv. Projects aimed at providing satisfaction.[2134]

7.3.1.2. Judicial and non-judicial reparation avenues

Under the initial version of the Internal Rules, reparation awards were to be directed against and borne exclusively by the convicted person.[2135] Case 001 illustrated, however, that where the scale of losses suffered was considerable and where convicted persons were indigent, reparations awarded under the classic Civil Party model were "unlikely to yield significant tangible results for Civil Parties".[2136] The 2010 amendments to the Internal Rules addressed these limitations by expanding the range of reparations before the ECCC.[2137]

First, a supplementary judicial reparation avenue was introduced allowing Civil Party Lead Co-Lawyers to request the chambers to recognise that a specific reparation measure based on external resources, designed or identified in coordination with the Victims Support Section ("VSS"), was appropriate and could be implemented.[2138] When submitting their claims, Civil Parties were required to specify one of the two modes of implementation sought.[2139] The two judicial avenues of reparation were not only distinct but also mutually exclusive.[2140]

[2132] Case 001, Appeal Judgment, paras, 683, 713 (installation of memorials; national commemoration day; official ceremonies; erection of informative and memorialising plaques); Case 002/01, Judgment, paras 1152-1153, 1161-1163 (the institution of a national remembrance day and the construction of public memorials fall into this category).

[2133] Case 001, Appeal Judgment, paras 701, 704 (provision of medical care and psychological services for Civil Parties); Case 002/02, Judgment, paras 4463-4465 (healing and reconciliation programs for survivors of the Khmer Rouge regime, including truth-telling community dialogues, memory initiatives/forum theatre, and youth outreach activities; provision of mental and physical care); Case 002/01, Judgment, paras 1154-1155 (mental health programs such as the institution of self-help groups and the organisation of testimonial therapies).

[2134] Case 001, Appeal Judgment, para. 675; Case 001, Judgment, para. 668, fn. 1153 (compilation and dissemination of apologetic statements made by Duch); Case 002/02, Judgment, paras 4461-4462 (production of an illustrated book containing Civil Parties accounts, particularly from those who did not have an opportunity to give statements; songwriting contest; exhibition of memory sketches of a security centre; access to the judicial records of the Khmer Rouge trials and Civil Party materials).

[2135] Internal Rules (Rev. 0), rule 23(11); Case 001, Appeal Judgment, para. 656; Case 001, Judgment, para. 661.

[2136] Case 002/02, Judgment, para. 4406; Case 002/01, Judgment, para. 1112; Case 002/01, Decision on Severance of Case 002/01 following Supreme Court Chamber Decision of 8 February 2013, 26 April 2013, E284, fn. 264. See also Case 001, Appeal Judgment, paras 668, 684, 692, 703, 709, 717; Case 001, Judgment, paras 662, 664, 666.

[2137] Internal Rules, rules 12 *bis* (3)-(4), 23 *quinquies* (3). See also Case 002/01, Judgment, paras 1109, 1112-1113; Case 002/02, Judgment, para. 4405.

[2138] Internal Rules, rules 12 *bis* (3), 23 *quinquies* (3)(b). See also Case 002/02, Judgment, para. 4405; Case 002/01, Judgment, para. 1113; Case 002/01, Initial Specification of the Substance of Reparations Awards sought by the Civil Party Lead-Co-Lawyers pursuant to Internal Rule 23 *quinquies* (3), 23 September 2011, E125, p. 2.

[2139] See Internal Rules (Rev. 6), rules 12 *bis* (2), 23(3), 23 *quinquies* (1)-(3).

[2140] Case 002/01, Judgment, paras 1118, 1123-1124. See also Case 002/02, Judgment, para. 4413.

Consequently, it was "not legally permissible" for Civil Parties to base their claims simultaneously on both modes of implementation.[2141]

Second, the amendments broadened the VSS's mandate. Internal Rule 12 *bis* (4) entrusted the VSS to develop and implement "non-judicial programs and measures addressing the broader interests of victims", including, where appropriate, in collaboration with governmental and non-governmental organisations external to the ECCC. Judge Catherine Marchi-Uhel reasoned that this orientation enabled the interests of victims to be addressed concurrently with the judicial process, including those who did not meet the admissibility requirements to qualify as Civil Parties.[2142]

The chambers had no authorisation to order the pre-trial freezing of assets for the purpose of securing the enforcement of a future reparation award.[2143]

7.3.1.3. Formulation and content of the reparation claim

The ECCC's reparations regime was a "claimant-driven mechanism", which required Civil Parties to submit award claims that were sufficiently designed and specified in order to be endorsed.[2144] The Internal Rules required that Civil Parties submit a single claim which provided a description of the awards sought, a reasoned argument as to how these awards addressed the harm suffered, specifying the relevant Civil Party group where appropriate, and the specific mode of implementation for each measure.[2145]

Since the introduction Internal Rule 23 *quinquies* (3)(b), reparations claims based on external funds or contribution could be granted where a proof of the relevant authorities' consent and cooperation (or any third party such as donors or private landowners) had been demonstrated. In other words, reparation projects based on Internal Rule 23 *quinquies* (3)(b) – whose costs were not borne by the convicted person – required secured sufficient funding.[2146]

[2141] Case 002/01, Judgment, para. 1124.
[2142] Case 002, Decision on Appeals against Orders on the Admissibility of Civil Party Applications, 24 June 2011, D404/2/4, Separate and Partially Dissenting Opinion of Judge Catherine Marchi-Uhel, para. 5.
[2143] Case 002, Decision on Appeal of Co-Lawyers for Civil Parties Against Order on Civil Parties' Request for Investigative Actions Concerning All Properties Owned by the Charged Persons, 4 August 2010, D193/5/5, paras 24-25.
[2144] Case 001, Appeal Judgment, paras 685, 687; Case 001, Judgment, para. 665.
[2145] Internal Rules, rules 23(3), 23 *quinquies* (2). See also Case 002/02, Judgment, para. 4411; Case 002/01, Judgment, para. 1117; Case 001, Judgment, para. 665.
[2146] Case 002/02, Judgment, paras 4463, 4465; Case 002/01, Judgment, paras 1122, 1126, 1153, 1155, 1162, 1163; Case 002/01, Trial Chamber's Response to the Lead Co-Lawyers' Initial Specification of Civil Party Priority Projects as Reparations pursuant to Rule 80 *bis* (4) (E218/7/1), 1 August 2013, E218/7/2, para. 4; Case 002/01,

Civil Parties had the burden of proof regarding the admissibility of applications and the substance of the claims for reparation.[2147] The Supreme Court Chamber held that the need to adjudicate criminal cases within a reasonable time did not enable the ECCC to adopt the Inter-American Court of Human Rights' approach, according to which the chambers would assume the "ultimate task of designing a just and equitable remedy for the injured party" and create "the reparations it deems appropriate and is even not bound by the victims' requests".[2148]

In Cases 002/01 and 002/02, the Trial Chamber exercised its powers under Internal Rule 80 *bis* (4) to direct the Lead Co-Lawyers to provide initial claim specifications, updates on the project financing status during the course of the trial, priority projects lists, and final claims.[2149] This active approach allowed the Trial Chamber to scrutinise compliance with the legal framework at an early stage, and the Civil Parties to provide as much specificity as possible while changes to project development were still feasible.[2150] In Case 001, the Trial Chamber ordered each group of Civil Parties to file written submissions outlining the forms of collective and moral reparations sought against the Accused.[2151]

A final claim for collective and moral reparation could deviate from the initial specification.[2152] From the final claim, a project could be subject to developments, provided that it remained substantially the same as described. The Trial Chamber considered that extensions to projects or the inclusion of novel, unforeseen elements to a project was "beyond the reach of endorsement".[2153]

At the appeal stage, Civil Parties could not introduce new reparation claims that were not submitted to the Trial Chamber.[2154]

Trial Chamber's subsequent and Final Order on the Updated Specification of Civil Party Priority Projects as Reparations pursuant to Rule 81 *bis* (4) (E218/7/3), 6 September 2013, E218/7/4, para. 3.

[2147] Case 001, Direction on Proceedings Relevant to Reparations and on the Filing of Final Written Submissions, 27 August 2009, E159, p. 2. See also Case 001, Appeal Judgment, para. 686; Case 001, Judgment, para. 665.

[2148] Case 001, Appeal Judgment, para. 685.

[2149] Case 002/02, Judgment, paras 4414-4415; Case 002/01, Judgment, paras 1120-1122.

[2150] Case 002/01, Initial Specification of the Substance of Reparations Awards sought by the Civil Party Lead-Co-Lawyers pursuant to Internal Rule 23 *quinquies* (3), 23 September 2011, E125, pp. 2-3.

[2151] See Case 001, Direction on Proceedings Relevant to Reparations and on the Filing of Final Written Submissions, 27 August 2009, E159, paras 1-2, 5.

[2152] Internal Rules, rule 80 *bis* (5). See also Case 002/01, Initial Specification of the Substance of Reparations Awards sought by the Civil Party Lead-Co-Lawyers pursuant to Internal Rule 23 *quinquies* (3), 23 September 2011, E125, pp. 2-3.

[2153] Case 002/02, Memorandum Responding to the Lead Co-Lawyers' Request for Guidance Regarding Additional Funding and Activities for Certain Reparation Projects, 15 December 2017, E457/6/2/5, para. 5.

[2154] Internal Rules, rule 110(5).

7.3.1.4. Enforcement of reparations

The legal framework did not grant any ECCC organ jurisdiction to enforce a reparation award.[2155] Internal Rule 113(1) provided that the enforcement of reparations orders against convicted persons "shall be done by appropriate national authorities in accordance with Cambodian law on the initiative of any member of the collective group, unless the verdict specifies that a particular award shall be granted in relation only to a specified group". Reparations based on Internal Rule 23 *quinquies* (3)(b) did not result in enforceable claims against the convicted person and their implementation did not fall within the scope of Internal Rule 113(1).[2156]

7.3.2. Principles

7.3.2.1. Scope of the reparations framework

Civil Parties could seek reparations but were not guaranteed to have them endorsed.[2157] Although numerous requests constituted appropriate forms of reparation and/or had been adequately specified, the constraints stemming from the ECCC's reparations framework prevented some awards from being endorsed.[2158] In such cases, the chambers encouraged national authorities, the international community, and other potential donors to show solidarity with the victims by providing financial and other forms of support to develop and implement appropriate forms of reparation not specifically endorsed in the judgment which could contribute to their rehabilitation, reintegration, and restoration of dignity.[2159] The relatively limited scope of reparations available at the ECCC "[did] not affect the right of the victims to seek and obtain reparations capable of fully addressing their harm in any such proceedings that could be made available for this purpose in the future".[2160]

[2155] Case 002, Decision on Appeal of Co-Lawyers for Civil Parties Against Order on Civil Parties' Request for Investigative Actions Concerning All Properties Owned by the Charged Persons, 4 August 2010, D193/5/5, para. 25. See also Case 001, Judgment, para. 661.
[2156] Case 002/01, Initial Specification of the Substance of Reparations Awards sought by the Civil Party Lead-Co-Lawyers pursuant to Internal Rule 23 *quinquies* (3), 23 September 2011, E125, p. 2; Internal Rules, rule 113(1).
[2157] Case 002, Decision on Appeal of Co-Lawyers for Civil Parties Against Order on Civil Parties' Request for Investigative Actions Concerning All Properties Owned by the Charged Persons, 4 August 2010, D193/5/5, para. 21.
[2158] Case 001, Appeal Judgment, para. 717. See also Case 002, Decision on Appeal of Co-Lawyers for Civil Parties Against Order on Civil Parties' Request for Investigative Actions Concerning All Properties Owned by the Charged Persons, 4 August 2010, D193/5/5, para. 25.
[2159] Case 001, Appeal Judgment, paras 692, 717; Case 002/02, Judgment, para. 4467; Case 002/01, Judgment, para. 1164; Case 001, Judgment, para. 663.
[2160] Case 001, Appeal Judgment, para. 668.

7.3.2.2. Ability to bind or order States and other third parties

The ECCC lacked jurisdiction to order the implementation or the funding of reparation measures against the Royal Government of Cambodia or any other individual or entity not party to the proceedings.[2161] Additionally, the ECCC was not vested with the authority to assess a State's compliance with its international obligations on reparative measures, distinguishing it from certain regional human rights courts.[2162]

Without a commitment to fund a project under Internal Rule 23 *quinquies* (3)(b), any reparation claim requiring active involvement from Cambodian authorities or third parties was bound to be rejected.[2163] This was particularly the case for requests seeking measures falling within governmental prerogatives, such as the instauration of a national commemoration day, the naming of public buildings after victims, the provision of citizenship to victims, the issuance of official statements of apology, or the organisation of a health care system.[2164]

7.3.2.3. The reparation claim

7.3.2.3.1. *Feasibility of the reparation measure*

The chambers adopted the view that reparations should be limited to those activities which could realistically be implemented.[2165] In this regard, the Supreme Court Chamber held that "an award that, in all probability, can never be enforced, *i.e.*, is *de facto* fictitious, would belie the objective of *effective* reparation and would be confusing and frustrating for the victims".[2166] Accordingly, an appropriate reparation measure was one that was "modest but tailored to what is in practical terms attainable".[2167]

The reparation measures sought required consideration of the availability of funds.[2168] The Supreme Court Chamber refused to endorse reparations where funding was based on the possibility that the indigent convicted person could enrich themselves in the future or that a third party would fund the reparations, opting to do so on behalf of the convicted person rather

[2161] Case 001, Appeal Judgment, paras 656, 663; Case 002/02, Judgment, para. 4410; Case 002/01, Judgment, para. 1116; Case 001, Judgment, para. 663.
[2162] Case 001, Appeal Judgment, para. 654; Case 001, Judgment, para. 663.
[2163] Case 001, Appeal Judgment, paras 662-664; Case 001, Judgment, paras 671, 674.
[2164] Case 001, Appeal Judgment, para. 664; Case 002/01, Initial Specification of the Substance of Reparations Awards sought by the Civil Party Lead-Co-Lawyers pursuant to Internal Rule 23 *quinquies* (3), 23 September 2011, E125, p. 3.
[2165] Case 001, Appeal Judgment, para. 668.
[2166] Ibid, para. 667 (original emphasis).
[2167] Ibid, para. 668.
[2168] Ibid, para. 668, fn. 1343.

than in their own name.[2169] Partially funded projects were not endorsed.[2170] Similarly, a commitment to continue fundraising was not a guarantee that funding would be obtained.[2171] Given the "limited donor funds and finite human resources in both the Lead Co-Lawyers' and Victims Support Sections", the Trial Chamber urged the Lead Co-Lawyers to "prioritise reparation projects which appeared to have the likelihood of being realised".[2172]

7.3.2.3.2. *Degree of detail and specificity*

Reparations claims required enough specificity and detail to enable the Trial Chamber to grant the proposal through an enforceable disposition.[2173] An order could not be issued where the object of the award and its cost were uncertain or indeterminable.[2174] Emphasis was placed on the ability of awards to be self-executing following a reparation order.[2175]

A lack of specificity was not a fatal flaw, "provided the request demonstrate[d] that the award sought would be otherwise appropriate and enforceable".[2176] The required level of detail depended on the nature of the reparation claim. A prerequisite to the grant of an award was the clear specification of the nature of the relief sought, its link to the harm caused by the Accused, and the quantum of indemnity or amount of reparation sought from the Accused to give effect to it.[2177]

7.3.2.3.3. *Nexus between the harm resulting from the crime and the proposed reparation*

Internal Rule 23 *quinquies* (1)(a) required that reparations measures acknowledge the harm suffered by Civil Parties as a result of the commission of the crimes for which an Accused was convicted.[2178]

[2169] Ibid, paras 643, 666, 668.
[2170] Case 002/01, Judgment, paras 1122, 1162-1163; Case 002/01, Trial Chamber's subsequent and Final Order on the Updated Specification of Civil Party Priority Projects as Reparations pursuant to Rule 81 *bis* (4) (E218/7/3), 6 September 2013, E218/7/4, para. 3.
[2171] Case 002/01, Judgment, para. 1163.
[2172] Case 002/02, Judgment, para. 4415; Case 002/01, Judgment, para. 1121. See also Case 002/01, Scheduling of Trial Management Meeting, 3 August 2012, E218, para. 19.
[2173] Case 001, Appeal Judgment, paras 687-688; Case 001, Judgment, paras 651, 665.
[2174] Case 001, Judgment, paras 665, 669, 672-674. See also Case 001, Appeal Judgment, paras 694, 704; Case 002/01, Judgment, para. 1162.
[2175] Case 001, Appeal Judgment, para. 688.
[2176] Ibid, para. 685.
[2177] Case 001, Judgment, para. 665. See also Case 001, Appeal Judgment, para. 694.
[2178] See also Case 001, Appeal Judgment, para. 699; Case 002/02, Judgment, para. 4436; Case 002/01, Judgment, para. 1141; Case 001, Judgment, para. 665.

This implied a connection between the form of reparation sought and the harm resulting from the crime.[2179] This "relation with the harm lies in the form of reparation being aimed at, and suitable to, removing the consequences of the criminal wrongdoing, as well as restoring, to the extent possible, the prior lawful status". For instance, where the harm established by the victims resulting from the crimes committed was of a physical and psychological nature, the provision of physical treatment and psychological services was an appropriate form of reparation.[2180]

Furthermore, the proposed reparation measures were limited to the crimes that formed the basis of the charges in the case.[2181] For instance, a claim seeking to acknowledge the suffering experienced by indigenous minorities in Ratanakiri and Mondulkiri provinces as a consequence of their alleged denigration, discrimination and persecution could not be granted if the case did not include such charges in these locations.[2182]

One consequence of the severance of Case 002 was that several victims were admitted as Civil Parties on the basis of a harm resulting from the crimes charged in Case 002/01 but not in Case 002/02, or the opposite. In its severance order, the Trial Chamber considered that "limiting the scope of facts to be tried" had no impact on the nature of Civil Party participation at trial, since the Civil Parties no longer participated at trial individually on the basis of their particular harm suffered but rather comprised a single consolidated group whose interests were collectively represented. It held that the formulation of reparation claims made on behalf of the consolidated group by the Civil Party Lead Co-Lawyers must take account of Internal Rule 23 *quinquies* (1)(a).[2183] Thus, the Trial Chamber held that it should only consider harm suffered stemming from the allegations which formed the basis of Case 002/01 in relation to reparations sought under Rule 23 *quinquies* (3)(a), where the costs were not borne by the convicted person. Civil Parties who could not speak to the facts at issue in Case 002/01, but whose experience was instead relevant to the subject-matter of future trials could "be heard during these trials".[2184]

7.3.2.3.4. *The extent of benefits*

The requirement in Internal Rule 23 *quinquies* (1)(b) that awards must benefit Civil Parties and

[2179] Case 001, Appeal Judgment, para. 699; Case 001, Judgment, paras 665, 674.
[2180] Case 001, Appeal Judgment, para. 699.
[2181] Case 002/02, Judgment, paras 4414, 4466; Case 001, Judgment, para. 674.
[2182] Case 002/02, Judgment, para. 4466.
[2183] Case 002, Severance Order pursuant to Rule 89 *ter*, 22 September 2011, E124, para. 8; Case 002/01, Decision on Severance of Case 002/01 following Supreme Court Chamber Decision of 8 February 2013, 26 April 2013, E284, paras 10, 157-158.
[2184] Case 002/01, Notice of Trial Chamber's disposition of remaining Pre-Trial Motions and further guidance to the Civil Party Lead Co-Lawyers, 29 November 2011, E145, p. 2.

address their harms represented a minimum standard. Because they formed a consolidated group at the trial stage, the moral and collective reparations sought on their behalf could address the harm suffered by this limited group *and* could also collaterally benefit a large number of unrepresented victims who had suffered harm as a result of the commission of the crimes for which the Accused were convicted.[2185]

The Supreme Court Chamber held that the collective nature of the reparation scheme favoured "measures that benefit[ted] as many victims as possible". It observed that "the most inclusive measures of reparation should be privileged", considering that numerous victims (1) were not aware of the proceedings or of the opportunity to participate as Civil Parties, (2) were not in a financial, physical, psychological or logistic position to join the proceedings, (3) did not possess sufficient evidence to meet the required threshold of admissibility for their application, or (4) did not wish to be engaged for other reasons.[2186]

This inclusive interpretation of Internal Rule 23 *quinquies* (1)(b) was reflected, for instance, when the Trial Chamber endorsed projects aiming at the introduction of a national remembrance day and the construction of a memorial to provide "public acknowledgement of the harm suffered by the victims" and "assist in healing the wounds of all victims by diffusing their effects far beyond the individuals who were admitted as Civil Parties".[2187] Particular emphasis was placed on the ability of the various reparations measures to contribute to the objectives of "public awareness", "national healing", "national reconciliation", and to the promotion of a "culture of peace".[2188]

7.3.2.4. Implementation of reparation measures

In view of the practical difficulties in securing external funding for the realisation of reparations measures based on Internal Rule 23 *quinquies* (3)(b), the implementation of reparation projects could begin prior to the verdict.[2189] Subsequent recognition of projects whose implementation had already begun, or had even concluded prior to the verdict, was consistent "with the purposes for which Internal Rule 23 *quinquies* (3)(b) was adopted, which were to enable, with donor assistance and that of external collaborators, the realization of meaningful reparations

[2185] Case 002/01, Judgment, fn. 3210.
[2186] Case 001, Appeal Judgment, para. 659.
[2187] Case 002/01, Judgment, para. 1152. See also Case 001, Appeal Judgment, para. 683.
[2188] Case 001, Appeal Judgment, para. 683, 708; Case 002/02, Judgment, para. 4467; Case 002/01, Judgment, paras 1152, 1154, 1156, 1158.
[2189] Case 002/02, Judgment, paras 4418, 4420-4433; Case 002/01, Indication of Priority Projects for Implementation as Reparation (Internal Rule 80 *bis* (4)), 3 December 2012, E218/7, p. 1.

within a reasonable time".[2190]

[2190] Case 002/01, Indication of Priority Projects for Implementation as Reparation (Internal Rule 80 *bis* (4)), 3 December 2012, E218/7, p. 1. See also Case 002/02, Judgment, para. 4418.

8. Administration of justice

The ECCC's administration of justice regime was outlined in its constituent documents, as supplemented through codes of conduct and developed through case law. Specific standards governed principles of judicial and professional ethics; recusal and disqualification of Judges; interference with the administration of justice; and misconduct of counsel. Each is discussed separately below.

8.1. Principles of judicial ethics and responsibility

The legal framework and principles of ethics and responsibility for Judges were outlined in the UN-RGC Agreement and the ECCC Law, and developed further in the ECCC Code of Judicial Ethics.[2191] Judges had core obligations of independence,[2192] impartiality,[2193] diligence,[2194] integrity,[2195] and confidentiality;[2196] reflecting national and international norms.[2197] The Co-Prosecutors shared similar obligations of integrity, competence, and diligence.[2198]

Judicial independence was "of paramount importance, and […] integral to instilling and maintaining public confidence in the judiciary".[2199] The right to an independent and impartial tribunal "[was also] a key element of the fundamental right to a fair trial".[2200] Judges were prohibited from accepting or seeking instructions from any government or other source,[2201] or from exercising any political function.[2202] A Judge was required both to be impartial and avoid

[2191] ECCC Code of Judicial Ethics, adopted at the Plenary Session of the Extraordinary Chambers in the Courts of Cambodia on 31 January 2008, and amended at the Plenary Session of the Extraordinary Chambers in the Courts of Cambodia on 5 September 2008 ("ECCC Code of Judicial Ethics").
[2192] UN-RGC Agreement, articles 3(3), 5(3); ECCC Law, articles 10 (new), 25; ECCC Code of Judicial Ethics, article 1. See also Internal Rules, rules 14(1), 17(1).
[2193] UN-RGC Agreement, articles 3(3), 5(3); ECCC Law, articles 10 (new), 25; ECCC Code of Judicial Ethics, article 2.
[2194] ECCC Code of Judicial Ethics, article 5.
[2195] UN-RGC Agreement, articles 3(3), 5(3); ECCC Law, article 10 (new); ECCC Code of Judicial Ethics, article 3.
[2196] ECCC Code of Judicial Ethics, article 4.
[2197] Ibid, preamble. See also Case 002, Decision on Co-Lawyers' Urgent Application for Disqualification of Judge Ney Thol Pending the Appeal Against the Provisional Detention Order in the Case of Nuon Chea, 4 February 2008, C11/29, para. 30.
[2198] UN-RGC Agreement, article 6(2); ECCC Law, article 19. See also Internal Rules, rule 13(1).
[2199] Case 002, Decision on Ieng Sary's Application to Disqualify Judge Nil Nonn and Related Requests, 28 January 2011, E5/3, para. 11.
[2200] Ibid, para. 5.
[2201] UN-RGC Agreement, articles 3(3), 5(3); ECCC Law, article 10 (new); ECCC Code of Judicial Ethics, article 2. See also ECCC Code of Judicial Ethics, article 8. The ECCC Code also underlines that the Code itself is not "intended in any way to limit or restrict the judicial independence of the judges". See ECCC Code of Judicial Ethics, article 9(2).
[2202] ECCC Code of Judicial Ethics, article 8(2).

the appearance of partiality,[2203] and to conduct themselves with probity and integrity, enhancing public confidence in the judiciary.[2204]

The Judges had to have relevant legal experience to be selected.[2205] They were required to act diligently in the exercise of their duties,[2206] take reasonable steps to maintain their knowledge and skills, and perform their duties expeditiously.[2207] Judges also had to respect the confidentiality of information obtained in the discharge of their judicial duties and to maintain the secrecy of deliberations,[2208] and exercise their freedom of expression and association in a manner that was compatible with their office, and did not affect or appear to affect judicial independence or impartiality.[2209]

Like Judges, the Co-Prosecutors were required to be of high moral character and integrity,[2210] and to possess a high level of professional competence, including extensive experience in the conduct of investigations and prosecutions of criminal cases.[2211] The Co-Prosecutors also had to be independent in the performance of their functions and were prohibited from accepting or seeking instructions from a government or other source.[2212]

8.2. Recusal and disqualification

In response to an Accused's right to be tried by an independent and impartial tribunal,[2213] Judges could be recused or disqualified because of actual or apparent bias.[2214] The regime for recusal and disqualification was set out in Internal Rule 34 and was developed through case law, which relied heavily on jurisprudence from the *ad hoc* tribunals, and in some cases, the European Court of Human Rights ("ECtHR").[2215]

[2203] UN-RGC Agreement, article 3(3); ECCC Law, article 10 (new); ECCC Code of Judicial Ethics, article 2.
[2204] ECCC Code of Judicial Ethics, article 3.
[2205] ECCC Law, article 10 (new).
[2206] ECCC Code of Judicial Ethics, article 5.
[2207] Ibid.
[2208] Ibid, article 4.
[2209] Ibid, article 7.1.
[2210] UN-RGC Agreement, article 6(2); ECCC Law, article 19.
[2211] Ibid. See also Internal Rules, rule 13(1).
[2212] ECCC Law, article 19. See also Internal Rules, rule 13(1).
[2213] See *e.g.*, Case 002, Reasons for Decision on Applications for Disqualification, 30 January 2015, E314/12/1, para. 33.
[2214] Internal Rules, rule 34. See also Case 002, Decision on Ieng Thirith, Nuon Chea and Ieng Sary's Applications for Disqualification of Judges Nil Nonn, Silvia Cartwright, Ya Sokhan, Jean-Marc Lavergne and Thou Mony, 23 March 2011, E55/4, para. 11; Case 002, Decision on Ieng Thirith's Application to Disqualify Judge Som Sereyvuth for Lack of Independence, 3 June 2011, Doc. No. 1/4, para. 10.
[2215] Internal Rules, rule 34. For a list of decisions on disqualification motions before the ECCC, see *Guide to the ECCC (Volume I)*, annex 5(A).

8.2.1. Procedure for recusal or disqualification

Judges could recuse themselves, or a party could file an application for their disqualification.[2216] An application for disqualification had to clearly indicate the alleged grounds, provide supporting evidence, and be filed as soon as the party became aware of those grounds.[2217]

To satisfy the clarity requirement for admissibility purposes, "an application need only identify a ground(s) for disqualification with sufficient clarity to enable the relevant Chamber to conduct a proper review of the merits of the ground(s)".[2218] All supporting evidence relied upon by the applicant was required to be filed with the application for disqualification.[2219] Internal Rule 35 was "not the proper mechanism to procure evidence in support of a motion for disqualification".[2220] An impacted Judge was entitled to present written submissions to the chamber within ten days of receipt of the application.[2221]

The application had to be submitted within the timeframes outlined in Internal Rule 34(4):

- against a Co-Investigating Judge, before the Closing Order;
- against a Pre-Trial Chamber judge, before its final decision in a particular case;
- against a Trial Chamber Judge, concerning matters arising before the trial, at the latest at the initial hearing; or concerning matters arising during trial or of which the parties were unaware before the trial, before the final judgment in the case; or
- against a Supreme Court Chamber Judge, concerning matters arising before the appeal, at the beginning of the appellate proceedings; or concerning matters arising during the appellate proceedings or of which the parties were unaware before the start of the appeal, before the final decision on the appeal.

[2216] Internal Rules, rules 34(1)-(2).
[2217] Internal Rules, rule 34(3).
[2218] Case 002, Decision on Application for Disqualification of Judge You Bunleng, 10 September 2010, Doc. No. 8, para. 26.
[2219] Internal Rules, rule 34(3). See also Case 002, Decision on Ieng Sary's Application to Disqualify Co-Investigating Judge Marcel Lemonde, 9 December 2009, Doc. No. 7, para. 14. A party could become aware of (what became) "supporting evidence" before they became aware of the grounds for disqualification: in such circumstances, the party must present the evidence as soon as they became aware of the relevance. See Case 002, Decision on Nuon Chea's Application for Disqualification of Judge Marcel Lemonde, 23 March 2010, Doc. No. 4, para. 13.
[2220] Case 002, Decision on Motions for Disqualification of Judge Silvia Cartwright, 2 December 2011, E137/5, para. 14.
[2221] Internal Rules, rule 34(7).

The application also had to be submitted to the relevant chamber in which the Judge was sitting, or the Pre-Trial Chamber, if against a Co-Investigating Judge.[2222] A sitting Judge would be replaced by a Reserve Judge in order to hear the application.[2223] A Judge was permitted to continue participating in judicial proceedings pending a decision but could decide to step down voluntarily.[2224]

The modalities of determining applications were not otherwise addressed in Internal Rule 34. According to the Trial Chamber, Internal Rule 34 provided "a number of procedural possibilities for determining an application for disqualification".[2225] These included determining the matter on the written submissions, holding a public hearing, or calling for written *amicus curiae* briefs.[2226] The Pre-Trial Chamber separately considered that Internal Rule 34 made no provision for an oral hearing or a written reply.[2227] Appeals against decisions on applications for disqualification were not permitted.[2228]

8.2.2. Standard for recusal or disqualification

The standard for recusal and disqualification was that of actual or apparent bias.[2229] Relying on the International Criminal Tribunal for the former Yugoslavia ("ICTY") Appeals Chamber's ruling in *Furundžija*, the ECCC held that appearance of bias[2230] was established if: (a) a Judge was a party to the case, or had a financial or proprietary interest in the outcome of the case, or if the Judge's decision would lead to the promotion of a cause in which he or she is involved; or (b) the circumstances would lead a reasonable observer, properly informed, to reasonably

[2222] Internal Rules, rule 34(5).
[2223] Internal Rules, rule 34(6).
[2224] Internal Rules, rule 34(5).
[2225] Case 002, Decision on Co-Lawyers' Urgent Application for Disqualification of Judge Ney Thol Pending the Appeal Against the Provisional Detention Order in the Case of Nuon Chea, 4 February 2008, C11/29, para. 8.
[2226] Ibid. Internal Rule 34 does not make explicit reference to these procedural routes.
[2227] Case 002, Decision on Ieng Sary's Application to Disqualify Co-Investigating Judge Marcel Lemonde, 9 December 2009, Doc. No. 7, para. 14.
[2228] Internal Rules, rule 34(8). See also Case 002, Decision on Ieng Sary's Appeal against the Trial Chamber's Decision on Motions for Disqualification of Judge Sylvia Cartwright, 17 April 2012, E137/5/1/3, para. 11.
[2229] Internal Rules, rule 34(2). See also Case 002, Reasons for Decision on Applications for Disqualification, 30 January 2015, E314/12/1, para. 33. See also Case 002, Decision on Motions for Disqualification of Judge Silvia Cartwright, 2 December 2011, E137/5, para. 13; Case 002, Decision on Ieng Thirith, Nuon Chea and Ieng Sary's Applications for Disqualification of Judges Nil Nonn, Silvia Cartwright, Ya Sokhan, Jean-Marc Lavergne and Thou Mony, 23 March 2011, E55/4, paras 10-11; Case 002, Decision on Application for Disqualification of Judge You Bunleng, 10 September 2010, Doc. No. 8, para. 34.
[2230] Rule 34 contains language which maps to case law on appearance of bias and does not directly encompass actual bias, similarly to the *ad hoc* tribunals. *Cf* Case 002, Decision on Ieng Sary's Application to Disqualify Co-Investigating Judge Marcel Lemonde, 9 December 2009, Doc. No. 7, para. 16.

apprehend bias.[2231] A "reasonable observer" for these purposes was an informed person, knowing all relevant circumstances including the traditions and duties of integrity and impartiality.[2232]

In an application for disqualification, "the burden of proof [lay] entirely with the applicant".[2233] The starting point for determination of an allegation of partiality was a presumption of impartiality, deriving from the judicial oath and qualifications for office.[2234] That high threshold was required "because it is as much of a threat to the interests of the impartial and fair administration of justice for Judges to be disqualified on the basis of unfounded and unsupported allegations of apparent bias, as the real appearance of bias itself".[2235]

An application that was speculative or based merely on suspicion was insufficient. While real or apparent judicial bias undermined confidence in the administration of justice, so too did disqualifying Judges based on unfounded allegations of bias. In this regard, the Trial Chamber referred to the fact that "[r]epetitive or frivolous disqualification motions" before other international tribunals had resulted in sanction or threat of sanction.[2236]

8.2.3. Statements made by Judges

In response to the principle that Judges must exercise their freedom of expression and

[2231] Case 002, Decision on Ieng Thirith, Nuon Chea and Ieng Sary's Applications for Disqualification of Judges Nil Nonn, Silvia Cartwright, Ya Sokhan, Jean-Marc Lavergne and Thou Mony, 23 March 2011, E55/4, paras 11-12. The articulation of this test was drawn from ICTY case law and did not follow Internal Rule 34(2).
[2232] Case 002, Decision on Ieng Thirith's Application to Disqualify Judge Som Sereyvuth for Lack of Independence, 3 June 2011, Doc. No. 1/4, para. 10, upholding the decision in Case 002, Decision on Ieng Thirith, Nuon Chea and Ieng Sary's Applications for Disqualification of Judges Nil Nonn, Silvia Cartwright, Ya Sokhan, Jean-Marc Lavergne and Thou Mony, 23 March 2011, E55/4, paras 11-12. See also Case 002, Decision on Co-Lawyers' Urgent Application for Disqualification of Judge Ney Thol Pending the Appeal Against the Provisional Detention Order in the Case of Nuon Chea, 4 February 2008, C11/29, para. 21.
[2233] Case 002, Decision on Ieng Sary's Application to Disqualify Co-Investigating Judge Marcel Lemonde, 9 December 2009, Doc. No. 7, para. 15. See also Case 002, Decision on Application for Disqualification of Judge You Bunleng, 10 September 2010, Doc. No. 8, para. 34; Case 002, Decision on Co-Lawyers' Urgent Application for Disqualification of Judge Ney Thol Pending the Appeal Against the Provisional Detention Order in the Case of Nuon Chea, 4 February 2008, C11/29, para. 19.
[2234] Case 002, Decision on Ieng Thirith, Nuon Chea and Ieng Sary's Applications for Disqualification of Judges Nil Nonn, Silvia Cartwright, Ya Sokhan, Jean-Marc Lavergne and Thou Mony, 23 March 2011, E55/4, para. 12, upholding the decision in Case 002, Decision on Co-Lawyers' Urgent Application for Disqualification of Judge Ney Thol Pending the Appeal Against the Provisional Detention Order in the Case of Nuon Chea, 4 February 2008, C11/29, paras 15-17. See also Case 002, Decision on Ieng Sary's Application to Disqualify Co-Investigating Judge Marcel Lemonde, 9 December 2009, Doc. No. 7, para. 15.
[2235] Case 002, Reasons for Decision on Applications for Disqualification, 30 January 2015, E314/12/1, para. 35. See also Case 002, Decision on Motions for Disqualification of Judge Silvia Cartwright, 2 December 2011, E137/5, para. 15; Case 002, Decision on Ieng Sary's Request for Appropriate Measures Concerning Certain Statements by Prime Minister Challenging the Independence of Pre-Trial Judges Katinka Lahuis and Rowan Downing, 30 November 2009, Doc. No. 5, para. 7.
[2236] Case 002, Decision on Motions for Disqualification of Judge Silvia Cartwright, 2 December 2011, E137/5, paras 14-15.

association in a way that did not affect (or appear to affect) judicial independence or impartiality,[2237] several applications were made for recusal or disqualification on the grounds of statements made by Judges.[2238] None were successful.

The Pre-Trial Chamber dismissed a motion to disqualify the International Co-Investigating Judge due to words he allegedly uttered at a staff meeting. The Pre-Trial Chamber considered that the evidence regarding the alleged incident was insufficient, taking account of the forum of the meeting (*i.e.*, private rather than public), that the Co-Investigating Judge had spoken in English rather than in French (*i.e.*, not his working language), and that it was possible that the words had been said in jest or as a "preference" rather than an explicit direction.[2239]

The Trial Chamber dismissed a motion to disqualify a Judge for words attributed to her in the press, as well as certain statements made during the trial proceedings. The Trial Chamber considered ECtHR case law which held that remarks made by a Judge to the press did not, unless demonstrating an unfavourable view of the applicant's case, demonstrate a lack of impartiality. In this case, the Trial Chamber found that the press statements did not suggest an unfavourable view of the Accused. In relation to in-court statements, the Trial Chamber considered that these were "an appropriate exercise of a […] judge's discretion to ensure the proper conduct of proceedings". The totality of the evidence adduced was therefore "inadequate to displace the presumption of [the] Judge['s] impartiality", and the application was rejected.[2240]

8.2.4. Alleged corruption and fitness to serve

Requests for disqualification of Judges based on alleged corruption, unfitness to serve and lack of impartiality were unsuccessful because no demonstrable impact was demonstrated. When concerns about a Judge's fitness to serve arose, the Trial Chamber considered that the issue should have been addressed through domestic mechanisms intended to maintain judicial integrity within the Cambodian judiciary.[2241]

[2237] Case 002, Decision on Ieng Sary's Application to Disqualify Co-Investigating Judge Marcel Lemonde, 9 December 2009, Doc. No. 7, paras 18-19.
[2238] See *e.g.*, ibid; Case 002, Decision on Application for Disqualification of Judge Sylvia Cartwright, 9 March 2012, E171/2.
[2239] Case 002, Decision on Ieng Sary's Application to Disqualify Co-Investigating Judge Marcel Lemonde, 9 December 2009, Doc. No. 7, paras 5, 20-26.
[2240] Case 002, Decision on Application for Disqualification of Judge Sylvia Cartwright, 9 March 2012, E171/2, paras 14, 17-18, 20.
[2241] Case 002, Decision on Ieng Sary's Application to Disqualify Judge Nil Nonn and Related Requests, 28 January 2010, E5/3, para. 16.

8.2.5. Alleged lack of independence and impartiality

Several applications for disqualification were based on judicial involvement in Cambodian political matters and alleged compromise to independence and impartiality.[2242] These applications did not meet the threshold for disqualification, with the ECCC affirming the presumption that "[w]hen a judge takes [their] oath of office it is assumed that [they] can and will disabuse their minds of any irrelevant personal beliefs or predispositions".[2243]

8.2.6. *Ex parte* communications

While emphasising the importance of judicial independence and impartiality, the ECCC Code of Judicial Ethics did not contain any specific provision regarding *ex parte* communications. Unless communication between a Co-Prosecutor and a Judge related to the substance of ongoing proceedings, *ex parte* communications did not demonstrate bias or an appearance of bias.[2244] Nonetheless, the Supreme Court Chamber found that such meetings could create the appearance of asymmetrical access, and recommended inclusion of the Defence Support Section or members of defence teams.[2245]

In Case 002, the Trial Chamber reviewed allegations of bias on the part of a Judge following her participation in dialogue with the International Co-Prosecutor and ECCC Deputy Director of Administration. The Trial Chamber considered that at other internationalised tribunals, regular meetings between the President, Prosecution, and Registrar were commonplace. Overall, the Trial Chamber concluded that the Judge's participation in these meetings would not create a reasonable apprehension of bias and dismissed the requests for disqualification.[2246]

The Supreme Court Chamber, considering the same facts on appeal, found that an *ex parte* meeting at which nothing inappropriate was alleged to have been discussed did not amount to

[2242] See *e.g.*, Case 002, Decision on Co-Lawyers' Urgent Application for Disqualification of Judge Ney Thol Pending the Appeal Against the Provisional Detention Order in the Case of Nuon Chea, 4 February 2008, C11/29; Case 002, Decision on Application for Disqualification of Judge You Bunleng, 10 September 2010, Doc. No. 8; Case 002, Decision on Ieng Thirith's Application to Disqualify Judge Som Sereyvuth for Lack of Independence, 3 June 2011, Doc. No. 1/4.
[2243] Case 002, Decision on Co-Lawyers' Urgent Application for Disqualification of Judge Ney Thol Pending the Appeal Against the Provisional Detention Order in the Case of Nuon Chea, 4 February 2008, C11/29, para. 28.
[2244] Case 002, Decision on Motions for Disqualification of Judge Silvia Cartwright, 2 December 2011, E137/5, paras 18, 22; Case 002, Decision on Ieng Sary's Appeal against the Trial Chamber's Decision on Motions for Disqualification of Judge Sylvia Cartwright, 17 April 2012, E137/5/1/3, para. 23.
[2245] Case 002, Decision on Ieng Sary's Appeal against the Trial Chamber's Decision on Motions for Disqualification of Judge Sylvia Cartwright, 17 April 2012, E137/5/1/3, para. 24.
[2246] Case 002, Decision on Motions for Disqualification of Judge Silvia Cartwright, 2 December 2011, E137/5, paras 15, 22.

a wilful and knowing interference with the administration of justice. Nonetheless, the Supreme Court Chamber considered that such meetings could "create the appearance of asymmetrical access enjoyed by the prosecutor to the trial judge", and as such recommended that such meetings include participation by the Defence Support Section or members of defence teams.[2247]

8.2.7. Findings in prior judicial proceedings

Defence counsel filed disqualification applications in Case 002, arguing that the participation of the same Judges in earlier cases demonstrated actual or apparent bias.[2248] Judicial rulings established a stringent standard for establishing bias, relying on ECtHR case law.

For allegations of bias based on previous judicial rulings, it was insufficient to allege an error of law on which there may be more than one possible interpretation. An applicant was also not permitted "to merely allege that the decisions were erroneous" or to challenge the assessment of the relevant facts. A disagreement with the substance of the decision was a matter for appeal, not an application for disqualification.[2249] An application based on alleged improprieties in another case was likely to fail unless there was evidence that it would prevent the Judges from being impartial in the present case.[2250] A finding of bias in a previous case did not by itself require disqualification from other unrelated cases.[2251]

The existence of judicial benches of the same composition, hearing successive cases, did not establish a basis for disqualification at the ECCC.[2252] The nature of the jurisdiction exercised by specialised international criminal tribunals was such that it often resulted in multiple trials

[2247] Case 002, Decision on Ieng Sary's Appeal against the Trial Chamber's Decision on Motions for Disqualification of Judge Sylvia Cartwright, 17 April 2012, E137/5/1/3, paras 23-24.
[2248] Case 002, Reasons for Decision on Applications for Disqualification, 30 January 2015, E314/12/1; Case 002, Decision on Ieng Thirith, Nuon Chea and Ieng Sary's Applications for Disqualification of Judges Nil Nonn, Silvia Cartwright, Ya Sokhan, Jean-Marc Lavergne and Thou Mony, 23 March 2011, E55/4.
[2249] Case 002, Reasons for Decision on Applications for Disqualification, 30 January 2015, E314/12/1, para. 36. See also Case 002, Decision on Ieng Thirith, Nuon Chea and Ieng Sary's Applications for Disqualification of Judges Nil Nonn, Silvia Cartwright, Ya Sokhan, Jean-Marc Lavergne and Thou Mony, 23 March 2011, E55/4, para. 13.
[2250] Case 002, Decision on Ieng Sary's Application to Disqualify Judge Nil Nonn and Related Requests, 28 January 2010, E5/3, para. 7; Case 002, Decision on Co-Lawyers' Urgent Application for Disqualification of Judge Ney Thol Pending the Appeal Against the Provisional Detention Order in the Case of Nuon Chea, 4 February 2008, C11/29, para. 31.
[2251] Case 002, Decision on Ieng Sary's Application to Disqualify Judge Nil Nonn and Related Requests, 28 January 2010, E5/3, para. 7.
[2252] Case 002, Decision on Ieng Thirith, Nuon Chea and Ieng Sary's Applications for Disqualification of Judges Nil Nonn, Silvia Cartwright, Ya Sokhan, Jean-Marc Lavergne and Thou Mony, 23 March 2011, E55/4, para. 20.

stemming from the same set of facts.[2253]

A prior ruling on an individual's culpability which "actually prejudged" the guilt of the Accused could, however, establish a reasonable apprehension of bias. Considering the case law of the ICTR and ECtHR, the Trial Chamber concluded "actually prejudged" meant having considered "all the relevant criteria necessary to constitute a criminal offence and […] whether the applicant was guilty, beyond reasonable doubt, of having committed such an offence".[2254] The Trial Chamber considered defence arguments that findings made by the same Chamber in Cases 001 and 002/01 would cause a reasonable observer to doubt the ability of the same panel of Judges to fairly re-evaluate those issues in Cases 002/01 and 002/02 respectively. This standard was not met in either case.[2255]

8.2.8. Alleged bias of staff members

The disqualification regime did not apply to staff members. In Case 002, Ieng Sary sought disqualification of staff members of the Office of the Co-Investigating Judges, "because the judicial obligation of impartiality must equally apply to those people who work closely with the Co-Investigating Judges and carry out judicial functions on their behalf". The Pre-Trial Chamber held that the grounds of admissibility under Internal Rule 34 clearly referred only to Judges. Staff members were not included, and the role and functions of investigators or legal officers were distinct from those of the Co-Investigating Judges. The Pre-Trial Chamber found the application to be inadmissible.[2256]

8.3. Alleged interference with the administration of justice

Internal Rule 35 set out the regime governing interference with the administration of justice at the ECCC.[2257] Following the ICTY Appeals Chamber, the ECCC established that the purpose of prohibiting this conduct was "to ensure that the exercise of a court's jurisdiction is not

[2253] Case 002, Decision on Ieng Thirith, Nuon Chea and Ieng Sary's Applications for Disqualification of Judges Nil Nonn, Silvia Cartwright, Ya Sokhan, Jean-Marc Lavergne and Thou Mony, 23 March 2011, E55/4, para. 20. *C.f.* Case 002, Reasons for Decision on Applications for Disqualification, 30 January 2015, E314/12/1, Partially Dissenting Opinion of Judge Rowan Downing, para. 17.
[2254] Case 002, Decision on Ieng Thirith, Nuon Chea and Ieng Sary's Applications for Disqualification of Judges Nil Nonn, Silvia Cartwright, Ya Sokhan, Jean-Marc Lavergne and Thou Mony, 23 March 2011, E55/4, para. 21.
[2255] Case 002, Reasons for Decision on Applications for Disqualification, 30 January 2015, E314/12/1, para. 92; Case 002, Decision on Ieng Thirith, Nuon Chea and Ieng Sary's Applications for Disqualification of Judges Nil Nonn, Silvia Cartwright, Ya Sokhan, Jean-Marc Lavergne and Thou Mony, 23 March 2011, E55/4, paras 22-25.
[2256] Case 002, Decision on the Charged Person's Application for Disqualification of Drs. Stephen Heder and David Boyle, 22 September 2009, Doc. No. 3, paras 7, 14, 19-20, 22.
[2257] Internal Rules, rule 35.

frustrated and that its basic judicial functions are safeguarded".[2258] The ECCC considered ICTY jurisprudence in interpreting the provisions regarding the interference with the administration of justice, given the demonstrable similarities between the two regimes.[2259]

The Supreme Court Chamber distinguished Internal Rule 35 – a general provision establishing categories of prohibited conduct – with Internal Rule 34, which was "a specialized procedure intended to safeguard the right to a fair trial and the integrity of the judicial role". It held that the relevant question under Internal Rule 35 was "whether an offence against the administration of justice [had] been committed".[2260]

The applicability of Internal Rule 35 to Judges was highly circumscribed. The Pre-Trial Chamber refused to initiate an investigation under Internal Rule 35 into allegations that a judicial decision was improperly influenced, holding that the ECCC chambers had no jurisdiction to determine whether a "judicial action" amounted to interference with justice under Internal Rule 35. It also held that there was no prescribed jurisdiction for any of the ECCC chambers to deal with disciplinary matters in respect of any of the ECCC Judges beyond the limits of Internal Rule 34. The Supreme Court Chamber considered, however, that the Judges were "at least in principle within the jurisdiction of Internal Rule 35, provided that [their] alleged conduct rises to the level of an interference with the administration of justice within the meaning of that rule".[2261]

8.3.1. Procedural requirements of applications under Internal Rule 35

A person subject to proceedings under Internal Rule 35 was entitled to legal assistance, and decisions under Internal Rule 35 were open to appeal (in contrast to those under Internal Rule 34).[2262]

Internal Rule 35 did not specify a timeframe for applications, but in responding to an allegation of interference or misconduct in relation to a potential witness in Case 002, the Trial Chamber considered that the defence had "failed to raise this allegation of interference with the

[2258] Case 002, Decision on Rule 35 Applications for Summary Action, 11 May 2012, E176/2, para. 21.
[2259] Case 002 Second Decision on Nuon Chea's and Ieng Sary's Appeal Against OCIJ Order on Requests to Summons Witnesses, 9 September 2010, D314/1/12, para. 32.
[2260] Case 002, Decision on Ieng Sary's Appeal against the Trial Chamber's Decision on Motions for Disqualification of Judge Sylvia Cartwright, 17 April 2012, E137/5/1/3, para. 15.
[2261] Ibid, paras 11-17 (citing Case 002, Decision on Ieng Sary's Appeal Against the Trial Chamber's Order Requiring His Presence in Court, 13 January 2012, E130/4/3).
[2262] Internal Rules, rules 35(3), 35(6). See also Internal Rules, rule 34(8).

administration of justice until more than two years later, reflecting a lack of due diligence and casting doubt on the urgency of the request". Generally, an investigation pursuant to Internal Rule 35 could only be "meaningfully […] conducted by the judicial body seised of the case".[2263] The Supreme Court Chamber agreed with the Trial Chamber's conclusion to this effect, but indicated that in certain circumstances, a judicial organ seised of a case might have powers in relation to prior alleged interference, because "any judicial organ seised of a case […] cannot but withhold a residual power to guarantee that the proceedings comport with the international standards of justice, regardless of when the alleged instances of interference occurred".[2264]

8.3.2. Sanctionable conduct

Sanctionable conduct was behaviour that attempted "to frustrate the mandate and functioning of the Court". The conduct need not have actually interfered with proceedings, if it "undermine[d] the Court's legitimacy with the parties and the general public".[2265]

Internal Rule 35 articulated "an array of conduct which [could] qualify as an interference with the administration of justice" or "an effort to frustrate the mandate and functioning of the Court".[2266] Sub-paragraphs (a), (b), and (e) concerned non-compliance with an order of the ECCC. Sub-paragraphs (c) and (d) addressed interference with evidence to be given in proceedings before the ECCC. Sub-paragraph (f) governed assistance to an Accused for purposes of evading the ECCC's jurisdiction.[2267] Rule 35(1) did not, however, "purport to define proscribed conduct exhaustively"; meaning other behaviour analogous to the listed behaviours in Internal Rule 35 could also be within the scope of the regime.[2268]

The Supreme Court Chamber confirmed that sanctionable conduct could, but need not, amount to a criminal act, and in contrast to the international tribunals, Internal Rule 35 was not an autonomous source of criminalisation.[2269] In relation to criminal acts, Cambodian criminal law

[2263] Case 002, Decision on Nuon Chea Motions Regarding Fairness of Judicial Investigation, 9 September 2011, E116, paras 21, 23.
[2264] Case 002, Decision on Immediate Appeal by Nuon Chea Against the Trial Chamber's Decision on Fairness of Judicial Investigation, 27 April 2012, E116/1/7, para. 31.
[2265] Case 002, Decision on Nuon Chea's Appeal Against the Trial Chamber's Decision on Rule 35 Applications for Summary Action, 14 September 2012, E176/2/1/4, paras 34-35.
[2266] Ibid.
[2267] Internal Rules, rule 35(1). See also Case 002, Decision on Nuon Chea's Appeal Against the Trial Chamber's Decision on Rule 35 Applications for Summary Action, 14 September 2012, E176/2/1/4, para. 34.
[2268] Case 002, Decision on Nuon Chea's Appeal Against the Trial Chamber's Decision on Rule 35 Applications for Summary Action, 14 September 2012, E176/2/1/4, paras 33-34.
[2269] Ibid, para. 32.

applied, while regarding non-criminal offences, ECCC Judges had responsibility to determine which non-criminal offences were included.[2270]

Judicial rulings expanded on behaviours within the scope of Rule 35. The Pre-Trial Chamber relied on the ICTY Appeals Chamber's case law regarding witness interference, which established that a threat was "a communicated intent to inflict harm or damage of some kind to a witness and/or the witness's property, or to a third person and/or his property, so as to influence or overcome the will of the witness to whom the threat is addressed". Intimidation, for these purposes, meant "acts or culpable omissions likely to constitute direct, indirect or potential threats to a witness, which may interfere with or influence the witness's testimony". Otherwise interfering with a witness was an "open-ended provision which encompasses acts or omissions, other than threatening, intimidating, causing injury or offering a bribe, capable of and likely to deter a witness from giving full and truthful testimony or in any other way influence the nature of the witness's evidence".[2271] The Supreme Court Chamber confirmed that disclosure of classified documents was an offence which could lead to a sanction in accordance with Cambodian law and/or a finding of misconduct against a lawyer.[2272]

Internal Rule 35 also "clearly require[d] that outside actors refrain from seeking to influence a court's judges or from acting in a way that could be perceived as an attempt to do so". The Trial Chamber considered media comments made by the Prime Minister about Nuon Chea were incompatible with presumption of innocence, and "risk[ed] being interpreted as an attempt to improperly influence the judges in charge of the case".[2273] The Supreme Court Chamber agreed that actions undermining the independence and impartiality of the Judges amounted to prohibited interference under Internal Rule 35(1). Damaging the ECCC's appearance of independence and impartiality was interference as such, rather than merely the appearance of interference.[2274] Having concluded that the statements posed a threat to Nuon Chea's presumption of innocence, the Trial Chamber chose to deliver "an unambiguous public reminder of the right of the Accused to be presumed innocent and of the need for officials to

[2270] Ibid, paras 32-33.
[2271] Case 002 Second Decision on Nuon Chea's and Ieng Sary's Appeal Against OCIJ Order on Requests to Summons Witnesses, 9 September 2010, D314/1/12, para. 33.
[2272] Case 002, Decision on Immediate Appeal by Nuon Chea Against the Trial Chamber's Decision on Fairness of Judicial Investigation, 27 April 2012, E116/1/7, para. 36.
[2273] Case 002, Decision on Rule 35 Applications for Summary Action, 11 May 2012, E176/2, paras 21, 29.
[2274] Case 002, Decision on Nuon Chea's Appeal Against the Trial Chamber's Decision on Rule 35 Applications for Summary Action, 14 September 2012, E176/2/1/4, para. 36.

avoid comments incompatible with this presumption".[2275]

Defence and Civil Party Lawyers could commit a sanctionable act (and if so, could be liable to misconduct proceedings under Internal Rule 38).[2276] Sanctionable conduct committed by a lawyer included "causing disorder in the courtroom", and "undermining the logistical functioning of the court".[2277] The Supreme Court Chamber also determined that misbehaviour by a Judge was, at least in principle, within the ambit of Rule 35.[2278]

8.3.3. *Mens rea* requirement

Under Rule 35(1), the sanctionable conduct was required to be "knowing and wilful";[2279] a standard which was developed through the case law.

According to the Pre-Trial Chamber, the *mens rea* standard required that "the accused acted willingly and with the knowledge that his conduct was likely to deter or influence a witness or potential witness".[2280] The Trial Chamber read Internal Rule 35 with reference to the ICTY's interference with administration of justice regime, which required "specific intent" to interfere.[2281] The Supreme Court Chamber clarified that the standard applied differently depending on the type of offence at issue. Criminal offences – and their *mens rea* – were defined under Cambodian law. As for non-criminal offences, the intent element was to be defined "to encompass culpability as is appropriate to effecting the protection that the proscription seeks to establish". Specific intent – as established by the ICTY's trial chambers for the criminal offence of contempt of court – was considered too strict for administrative offences.[2282]

[2275] Case 002, Decision on Rule 35 Applications for Summary Action, 11 May 2012, E176/2, para. 31.
[2276] Internal Rules, rule 35(5).
[2277] Case 002, Decision on Nuon Chea's Appeal Against the Trial Chamber's Decision on Rule 35 Applications for Summary Action, 14 September 2012, E176/2/1/4, para. 35.
[2278] Case 002, Decision on Ieng Sary's Appeal against the Trial Chamber's Decision on Motions for Disqualification of Judge Sylvia Cartwright, 17 April 2012, E137/5/1/3, para. 14. See also Case 002, Decision on Nuon Chea's Appeal Against the Trial Chamber's Decision on Rule 35 Applications for Summary Action, 14 September 2012, E176/2/1/4, para. 36. The Pre-Trial Chamber had previously declined to initiate an investigation under Internal Rule 35 into allegations that a judicial decision was improperly influenced, holding that ECCC chambers had no jurisdiction to consider whether a judicial action amounted to an interference with justice under Internal Rule 35.
[2279] Internal Rules, rule 35(1). See also Case 002, Decision on Nuon Chea's Appeal Against the Trial Chamber's Decision on Rule 35 Applications for Summary Action, 14 September 2012, E176/2/1/4, para. 37.
[2280] Case 002 Second Decision on Nuon Chea's and Ieng Sary's Appeal Against OCIJ Order on Requests to Summons Witnesses, 9 September 2010, D314/1/12, para. 35.
[2281] Case 002, Decision on Rule 35 Applications for Summary Action, 11 May 2012, E176/2, para. 22.
[2282] Case 002, Decision on Nuon Chea's Appeal Against the Trial Chamber's Decision on Rule 35 Applications for Summary Action, 14 September 2012, E176/2/1/4, para. 38.

8.3.4. Avenues for addressing potentially sanctionable conduct

Where the Co-Investigating Judges or chambers had reason to believe that a person may have committed any of the acts set out in Rule 35(1), they could: (1) deal with the matter summarily; (2) conduct further investigations to ascertain whether there are sufficient grounds for instigating proceedings; or (3) refer the matter to the Cambodian authorities or the United Nations.[2283] Actions under Rule 35 were discretionary.[2284]

The summary procedure under Internal Rule 35(2)(a) was particularly suited to acts which were "notorious because of their public nature, recorded on the Court's video". Where criminal interference was at issue, the most likely course of action was a referral to the Cambodian authorities. Given the limited time and resources, the ECCC was "unlikely to engage in a finding of criminal liability and mete out criminal punishment".[2285]

8.3.5. Standard of proof for investigations and sanctions

According to Internal Rule 35(2), Judges had to have "reason to believe" that sanctionable conduct had taken place before proceeding to one of the actions listed in Internal Rule 35(2) (summary decision, referral, or further investigation). The "further investigation" avenue required there to be "sufficient grounds" for proceedings.[2286] Standards of proof for investigations and sanctions were not otherwise defined in Internal Rule 35 and were addressed by the Pre-Trial Chamber, the Trial Chamber, and Supreme Court Chamber.[2287]

Internal Rule 35(2) provided three courses of action when the Co-Investigating Judges or a chamber had *reason to believe* that a person may have committed any of the acts listed in Internal Rule 35(1). The Pre-Trial Chamber considered that this was "an extremely low threshold and merely invoke[d] inquiry by the [Co-Investigating Judges] or a Chamber". There was no requirement to have determined the merits of an allegation or suspicion of interference, although the Co-Investigating Judges or chamber must have had a material basis or reason that

[2283] Internal Rules, rule 35(2).
[2284] Case 002, Decision on Nuon Chea's Appeal Against the Trial Chamber's Decision on Rule 35 Applications for Summary Action, 14 September 2012, E176/2/1/4, para. 39.
[2285] Ibid, paras 39, 41.
[2286] Internal Rules, rule 35(2)(b).
[2287] Case 002, Decision on Nuon Chea's Appeal Against the Trial Chamber's Decision on Rule 35 Applications for Summary Action, 14 September 2012, E176/2/1/4; Case 002, Decision on Rule 35 Applications for Summary Action, 11 May 2012, E176/2; Case 002, Decision on Immediate Appeal by Nuon Chea Against the Trial Chamber's Decision on Fairness of Judicial Investigation, 27 April 2012, E116/1/7; Case 002 Second Decision on Nuon Chea's and Ieng Sary's Appeal Against OCIJ Order on Requests to Summons Witnesses, 9 September 2010, D314/1/12.

was the foundation of their belief (which could have been subjective).[2288]

In terms of the procedural avenues available after such suspicion had been established, only one of them – conducting further investigations to ascertain whether there were *sufficient grounds* for instigating proceedings – alluded to a standard of proof.[2289] In line with the ICTY Appeals Chamber, the Pre-Trial Chamber considered that this required consideration of whether the evidence amounted to a *prima facie* case of interference with administration of justice, and not a final determination on whether the alleged conduct had in fact occurred.[2290]

A more controversial question was the standard to be applied when dealing with a matter summarily, *i.e.*, when the ECCC chose to impose sanctions itself. The Pre-Trial Chamber considered that the *beyond reasonable doubt* standard of proof had to be satisfied before sanctions could be imposed on an individual for a violation of Internal Rule 35(1), because this was "the universally accepted standard of proof in criminal matters".[2291]

The Supreme Court Chamber – which, as outlined previously, had clarified that conduct included both criminal and administrative offences – established that determination of liability had to "comport with the fundamental requirement of fairness".[2292] In relation to criminal offences, this required a standard of proof higher than "reasons to believe".[2293] The burden of proof for non-criminal offences varied from "a balance of probabilities" to "beyond reasonable doubt" based on the measure or sanction available.[2294]

In reaching this decision, the Supreme Court Chamber diverged from the Trial Chamber. In considering alleged public statements on the guilt of Nuon Chea, the Trial Chamber had concluded that while the evidence was "insufficient to warrant a criminal enquiry and [was] speculative", the statements did "satisfy the lower standard for intervention" in relation to non-

[2288] Case 002, Second Decision on Nuon Chea's and Ieng Sary's Appeal Against OCIJ Order on Requests to Summons Witnesses, 9 September 2010, D314/1/12, paras 36-37.
[2289] Ibid, paras 36, 38.
[2290] Ibid, para. 38. The Pre-Trial Chamber read this standard as applicable to all three avenues under Internal Rule 35(2).
[2291] Ibid, paras 36, 39.
[2292] Case 002, Decision on Nuon Chea's Appeal Against the Trial Chamber's Decision on Rule 35 Applications for Summary Action, 14 September 2012, E176/2/1/4, para. 42.
[2293] Ibid, para. 39. See also Case 002, Second Decision on Nuon Chea's and Ieng Sary's Appeal against OCIJ Order on Requests to Summons Witnesses, D314/1/12, para. 36.
[2294] Case 002, Decision on Nuon Chea's Appeal Against the Trial Chamber's Decision on Rule 35 Applications for Summary Action, 14 September 2012, E176/2/1/4, para. 39. See also Case 002, Decision on Immediate Appeal by Nuon Chea Against the Trial Chamber's Decision on Fairness of Judicial Investigation, 27 April 2012, E116/1/7, para. 36 (where the Supreme Court Chamber confirmed that disclosure of classified documents, "if established beyond reasonable doubt", was an offence which could lead to a sanction in accordance with Cambodian law and/or a finding of misconduct against a lawyer).

criminal cases, and proceeded to identify sanctionable conduct.[2295] The Supreme Court Chamber, by contrast, considered that the weight of evidence should not be considered as part of the assessment of whether the offence should be referred: dealing with a matter summarily was a simplified way of making a determination, and "[did] not authorise unfettered determinations based upon a low level of proof".[2296]

8.3.6. Applicable sanctions

Internal Rule 35(4) provided that Cambodian law applied in respect of "sanctions imposed" in respect of the behaviours outlined in Internal Rule 35(1) but did not otherwise define the sanctions available.

The Supreme Court Chamber clarified that it was permitted to impose any response necessary to ensure the integrity of proceedings, whether of punitive or non-punitive nature, in addition to the criminal sanctions provided for by Cambodian law when a crime was committed.[2297] Permissible sanctions included "an admonition", a "notice to self-regulatory bodies", the "publication of the outcome of proceedings", and "a limited administrative fine".[2298] All sanctions were required to comport with the principles of necessity and proportionality.[2299]

8.4. Lawyers' ethical duties and professional responsibilities

Defence counsel and Civil Party Lead Co-Lawyers had ethical duties and professional responsibilities, set out in the Internal Rules[2300] and in the Bar Association of the Kingdom of Cambodia ("BAKC") Code of Ethics.[2301]

[2295] Case 002, Decision on Rule 35 Applications for Summary Action, 11 May 2012, E176/2, para. 30.
[2296] Case 002, Decision on Nuon Chea's Appeal Against the Trial Chamber's Decision on Rule 35 Applications for Summary Action, 14 September 2012, E176/2/1/4, para. 41.
[2297] Ibid, paras 44-45. See also Case 002, Decision on the Conduct of the Co-Lawyers for Nuon Chea During the Appeal Hearing of 17 November 2015, 27 January 2016, F30/18, para. 23.
[2298] Case 002, Decision on Nuon Chea's Appeal Against the Trial Chamber's Decision on Rule 35 Applications for Summary Action, 14 September 2012, E176/2/1/4, para. 44. See also Case 002, Decision on the Conduct of the Co-Lawyers for Nuon Chea During the Appeal Hearing of 17 November 2015, 27 January 2016, F30/18, para. 23. Unlike sanctions issued under Internal Rule 38, those issued under Internal Rule 35 did not require a preliminary warning. See Case 002, Decision on Appeal Against the Co-Investigating Judges' Order Issuing Warnings under Internal Rule 38, 7 June 2010, D367/1/5, para. 11.
[2299] Case 002, Decision on Nuon Chea's Appeal Against the Trial Chamber's Decision on Rule 35 Applications for Summary Action, 14 September 2012, E176/2/1/4, para. 44. See also Case 002, Decision on the Conduct of the Co-Lawyers for Nuon Chea During the Appeal Hearing of 17 November 2015, 27 January 2016, F30/18, para. 23.
[2300] Internal Rules, rules 11(2), 11(4), 12 *bis* (1), 12 *ter* (2), 22(1), 22(4).
[2301] Code of Ethics for Lawyers of the Bar Association of the Kingdom of Cambodia ("BAKC Code").

Defence counsel and the Co-Lawyers for the victims had to be registered with BAKC.[2302] They were obliged to comply with the ECCC regime, the Law on the Statutes of the Bar, and "recognised standards and ethics of the legal profession".[2303] Lawyers had to have established competence in criminal law and procedure at national and international level, with additional requirements of experience and standing for international lawyers,[2304] and shared an obligation to promote justice and the fair and effective conduct of proceedings.[2305]

Counsel were obliged to respect "the principles of conscience, humanity, and tact",[2306] and to act in the best interests of their clients.[2307] Other obligations included confidentiality,[2308] and "prudence" in public or media activities.[2309] Defence counsel owed a duty to the court as well as to their client,[2310] having "an obligation to promote justice and the fair and effective conduct of proceedings".[2311] Defence counsel were not obliged to follow their client's instructions where these led to an obstruction of the proceedings or were against the interests of justice.[2312] The Supreme Court Chamber considered that the applicable legal framework made it "abundantly clear that lawyers, though guided by their conscience and clients' directions, have to respect the law and other applicable regulations, including court orders".[2313] Defence counsel

[2302] Internal Rules, rules 11(2)(b)-(c), 12 *bis* (1)(c), 22(1). See also Kingdom of Cambodia, Law on the Bar, adopted by the National Assembly on 15 June 1995 ("Law on the Bar"), articles 6, 8. BAKC also adopted principles of independence, see Law on the Bar, article 13 ("[BAKC] shall not be subordinate to any political party, any religious organization, or any other organization. All ideological, religious, or political expressions shall be prohibited").
[2303] Internal Rules, rule 22(4). See also Law on the Bar, article 1.
[2304] Internal Rules, rule 11(4)(c)-(d). International Defence Counsel were required to have 10 years of relevant professional experience, while international Co-Lawyers did not have a specified time limit.
[2305] Internal Rules, rule 12 *ter* (2), 22(4).
[2306] BAKC Code, article 6 (see also article 16). Article 34 of the Law on the Bar set out the oath that lawyers must take before "the Appeal Court", being: "I swear that I shall implement my profession with dignity, conscientiousness, honesty, humanity, and with an independent mind, and in observance of the Constitution and Laws of the Kingdom of Cambodia". Article 58 of the Law on the Bar stipulated that "[l]awyers shall determine by their own conscience and with the consent of the client what issues to raise in order to defend the interests of the client".
[2307] See Case 002, Decision on the Appointment of Court Appointed Counsel for Khieu Samphan, 21 November 2014, E320/2, para. 18 (referring to Internal Rules, Internal Rule 22).
[2308] BAKC Code, article 7.
[2309] BAKC Code, article 15. See also Law on the Bar, article 7.
[2310] Case 002, Decision on the Conduct of the Co-Lawyers for Nuon Chea During the Appeal Hearing of 17 November 2015, F30/18, para. 26.
[2311] Case 002, Decision on the Appointment of Court Appointed Counsel for Khieu Samphan, 21 November 2014, E320/2, para. 18 (quoting Internal Rules, rule 22(4)). See also Case 002, Order to Refer Conduct of Counsel for Khieu Samphan to Appropriate Professional Bodies, 19 December 2014, E330, para. 28.
[2312] Case 002, Decision on the Appointment of Court Appointed Counsel for Khieu Samphan, 21 November 2014, E320/2, para. 18.
[2313] In Case 002, National Counsel for Nuon Chea argued, in explanation of his departure from the courtroom on the first day of the appeal hearing, that Article 58 of the Cambodian Law on the Bar established that lawyers are bound by conscience and client instructions in deciding the defence strategy. See Case 002, Decision on the Conduct of the Co-Lawyers for Nuon Chea During the Appeal Hearing of 17 November 2015, 27 January 2026,

appearing before the ECCC were also required by Cambodian law to "preserve for the judges, in independence and dignity, the respect due to their position".[2314]

8.4.1. Misconduct of counsel

Internal Rule 38 governed the misconduct of lawyers.[2315] The rule covered conduct that was "considered offensive or abusive, obstructed the proceedings, amount[ed] to abuse of process, or [was] otherwise contrary to Article 21(3) of the Agreement".[2316] This behaviour was not otherwise defined, and was elucidated through the case law. All sanctions were issued against defence counsel.[2317] If a person was struck off the list of lawyers approved to appear before the ECCC as a result of disciplinary action, the lawyer was required to transmit all material to the appropriate unit of the Office of Administration to ensure continuity of representation.[2318]

Internal Rule 38 provided for a "simpler and less formalised procedural avenue compared with Internal Rule 35".[2319] Internal Rule 38, which was intended to "ensure that proceedings [were] not disrupted by […] conduct which […] may endanger the administration of justice",[2320] overlapped to a degree with Internal Rule 35, and the misconduct regime could apply in conjunction with, or independently from, Internal Rule 35.[2321] Nonetheless, Internal Rule 38 was "designed to address a lawyer's misconduct regardless of whether it qualifie[d] as interference with the administration of justice [under Internal Rule 35]".[2322] In one instance,

F30/18, para. 25. See also Case 002, Decision on Nuon Chea Defence Counsel Misconduct, 29 June 2012, E214, para. 8.

[2314] Case 002, Decision on Nuon Chea Defence Counsel Misconduct, 29 June 2012, E214, para. 8. See also BAKC Code, article 24.

[2315] Internal Rules, rule 38.

[2316] Internal Rules, rule 38.

[2317] In one case, the Defence argued that the Prosecution should be sanctioned for failure to disclose exonerating material. This was dismissed on grounds that was no prejudice to the Defence. See Case 002, Order on the Request by the Ieng Sary Defence Team for Sanctions against the Co-Prosecutors, 26 November 2009, D97/9/7, paras 9, 13.

[2318] Internal Rules, rule 38(4).

[2319] Case 002, Decision on the Conduct of the Co-Lawyers for Nuon Chea During the Appeal Hearing of 17 November 2015, 27 January 2016, F30/18, para. 24.

[2320] Case 002, Warning to International Co-Lawyer, 19 May 2009, C26/5/22, para. 25. The Pre-Trial Chamber considered the ICTY's interpretation of a similar rule to Internal Rule 38, agreeing that the rule was "meant to deal with questions of courtroom decorum or other behaviour in the course of proceedings, that makes it necessary to ensure that counsel has no platform in the hearings to continue his disruptive conduct". The Pre-Trial Chamber also considered ICTY and SCSL case-law concluding that disruption of a trial may give rise to the risk of a miscarriage of justice, and that it was a Chamber's duty to ensure that proceedings were conducted properly in accordance with the norms of the judicial process. See Case 002, Warning to International Co-Lawyer, 19 May 2009, C26/5/22, paras 20-24.

[2321] Case 002, Order on Breach of Confidentiality of the Judicial Investigation, 3 March 2009, D138, para. 20.

[2322] Case 002, Decision on the Conduct of the Co-Lawyers for Nuon Chea During the Appeal Hearing of 17 November 2015, 27 January 2016, F30/18, para. 24. See also Case 001, Order to Refer Conduct of Counsel for Khieu Samphan to Appropriate Professional Bodies, 19 December 2014, E330, para. 14.

the Supreme Court Chamber – while finding that interference with the administration of justice had occurred – chose instead to use sanctions under Internal Rule 38, given that Internal Rule 35 "would absorb further time and resources".[2323]

Offensive, disrespectful, or otherwise unethical in-court behaviour was a well-established conduct breach.[2324] Examples included the continued irrelevant or inappropriate questioning of a witness in disregard of repeated orders and warnings;[2325] failure to appear at a hearing, causing delay to proceedings and waste of resources;[2326] refusal to continue participating in a hearing;[2327] failure to participate meaningfully in a hearing;[2328] and "encourage[ing] the Accused [to] mislead the Chamber".[2329]

Disrespectful attitudes towards Judges, whether in the courtroom or not, amounted to sanctionable conduct. The Pre-Trial Chamber considered that "[w]hile the composition and the functioning of a tribunal may be criticized, verbal attacks of a personal nature made against the judges, creating an atmosphere detrimental to the orderly administration of justice, may be subject to sanctions".[2330] In that case, unsubstantiated allegations and language employed by a Co-Lawyer were found to be "abusive and insulting towards the Pre-Trial Chamber's judges",[2331] and offensive or disrespectful remarks in written motions were similarly found to amount to misconduct.[2332]

In considering a Co-Lawyer's failure to attend a session of the appeal hearing, the Supreme Court Chamber found that he had interfered with the administration of justice under Internal

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[2323] Case 002, Decision on the Conduct of the Co-Lawyers for Nuon Chea During the Appeal Hearing of 17 November 2015, 27 January 2016, F30/18, paras 29-33.
[2324] Case 002, Decision on Nuon Chea Defence Counsel Misconduct, 29 June 2012, E214, para. 6. See also Case 002, Decision on the Conduct of the Co-Lawyers for Nuon Chea During the Appeal Hearing of 17 November 2015, 27 January 2016, F30/18, para. 20.
[2325] Case 002, T. 13 December 2012, E1/153.1, pp. 49, 56, 60-65. See also Case 002, Decision on the Conduct of the Co-Lawyers for Nuon Chea During the Appeal Hearing of 17 November 2015, 27 January 2016, F30/18, para. 20.
[2326] Case 002, Decision on the Conduct of the Co-Lawyers for Nuon Chea During the Appeal Hearing of 17 November 2015, 27 January 2016, F30/18, para. 20; Case 002, Warning to International Co-Lawyer, 19 May 2009, C26/5/22, para. 31. See also Case 002, Decision on the Appointment of Court Appointed Standby Counsel for Khieu Samphan, 5 December 2014, E321/2, para. 12 (regarding court-appointed counsel).
[2327]Case 002, Decision on the Conduct of the Co-Lawyers for Nuon Chea During the Appeal Hearing of 17 November 2015, 27 January 2016, F30/18, para. 20.
[2328] Case 002, Warning to International Co-Lawyer, 19 May 2009, C26/5/22, para. 31. See also Case 002, Decision on the Conduct of the Co-Lawyers for Nuon Chea During the Appeal Hearing of 17 November 2015, 27 January 2016, 27 January 2016, F30/18, para. 20.
[2329] Case 002, Decision on Nuon Chea Defence Counsel Misconduct, 29 June 2012, E214, para. 13.
[2330] Case 002, Warning to International Co-Lawyer, 19 May 2009, C26/5/22, paras 21, 25.
[2331] Ibid, para. 30.
[2332] Case 002, Decision on Nuon Chea Defence Counsel Misconduct, 29 June 2012, E214, para. 12. The cited examples refer to suggestions that the Chamber was "unreasoned", "unreasonable" and "erroneous".

Rule 35.[2333] The Chamber concluded, however, that it would not invoke Internal Rule 35 "'for the sake of efficiency', considering that such course of action would absorb further time and resources".[2334] Consequently, the Supreme Court Chamber found the appropriate sanction to be a public reprimand under Internal Rule 38.[2335]

Other illustrations of misconduct included the disclosure of confidential documents by counsel,[2336] and failure to comply with chamber directions to file documents within a specified timeframe.[2337]

8.4.2. Warnings, sanctions and referral

Under Internal Rule 38, the Co-Investigating Judges or chambers could, after a warning, impose sanctions against or refuse audience to a lawyer if, in their opinion, the lawyer's conduct was considered offensive or abusive.[2338] The exact range of sanctions was not defined in Internal Rule 38(1),[2339] and was developed through the case law.

While a warning or consequential sanction was discretionary under Internal Rule 38, the Pre-Trial Chamber concluded that it had "a duty to protect the integrity of proceedings" in proceeding to this step.[2340]

Warnings were "frequently issued as both a punitive and preventative measure for misconduct" such as disclosing confidential information, refusing to participate in the proceedings, failing to appear, and using offensive or abusive courtroom behaviour.[2341] A common sanction was a

[2333] Case 002, Decision on the Conduct of the Co-Lawyers for Nuon Chea During the Appeal Hearing of 17 November 2015, 27 January 2016, F30/18, para. 31.
[2334] Ibid, para. 32.
[2335] Ibid, para. 33.
[2336] Case 002, Decision on Nuon Chea's Appeal Against the Trial Chamber's Decision on Rule 35 Applications for Summary Action, 14 September 2012, E176/2/1/4, para. 31; Case 002, Decision on Admissibility on "Appeal Against the Co-Investigating Judges' Order on Breach of Confidentiality of the Judicial Investigation," 13 July 2009, D138/1/8. See also Case 002, Decision on the Conduct of the Co-Lawyers for Nuon Chea During the Appeal Hearing of 17 November 2015, 27 January 2016, F30/18, para. 20; Case 002, Decision on Nuon Chea Defence Counsel Misconduct, 29 June 2012, E214, para. 7; Case 002, Decision on Nuon Chea's Fitness to Stand Trial and Defence Motion for Additional Medical Expertise, 15 November 2011, E115/3, para. 39, fn. 93. The Chamber noted that the external medical consultant had been provided with a number of strictly confidential or confidential documents in breach of article 8.1 of the Practice Direction on the Classification and Management of Case-Related Information.
[2337] Case 002, Decision on Nuon Chea Defence Counsel Misconduct, 29 June 2012, E214, para. 15.
[2338] Case 002, Decision on the Conduct of the Co-Lawyers for Nuon Chea During the Appeal Hearing of 17 November 2015, 27 January 2016, F30/18, para. 24.
[2339] Ibid.
[2340] Case 002, Warning to International Co-Lawyer, 19 May 2009, C26/5/22, para. 25.
[2341] See *e.g.*, Case 002, Decision on Immediate Appeal by Nuon Chea Against the Trial Chamber's Decision on Fairness of Judicial Investigation, 27 April 2012, E116/1/7, para. 37; Decision on Nuon Chea's Fitness to Stand Trial and Defence Motion for Additional Medical Expertise, 15 November 2011, E115/3, para. 39, fn. 93; Case

private or public reprimand, considered by the Supreme Court Chamber to be a "mild form of lawyer discipline" that "declares the lawyer's conduct improper but does not limit his or her right to practice law".[2342] Other sanctions included referral of conduct to domestic Bar Associations,[2343] recommendations of payment refusal,[2344] expulsion from the courtroom,[2345] and being ordered to cease the relevant behaviour.[2346] Other potential penalties included "permanent or long-lasting refusal of a right of audience or pecuniary sanctions".[2347]

Under Internal Rule 38(3), a foreign lawyer practising before the ECCC who was subject to disciplinary action by BAKC could appeal to the Pre-Trial Chamber within 15 days of receiving notification of the decision of the BAKC.[2348] The appeal suspended enforcement of the decision unless the Pre-Trial Chamber decided otherwise; the decision of the Pre-Trial Chamber was not subject to any appeal.[2349] There was no other right to appeal expressed in Internal Rule 38. The Pre-Trial Chamber, in finding that warnings could be challenged only in relation to a subsequent appeal in relation to sanctions imposed under Internal Rule 38, indicated that a substantive appeal right did exist.[2350] The Supreme Court Chamber observed, however, that in contrast to Internal Rule 38, Internal Rule 35 provided no "right of appeal".[2351]

8.4.3. Replacement of counsel

Relying on the practice of international criminal tribunals, the ECCC established that when an Accused's choice on representation led to obstruction in the proceedings, the chamber had

002, Order on Breach of Confidentiality of the Judicial Investigation, 3 March 2009, D138; Case 002, Decision on the Conduct of the Co-Lawyers for Nuon Chea During the Appeal Hearing of 17 November 2015, F30/18, para. 24; Case 002, Decision on Application to Adjourn Hearing on Provisional Detention Appeal, 23 April 2008, C26/I/25; Case 002, Trial Chamber Memorandum entitled "Warning to Counsel for Nuon Chea and Khieu Samphan", 24 October 2014, E320, paras 6, 8; Case 002, Warning to International Co-Lawyer, 19 May 2009, C26/5/22.

[2342] Case 002, Decision on the Conduct of the Co-Lawyers for Nuon Chea During the Appeal Hearing of 17 November 2015, 27 January 2016, F30/18, para. 24.

[2343] Case 002, Decision on Nuon Chea Defence Counsel Misconduct, 29 June 2012, E214, p. 8. See also Case 001, Order to Refer Conduct of Counsel for Khieu Samphan to Appropriate Professional Bodies, 19 December 2014, E330, para. 31.

[2344] Case 001, Order to Refer Conduct of Counsel for Khieu Samphan to Appropriate Professional Bodies, 19 December 2014, E330, para. 30.

[2345] See Case 002, Decision on the Conduct of the Co-Lawyers for Nuon Chea During the Appeal Hearing of 17 November 2015, 27 January 2016, F30/18, para. 24.

[2346] Case 002, Order on Breach of Confidentiality of the Judicial Investigation, 3 March 2009, D138, p. 10.

[2347] See Case 002, Decision on the Conduct of the Co-Lawyers for Nuon Chea During the Appeal Hearing of 17 November 2015, 17 January 2016, F30/18, para. 24.

[2348] Internal Rules, rule 38(3).

[2349] Internal Rules, rule 38(3).

[2350] Case 002, Decision on Appeal Against the Co-Investigating Judges' Order Issuing Warnings under Internal Rule 38, 7 June 2010, D367/1/5, para. 11.

[2351] Case 002, Decision on the Conduct of the Co-Lawyers for Nuon Chea During the Appeal Hearing of 17 November 2015, 27 January 2016, F30/18, para. 24.

discretion to appoint counsel to assist the Accused.[2352] This was necessary to ensure that proceedings could move forward "fairly and expeditiously".[2353]

[2352] Case 002, Decision on the Appointment of Court Appointed Standby Counsel for Khieu Samphan, 5 December 2014, E321/2, para. 15.
[2353] Ibid, para. 18.