

SUMMARY OF APPEAL JUDGEMENT
Case File 001/18-07-2007/ECCC/SC (KAING Guek Eav)
3 February 2012

A. Introduction

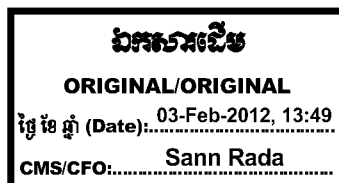
1. The following is a summary of the Supreme Court Chamber's findings in its Appeal Judgement in Case 001. The authoritative account of those findings is contained in the written Appeal Judgement. Khmer and English versions of the Appeal Judgement will be made available in due course, and a French translation will be available in due course thereafter.

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

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

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

5. The Supreme Court Chamber will now summarize its findings on the appellants' grounds of appeal.



B. Personal Jurisdiction

6. The Accused contends that the Trial Chamber had no personal jurisdiction over him, and accordingly his conviction and sentence ought to be set aside by the Supreme Court Chamber. According to the Accused, neither his operational responsibilities nor the duties he performed during the DK bring him within the description of a “senior leader” of the DK or one of “those who were most responsible” for the crimes that were committed during the DK. The Co-Prosecutors argue that the Accused’s appeal on personal jurisdiction is inadmissible since his Notice of Appeal and Appeal Brief fail to meet the minimum standards of pleading. The Co-Prosecutors also submit that: the Trial Chamber was entitled to reject the Defence submission on personal jurisdiction as untimely; the Trial Chamber was right to conclude that the phrase “senior leaders of Democratic Kampuchea and those who were most responsible” refers to two distinct categories of suspects; and the Trial Chamber was right to conclude that it had personal jurisdiction over the Accused on the basis of his status as one of those “most responsible” for the crimes committed during the DK. Civil Parties Group 3 responded in support of the Co-Prosecutors.

7. The Supreme Court Chamber finds that a fair trial demands that the Accused has the right to raise an objection to a patent or latent lack of jurisdiction that could vitiate the trial at whatever time s/he decides safeguards his/her interests. The Trial Chamber must entertain any and all such objections to jurisdiction raised by an accused person “at the same time as the judgement on the merits” at the latest. In any event, the Accused was convicted of a crime and therefore has “the right to his conviction and sentence being reviewed by a higher tribunal according to law.” On the basis of this right, the Accused is entitled to appeal against any alleged error of law or fact that may invalidate the Trial Judgement or constitute a miscarriage of justice, respectively, including the Trial Chamber’s decision on personal jurisdiction.

8. Regarding standards of appellate pleading, the Supreme Court Chamber finds that the decisive question is whether an appellant has pleaded his case in a manner that enables an opposing party to know the case he has to meet, and enables the Supreme Court Chamber to identify and rule upon the issues in dispute. The Supreme Court Chamber finds that the core issues arising for decision under the Accused’s appeal are relatively easy to identify, and the operative passages of the Trial Judgement are readily identifiable and set out with clarity the reasoning that led it to the conclusion that the Accused is one of those “most responsible.”

9. On the central issue of personal jurisdiction, pursuant to the ordinary meaning to be given to the term in its context and in the light of the object and purpose of the UN-RGC Agreement, the Supreme Court Chamber finds that the term “senior leaders of Democratic Kampuchea and those who were most responsible” refers to two categories of Khmer Rouge officials which are not dichotomous. One category is senior leaders of the Khmer Rouge who are among the most responsible, because a senior leader is not a suspect on the sole basis of his/her leadership position. The other category is non-senior leaders of the Khmer Rouge who are also among the most responsible. Both categories are “suspects” subject to criminal prosecution before the ECCC.

10. The Supreme Court Chamber must also consider whether interpreting the term “senior leaders of Democratic Kampuchea and those who were most responsible” as a jurisdictional requirement is consistent with the object and purpose of the UN-RGC Agreement and whether such an interpretation would lead to a “manifestly absurd or unreasonable” result. The Supreme Court Chamber finds that the personal jurisdiction of the ECCC covers Khmer Rouge officials, and the question of whether an accused was a Khmer Rouge official is justiciable before the Trial Chamber. However, the term “most responsible” cannot be a jurisdictional requirement for many reasons, including: the notion of comparative responsibility is inconsistent with the ECCC Law’s prohibition of a defence of superior orders; and the determination of whether an accused is “most responsible” requires a large amount of discretion. The Supreme Court Chamber therefore finds that the term “most responsible” should be interpreted as a non-justiciable, policy guide for the Co-Investigating Judges and the Co-Prosecutors in the exercise of their discretion as to the scope of investigations and prosecutions. Regarding the term “senior leaders,” the Supreme Court Chamber finds that it, too, is a non-justiciable, policy guide, rather than a jurisdictional requirement, due, among other reasons, to the flexibility in the term’s definition. In the absence of bad faith, or a showing of unsound professional judgement, the Trial Chamber has no power to review the alleged abuse of the Co-Investigating Judges’ or Co-Prosecutors’ discretion under Articles 5(3) and 6(3) of the UN-RGC Agreement regarding the scope of investigations and prosecutions. Whether an accused is a senior leader or one of those most responsible are exclusively policy decisions for which the Co-Investigating Judges and Co-Prosecutors, and not the Chambers, are accountable. The Accused’s appeal on personal jurisdiction is accordingly rejected in full.

C. Crimes Against Humanity

a. The Principle of Legality

11. The Co-Prosecutors submit that the Trial Chamber erred as a matter of law in several respects in its determination of the charges of crimes against humanity brought against the Accused under Article 5 of the ECCC Law.

12. The Supreme Court Chamber notes that to dispense with these grounds of appeal, it must examine the ECCC’s subject matter jurisdiction over crimes against humanity generally and the Trial Chamber’s definitions of the underlying crimes against humanity at issue, namely enslavement, torture, rape and persecution. The Supreme Court Chamber agrees with the Trial Chamber that, in order for charged offences and modes of participation to fall within the ECCC’s subject matter jurisdiction, they must be provided for in the ECCC Law, explicitly or implicitly. In addition, because the ECCC Law was enacted after the alleged criminal conduct, they must be examined in light of the principle of *nullum crimen sine lege* (the principle of legality). Pursuant to Article 33 new of the ECCC Law and Article 15 of the International Covenant on Civil and Political Rights, the offenses or modes of liability charged before the ECCC must have existed under national law or international law at the time of the alleged criminal conduct occurring between 17 April 1975 and 6 January 1979. Furthermore, they must have been foreseeable and accessible to the Accused.

b. Crimes Against Humanity from 1975-1979

13. With respect to the ECCC's jurisdiction over crimes against humanity generally from 1975-1979, the Supreme Court Chamber has reviewed the development of crimes against humanity in international law starting with antecedents to crimes against humanity in the 1600s and tracing post-World War I and post-World War II state practice and *opinio juris*. The Supreme Court Chamber agrees with the Trial Chamber that a crime against humanity was an international crime during the ECCC's temporal jurisdiction. Furthermore, this Chamber holds that the general definition of crimes against humanity found in the 1950 Nuremberg Principles reflects the state of customary international law at the time. When examining specific grounds of appeal, the Supreme Court Chamber will determine whether that definition persisted under international law from 1975-1979. The Chamber will now proceed to address specific crimes against humanity.

c. Enslavement

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

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

16. However, upon consideration of the definition of slavery under the 1926 Slavery Convention, and the prosecution of enslavement as a crime against humanity in post-World War II jurisprudence, the Supreme Court Chamber finds that the Trial Chamber did not articulate with precision the applicable definition of enslavement. The definition of enslavement as a crime against humanity as it existed under customary international law from 1975-1979 is: 1) the exercise over persons of the powers that attach to the right of ownership (*actus reus*); and 2) intention to accrue some gain through exercise over persons of the powers that attach to the right of ownership (*mens rea*). The Supreme Court Chamber finds that this definition was both foreseeable and accessible to the Accused.

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

d. Torture and Rape

18. The Co-Prosecutors request that the Supreme Court Chamber cumulatively convict the Accused for both rape and torture as crimes against humanity.

19. Given the lack of support for the existence of rape as a distinct crime against humanity during the ECCC's temporal jurisdiction, the Supreme Court Chamber finds that the Trial Chamber erred in concluding that the incident that occurred at S-21 constituted rape as a crime against humanity. Accordingly, this part of the Co-Prosecutors' appeal fails automatically.

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

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

e. Persecution

22. The Supreme Court Chamber concludes that persecution was a recognized crime against humanity under international law as of 1975. The Supreme Court Chamber agrees with the Trial Chamber that the *mens rea* requirement is the "deliberate" perpetration of an act or omission with the specific intent to persecute on racial, religious or political grounds. Furthermore, the Chamber concludes that the majority of the Trial Chamber did not err in its application of the requisite *mens rea* for persecution in reaching the conclusion that the Accused shared the requisite *mens rea* in this case.

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

24. Finally, the Supreme Court Chamber turns to consider whether the Trial Chamber erred in its factual conclusion that *every* individual detained at S-21 was targeted on political grounds and

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

f. Cumulative Convictions

25. The Co-Prosecutors submit that the Trial Judgement erred in law by subsuming specific crimes against humanity under the crime of persecution instead of convicting him for all the crimes against humanity for which he was found responsible by the Trial Chamber.

26. The Supreme Court Chamber finds that in considering the question of cumulative convictions the Trial Chamber correctly resorted to the *Čelebići* test elaborated in ICTY and ICTR jurisprudence. It however committed an error of law in its application of the test to persecution vis-à-vis the other crimes against humanity. This Chamber holds that when analysing cumulative convictions it is the crime's abstract legal elements that must be compared rather than the factual circumstances surrounding the underlying conduct. The Trial Chamber improperly focussed its analysis of cumulative convictions on the conduct underlying the charges, rather than on the elements of legal definitions of crimes that it had found applicable. As a result, it failed to enter cumulative convictions for persecution and other crimes against humanity for which the Accused was held responsible.

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

D. Sentence

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

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

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

31. For these reasons the Defence’s second ground of appeal on sentence is dismissed.

32. The Co-Prosecutors argue that the Trial Chamber erred in imposing a sentence that is too lenient. According to the Trial Chamber’s descriptions, two of the four mitigating factors were of “limited” impact only and the impact of a third was “undermined” and “diminished.” However, further on in its Judgement the Trial Chamber, without explanation, described the four mitigating factors as “significant.”

33. Notwithstanding the broad discretion vested with the Trial Chamber in determining the weight of mitigating factors, the Supreme Court Chamber finds that the effect that mitigating factors had on the Trial Chamber’s determination of the sentence constituted an error of law. The Supreme Court Chamber holds that the mitigating impact of these factors is limited at most. Further, the aggravating elements and exceptional gravity of crimes neutralise the limited impact of these mitigating factors.

34. The limited weight of mitigating factors in the present case is sufficient to overturn the Trial Chamber’s finding, made without reference to any legal authority, that the “significant” mitigating factors “mandate” a finite sentence. The Trial Chamber also failed to discuss, and therefore presumably did not attach any weight to, relevant Cambodian and international law which permits life imprisonment notwithstanding mitigating factors.

35. The Supreme Court Chamber therefore holds that the Trial Chamber attached undue weight to mitigating circumstances and insufficient weight to gravity of crimes and aggravating circumstances. These failures of the Trial Chamber constitute an error on a question of law invalidating the sentence in the Trial Judgement. The intervention of the Supreme Court Chamber is required to determine an appropriate sentence. The Co-Prosecutors’ first ground of appeal is therefore granted.

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

37. It is well-established in international jurisprudence that the primary factor in sentencing is the gravity of the convicted person’s crimes. The Supreme Court Chamber further observes that ad hoc tribunals have issued sentences of life imprisonment mostly in cases in which the accused abused a position of leadership by planning or ordering the alleged crimes, as well as cases in which the convicted person exhibited particular cruelty or zeal in the commission of the crimes. In determining the appropriate sentence, the Supreme Court Chamber will therefore consider the

gravity of the crimes as well as any aggravating factors, such as the leadership role of KAING Guek Eav and the particularly cruel or zealous commission of his crimes.

38. In the present case the Trial Chamber determined that the crimes of KAING Guek Eav were of a “particularly shocking and heinous character,” based on the number of people who were proven to have been killed, at least 12,272 victims, as well as the systematic torture and deplorable conditions of the detention which they suffered. The high number of deaths for which KAING Guek Eav is responsible, along with the extended period of time over which the crimes were committed (more than three years), undoubtedly place this case among the gravest before international criminal tribunals.

39. As to aggravating factors, KAING Guek Eav held a central leadership role at S-21, which he abused by training, ordering, and supervising staff in the systematic torture and execution of prisoners deemed to be enemies of the DK, and showed “dedication to refining the operations of S-21.” The fact that he was not on the top of the command chain in the DK regime does not justify a lighter sentence. Indeed, there is no rule that dictates reserving the highest penalty for perpetrators at the top of the chain of command. KAING Guek Eav’s sentence must be proportionate to the crimes he committed, regardless of whether others may have committed more serious offenses.

40. In the Supreme Court Chamber’s view, KAING Guek Eav’s leadership role and particular enthusiasm in the commission of his crimes are aggravating factors that should be given significant weight in the determination of his sentence.

41. The Supreme Court Chamber is of the view that retributive and deterrent purposes of punishment are particularly relevant to this case in light of the gravity of KAING Guek Eav’s crimes. The penalty must be sufficiently harsh to respond to the crimes committed and prevent the recurrence of similar crimes. The crimes committed by KAING Guek Eav were undoubtedly among the worst in recorded human history. They deserve the highest penalty available to provide a fair and adequate response to the outrage these crimes invoked in victims, their families and relatives, the Cambodian people, and all human beings.

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

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

44. For these reasons, the Supreme Court Chamber holds that the sentence of 35 years of imprisonment by the Trial Chamber does not appropriately reflect the gravity of crimes and the individual circumstances of KAING Guek Eav. The Trial Chamber erred in imposing a manifestly inadequate sentence. The Supreme Court Chamber decides to impose a sentence of life imprisonment against KAING Guek Eav.

45. On parole, it is a distinct procedure in the stage of execution of a sentence of imprisonment. The Supreme Court Chamber holds that the lack of special provisions on parole in the ECCC's statutory documents indicates that the issue should be decided according to procedures in force at the time when parole is to be considered. The Supreme Court Chamber therefore holds that it does not have competence to decide *a priori* on KAING Guek Eav's eligibility for parole.

46. The Trial Chamber held that the combination of a reduction of 5 years and credit for time spent in detention under the authority of the Cambodian Military Court is an appropriate remedy for the violation of KAING Guek Eav's rights occasioned by his illegal detention by the Cambodian Military Court between 10 May 1999 and 30 July 2007.

47. The Supreme Court Chamber finds that the Trial Chamber misinterpreted the relevant international jurisprudence to mean that violations of KAING Guek Eav's rights should be redressed by it *even* in the absence of violations attributable to the ECCC and in the absence of abuse of process. In the absence of both of these circumstances, the Trial Chamber should have rejected KAING Guek Eav's request for remedy.

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

49. Judges Klonowiecka-Milart and Jayasinghe disagree with the majority's decision not to grant KAING Guek Eav a remedy for the following reasons. A hybrid court such as the ECCC should, where it is fair and equitable in all the circumstances, take responsibility for excessive domestic pre-trial detention. In this case, these circumstances include the following. First, as Chambers established "within the existing court structure of Cambodia", the ECCC is highly integrated into the Cambodian judicial system. Second, there is a strong nexus between the case against KAING Guek Eav at the ECCC and the charges before the Military Court. In that regard, Judges Klonowiecka-Milart and Jayasinghe note that the Cambodian court held KAING Guek Eav for eight years, during which time it performed no substantial investigation. It then transferred him to the ECCC soon after it was established by the Cambodian state. Third, the gravity of the deprivation of liberty was extreme by international standards. Fourth, this Court is uniquely positioned to grant a remedy of a restorative nature. Accordingly, Judges Klonowiecka-Milart and Jayasinghe would grant KAING Guek Eav a remedy by commuting the life sentence to a fixed term of 30 years' imprisonment.

50. The Trial Chamber held that KAING Guek Eav is entitled to credit for the entirety of his time spent in detention, which was under the authority of the Cambodian Military Court from 10 May 1999 to 30 July 2007 and under the authority of the ECCC from 31 July 2007 until the Trial Judgement becomes final. According to the Trial Chamber, while the first period was granted as part of the remedy for illegal detention, the second period was derived as a right from Article 503 of the 2007 Code of Criminal Procedure of Cambodia. Whereas the credit for the second period is not in dispute, the Supreme Court Chamber finds that discussion is required with respect to credit for the first period.

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

E. Admissibility of Civil Party applications

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

53. The Civil Party Appellants averred that the Trial Chamber adopted an arbitrary criterion of special bonds of affection or dependence with direct victims in determining the admissibility of applications from indirect victims. The Supreme Court Chamber finds that the criterion of special bonds of affection or dependence connecting the applicant with the direct victim captures the essence of inter-personal relations, the destruction of which is conducive to an injury on the part of indirect victims. This criterion applies to all persons who claim to be indirect victims, whether family or not, because without prior bonds tying the claimants emotionally, physically or economically to the direct victim, no injury would have resulted to them from the commission of the crime. While the term as such may have been introduced for the first time in the Trial Judgement, the criterion or "test" which it denotes is inherent to the notion of injury under the meaning of Article 13 of the 2007 Code of Criminal Procedure as applicable to indirect victims. Therefore the use of this requirement was legally correct and foreseeable, just as the requirement to demonstrate injury must have been foreseeable for all Civil Party Applicants. Accordingly, the Civil Parties' appeals fail insofar as they allege an error of law and lack of foreseeability regarding this criterion.

54. The Supreme Court Chamber notes that bonds of affection and dependence are dynamics that usually exist among close family members. Therefore, the forced disappearance, imprisonment, torture and eventual murder of a family member will likely bring about suffering, anguish and other kinds of injury, such as financial damage, to the victim's close family members. This conclusion is substantiated by the evidence collected in this case, common sense, and evidence-based findings under the American Convention on Human Rights and at the

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

55. Concerning the scope of the presumption of injury, it would be reasonable to define it by taking into account the nature of the injury claimed in the context of Cambodian familial relationships. In this respect, an expert retained by the Trial Chamber testified that Cambodian families generally live close together and co-depend on one another so that strong bonds are usually formed. Families encompass not just couples and their offspring but also “other family members, such as ageing parents,” or “siblings and their families” or “grandparents, cousins, uncles and aunts.” In most circumstances the older generation acts as a role model in the lives of the younger generation, thus generating a very special and close bond. The Trial Chamber accepted this broad notion of *de facto* immediate family members, but nonetheless later found that “only in exceptional circumstances” will non-immediate family members be considered to have had “special bonds of affection or dependence” with the direct victim. Whereas this conclusion defines the scope of presumption more narrowly than could be justified by the accepted expert testimony, it does not infringe on the rights of the Civil Party Appellants because the formulation of a presumption lies in the area of the court’s discretion and not the parties’ right to benefit from it.

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

57. Concerning the averment that the Trial Chamber erred in adopting a two-tier review of the admissibility of Civil Party applications, the Supreme Court Chamber recalls that Internal Rule 100(1) reflects Article 355 of the 2007 Code of Criminal Procedure, which is clear in its terms: “[i]n the criminal judgement, the court [of first instance] shall also decide upon civil remedies. The court shall determine the admissibility of the civil party application and also decide on the claims of the civil party against the accused and civil defendants.” The Supreme Court Chamber therefore finds that the Trial Chamber had a lawful basis in Cambodian criminal procedure to determine in its Judgement the merits of victims’ applications for Civil Party status.

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

59. Notwithstanding a lack of legal error on the part of the Trial Chamber, the Supreme Court Chamber nonetheless notes that there appears to have been a fundamental misunderstanding between the Trial Chamber and the Civil Party Appellants as to the merits and legal effect of the initial review of their applications. The Supreme Court Chamber also recognises that the Civil Party admissibility process and the revocation of the Appellants' status in the Trial Judgement may have caused anguish and frustration at the futility of their practical and emotional investment in the proceedings. Having regard to the novel character of the Civil Party framework before the ECCC and the conceivable lack of clarity as to its specific arrangements as discussed above, the Supreme Court Chamber acknowledges the possibility that some among the Civil Party Appellants may have been confused as to whether submission of evidence was still expected of them. Therefore, in order to remedy any missed opportunity, the Supreme Court Chamber decided to grant the Civil Party Appellants' motions to submit additional evidence, irrespective of whether such evidence would have been available during the first instance proceedings.

60. The Supreme Court Chamber finds that, in addition to those Civil Parties admitted by the Trial Chamber in the Trial Judgement, the following Civil Party Appellants have substantiated their applications on appeal, and are therefore admitted as Civil Parties in Case 001:

- E2/61, LY Hor alias EAR Hor
- E2/62, HIM Mom
- E2/86, and E2/88, JAMES Jeffrey, ROTHSCHILD Joshua
- E2/35, CHHAY Kan *alias* LEANG Kan
- E2/83, HONG Savath
- E2/33, PHAOK Khan
- E2/82, MORN Sothea
- E2/22, CHHOEM Sitha
- E2/32, NAM Mon

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

62. Regarding the appeal by Civil Party Mr. CHUM Sirath, D25/6, the Supreme Court Chamber accepts that the omission of Ms. KEM Sovannary and her child from the list of victims in the Trial Judgement amounts to a clerical error. The Supreme Court Chamber therefore corrects the clerical error itself to include Ms. KEM Sovannary and her child's name in the Trial Judgement.

F. Civil Party Reparations

63. The Trial Chamber ruled on the reparation requests: (a) by granting the inclusion of Civil Parties' names in the Judgement; and (b) by committing to compile and publish all statements of apology and acknowledgments of responsibility expressed by KAING Guek Eav in the course of the trial. All other Civil Party claims for reparations were rejected on the grounds that they either lacked specificity or were beyond the scope of available reparations before the ECCC.

64. Even though Civil Parties Group 1 has not lodged an appeal against the Trial Chamber's findings on reparations, it requests that, in the event that the grounds of appeal on reparation put forward by Civil Party Groups 2 and 3 are granted, the benefits deriving from any reparations that are awarded by the Supreme Court Chamber be extended also to the Civil Parties in Civil Parties Group 1. Civil Party Group 2 articulates extensive submissions on reparations and requests the Supreme Court Chamber to overturn the Trial Chamber's rejection of its nine reparation requests and consequently grant these claims in their entirety. Civil Parties Group 3 also requests the Supreme Court Chamber to grant the Civil Parties' original claims for reparations filed before the Trial Chamber but refused in the Trial Judgement.

65. At the outset, the Supreme Court Chamber will outline the legal framework related to reparations before the ECCC. While the Civil Party Appellants rely on a variety of international legal authorities as sources to engage in a more flexible approach on reparations, this Chamber emphasises that the ECCC forms part of a unique legal system and that only limited analogy and guidance may be drawn from distinct frameworks. Whereas it is correct that Cambodia is a State Party to several of the international instruments that enshrine the right of victims to an effective remedy, the ECCC is not vested with the authority to assess Cambodia's compliance with these international obligations. The Supreme Court Chamber also holds that it has no jurisdiction to grant requests for reparation that entail, either explicitly or by necessary implication, an active involvement of the Cambodian authorities in order for the measures to be realised. It also lacks the competence to enforce reparation awards.

66. Therefore, while the ECCC is competent to grant reparations, this competence must be interpreted in view of its narrow mandate and purpose. Internal Rule 23 mandates that reparations are limited to "collective and moral" awards. The term "moral" denotes the aim of repairing moral damages rather than material ones, whereas the term "collective" excludes individual awards, whether or not of a financial nature, and privileges those measures that benefit as many victims as possible.

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

68. The Chamber finds that a number of the claims are predestined for rejection, due to the fact that their realisation would imply an order against the Cambodian State. This is the case, for instance, of the requests for State apology, organisation of health care, institution of national commemoration days and naming of public buildings after the victims. Other parts of the claims are dismissed because of the lack of financial means to ensure their implementation. This is the case, for example, of the requests for construction of memorials and for paid visits to memorial sites. The requests for the Court to order KAING Guek Eav to write letters to the Government are rejected as non-enforceable. As for the requests related to the dissemination of materials concerning the ECCC proceedings, the Chamber notes that they fall within the mandate of the Public Affairs and the Victims Support Sections.

G. Disposition

69. The Supreme Court Chamber will now read the Disposition of the Appeal Judgement. The Disposition, which is full and final, has been signed by the judges of the Supreme Court Chamber and is included in this Summary.

DISPOSITION

For the foregoing reasons, **THE SUPREME COURT CHAMBER**,

PURSUANT TO Article 4(1)(b) of the UN-RGC Agreement, Articles 14 new(1)(b) and 36 new of the ECCC Law, and Internal Rule 111 (Rev. 8),

NOTING the respective written appeal submissions of the Parties and the arguments they presented at the Appeal Hearing from 28-30 March 2011;

In respect of KAING Guek Eav's appeal.

DISMISSES the Defence Appeal;

In respect of the Co-Prosecutors' Appeal.

GRANTS, in part, and **DISMISSES**, in part, the Co-Prosecutors' Ground of Appeal 2, and:

QUASHES the Trial Chamber's decision to subsume under the crime against humanity of persecution the other crimes against humanity for which it found KAING Guek Eav responsible;

AFFIRMS KAING Guek Eav's conviction for the crime against humanity of persecution; and

ENTERS additional convictions for the crimes against humanity of extermination (encompassing murder), enslavement, imprisonment, torture, and other inhumane acts;

GRANTS the Co-Prosecutors' Ground of Appeal 1, and:

QUASHES the Trial Chamber's decision to sentence KAING Guek Eav to 35 years of imprisonment;

QUASHES the Trial Chamber's decision to grant a remedy for the violation of KAING Guek Eav's rights occasioned by his illegal detention by the Cambodian Military Court between 10 May 1999 and 30 July 2007;

ENTERS a sentence of life imprisonment; and

FINDS that KAING Guek Eav has served 12 years and 269 days of such sentence;

DISMISSES the Co-Prosecutors' Ground of Appeal 3;

In respect of Civil Parties Groups 1, 2, and 3's Appeals.

GRANTS, in part, and **DISMISSES**, in part, the Civil Parties' grounds of appeal on admissibility of their Civil Party applications, and **DECLARES** that, in addition to those Civil Parties admitted by the Trial Chamber in the Trial Judgement, the following Civil Party

Appellants have demonstrated on appeal that they have suffered harm as a direct consequence of the crimes for which KAING Guek Eav has been convicted:

- E2/61, LY Hor alias EAR Hor
- E2/62, HIM Mom
- E2/86, and E2/88, JAMES Jeffrey, ROTHSCHILD Joshua
- E2/35, CHHAY Kan alias LEANG Kan
- E2/83, HONG Savath
- E2/33, PHAOK Khan
- E2/82, MORN Sothea
- E2/22, CHHOEM Sitha
- E2/32, NAM Mon;

And **REJECTS** the remainder of the Civil Party Appellants' applications as inadmissible;

DISMISSES the Civil Parties' grounds of appeal on reparations, and **AFFIRMS** the Trial Chamber's decision to compile and post on the ECCC's official website all statements of apology and acknowledgements of responsibility made by KAING Guek Eav during the course of the trial, including the appeal stage, and **AFFIRMS** the Trial Chamber's rejection of all other Civil Party claims for reparations;

PURSUANT TO Internal Rules 111(5) and 113(1)-(3),

ORDERS that KAING Guek Eav remain in the custody of the ECCC pending the finalization of arrangements for his transfer, in accordance with the law, to the prison in which his sentence will continue to be served.

Done in Khmer and English.
Dated this third day of February 2012
At Phnom Penh
Cambodia

Greffiers

SEA Mao

Christopher RYAN

PHAN Theoun

Paolo LOBBA



Judge KONG Srim
President

Judge Motoo NOGUCHI

Judge SOM Sereyvuth

Judge Agnieszka KLONOWIECKA-MILART

Judge SIN Rith

Judge Chandra Nihal JAYASINGHE

Judge YA Narin

Judges Agnieszka KLONOWIECKA-MILART and Chandra Nihal JAYASINGHE append a partially dissenting joint opinion.

This Appeal Judgement becomes final on 3 February 2012.

Certified Copy on 3 February 2012

Greffiers



SEA Mao



Christopher RYAN



PHAN Theoun



Paolo LOBBA