

# **LESSONS LEARNED FROM THE ‘DUCH’ TRIAL**

## **A COMPREHENSIVE REVIEW OF THE FIRST CASE BEFORE THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

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## 1. Part One: Introduction and Executive Summary

The Extraordinary Chambers in the Courts of Cambodia ('ECCC' or the 'Court') was established by Agreement between the United Nations and the Government of the Kingdom of Cambodia, and signed in June of 2003. The Court is mandated to try senior leaders and those most responsible for committing serious crimes in Cambodia between 17 April 1975, and 6 January 1979 (also known as the period of '**Democratic Kampuchea**' or the '**DK era**'). It has been especially established as part of the Cambodian judicial system and is composed of Cambodian and international judges, prosecutors and staff, applying both Cambodian and international law when investigating, prosecuting and trying alleged perpetrators of the crimes.

The atrocities committed during the period of Democratic Kampuchea have been widely documented and need no introduction. During the four-year reign of the Khmer Rouge regime under the Communist Party of Kampuchea ('CPK'), an estimated 1.7 million people died either through torture, execution or starvation, and several million more lived under inhumane conditions in forced labor camps throughout the country. The Khmer Rouge abolished schools, religion, and familial structures central to agrarian life in Cambodia in an attempt to rebuild a nation under the authority of Angkar (or the Organization), who atomized its citizens in order to maximize social control.

To date, the ECCC has apprehended a total of five suspects: Nuon Chea, Kaing Guek Eav, Khieu Samphan, Ieng Sary, and Ieng Thirith. The first of these to be apprehended, Kaing Guek Eav, alias 'Duch' (hereafter, '**Duch**', the '**Accused**' or the '**Accused Person**'), was transferred to the ECCC from the Military Prison in Phnom Penh on 30 July 2007. Duch's case went to trial on 30 March 2009, following an initial hearing on 17 February ('**Case 001**'). Substantive hearings ended on 17 September and closing submissions in his case were heard from 23 to 27 November 2009. The trial spanned a total of 22 weeks (or 77 days), during which time the Chamber heard a total of 47 witnesses (comprising 38 witnesses of fact and 9 expert witnesses) and 22 Civil Parties. The four additional suspects currently under investigation are to be tried in a second case slated to begin in 2011 ('**Case 002**'). The International Co-Prosecutor has also filed a further two introductory submissions with the Office of the Co-Investigating Judges, identifying a total of 5 additional suspects.<sup>1</sup>

The following report provides an overview of the proceedings in the Duch trial, with a view to summarizing the 'lessons learned' from the ECCC's first case, both for future cases at the Court and at international(ized) tribunals generally.<sup>2</sup> Where deemed relevant by the Cambodian monitors attending the proceedings, comment on the 'lessons learned' for the Cambodian national sector has also been included in this report. As a result, the report looks both retrospectively – at the proceedings that unfolded during this period – and prospectively, at what might be the most significant issues to consider in light of the Court's ongoing cases. The report is written by monitors and researchers from the combined University of California, Berkeley War Crimes Studies Center / East West Center's Asian International Justice Initiative ('**AIIJ**'), and can be read in conjunction with a series of weekly trial reports written by the same group. The group as a whole comprises lawyers and legal researchers from Cambodia, China, Germany, Indonesia, the Philippines, Singapore, Switzerland, and the United States of America (the '**Monitoring Group**', '**Monitors**' or the '**Group**').<sup>3</sup>

The report is based on the observations of the Monitoring Group who collectively attended the entire duration of the proceedings. Additionally however, members of the

Group undertook interviews over a period of several weeks with members of the Office of the Co-Prosecutors; the Defense; the Civil Parties and their lawyers; Chambers; the Translation Unit; the Public Affairs Section and the Victims Unit. Hence, unlike the methodology adopted by other monitoring groups, court actors were given the chance to comment on observations made in the weekly reports produced by the Group. None of the interviews were conducted with the view to influencing the outcome of the Duch trial; rather, questions were raised and discussed as a means of further enhancing the analysis provided in this report.

The remainder of this report is divided into four parts. Part Two provides the reader with an overview of the testimony heard at trial. This includes a summary of the testimony provided by the Accused Person and the Civil Parties, as well as the witnesses. The summary is divided into the seven factual areas on which the Chamber and the Parties questioned the witnesses, the Accused and the Civil Parties during the twenty weeks of substantive trial.<sup>4</sup> These factual areas were: (i) Issues relating to M-13; (ii) Establishment of S-21 and the Takmao Prison; (iii) Implementation of the Communist Party of Kampuchea's Policy at S-21; (iv) Armed Conflict (or the existence of an Armed Conflict Between Cambodia and Viet Nam); (v) Functioning of S-21, including Choeung Ek; (vi) Establishment and Functioning of S-24; and (vii) the Character of the Accused. Although the Chamber considered issues related to reparations and sentencing as a part of this final topic, we have presented this as a separate category, for ease of reference. So far as possible, the summary proceeds to analyze the testimony in the order it was heard at trial.

Part Three of the report then turns to look at the key legal and procedural issues that emerged during the proceedings. Based on the overall observations and analysis of the Monitoring Group, the following six key issues were identified as being the most important to emerge during Duch's trial: (i) the application of the theory of Joint Criminal Enterprise to Duch's case, and its impact on the Accused Person's right to know the nature of the charges before him before the case begins, as enshrined under Article 35 (new) of the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia (hereafter, the '**ECCC Law**');<sup>5</sup> (ii) the legality of Duch's provisional detention and its impact on the Accused Person's right to be tried without undue delay, as well as the Trial Chamber's determination regarding remedies which may be sought by an Accused in the event such detention is found to be illegal; (iii) the effect of the Accused Person's remorse, both on the duration of his trial and its likely impact on his sentencing; (iv) the impact of Civil Party participation on the principle of Equality of Arms; (v) the Trial Chamber's interpretation of Rule 87 of the Court's Internal Rules – namely, of admissibility and disclosure during trial proceedings; and (vi) the use of evidence obtained under torture.

Part Four looks specifically at Civil Party and witness protection, support and participation during the trial proceedings. This section of the report predominantly focuses on the 'lessons learned' from the Civil Party scheme adopted by the Court to date, bearing in mind proposed changes to that scheme as announced by the Judges following the Sixth Judicial Plenary Session in September 2009.<sup>6</sup> It provides an overview of the key challenges faced by Civil Parties and their lawyers during Case 001, including: (i) establishing the nexus between the harm suffered by a Civil Party and the crimes for which Duch was being charged; (ii) issues relating to attendance and participation in the proceedings; and (iii) case preparation and coordination concerns in Civil Party representation. Moreover, the section provides an overview of certain witness protection and management concerns that arose during Case 001.

Finally, in Part Five of this report, we turn to look at the key trial management issues that arose during the Duch trial. The section assesses both judicial management of the proceedings, as well as administrative issues that impacted on both the accessibility of the trial to the Cambodian public and the administration of justice as a whole. Part Five is subdivided further into four parts: (i) judicial management; (ii) general management; (iii) public participation; and (iv) the Parties' attendance and performance.

Overall, the Monitoring Group assessed the Duch trial to have been conducted in accordance with generally accepted standards of due process at international criminal tribunals. Although Monitors have some concerns regarding the application of joint criminal enterprise to Duch's case (as detailed in Part Three of this report), when assessing Duch's trial against the benchmark of the international criminal tribunals established for Rwanda and Yugoslavia ('ICTR', 'ICTY' or '*ad hoc tribunals*'), as well as that of other international(ized) tribunals, we found the Accused Person's right to a fair trial to have been upheld.

Duch's trial may prove unique in the history of the ECCC, in that he is the only defendant to date who has admitted to the vast majority of the factual allegations against him. Although Duch requested that he be acquitted during his final week at trial, he largely cooperated with the Chamber throughout the proceedings and, until that point, had plead for remorse and been willing to accept punishment. As a result, certain procedural rights guaranteeing the presumption of innocence (or which seemingly prevent a shift in the burden of proof from the Prosecution to the Defense) have not been called into question. For instance, the Defense did not challenge the nature of the evidence being brought against Duch (largely archival and hence, open to being tampered with, in light of the 30 years since the DK era ended). Additionally, issues relating to translation were swiftly resolved, despite further efforts being needed to improve translation and interpretation at the ECCC. Accused Persons in further cases brought before the Court may not prove to be so cooperative.

Based on the analysis provided in this report and their observations throughout the duration of the trial, the Monitoring Group identified the following key 'lessons learned' from the trial:

**(A) With regard to structuring the proceedings:**

The Trial Chamber may wish to consider adopting a different approach to structuring the evidence presented during future cases. The use of evidentiary topics to structure witness testimony meant that at times, testimony was repetitive. Furthermore, it appeared to prove difficult to ensure Parties' questions remained confined to a specific topic when questioning certain witnesses, particularly experts and former employees of S-21. In order to facilitate a more streamlined approach to eliciting evidence in Case 002 (and for subsequent cases) the Chamber may wish to consider adopting the approach of other international tribunals and structure evidence according to categories of witness and geographic crime-base.

**(B) With regard to legal and procedural practice at trial:**

- The civil law notion of *iura novit curia* should be applied cautiously to cases before the ECCC, bearing in mind the gravity of the charges faced by the Accused and the impact it may have on the Accused Person's right to be notified of the

charges s/he faces before the trial begins and the particular nature of mass atrocity cases. This is particularly the case with regard to the application of the theory of joint criminal enterprise as a mode of liability, in light of recent jurisprudence regarding the specificity required to plead JCE from the *ad hoc* tribunals, and its limited application to date at the International Criminal Court.

- Streamlining methods of admitting documents is a commendable practice, and the Trial Chamber and the Parties have set positive precedents at the ECCC in this regard. These should continue to be followed in Case 002.
- Important precedents relating to provisional detention and the use of torture evidence have emerged from the Duch trial for the Cambodian domestic sector. Cambodian lawyers may wish to consider using these in trials before the municipal courts.

**(C) With regard to Civil Party Participation:**

- Regardless of any changes made to the Civil Party participation scheme in Case 002 and for future cases, the Judges of the ECCC may wish to consider issuing a practice directive with regard to Civil Party Lawyers' participation at trial. Basic questions, such as the role Civil Party Lawyers should play vis-à-vis representing their clients' interests as well as supporting the Prosecution, still require clarification.
- Greater resources allocated to Civil Party Lawyers to ensure more interaction with their clients would enhance their performance in Court and their ability to represent their client's interests. Additionally, however, greater coordination amongst civil party lawyers (regardless of the extent to which the Civil Party scheme is streamlined) will prove beneficial for the trials as a whole.
- Greater focus on defining a mandate for moral and collective reparations is required, if Civil Party Lawyers are to make meaningful reparations submissions on behalf of their clients and victims generally.

**(D) With regard to Trial Management:**

- Avoiding arbitrary rulings in Case 002 would further enhance the trial process and the Court's ability to act as an example for Cambodia's national judicial sector. The Judges should endeavor to provide clear reasoning for all their rulings.
- Steps taken by the Judges to curtail irrelevant questions were commendable. However, in certain instances, a more qualitative assessment of the questions being asked appeared to have been required. Overall, however, this practice enhanced the efficiency of the proceedings, and we encourage the Chamber to continue to be proactive in this regard.
- Greater coordination between prosecuting attorneys, and avoiding high staff turnover, would benefit the Office of the Co-Prosecutor's presentation of its case in Court.
- In light of surprising events during the final week of trial, during which Duch's national and international co-lawyers each argued differing pleas for their client

(the former ‘Not Guilty’ and the latter, ‘Guilty’), a change in the Court’s internal rules to ensure that each Defense team appoints a lead counsel seems warranted.

- No witnesses testified in closed session – a commendable practice adopted by the Chamber, which safeguarded Duch’s fundamental right to a public trial.
- Greater efforts at securing accurate translation and interpretation are being taken and should continue to be taken throughout the lifetime of the ECCC, to ensure the Accused Person’s rights are upheld.

**(E) With regard to Public Participation and Outreach:**

- Commendable efforts taken by the Public Affairs Section to improve public attendance should continue throughout the Court’s future cases. In addition, improving public access and public facilities at the Court is necessary.
- Further efforts to both increase Civil Party attendance and to manage the expectations of Civil Parties with regard to attending proceedings should be undertaken during future cases before the ECCC. Additional measures to ensure Civil Parties and complainants, as well as victims generally, are able to remain properly informed about the trial proceedings are imperative. As well as this, increasing non-legal activities for victims would likely enhance the Court’s ability to leave a positive legacy in Cambodia.

## **2. Part Two: Summary of Testimony**

### **(A) Background to the Duch Trial**

The accused, Kaing Guek Eav, alias ‘Duch,’ was born in Kampong Thom province on 17 November 1942.<sup>7</sup> He was a teacher by profession and joined the communist movement in the late 1960s, and was ‘introduced’ to the Communist Party on 25 November 1967. The Sihanouk government arrested him in January of 1968 and sentenced him to 20 years’ imprisonment with hard labor for breaches of state security. Like many other political prisoners, in April of 1970, the Lon Nol government released him. He subsequently went on to serve as the Head of M-13, a security prison established in 1971, primarily to interrogate and execute ‘enemies’ of the Party.<sup>8</sup>

During the period of Democratic Kampuchea, Duch held positions at Office S-21 in Phnom Penh. According to the Accused, the letter ‘S’ stood for ‘santebal’, a reference to a new form of security force deployed by the Khmer Rouge to preserve peace and security. S-21 was security prison, and, like M-13, was primarily utilized by the Khmer Rouge’s upper echelon to smash or kill perceived enemies of the regime. Duch admitted to being the Head of S-21 from March 1976 until January 1979.<sup>9</sup> Additionally, at some point between 1976 and 1977, Duch decided to relocate the execution site for S-21 to Choeung Ek, located 15 km south of Phnom Penh in Kandal Province.<sup>10</sup> A further site known as S-24, also formed part of S-21 and was considered a re-education camp for the regime.<sup>11</sup>

Duch was detained by the ECCC by an order of provisional detention on 31 July 2007, whereupon he was transferred from the Cambodian Military Prison in Phnom Penh. He had been incarcerated by the Military Prison since 1999, a fact that would make the length of his provisional detention a contentious issue. He was indicted and sent to trial for allegedly perpetrating Crimes Against Humanity, Grave Breaches of the 1949 Geneva Conventions, and Homicide and Torture pursuant to the 1956 Cambodian Penal Code, punishable under Articles 3, 5, 6, 29 and 39 of the ECCC Law. According to the Closing Order detailing the charges faced by the Accused, over 12,380 detainees were unlawfully killed at S-21, either as a result of murder or due to living conditions calculated to bring about death.<sup>12</sup>

### **(B) Competing Theories of Liability**

The substantive hearings in Duch’s trial took place over a period of 73 days between 17 February and 17 September 2009.<sup>13</sup> Unlike other international(ized) criminal trials, which have primarily adopted an adversarial system to present cases, Duch’s trial was conducted in accordance with the Western legal tradition that has most strongly influenced Cambodia’s fledgling democracy: the French criminal justice system. Hence, the Court adopted a predominantly inquisitorial approach, and the Judges of the Trial Chamber called witnesses and primarily led the evidence in the case. Nevertheless, both the Prosecution and the Defense gave opening statements, detailing contrasting theories of Duch’s responsibility and endeavoring to portray contrasting pictures of the Accused. Additionally, each of the Civil Parties, the Prosecution and the Defense gave closing submissions before the Chamber.

For the Prosecution, Duch, albeit claiming to be remorseful, could not escape the fact that he ‘knowingly and actively’ exercised ‘independent authority’ over the functioning of S-21.<sup>14</sup> After the National Co-Prosecutor, Ms Chea Leang, detailed the inhumane

conditions experienced by detainees at S-21 – including various forms of torture and being denied food and medical provisions – the then International Co-Prosecutor, Robert Petit, endeavored to show the ‘meticulous control’ executed by the Accused in carrying out his duties as Head of the Center. Any suggestion that Duch performed a limited and perfunctory role at S-21 was said to be ‘illogical and unsupported by the evidence.’<sup>15</sup>

For the Defense, Duch was ‘very regretful and shameful’ for the crimes he had committed in the name of Angkar, and was willing to cooperate with the tribunal in an attempt to remedy or relieve the sorrow of the Cambodian people. Although Duch’s national co-counsel would eventually ask for an acquittal for his client, his lawyers spent the majority of his case arguing that their client was essentially pleading guilty. Additionally, Duch himself stated during the course of the proceedings that he was willing to accept any sentence given to him by the Chamber and would not appeal his verdict. He was portrayed as a victim of a regime predominantly characterized by terror and secrecy, through which he was very much subjected to a ‘kill or be killed’ mentality.<sup>16</sup> The fact that Duch was one of 196 prison chiefs operating prisons throughout Cambodia was also emphasized: with none of the other prison chiefs currently facing trial, Duch’s National Counsel warned against his client becoming a ‘scapegoat’ for a far greater number of perpetrators, some of whom had committed even more heinous crimes than the Accused.<sup>17</sup> Hence, the real question, for the Defense, was one of whether ‘the hearings would allow one who has exited from humanity to return to humanity.’<sup>18</sup> Both of these competing theories would provide a backdrop to the evidence heard during the course of the proceedings that followed.

### **(C) Overview of the Evidence Presented**

Over the next twenty weeks, the Chamber would hear evidence in categories based on a loose chronological order, in accordance with a Scheduling Direction it had issued prior to the start of the trial. The categories of evidence dividing the order in which witnesses were heard were: (i) Issues relating to M-13; (ii) Establishment of S-21 and the Takmao Prison; (iii) Implementation of CPK Policy at S-21; (iv) Armed Conflict (or the existence of an Armed Conflict Between Cambodia and Viet Nam); (v) Functioning of S-21, including Choeung Ek; (vi) Establishment and Functioning of S-24; and (vii) the Character of the Accused. Additionally, the Chamber heard evidence from expert witnesses on reparations (and its psychological impact on civil parties and complainants) as well as sentencing.<sup>19</sup>

Table 1 provides a summary of the testimony heard or admitted into the record by category of evidence. In total, 69 persons other than the Accused provided evidence to the Chamber, 22 of whom were Civil Parties, 9 of who were expert witnesses and 38 of whom were witnesses of fact. Of these witnesses of fact, 14 provided sworn affidavits, while 24 testified in Court. The witnesses who gave oral testimony include 12 persons who gave evidence as former employees of M-13, S-21, S-24 or Prey Sar, 7 character witnesses and 5 victim witnesses. No witnesses testified in closed session – a commendable practice adopted by the Chamber, which safeguarded Duch’s fundamental right to a public trial.

**TABLE 1: SUMMARY OF WITNESS TESTIMONY**

<b>TOPIC:</b>	<b>WITNESSES WHO GAVE EVIDENCE / PARTY:</b>	<b>APPROX. NO. OF WKS OF TT*:</b>	<b>% OF OT*:</b>
<b>Issues related to M-13</b>	The Accused; François Bizot [F]; Uch Sorn [F]; Chan Voeun [F]; Chan Khorn [F].	2 (Reports No. 3&4)	10
<b>Establishment of S-21 and Takmao Prison</b>	The Accused	Less than 1 (Report No.5)	>5
<b>Implement'n of CPK Policy at S-21</b>	Craig Etcheson [E]; the Accused; Mam Nay [F]; Raoul Marc Jennar [E].	2.5 (Reports No. 5,6, 7, 8, 13 & 19)	12.5
<b>Armed Conflict</b>	Nayan Chanda [E]; the Accused.	1 (Reports No. 7 & 8)	5
<b>Functioning of S-21, including Choeng Ek</b>	The Accused; Van Nath [F]; Chum Mei [C]; Bo Meng [C]; Norng Chanphal [F]; Ly/Ear Hor [C]; Lay Chan [C]; Phaok Khan [C]; Chin Met [C]; Nam Mon [C]; Mam Nay [F]; Him Huy [F]; Prak Khorn [F]; Kok Sros [F]; Suos Thy [F]; Meas Pengkry [FA]; Sek Dan [F]; Lach Mean [F]; Cheam Sou [F]; Kheav Yet [FA]; Pesh Mab [FA] Nhem En [FA]; Nheab Ho [FA]; Khung Pai [FA]; David Chandler [E]; Chuun Phal [F]; Soam Met [F]; Makk Sithim [FA]; Toy Teng [FA]; Soam Sam Ol [FA] Chey Sopheara [FA]; Horn Im [FA]; Kaing Pan [FA];	7 (Reports No. 9-17)	35
<b>Establishment and Functioning of S-24</b>	Chin Met [C]; Tay Teng [FA]; Bou Thon [F]; Uk Bunseng [FA]; Phach Siek [FA]; Kaing Pan [FA]; Chum Neou [C]; Meas Peng Kry [F]	2 (See Reports No. 12, 17)	10
<b>Damage and injury suffered from the crimes allegedly committed by the Accused</b>	Martine Lefevre [C]; Uk Neary [C]; Robert Hamill [C]; Antonya Tioulong [C]; Hav Sophea [C]; So Sounng [C]; Neth Phally [C]; Im Sunthy [C]; Phung Guth Sunthary [C]; Seang Vandy [C] Chum Sirath [C]; Chum Neou [C]; Ou Savrith [C]; Chhin Navy [C]; Touch Monin [C].	1 (See Reports No. 18 - 19)	5
<b>The Character of the Accused</b>	Françoise Silboni-Guilbaud [E]; Kar Sunbunna [E]; Sou Sat [F]; Tep Sem [F]; Tep Sok [F]; Chou Vin [F]; Hun Smien [F]; Peng Poan [F]; Christopher Lapel [F].	2.5 (See Reports No.19, 20 and 21)	12.5
<b>Sentencing – Aggravating and Mitigating Circumstances and Reparations</b>	Chhim Sotheara [E]; Richard Goldstone [E]; Stephane Hessel [E].	1.5 (See Reports No.19 and 21)	7.5

**Key**

[E] = Expert Witness

[F] = Witness of Fact who testified in open court

[FA] = Witness of Fact whose affidavit was read into the record

[C] = Civil Party (N.B. This includes Civil Parties who testified whose status is challenged by the Defense)

\*‘TT’ refers to ‘trial time’; Estimates made on rough calculations of hours spent during a particular week on hearing testimony and are for indicative purposes only. ‘OT’ refers to ‘overall testimony’; Percentages are given as a percent of the overall testimony.

## **(D) Summary of Evidence Presented By Category**

The following summary provides a brief overview of the evidence presented at trial by category of evidence, linking the significance of this evidence to the charges faced by the Accused under the Closing Order. Additionally, we have included a brief summary of the arguments presented during the week of closing submissions. For a fuller account of the evidence presented, please consult KRT Trial Monitor, Reports No. 1 – 22 and the relevant annexures.

### **(i) Issues Relating to M-13**

Although Duch does not face charges for his role as Head of M-13, the Trial Chamber determined that understanding the role he played at this security prison would be ‘pivotal’ to their assessment of the degree of the Accused Person’s knowledge of the development of security prisons in Democratic Kampuchea in general, and at S-21 in particular.<sup>20</sup> This appeared to be borne out by the Accused Person’s testimony: according to Duch, at M-13, a security prison subdivided in two branches of which he directly supervised one (M-13A), his principle mission was ‘to beat, interrogate and ‘smash’’ perceived spies from what he referred to as the ‘Lon Nol’ area. (It became apparent during the course of the trial that the term ‘smash’ was a euphemism used by the Khmer Rouge to mean ‘kill’). Reiterating statements he made to the Co-Investigating Judges, the Accused elaborated that decisions pertaining to who to smash were made exclusively by the ‘upper echelon’ of the Khmer Rouge – at that time comprising Ta Mok, Vorn Vett and Chou Cheat (alias ‘Brother C’), among others.<sup>21</sup> He seemed at once to be affirming the extent to which he had carried out acts of violence, while at the same time implying that he had committed them for a higher purpose and under the command of superiors – sentiments that would emerge as a theme throughout Duch’s testimony at trial.

The Chamber called four witnesses to testify in this category: François Bizot, a former detainee at the camp; and Uch Sorn, Chan Vooun and Chan Khorn, all of whom were allegedly staff at M-13 (a claim the Accused rejected).<sup>22</sup> Bizot’s characterization of Duch tended to support the Defense’s theory of the Accused as a man who was ‘a vector of state-institutionalized mass killing on the one hand, and on the other hand, a young man who had committed his life to a cause, to a purpose, based on the idea that crime was not only legitimate, it was deserved.’<sup>23</sup> The three other witnesses all asserted that conditions for the detainees at M-13 were significantly harsher and more violent than the Accused himself had suggested, particularly as it related to the number of detainees held in incarceration in large, open pits, and the conditions under which they were both interrogated and detained.

### **(ii) Establishment of S-21 and Takmao Prison**

The Accused Person himself was asked to explain the establishment of S-21 and Takmao Prison, with no witnesses having been called specifically to testify in this category. Other witnesses, however, would seemingly give details of S-21’s establishment throughout the course of their testimony.<sup>24</sup> Perhaps the most significant evidence given by the Accused at this point during the trial related to the reporting structures that were implemented at S-21 from the moment of its inception – evidence likely to be considered by the Chamber when assessing the responsibility of the Accused as a superior holding the position of Head of S-21.<sup>25</sup> According to Duch, all

his subordinates at S-21 reported directly to him, and he subsequently reported directly to the CPK's Standing Committee – a sub-committee of the Party's Central Committee, alleged to have acted as 'the highest and most authoritative unit in Democratic Kampuchea.'<sup>26</sup> The Accused evidenced this reporting practice by displaying various confessions that he had annotated and sent to Son Sen (Deputy Prime Minister in charge of Defense and Security and a member of the Standing Committee) and later, Nuon Chea (alias 'Brother No. 2'), addressing them both as respectful brother. Other annotations on these confessions showed that Son Sen passed these documents on to Pol Pot or circulated them within the Standing Committee, as he found appropriate. The Accused also claimed to meet his superiors 'quite often' to discuss activities within S-21.<sup>27</sup>

### **(iii) Implementation of CPK Policy at S-21**

Evidence of the implementation of CPK Policy at S-21 is likely to be significant, both in the Chamber's determination of: (i) the extent to which the Accused Person was aware of a common plan, purpose, or design that formed part of a joint criminal enterprise, of which he is alleged by the Prosecution to have been a part (should they determine this theory is applicable to the case), as well as (ii) the chapeau element of the crimes against humanity for which the Accused is charged – namely, extent to which the crimes that occurred at S-21 formed part of a widespread or systematic attack against the civilian population in Cambodia, based on national, racial, ethnic, religious or political grounds.<sup>28</sup> Both the *ad hoc* tribunals have held that although a policy or plan is not a requirement for proving that a widespread or systematic attack occurred, evidence of a policy or plan may be used for this purpose.<sup>29</sup>

The Chamber appears predominantly to be relying on experts and the Accused Person to provide it with evidence related to the implementation of CPK Policy at S-21. This may have resulted, at least in part, from the difficulty in obtaining testimonies from witnesses above Duch in the chain of command, due to the fact that many of the witnesses who could provide the most meaningful testimony are now deceased.<sup>30</sup> Consequently, much of the Chamber's characterization of Duch's implementation of CPK policies at S-21 will largely depend on their assessment of the competing claims of experts Craig Etcheson and Raoul Marc Jennar on the extent the Accused Person exercised control at S-21 (and the uniqueness of S-21 as an institution), as well as the Accused Person's accounts himself. Although there were points of commonality between all three, Etcheson clearly disagreed with both Jennar and the Accused with regard to the significance of S-21 and Duch's role as its Head. Referring to it as 'the security office associated with the penultimate node in the power pyramid of Democratic Kampuchea,' Etcheson implied that 'only [it] had the authority to arrest and detain people from across the country.'<sup>31</sup> Jennar, on the other hand, believed that the extent to which S-21 was considered distinctive from other security prisons in Cambodia had been over-emphasized. Both experts, however, agreed that purging of political enemies – either perceived or actual – became the norm during the DK era, a conclusion that may somewhat support the claim of a widespread attack occurring against the civilian population on political grounds, as is alleged in the Closing Order.<sup>32</sup>

### **(iv) Armed Conflict**

In order to prove the applicability of the Geneva Conventions to the Accused Persons' case (and hence, the charges that related to this under the Closing Order), the Chamber will likely assess whether four general conditions existed during the period of

Democratic Kampuchea: (i) the existence of an armed conflict; (ii) that the armed conflict was international in nature; (iii) the existence of a link or a nexus between the alleged crimes and the armed conflict; and (iv) that the victims of the alleged crimes are protected persons pursuant to the provisions of the Geneva Conventions. The ICTY Appeals Chamber established these criteria as general requirements triggering the applicability of the grave breach provisions.<sup>33</sup>

The Chamber heard from one witness – expert Nayan Chanda – on the existence of an armed conflict between Cambodia and Viet Nam during the period of Democratic Kampuchea.<sup>34</sup> Mr Chanda was a journalist for the *Far Eastern Economic Review* reporting on Viet Nam and Cambodia during the DK era. Although not a legal expert, Mr Chanda testified that both nations were engaged in armed combat, to varying degrees of intensity, from the fall of Phnom Penh in 1975. According to Mr Chanda, Viet Nam officially declared itself at war with Cambodia in December of 1977. Mr Chanda testified that the Khmer Rouge was responsible for killing both civilians and Vietnamese prisoners of war (‘POWs’) during this period, both of whom are protected persons under the Geneva Conventions. He also noted that anti-Vietnamese sentiment was used by the Khmer Rouge to justify its actions against the Vietnamese. The existence of Vietnamese civilians and POWs at S-21 was affirmed by both the Accused Person himself and several of the witnesses who subsequently testified to the functioning of the security prison.<sup>35</sup>

#### **(v) Functioning of S-21 (including Cheoung Ek)**

As can be seen from Table 1, the vast majority of the Chamber’s time was spent hearing testimony relating to the functioning of S-21 and Cheoung Ek. This evidence is likely to be most important in illustrating that the crimes the Accused Person is charged with (namely, murder, extermination, torture, persecution, physical violence and rape, among others) were actually committed at S-21. Additionally, assessing the demographic of S-21 – and the extent to which it can be said to have comprised members of the civilian population systematically targeted or who came from geographically diverse areas within Cambodia – will be important in the Chamber’s assessment of the extent to which crimes against humanity were committed at S-21, should it determine they were committed.

Based on Monitors’ own calculations, about 35% of the testimony at trial comprised hearing evidence in this category. Of the witnesses of fact who testified in this category, the vast majority were former employees of S-21 – comprising largely former interrogators; guards; administrative officers; and medics.<sup>36</sup> Far less time (approximately two weeks, or 10% of the overall testimony) was devoted to hearing testimony about the establishment and functioning of S-24, though this was in part due to the fact that some of this testimony overlapped with that on the functioning of S-21.

The Chamber and Parties focused on asking witnesses and Civil Parties to explain the conditions at S-21, and the methods of interrogation and torture utilized by the interrogators that worked there. At points, particularly gruesome details of these conditions were revealed by both the Accused and witnesses: some detainees were killed by having their bodies drained of blood;<sup>37</sup> others were subjected to particularly egregious torture techniques, including being forced to ingest feces and urine or being subject to medical experimentation;<sup>38</sup> a baby was allegedly dropped from one of the upper floors of the S-21 complex;<sup>39</sup> and one detainee was allegedly burned alive.<sup>40</sup> Additionally, Duch, and witnesses Him Huy and Prak Khorn all acknowledged

incidences of rape, though such incidences did not appear to have been prevalent at S-21.<sup>41</sup>

Some witnesses were also questioned on the prisoner demographic at S-21. The Accused himself noted the presence of 48 prisoners from 11 countries (other than Cambodia) at S-21.<sup>42</sup> Many of the interrogators affirmed Duch's statement that he had not been personally present or taken part in the interrogations at S-21. However, they additionally noted that they knew he was the overall commander of the institution.<sup>43</sup> Moreover, both the witnesses and the Accused revealed details regarding the extent to which Duch was involved in training interrogators.<sup>44</sup> Expert David Chandler also testified before the Chamber, largely relating and expanding on concepts from his book, *Voices of S-21: Terror and History in Pol Pot's Secret Prison* (University of California Press, 1999).<sup>45</sup>

#### **(vi) Establishment and Functioning of S-24 ('Prey Sar')**

S-24 was essentially characterized as a 'holding place' for detainees who were considered capable of being re-educated prior to being sent to other units. All witnesses who testified to being at S-24 (either as employees or detainees) agreed that detainees who were not 'successfully tempered' would be sent to S-21 to be smashed. Kaing Pan, a former employee of S-24, personally witnessed the removal of S-24 detainees via covered trucks at night. Phach Siek, another employee, placed the number of prisoners at Prey Sar at around 2,000. All witnesses, as well as some Civil Parties (including civil party Chum Neou) underscored the grueling work conditions at the re-education camp, with many of the detainees undernourished and being forced to work up to 18 hours a day.<sup>46</sup>

#### **(vii) Character of the Accused**

A total of seven character witnesses testified on Duch's behalf, three of whom knew the Accused prior to his imprisonment by Sihanouk's government in 1968, and four of whom knew him in the mid 1990s, when he resumed work as a teacher in Svey Chek District. In general, Duch was considered to be a gentle, dedicated and knowledgeable person. All of these character witnesses expressed surprise and bewilderment at the fact that the man they knew had been the Chairperson of the most notorious Security Center of the DK era.<sup>47</sup> None seemed to point to the duality in Duch's character identified by François Bizot and expert David Chandler, the latter of whom noted the zeal with which the Accused exercised authority at S-21.<sup>48</sup> Additionally, psychological experts Ms Françoise Silboni-Guilbaud and Mr Kar Sarbunna testified jointly before the Chamber. Both experts' unequivocal opinion was that Duch did not suffer from any psychological disorders. They further noted that he was undergoing a process through which he was coming to terms with the notion of guilt, and that his sense of remorse was real and genuine. Notably, the trial was said to have contributed toward the Accused being able to undergo this rehabilitative process.<sup>49</sup>

#### **(viii) Damages, Reparations and Sentencing**

Although not identified as a separate and distinct category of evidence, the Chamber also heard expert witness Mr Chhim Sothera on the issue of reparations, and its meaning for Civil Parties in the case. Several Civil Parties also testified in this category, both to assist the Chamber to understand the long-term impact of what had happened at S-21 and in order to prove a link between themselves and the events that had occurred to

legitimate their claim to reparations. Emotions ran high as Civil Parties recounted memories of their loved ones who perished at S-21, their invaluable place in the family, and the extreme trauma the family had had to endure upon learning of their demise.<sup>50</sup>

Justice Richard Goldstone and Mr Stephane Hessel testified regarding aggravating and mitigating circumstances for sentencing of the Accused, as well as the nature of remorse.<sup>51</sup>

### **(E) Closing Submissions**

Proceedings in Case 001 came to an end after the Parties presented Closing Submissions from 23 to 27 November 2009. The Civil Party lawyers began the week and focused on the need to mete out justice, to unearth the truth and provide ample reparations in order to afford their clients and the many victims of the Khmer Rouge a sense of closure. Additionally, they rejected Duch's claim to having no autonomy at S-21 and asserted instead that he had run a camp 'dedicated to death'. They further portrayed the Accused as having done what he had done 'not only because he was of the same mind as those implementing the suffering, but in fact because it was convenient for him'.<sup>52</sup>

Consistent with the theory of the case they had endeavored to present at trial, the Prosecution asserted that the Accused Person should be held individually criminally responsible for the heinous atrocities committed at S-21. Dismissing his pleas for remorse and his tendency to view himself as merely a cog in the machine of the murderous Khmer Rouge machine, National Co-Prosecutor Chea Leang focused on both the distinct nature of S-21 as a prison at the apex of the DK's security centers, and the zeal with which the Accused Person had carried out his duties. Additionally, Acting International Co-Prosecutor William Smith argued the evidence had indicated that the efficiency with which the Accused carried out his duties as head of this renowned torture center had meant, in effect, that he encouraged the upper echelon to arrest, detain and 'smash' cadres at S-21. He was portrayed as forging a 'misguided crusade' together with his superior, Son Sen, for which both were willing 'to sacrifice their hearts, souls and humanity'.<sup>53</sup> The Prosecution subsequently requested that the Chamber sentence the Accused to forty years' imprisonment. This request included a reduction of five years to his sentence, bearing in mind mitigating factors such as the Accused's cooperation with the Chamber.

In a surprising turn of events, the Defense ended the week by pleading 'not guilty' to all the charges Duch faced under the Closing Order. Despite Duch's international counsel, Mr François Roux, drawing parallels between his client's case and that of *Obrenovic* at the ICTY (who pleaded guilty) and consistently stating that his client was remorseful, both Duch and his national co-counsel asserted instead that he was requesting an immediate release. Bringing up jurisdictional arguments that should have been raised as preliminary matters in Duch's case, national counsel Kar Savuth, argued variously that: Duch was not one of the senior leaders and could not be held 'most responsible' for the crimes committed at S-21, the statute of limitations for the Chamber to try Duch for domestic crimes had expired, and that the punishment facing his client was unconstitutional. Mr Savuth also invoked a 'superior orders' defense, despite the Defense agreeing previously that this was not a full defense under international law.<sup>54</sup> When questioned by the Chamber as to whether this meant the Accused was ostensibly asking for an acquittal, Mr Savuth responded in the affirmative. Although both Duch and his international counsel continued to maintain that Duch was sorry for the crimes committed at S-21 and admitted to being responsible for the actions of his subordinates,

the Accused ultimately requested that the Chamber look to his national counsel to determine which plea he was entering.<sup>55</sup>

#### **(F) ‘Lessons Learned’ from the Presentation of Evidence**

In certain respects, hearing evidence under general categories provided an ideal framework through which to structure and organize Case 001 and created a coherent chronological backdrop through which to construct a narrative of the case. From the perspective of the Chamber and the Parties, this may have proved beneficial for organizing and preparing questions for witnesses. However, despite their best efforts to ensure that questions remained relevant to a particular category of evidence, the Chamber appeared to have difficulty containing Parties’ questioning of individual witnesses, often finding that they would put questions to the witnesses that spanned more than one evidentiary topic. This was particularly the case in relation to questions relating to CPK Policies on the one hand, and the Functioning of S-21 and Cheoung Ek, on the other, given many questions in these categories overlapped.<sup>56</sup> Additionally, the Judges themselves appeared to ask repetitive questions at various points in the proceedings.<sup>57</sup>

Furthermore, the general nature of the topics meant that at times, the focus of the proceedings seemed to be largely on elements of a particular topic that were unlikely to have any direct bearing on assessing the degree of culpability of the Accused. This included ascertaining the distinct features of the brand of communism represented by the Khmer Rouge ideology (which seemingly lead to discussions which were too abstract to determine Duch’s individual criminal responsibility) and minutiae of the prison conditions at S-21 (which seemed irrelevant, in light of the extent to which he had already admitted being responsible).<sup>58</sup>

For Case 002, rather than choosing to consider topics in chronological order, the Chamber may wish to adopt a similar approach to that of other international(ized) tribunals. At the ICTY, for instance, the Chambers would generally hear evidence from key ‘insider’ witnesses or military experts first, followed by crime-base evidence produced by municipality (*i.e.* from district to district). For cases dealing with multiple crime sites, this allowed for an overall ‘story’ of the case to emerge first, followed by that of the individual crime sites the prosecutor had investigated.<sup>59</sup> The Special Court for Sierra Leone has adopted similar strategies, although in some instances, witnesses were heard by category of crimes (*e.g.* rape victims were heard together) rather than by crime-base *per se*.<sup>60</sup> This may allow for questioning to be more streamlined and focused, especially given this case deals with multiple accused facing charges across a much larger geographical area.

### 3. Part Three: Legal and Procedural Issues

Like all international(ized) justice institutions – established with limited jurisdictional mandates and so as to serve specific, politically-negotiated purposes – the Extraordinary Chambers in the Courts of Cambodia has had to grapple with how best to implement a coherent set of procedures and adhere to a cogent rubric of legal norms within a very short time frame. In this regard, the Duch trial became a ‘test case’ for the Trial Chamber’s application of the Court’s Internal Rules. It also tested the extent to which the Chamber would deem it necessary to adhere to internationally recognized standards of due process as implemented at other tribunals, most of which (unlike the ECCC) were modeled on an adversarial system of justice.<sup>61</sup>

The ECCC’s basic procedural structure employs an inquisitorial model, where judges play a more active role in controlling the course of proceedings. This model is believed to better accomplish the objective of establishing an ‘accurate historical record’ since judges are regarded as objective truth-seekers, empowered to ask questions that pertain to relevant facts.<sup>62</sup> Hence, unlike the adversarial models of justice adopted at the *ad hoc* tribunals for Yugoslavia and Rwanda, which ascribe to a largely advocate-led process, judges at the ECCC are expected to take a far more proactive role in determining the parameters of the case and questioning witnesses. Additionally, the inquisitorial model adopted in Cambodia, which largely follows the French system, provides far greater space for the Accused Person to respond to witness testimony than at other tribunals. As a result, a large amount of the Chamber’s time was spent questioning Duch on the testimony of witnesses and giving him the right to comment on the veracity of their statements. This may prove to pose greater challenges from a trial management perspective in cases where there are multiple accused persons, such as in Case 002.

Much like the tribunals that came before it, the ECCC’s adoption of procedures has become very much a ‘work in progress,’ as the judges endeavor to establish coherent and efficient procedural rules by incorporating the best practices from existing legal traditions to both further the Court’s objectives and protect the rights of the parties before it. International Defense Counsel and French *avocat* François Roux recognized that each legal tradition has its own advantages and disadvantages, but expressed concern over combining the two systems. He observed that while the objective is to adopt the best practices of each system, there were instances when the worst was implemented during the proceedings, when parties, exhibiting lack of understanding of the civil law system, insisted on employing common law procedures.<sup>63</sup> According to Roux, the confusion regarding the two systems was noticeable particularly from the Office of the Co-Prosecutor’s failure to maximize its role during the investigative stage, the frequent use of leading questions, and the Civil Parties’ resolve to present their arguments on sentencing.<sup>64</sup> Judge Silvia Cartwright explained that this was part of a move towards a ‘homogenous system’ at the international level, adapting procedures from both common law and civil traditions, to ensure they fit the realities on the ground.<sup>65</sup> Acting International Co-Prosecutor William Smith, on the other hand asserted that the conflict between the civil law and common law systems was ‘more myth than reality’ at the international/hybrid level, in that the difficulties experienced in the cases had more to do with the large amount of evidence being presented than it did the difference between the traditions.<sup>66</sup>

The following section provides an overview of the key legal and procedural issues that emerged during Duch’s trial, as identified by the Monitoring Group throughout the proceedings. However, discussion of procedural issues relating to Civil Party

participation will be considered in Part Four of this report. This section focuses specifically on three broader legal issues – namely, provisional detention, sentencing, and the application of the theory of joint criminal enterprise to the Accused Person’s case – and three specific procedural issues – namely, the application of the principle of equality of arms, the admissibility of evidence and disclosure throughout the trial, generally and the use of torture evidence specifically. These issues were considered by the Monitoring Group both: (i) to have had the greatest potential of impacting negatively on the Accused Person’s right to a fair trial, as enshrined in Article 14 of the International Covenant on Civil and Political Rights, to which Cambodia has acceded and which is incorporated by reference in the ECCC Law; and (ii) to provide the most important ‘lessons learned’ for both the Court’s ongoing cases and the national judicial sector.

**(A) The Right to be Informed of the Nature and Cause of the Charges against Him: The Application of the Theory of Joint Criminal Enterprise to Duch’s Case**

Joint criminal enterprise (‘JCE’) is a mode of liability that aims to capture manifestations of collective criminality where crimes are carried out by groups of individuals acting in pursuance of a common criminal design. Although the theory was accepted by the International Criminal Tribunal for the former Yugoslavia in its seminal *Tadić* judgment to have crystallized as a customary international law norm as early as 1945, its application, both at the ECCC and at the international level, has become somewhat controversial.<sup>67</sup>

The issue of the application of JCE to Duch’s case first became contentious when the Office of the Co-Investigating Judges determined not to include specific reference to a JCE theory in the Closing Order indicting Duch. In their appeal against the Closing Order, the Co-Prosecutors argued that the material facts included revealed that a JCE persisted from the establishment of S-21 on 15 August 1975 until the collapse of the DK regime on 7 January 1979. According to the Prosecution, the collective criminal purpose of this JCE was the ‘systematic arrest, detention, ill-treatment, interrogation, torture and execution of ‘enemies’ of the DK regime’ at S-21.<sup>68</sup> The Co-Prosecutors allege that Duch is liable under all three categories of JCE – namely, JCE I or the ‘basic’ form of JCE, where Duch is considered a co-perpetrator of criminal acts committed throughout the DK era; JCE II or its ‘systemic’ form, under which Duch is alleged to have implemented a system of repression that pervaded S-21; and JCE III, or the extended form of liability, under which crimes committed outside the collective criminal purpose as carried out at S-21 are nevertheless considered a natural and foreseeable consequence of the establishment of the system for which Duch can be held liable.<sup>69</sup>

The Pre-trial Chamber dismissed this arm of the Co-Prosecutor’s Appeal on procedural grounds. The Chamber opined that the Accused had not been adequately informed of the allegations of his participation in a JCE at S-21 prior to the Co-Prosecutors’ issuing their final submission in the case. Seemingly undaunted by this, the Co-Prosecutors subsequently made submissions to the Trial Chamber at the start of Duch’s trial, requesting it to amend the legal characterization of the crimes stipulated in the Closing Order, pursuant to Rule 98(2) of the Court’s Internal Rules, Rev.3.<sup>70</sup> The Co-Prosecutors asserted that any change in the legal characterization of the crimes for which Duch is charged will not impinge on Duch’s right to be informed of the nature and cause of the charges he faces, because the facts supporting the JCE were properly plead and with sufficient particularity. After receiving submissions from the Parties on

JCE, the Trial Chamber determined that it will reserve judgment on this issue until after the case has closed.

The Trial Chamber's power to amend the legal characterization of facts in an indictment is derived from the civil law principle, *iura novit curia* (the court knows the law).<sup>71</sup> Apart from the ECCC, only the ICC's Regulations reflect this concept and provide for the modification of legal characterization made for a charge '...without exceeding the facts and circumstances described in the charges and any amendments to the charges.'<sup>72</sup> That parties may request the Trial Chamber to reconsider the legal characterization of the facts described in the charges against the accused was confirmed by the Pre-Trial Chamber of the ICC in the case of the *Prosecutor v. Lubanga Dyilo*.<sup>73</sup> In *Kupreškić, et al.*, however, the ICTY cautioned against the use of the *iura novit curia* principle before international criminal courts because this violated Article 21(4)(a) of the ICTY Statute, which guarantees the right of an accused to be informed promptly and in detail of the nature and cause of the charge against him.<sup>74</sup>

The resolution of the application of JCE to Case 001 will have important ramifications for subsequent cases tried before the ECCC. A positive ruling on the existence of JCE I, II & III in the Duch Case could allow the extent of all the Accused Persons' culpability for crimes committed during the DK era to be significantly expanded. Additionally, it may mean that, regardless of what is plead in the Closing Order against other Accused, the Trial Chamber Judges may be able to characterize the facts plead as amounting to a JCE at the close of trial. Given the gravity of the crimes for which the Accused Persons are charged, it would seem prudent, however, for the Trial Chamber to determine a test of how it will exercise its discretion relative to the legal characterization of the facts and law in the Closing Order. Additionally, it seems incumbent on both the Co-Prosecutors and the Co-Investigating Judges to ensure that the Closing Order in Case 002 and subsequent cases does not replicate the weaknesses of insufficient pleading as identified by the Pre-Trial Chamber for Case 001.

## **(B) The Right to a Trial without Undue Delay**

### **(i) Duch's Provisional Detention**

Duch had been in provisional detention under the authority of the Cambodian Military Court for eight years before being transferred to the ECCC on 30 July 2007.<sup>75</sup> Both the Office of the Co-Investigating Judges and the Pre-Trial Chamber opined that the legality of Duch's detention prior to being transferred was not the responsibility of the ECCC, and that the continuance of his incarceration was necessary to ensure his safety.<sup>76</sup> This prompted the Defense to raise the issue before the Trial Chamber, on the grounds that Duch's continued detention without trial flouted both Cambodian law and international standards.<sup>77</sup> The Defense asked for Duch's immediate release and the remedy of entitlement to credit for the total duration of his time in detention in the event of his conviction.<sup>78</sup> Indeed, if Duch's eight-year incarceration by order of the Military Court was added to the time he has been kept in Pre-trial Detention at the ECCC, his provisional detention has far exceeded the three-year limitation set out in the Cambodian Code of Criminal Procedure as well as generally accepted norms for pre-trial detention during ordinary criminal proceedings.<sup>79</sup>

In its Decision dated 15 June 2009, the Trial Chamber acknowledged that the rights of the Accused had been infringed by the Military Tribunal and further declared that, in the event of an acquittal, Duch is entitled to seek appropriate remedies for time spent in

incarceration at the Military Court and for this violation of his rights.<sup>80</sup> In the event of conviction, Duch is entitled to credit for the time he spent in detention under the authority of the Military Court, from 10 May 1999 to 30 July 2007, and for the time he served in detention under the authority for the ECCC since 31 July 2007, pursuant to Article 503 of the Cambodian Code of Criminal Procedure. This means that if Duch is found guilty, he will be entitled to approximately 8 years' reduction to his sentence.<sup>81</sup>

While the Constitution of Cambodia and the Cambodian Code of Criminal Procedure provide for safeguards to the right of the accused persons against unwarranted and excessive provisional detention, in practice, these rights continue to be violated.<sup>82</sup> The extension of periods of detention allowed by the Code of Criminal Procedure is vulnerable to abuse given 'the unprincipled ways in which many prosecutors and courts use their powers.'<sup>83</sup> Additionally, due to various challenges in implementing the applicable standards (such as the difficulties associated with completing investigations), pre-trial detainees often suffer incarceration for months and even years beyond the statutory limit. The Trial Chamber's ruling on the illegality of Duch's detention before the Military Tribunal is undoubtedly a welcome precedent which national lawyers may seek to use to advocate for the proper resolution of issues concerning provisional detention. Its decision reinforces the right of accused persons to be tried within a reasonable time, and their entitlement to remedies should this right, or indeed, any of their human rights, be violated.

#### **(ii) Duch's Plea of Remorse**

During pre-trial investigations and for the vast majority of Duch's case at the ECCC, Duch largely accepted responsibility for his role in the Khmer Rouge regime and the crimes committed at S-21. Hence, when the Accused responded to the Co-Prosecutors' opening statement on the second day of trial, he expressed contrition, apologized to victims and asked for their forgiveness.<sup>84</sup> Duch also agreed to cooperate with the Chamber and the Parties and stated that this was his way 'to relieve the sorrow of the Cambodian people.'<sup>85</sup> In the context of common law procedure and other international criminal tribunals, Duch's acknowledgment of responsibility, at least until the time of Closing Submissions, was akin to a plea of guilt to the majority of charges he faced. However, consistent with Cambodian procedural law (and unlike other international tribunals) the ECCC's Internal Rules do not provide for expedited proceedings following an admission of guilt.<sup>86</sup> Instead, the Internal Rules have a two-fold requirement before any accused is convicted: first, that the Prosecution prove the guilt of the accused; and second, that the Chamber be convinced of the guilt of the accused beyond reasonable doubt.<sup>87</sup> Hence, substantive hearings were held (notwithstanding Duch's confession) in compliance with these requirements.

Notwithstanding the Accused Person's change of plea during the final week of trial, an issue related to the conduct of full-blown hearings during Duch's case was the possible infringement of his right to an expeditious trial. The substantive proceedings lasted twenty-one weeks (twenty-two, including closing submissions) and there is no indication how long it will take the Trial Chamber to deliberate and finally issue its sentencing judgment.<sup>88</sup> It could be said that Duch's trial should have been completed much earlier, considering that he had already largely admitted responsibility for the charges against him during the investigation. In the ICTY, the average time between an accused person's plea of guilt and the issuance of the Trial Chamber's sentencing judgment is 22 weeks.<sup>89</sup> The longest period from the time the accused person made his guilty plea until the Trial Chamber issued its sentencing judgment was 35 weeks while

the shortest was 7 weeks.<sup>90</sup> Evaluated against the foregoing, it appears that Duch's trial is not as protracted as is often perceived, given the various factors that contribute to the delay of the proceedings in the ECCC, least of all the gap of over 30 years between the commission of the crimes and the commencement of the trial, and the unprecedented participation of Civil Parties.

It is perhaps worth considering whether, if part of the ECCC's role of meting out justice is determining the truth about the totality of crimes committed occurred during the DK era, the trial was to some extent, justified.<sup>91</sup> Arguably, the evidence presented during the proceedings has helped shed further light on one of the darkest periods in Cambodia's history.<sup>92</sup> It is therefore conceivable that these benefits outweigh the ostensible violation of the right of the Accused to a speedy trial in this instance.

### **(C) The Principle of Equality of Arms**

The principle of 'equality of arms' is considered an essential element of a fair trial in adversarial proceedings, and generally refers to the existence of reasonably equivalent resources, as well as procedural equality between, the Prosecution and the Defense.<sup>93</sup> The principle is particularly important to maintain during mass atrocity cases, due to the extensive pressure to convict placed on the Prosecution and the correlative tendency historically to downplay the role of the Defense. At the ECCC, however, the application of this principle has been further complicated by the participation of Civil Parties in the proceedings, shifting the balance of power between opposing sides to a tripartite structure, which includes serving the rights of Civil Parties and their lawyers ('**Civil Party Lawyers**'). In light of this, it is perhaps more accurate to characterize the application of this principle at the Court as ensuring the maintenance of a fair balance between all Parties.<sup>94</sup>

The ECCC's Internal Rules provide that the purpose of the Civil Party action was to ensure victims could participate in the proceedings by 'supporting the prosecution.'<sup>95</sup> As Duch's trial progressed, however, the need for a definitive interpretation of this provision became apparent as the Defense opposed the manner and extent through which Civil Party Lawyers exercised this right.<sup>96</sup> The Defense repeatedly claimed that Civil Party Lawyers were acting as 'second prosecutors' as opposed to merely supporting it.<sup>97</sup> In an interview, Defense Lawyer François Roux explained that while Civil Parties are allowed to intervene in the proceedings to further their interest in obtaining reparations, this is only relevant when an accused denies responsibility, which was not the case with his client.<sup>98</sup>

In its Decision dated 9 October 2009, the Trial Chamber ruled that the right to the Accused 'to a fair trial in criminal proceedings includes the right to face one prosecuting authority only. Accordingly, and while Civil Parties have the right to support or assist the Prosecution, their role within the trial must not, in effect, transform them into additional prosecutors.'<sup>99</sup> It did not elaborate, however, upon how this role would be defined, nor did it provide clear indicia for the Civil Party Lawyers' involvement. Rather, the Chamber merely declared that '[E]ach party has a distinct role, in keeping with their particular interests and responsibilities at trial.'<sup>100</sup> As a result, it seems likely that this issue will resurface in Case 002, where a larger number of civil parties are expected to participate.

## **(D) The Application and Interpretation of the Court's Internal Rules**

### **(i) Admissibility and Disclosure I: The Practice of 'Putting Evidence' before the Chamber**

The Trial Chamber is mandated to base its decision exclusively on evidence that has been put before it and subjected to examination by the Parties. Under Court's Internal Rules (Rev. 3) material may be considered as evidence only if its content has been summarized or read out in court.<sup>101</sup> However, strict adherence to this requirement during Case 001 proved both tedious and time consuming.<sup>102</sup>

A Trial Management Meeting was held on 11 June 2009 in order to address this concern.<sup>103</sup> The guidelines agreed upon during the meeting allowed the Parties to identify a document by citing its reference number for purposes of putting evidence before the Chamber. The Co-Prosecutors expressed appreciation for this timely response to the challenge of presenting voluminous evidence before the Trial Chamber and noted that, this exercise of 'judicial creativity' reflected the practice of other international tribunals similarly tasked with prosecuting complex and widespread crimes affecting thousands of victims.<sup>104</sup> Having recognized that this improved method of presenting evidence considerably expedited the proceedings, Rule 87(3) of the Internal Rules was subsequently amended to include identification of materials as a means of putting evidence before the Chamber and the Parties.<sup>105</sup> This is likely to save the Chamber time during the course of Case 002, when far more extensive numbers of documents are likely to be put before it.

### **(ii) Admissibility and Disclosure II: The Impact of the Method of Obtaining Evidence on its Admissibility**

A secondary but related admissibility issue that arose during Case 001 was the extent to which interviews on the Case File which had not been the subject of a judicial process could be considered as evidence by the Chamber. The impasse that resulted from this issue became protracted when the Defense objected to the inclusion of interviews conducted by Documentation Center of Cambodia ('**DC-Cam**') with persons who are now deceased.<sup>106</sup> The Defense argued they were un-sworn statements that had not been subject to adversarial debates prior to the trial and therefore should be deemed inadmissible.<sup>107</sup> Notwithstanding the Co-Prosecutor's counter-arguments, the Trial Chamber found in favor of the Defense and declared the interviews inadmissible.<sup>108</sup> The Trial Chamber explained that, the questionable origin and content of the interviews, as well as the 'inability of the Accused to challenge their veracity,' rendered them unsuitable to prove the facts they purport to prove, in accordance with Rule 87(3).<sup>109</sup>

Similarly, the admissibility of an interview the Accused gave in the late 1990s to Mr Christophe Peschoux, the current Representative of the United Nations Office of the High Commissioner on Human Rights in Cambodia, was the subject of heated debate between the Prosecution and the Defense. Upon inquiries made by Judge Jean-Marc Lavergne on the circumstances of the interview, Duch claimed, among other things, that he was asked to give the interview under false pretenses and that he was unaware that his statements would be used as evidence against him during the trial.<sup>110</sup> The Co-Prosecutors pointed out that this issue had not been raised during the Pre-Trial stage, when the evidence was placed on the Case File. Additionally, Civil Party Lawyer Silke Studzinsky noted that it was clearly in the Accused Person's interests to exclude this

interview, which would likely have revealed further incriminating evidence about his personal role carrying out acts of physical violence at S-21.<sup>111</sup>

The Trial Chamber excluded the interview on the basis of Rule 87(3)(b) and (c) which provide for the rejection of a request for evidence when such evidence is impossible to obtain within a reasonable time, and is repetitious. It noted that the lengthy process of investigating Duch's allegations and examining the accuracy of the transcripts of the interview would cause unwarranted delay, particularly since, in its view, the interview in question was merely corroborative evidence.<sup>112</sup>

The Chamber appears to be adopting a generally pragmatic approach to issues of admissibility while at the same time ensuring the rights of the Accused are upheld. A cautious approach to admitting additional documents into evidence seems warranted in light of the already voluminous number of documents the Chamber will need to consider and the fact that the Accused has, for the most part, agreed with the factual allegations brought against him in the Closing Order. Admissibility issues are likely to become more pronounced in Case 002, given the magnitude of the case being tried and the likelihood that the four accused will likely be more inclined to dispute the veracity of documents being presented. Adopting a pragmatic approach at this early stage is likely to have stood the Chamber in good stead once these more complex arguments arise.

### **(iii) Admissibility and Disclosure III: Admitting Evidence Obtained Under Torture**

Part of the materials in the Duch's Case File constitutes confessions executed by prisoners in S-21 under conditions of torture. When the Parties sought clarification on the ECCC's policy on the use of statements made as a result of torture as evidence, the Trial Chamber advised parties to ascertain the situation under which a certain statement was given.<sup>113</sup> Taking into account the applicable proscriptions under Article 15 of the United Nations Convention against Torture, and other Cruel, Inhuman or Degrading Treatment or Punishment ('CAT'), the Trial Chamber determined that a party may only use the content of documents when it can be ascertained that no violation of CAT has occurred or if the evidence is being used only to show that a statement was made.<sup>114</sup> The Trial Chamber affirmed its oral ruling in a subsequent written decision, clarifying that, '[T]he relevance of these documents is limited to the fact that [the statements] were made and, where appropriate constitute evidence that they were made under torture. They are not admitted for the truth of their contents.'<sup>115</sup>

Confronted with the same issue in Case 002, the Office of the Co-Investigating Judges has ruled that the exclusionary rule Article 15 of the CAT prohibits use of statements made under torture as evidence against the victim, but not entirely against those who are implicated for torture.<sup>116</sup> Thus, information contained in confessions executed by torture victims may still be used as investigative leads to other sources of information, provided that, such information is used not for the truth of its contents but as evidence that 'the CPK relied on the contents of the confessions to carry out systematic crimes falling within the jurisdiction of the ECCC.'<sup>117</sup> At the time this report went to print, the issue was on appeal before the Court's Pre-Trial Chamber.

It is worth noting that the Rules of Procedure and Evidence of both the *ad hoc* tribunals provide for the exclusion of evidence obtained by methods which cast substantial doubt on its reliability, or if its admission would cause serious damage to the integrity of the proceedings.<sup>118</sup> The Rules of Procedure and Evidence of the Special Court for Sierra

Leone, on the other hand, mandates the exclusion of evidence that would bring the administration of justice into serious disrepute.<sup>119</sup> The Trial Chamber in Case 001 and the Office of the Co-Investigating Judges in Case 002 appear to have taken a congruent approach in resolving the issue of admissibility of confessions executed by victims of torture. Both organs of the ECCC have likewise made assurances that the statements and annotations in the confessions will not be used for the truth of their contents but only as evidence of their existence or as investigative leads. However, the ECCC may find itself on a slippery slope in the absence of more stringent guidelines: Rule 21(3), the only provision that operates as an exclusionary rule against statements that were obtained by questionable means, applies exclusively to information culled by organs of the ECCC and not by the CPK.<sup>120</sup> Thus, the ECCC may well refer to the ‘serious damage or disrepute’ test employed by other international criminal tribunals as guidance when faced with the important question of admissibility of documents tainted by torture.

Much care and deliberation is required when any organ of the ECCC exercises its broad discretion over issues of this nature, especially because the employment of torture and cruel, inhuman degrading treatment or punishment is a grave concern in Cambodia.<sup>121</sup> Moreover, the need to ensure that the ECCC’s well-reasoned position on the use of confessions as evidence is not misconstrued or abused cannot be overemphasized, considering the reported weight afforded to confessions in criminal proceedings and reliance by the police and the judiciary on confessions to secure convictions.

### **(E) Sentencing**

Throughout the proceedings, the Defense endeavored to temper Duch’s responsibility by highlighting the system of terror and secrecy that prevailed during the KR regime.<sup>122</sup> It is within this context that Duch’s lawyers advanced factors that the Trial Chamber may consider to mitigate the sentence of the Accused, including admission of guilt, expression of remorse, and cooperation with the Chamber and the Parties. An admission of guilt as it applies in other international criminal tribunals extenuates criminal liability because it encourages other people to come forward, whether already indicted, unknown perpetrators or witnesses.<sup>123</sup> It also saves the court from lengthy proceedings and assists in the establishment of the truth.<sup>124</sup> Although Duch would ultimately seek an acquittal from the Chamber, he did spend the majority of his case seemingly admitting to the majority of the facts in the Closing Order. As regards contrition, while judges must be convinced that it is genuine and sincere in order for it to be given weight, forgiveness by victims is another matter altogether. During his testimony, Justice Richard Goldstone explained that acknowledgment of responsibility and expression of remorse by an accused person fosters national reconciliation, regardless of acceptance by victims.<sup>125</sup> Finally, substantial cooperation with the prosecution is a mitigating circumstance stipulated in Rule 101 of the Rules of Procedure and Evidence at the *ad hoc* tribunals.

In addition to highlighting possible mitigating circumstances the Chamber should consider at sentencing, the Defense sought to establish additional extenuating factors that may play into the Chamber’s characterization of the Accused Person’s culpability. In particular, the Defense highlighted that their client was acting under superior orders and duress, having no choice but to obey the orders of Angkar, and that he was constantly in fear for his life and the safety of his family. It is well settled, however, that obeying superior orders is not an exculpatory circumstance – a fact which Duch’s lawyers also acknowledged.<sup>126</sup> In *Prosecutor v. Erdemović*, for instance, the Trial Chamber of the ICTY recognized that, while the accused certainly did not have a choice

but to kill or be killed, ‘duress does not afford a complete defense to a soldier charged with a crime against humanity and/or a war crime involving the killing of innocent human beings.’<sup>127</sup> Not all Parties, however, consider Duch’s plea as tantamount to a guilty plea. According to Civil Party Lawyer, Silke Studzinsky, Duch only admits to 68% of the facts in the Closing Order, which should not be construed as ‘tantamount to a full confession’.<sup>128</sup>

Other factors that the Judges may consider at sentencing are Duch’s personal circumstances such as his age, his kind and generous character as a teacher before his recruitment to the CPK and during the 1990s, as well as his desire to be rehabilitated and reintegrated into society.<sup>129</sup> At the same time, the presence of several aggravating circumstances may also be recognized by the Trial Chamber in order to establish the full extent of Duch’s liability, including Duch’s superior position as the Deputy Secretary and later, the Secretary of S-21, and the victimization of helpless and innocent persons, including the elderly, women and children.<sup>130</sup> The massive scale of criminality – the ‘indiscriminate, disproportionate, terrifying’ or ‘heinous’ means and methods used to commit the crimes – is also relevant when ascertaining an appropriate sentence.<sup>131</sup> Moreover, the physical and psychological suffering of the victims, and the long-term damage of the crimes to the survivors, family members of the victims and the Cambodian people may also affect the liability of the Accused. There is no open-ended enumeration of these factors and their identification and consideration rest with the Trial Chamber.

It remains to be seen which attendant factors the Trial Chamber will consider and how much weight it will give in determining Duch’s sentence. The extent to which Duch’s plea for an acquittal on the final day of trial affects his sentence is also a matter which the Chamber will need to determine: it seems likely that this seeming about face may mean the Chamber questions the genuineness of the Accused Person’s remorse. It is anticipated that the Trial Chamber will seek guidance from the case law of other international criminal tribunals since neither the constitutive documents of the ECCC nor its Internal Rules enumerate the circumstances that may be considered to affect criminal liability. However, it is also hoped that the wide latitude afforded the Judges in carrying out this function enables them to appreciate all the pertinent facts and circumstances that would capture the true extent of Duch’s liability.

#### **(F) ‘Lessons Learned’ from the Legal and Procedural Issues that arose in Case 001**

Overall, the Trial Chamber appeared to act prudently and pragmatically in its determination of legal and procedural issues that arose during Duch’s trial. This approach is to be commended. In particular, the principled approach the Chamber adopted toward both affording Duch a proper remedy for his extensive pre-trial detention, as well as limiting the use of evidence obtained under torture at S-21, set important precedents for future cases at the ECCC. The former decision also has the potential to be used positively in Cambodia’s domestic legal sector: lawyers working in the Cambodian courts may consider utilizing this precedent in defense of their client’s right to a decreased sentence, in the event that s/he has been held in custody in violation of the time limits set by the Code of Criminal Procedure. While monitors have some reservations with regard to the potential application of JCE to Duch’s case (and its impact, if applied, on ensuring the Accused’s right to be on notice of the charges he faces before the trial begins), making any assessment on this issue prior to the verdict would be premature. Similarly, discussion on the impact of the Chamber’s determination of Duch’s sentence is best left until it has issued its judgment.

It seems likely, however, that the Chamber will face further submissions relating to balancing the Accused Persons' rights against the rights exercised by Civil Parties as Case 002 progresses to trial. As will be discussed in the next section, although the Judges of the ECCC are currently in the process of assessing and changing the Civil Party scheme at the Court, basic issues, such as the real meaning of the phrase 'support the prosecution' under Rule 23 still appear to be unresolved. These will likely need to be considered before Case 002 goes to trial, to ensure proceedings can be run efficiently.

#### **4. Part Four: Civil Party and Witness Participation, Protection and Support**

Perhaps one of the most innovative steps taken by the ECCC (and certainly one which has garnered some of the most significant international attention) has been its inclusion of a comprehensive civil party participation process in its proceedings.<sup>132</sup> Taking participation a step further than that envisaged by the International Criminal Court, the ECCC's Judges determined during a 2007 plenary session to import the French civil law notion of civil parties into the Court's Internal Rules, in order to further accommodate victims' right to truth and justice. Hence, for the first time in an international(ized) criminal trial, victims of mass atrocity have been included in the trial process as parties, rather than as mere simple witnesses – an innovation which has widely been hailed as providing an historic step forward for victims' rights.

The decision taken by the ECCC's Judges to include victims in the process seemed bold, given the Court's foundational documents did not provide a firm basis upon which to adopt such measures: although Article 12 of the Agreement inaugurating the ECCC directs the Court to establish procedures 'in accordance with Cambodian law,' which formally recognizes civil parties' right to participate in criminal proceedings, the Agreement does not contain any explicit reference to a participatory scheme for victims.<sup>133</sup> Additionally, up until the time at which the Judges took this decision, the Court did not budget for the inclusion of a victims' participation process – a process which would inevitably be costly if rights afforded to victims (such as the right to apply for civil party status, to legal representation, and to seek collective and moral reparations) were to be meaningfully upheld.<sup>134</sup>

The Duch trial provided the first avenue through which the civil party process would be tested. A total of 90 victims would end up acting as Civil Parties in the case. Civil Parties were divided into four groups, based solely on the derivative source of their applications to the Court – namely, the four non-governmental organizations ('NGOs') who had acted as intermediaries to facilitate their participation – rather than any particular category of harm suffered. Each of the four groups had both national and international legal representation throughout the trial, and both national and international lawyers were able to make submissions on their behalf. This meant that, in any given trial session, up to eight victims' lawyers could question witnesses or the Accused, in addition to the two Co-Prosecutors and two Co-Counsels for the Defense.

Both the Trial Chamber and the Civil Parties themselves appeared to face significant challenges in attempting to negotiate the parameters of this novel mechanism. From the Chamber's perspective, balancing the rights of Civil Parties (and their lawyers) against the rights of the Accused proved to be burdensome: although the Chamber would eventually impose strict time limits upon Civil Party Lawyers, the initial stages of the trial proceedings were dominated by their questions and submissions. From the Civil Parties' perspective, a lack of clear guidelines regarding the role of Civil Party Lawyers (as well as the extent to which Civil Parties should be anticipating the Court to implement a comprehensive reparations scheme) left some Civil Parties disenchanted by the process and frustrated by the seeming arbitrariness with which their counsels' rights were eventually curtailed. Many of the problems that would emerge during the trial seemed to be the result of inadequate planning and preparation on the Court's behalf with regard to the Civil Party process as a whole. While teething problems were only ever to be expected (given the novelty of the process in a trial of this kind), greater coordination between the Court's administration, the Judges and the NGO

intermediaries ahead of time would have likely ensured that Civil Parties were better informed about the process and that their lawyers had more realistic expectations with regard to their role in the courtroom.

As a result of the challenges posed by Civil Party Participation in Case 001, and bearing in mind the discrepancy in the magnitude of the cases, the Judges are currently considering significantly streamlining the process for Case 002. While it is still unclear as to what this will mean for Civil Party participation, the anticipated scheme appears to limit significantly the role of Civil Party Lawyers, with a scheme that seems more akin to one in support of a victims' advocate. In light of this proposal, it is worth taking a closer look at the Civil Party process that emerged during Case 001, and considering how the challenges faced by the Chamber can be best met in Case 002. This section of the report begins by discussing the requirements to establish Civil Party status, and then proceeds to address Civil Parties' substantive rights as they played out in the Courtroom. The performance of Civil Party Lawyers is also discussed in this section. In the last part of this section, we also briefly discuss witness management and support for victims and witnesses at the ECCC.

### **(A) Establishing Civil Party Status**

One of the key issues facing the ECCC in facilitating a process whereby victims could participate at trial was to determine how best to define who a victim is for the purposes of participation. Under the Court's Internal Rules, a 'victim' is defined as one who has suffered an injury, be it 'physical, material or psychological' as 'the direct consequence of the offence, personal and have actually come into being.'<sup>135</sup> According to Rule 23, Victims can be joined as Civil Parties in proceedings, where first, the Co-Investigating Judges, or subsequently, the Trial Chamber, awards them this status, prior to the start of trial. However, the extent to which this status can be challenged by the Defense does not appear to have been clearly defined under the Rules: while it would appear from a plain reading of Rule 23(4) that the Chamber has sole discretion to determine the status of Civil Parties at the trial stage, Rule 100(1) defers the assessment of Civil Party claims against the Accused to judgment. This suggests that the Chamber can, if it deems fit, solicit submissions from the Defense regarding the status of Civil Parties at any stage prior to the close of the trial.

This is, in fact, the procedure the Chamber adopted for Case 001. As a result, just three weeks before the conclusion of hearings, the Defense submitted its objections to the applications of about one quarter of the Civil Parties to the proceedings.<sup>136</sup> Not surprisingly, challenges at this late stage triggered objections from the Civil Party Lawyers, who argued that Rule 23(4) (read together with Rule 83(1)) indicated that challenges to admissibility of Civil Parties' application should take place no later than the initial hearing precipitating the start of the trial.<sup>137</sup> The Defense, however, maintained that they were merely complying with the Trial Chamber's request, a submission the Chamber agreed with.

#### **(i) Documentation Required to Prove Status as Civil Parties**

The Defense formulated its challenge against a number of Civil Parties' applications based on a lack of evidence substantiating their status as victims of S-21 and/or the nexus between the applicants and the victims who had died at that security center.<sup>138</sup> Contention thus revolved around both the kinds of identification documents produced to show this nexus and the notion of 'kinship' the Civil Parties appeared to be adopting.

In response to the Defense's allegations regarding insufficient documentation, the Civil Party Lawyers explained the difficulty in gathering identification information for this purpose. They argued that incomplete S-21 archives and the fact that many documents had been destroyed during the Khmer Rouge period prohibited their clients' ability to produce watertight evidence in this regard.<sup>139</sup> They further plead that the Trial Chamber consider that, in the absence of documentary evidence of an archival nature (*i.e.* from the DK era itself), the merit of their clients' applications should be considered by analyzing the affidavits they had provided, or other forms of evidence, in its entirety.<sup>140</sup> This argument tends to suggest that the Chamber should adopt a similar standard of proof to that of the ICC in the *Bemba* case, where it has been held that 'each application is assessed on the merits of its intrinsic coherence' rather than with reference to any particular form of documentation.<sup>141</sup> In that case, Pre-Trial Chamber III of the ICC noted that a victim-applicants' 'personal circumstances' as well as the difficulties they 'may encounter in obtaining or producing copies of official identity documents' should be taken into consideration when assessing their application.<sup>142</sup> In that case, 22 kinds of documents were accepted as proof of identity.<sup>143</sup> Civil Party Lawyer Mr Alain Werner warned that if Civil Parties' applications were to be rejected for lack of documentation in Case 001, where archives were relatively well preserved, then for Case 002, a majority of applications would be rejected.<sup>144</sup>

## **(ii) Proof of Kinship**

Additionally, the Defense also challenged some Civil Parties' applications on the grounds that they had not proved 'kinship' with the alleged S-21 victims. For example, Civil Party E2/37 was challenged because his claim was based on the death of his friends at S-21. Though the Internal Rules provide no explicit requirement of 'kinship' for the purpose of filing a Civil Party application, the Defense held that it had long been the customary law of civil law systems that the proximity between the Civil Parties and alleged victims required close kinship or direct family relation.<sup>145</sup> This interpretation also finds support in the ICC jurisprudence, where it has been held that 'emotional suffering may be claimed by immediate family members and dependants.'<sup>146</sup> Significantly, Principle 8 of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law provides that, victims should be limited to immediate family and direct victims.<sup>147</sup>

The Chamber determined that it would render a decision on the merits of the Defense's challenges to the Civil Party's applications at the time at which the verdict is handed down. It is at this stage that the status of all Civil Parties' claims will be considered and determined. The seeming uncertainty with which many Civil Parties have been left as a result of this process has been a cause of frustration for Civil Party Lawyers, including Silke Studzinsky, who expressed serious concerns at the limbo facing her clients.<sup>148</sup>

The Judicial Plenary has since determined, in principle, that for Case 002, any challenges to the status of Civil Parties should take place prior to the start of the trial. In order to avoid confusion in the subsequent trials of the ECCC, the Plenary may also wish to consider providing guidelines on the requirement and extent of kinship the Chamber will consider when determining the status of Civil Parties. In doing so, it might be helpful to take into account internationally recognized standards of human rights, as well as the Cambodian local context where 'the concept of family is quite broad' and goes beyond that of the nuclear family.<sup>149</sup>

## **(B) Participation in the Proceedings I: Attendance**

A victim's right to be present at trial is a corollary of their right to truth, the latter of which is increasingly recognized as 'an emerging customary norm as well as a general principle of law'.<sup>150</sup> From a psycho-social perspective, victims' presence at trial – both in the public gallery and in the courtroom – is important in ensuring that the broader process of reconciliation is able to be realized in Cambodia. As has been noted by psychologists from the Trans-cultural Psychosocial Organization of Cambodia, 'the more [victims] are able to confront and understand why all these things happened, the better they can deal with the legacy (of the Khmer Rouge)'.<sup>151</sup> Similarly, Civil Party Ms. Chum Noeu acknowledged that attending the trial had, to some extent, enabled her to better reconcile with the past and overcome her obsession with revenge.<sup>152</sup>

For Civil Parties (in contrast with victims in general), the meaning of attendance is even more important. Lawyer Alain Werner, for instance, noted the significance of 'the sense of getting involved' for his clients.<sup>153</sup> Similarly, Civil Party Mr. Chum Mei told Monitors that he felt 'obliged' to attend every session of the trial as he both wanted to actively participate in ensuring the proceedings were fair that justice was being done.<sup>154</sup> He also noted that he felt a sense of satisfaction whenever the Court responded to his observations or complaints.<sup>155</sup>

Despite this importance, for many Civil Parties, attending trial proceedings proved costly and difficult. As a result, during the first three months of the trial, only 3 of the 10 seats in the courtroom were regularly filled.<sup>156</sup> Monitors were informed that this low attendance was not due to lack of interest: NGOs noted that many Civil Parties were disappointed by the fact that they were unable to attend the proceedings, but could not afford to attend.<sup>157</sup> Many of them living outside Phnom Penh found the visit to the Court as an unaffordable luxury, given their need to ensure they had accommodations and meals during their stay in the capital.<sup>158</sup> Although attendance by Civil Parties did improve throughout the duration of the Duch trial from mid-June onwards, it may be difficult for the Court to reasonably sustain increased levels of Civil Party attendance during Case 002, when thousands of victims may be granted civil party status.<sup>159</sup>

Neither the ECCC Law nor the Internal Rules expressly stipulate that the Court has the obligation to finance Civil Parties' attendance.<sup>160</sup> However, considering the significance of attendance for Civil Parties, it seems at least arguable that the Court should recognize some level of responsibility to facilitate this. Acknowledging this responsibility, the Court has more recently adopted measures to ensure greater access to the Court by Civil Parties. The Court's Victims Unit has recently indicated its aspiration to bring every Civil Party to the Court during the week of opening statements and closing submissions in their trial, and at least once in between.<sup>161</sup> This is a commendable goal. Additionally, if the resources within the Victims Unit do not allow for attendance by Civil Parties, it may consider cooperating with the civil society or other Organs of the Court, such as the Public Affairs Section, to ensure it can achieve this goal.

## **(C) Participation in Proceedings II: Supporting the Prosecution and Seeking Reparations**

### **(i) General Rights At Trial**

As has already been noted in Part Three of this report, the Court's Internal Rules provide extremely general guidelines on the extent to which Civil Parties can participate in proceedings. According to Rule 23(1), victims are able to participate in the proceedings by 'supporting the prosecution,' yet the extent to which this should mean they are able to question particular categories of witnesses or the Accused has not been clearly defined. As a result, the Trial Chamber has been vested with a wide ambit of discretion when determining the extent to which Civil Parties should be able to participate.

Throughout the Case 001, the Trial Chamber appeared increasingly to adopt a more restrictive approach to Civil Party participation. Civil Party requests to be allowed to make submissions on the Accused Person's release from provisional detention as well as to respond to the Co-Prosecutor's opening statements were both denied.<sup>162</sup> Additionally, although seemingly being afforded this right before cases at the International Criminal Court, Civil Parties themselves were not afforded the right to make opening statements at the ECCC.

Moreover, although initially affording Civil Party lawyers a wide ambit of discretion when questioning witnesses, the Chamber subsequently imposed time limits on Civil Party Lawyers as well as the other parties, in order to ensure greater efficiency during the proceedings. This move seemed warranted, given many of the Civil Party Lawyers appeared to ask largely repetitive questions.

Perhaps the most contentious issues regarding Civil Party participation arose towards the end of the trial, when the Chamber determined that Civil Party Lawyers would not be able to question the Accused Person or character witnesses on his character, nor make submissions on sentencing. At the time the rulings were made, the decisions appeared somewhat arbitrary: the oral rulings submitted in Court were not accompanied by a written decision, and hence, Civil Party Lawyers had no avenue with which to lodge an appeal prior to the close of the trial. For many Civil Parties, the prohibition imposed by the two rulings and the absence of prompt reasoning adversely impacted their perspective of the trial such that, at one point, some of them even boycotted the proceedings in a silent protest against the Judges' actions.<sup>163</sup>

In its decision issued on 9 October 2009, the majority of the Trial Chamber noted that Civil Parties' role in trial proceedings did not confer on them 'a general right of equal participation with the Co-Prosecutors.'<sup>164</sup> As Civil Parties' role within the trial must not 'transfer them into additional prosecutors,' sentencing should remain the exclusive domain of the Prosecution.<sup>165</sup> This included questioning character witnesses, given their evidence was led to support the Accused Person's claim to mitigating circumstances.<sup>166</sup> In his dissenting opinion, however, Judge Lavergne noted that inquiries on personality could bear relevance to the question of culpability.<sup>167</sup> He also pointed out that prior to the discussion on the character of the Accused, Civil Parties had always been allowed to question witnesses and the Accused on issues that could pertain to his character, albeit under different topics during the evidentiary debate.<sup>168</sup> Unlike the majority decision, Judge Lavergne further took into consideration 'one of the fundamental goals of this

court' as being reconciliation.<sup>169</sup> He further noted that it would be difficult to achieve this end if the victims are deprived from inquiring for 'why' the crimes had been committed against them.<sup>170</sup> Civil Party Lawyers have appealed the majority decision.

## **(ii) Performance of Lawyers / Legal Representation**

Rule 23(7) of the Court's Internal Rules guarantees Civil Parties' right to legal representation. Despite instituting this right, the Court did not provide funding for victims to be provided with lawyers for Case 001. Instead, external donors and intermediary NGOs facilitated and funded lawyers' participation in the trial. As a result, all four civil party groups were funded by separate entities and seemingly adopted different approaches towards Civil Party participation.

Apart from this, although the Court's Victims Unit acted as an *ad hoc* intermediary between different lawyer groups and the Court, it did not, during Case 001, have the funds or resources to facilitate a coordinated strategy on issues of common concern throughout the case. Furthermore, it did not appear to have the authority to do so: largely perceived in the early stages of its development as providing an initial screening mechanism for victims' applications, the Victims Unit was not given the mandate to ensure that lawyers cooperated with one another to ensure the best representation of the interests of their clients, nor were there practice directions issued to facilitate this kind of relationship.

Additionally, the Victims Unit did not appear to have sufficient funds to facilitate adequate lawyer-client interaction and case preparation.<sup>171</sup> Several lawyers interviewed expressed frustrations at the resource constraints that seemingly prohibited them from having more face-to-face meetings with their clients or employing adequate support for their teams.<sup>172</sup> Furthermore, according to Civil Party, Chum Neou, the absence of full-time international legal counsel contributed to the difficulties faced by her national counsel.<sup>173</sup> The current head of the Victims Unit, Dr Helen Jarvis, has acknowledged the need for the Court to facilitate greater lawyer-client interaction and has expressed a commitment to 'increase Civil Party Lawyers' opportunities to interact with their clients in Case 002.'<sup>174</sup>

This seeming lack of resources and overall coordination meant that Civil Party Lawyers' performance throughout Case 001 was mixed. While some Civil Party Lawyers assumed that their role in Court was predominantly to 'support the prosecution,' others highlighted their role as the voice for their clients' views and concerns. At times, this led lawyers to pursue lines of questioning solely premised on the needs of their individual clients, even when they did not appear relevant to the case.<sup>175</sup> Conversely, lawyers who predominantly endeavored to support the Prosecution seemed sometimes to be acting as second prosecutors, rather than providing mere support.

An even greater concern arose in relation to Civil Parties' giving statements at trial. For Civil Parties to take the stand, adequate interaction and discussion with their lawyers prior to appearing in Court is vital, as insufficient preparation may lead to victims having an adverse experience in Court. The seeming lack of preparation of victims became most prominent during the testimony of Civil Party Mr Ly Hor, an alleged survivor of S-21, when inconsistencies in his account led the Accused to publicly challenge his identity.<sup>176</sup> Inconsistencies in other Civil Parties' accounts – either in the statements attached to their applications or in court – further prompted the Defense to

underline these discrepancies.<sup>177</sup> As a result, some Civil Parties left the stand with their identity as victims questioned. This experience may defeat the positive outcomes of participation and instead lead to re-traumatization.<sup>178</sup> One Civil Party Lawyer interviewed explained that he had not focused on proofing his Client prior to trial as he had not anticipated that s/he was going to be scrutinized as a witness.<sup>179</sup> Given the Court's Internal Rules tend to suggest that Civil Parties should not be treated the same as simple witnesses, this justification is not entirely implausible.

A final concern relating to Civil Party representation was lawyers' time management strategy, as Civil Party Lawyers seemed to frequently ask repetitive questions.<sup>180</sup> In Week 9, the Trial Chamber imposed time limitation to the Parties' questioning, but the problem did not cease to exist.<sup>181</sup> The occurrence of repetitious questions significantly decreased after the Civil Party Lawyers finally followed the Chamber's suggestion from Week 15 and appointed one or two Counsels to ask questions on behalf of all the Groups.<sup>182</sup> Yet by this stage, over two-thirds of the trial had already been completed.

To avoid similar problems related to Civil Parties' legal representation, the Sixth ECCC Plenary Session has agreed to appoint two lead counsels who will take charge of Civil Parties' case as a whole.<sup>183</sup> It is also envisaged that in Case 002, Civil Party groupings will be based on distinct interest groups (*e.g.*, on the basis of injury, ethnicity, gender or religion) who shall be represented by specialized lawyers, who in turn, will operate under the direction of the lead counsels.<sup>184</sup> However, there remain concerns related to this new approach. One is, who shall be responsible to select the lead counsels and under what criteria? Additionally, to what extent will the Court mandate that the lead counsels facilitate and coordinate the existing civil party lawyer framework, or simply allow them to dictate to counsels how to run their cases? Civil Party Lawyer Alain Werner opined that for this new system to work, the two lead counsels need to be very senior and experienced international criminal trial lawyers, capable of coordinating the work of different lawyers used to operating in diverse legal systems.<sup>185</sup> Another concern is whether civil parties really wish to be represented on their special interest; some might prefer to be represented simply as victims, rather than from a particular category. These are just two of several concerns raised which will need to be addressed before Case 002 goes to trial.

### **(iii) Reparations**

Rule 23(11) makes clear that the Chamber may award only collective and moral reparations to Civil Parties, which 'shall be awarded against, and be borne by convicted persons.'<sup>186</sup> Accordingly, the Civil Party Lawyers, in their joint submission, requested only reparations of a 'collective and moral' nature. This included outreach, publication and dissemination of information, provision of medical care, education programs and memorialization for victims of the Khmer Rouge in Cambodia.<sup>187</sup> These forms of reparations highlighted the possible legacy of the trial as a stimulus for reconciliation. However, lawyers failed to differentiate Civil Parties from non-Civil Party victims in their reparations submission and appeared to be making relatively general requests. Some Civil Parties also expressed during interviews with the Monitoring Group that they were dissatisfied with non-individual reparations.<sup>188</sup> It would therefore appear necessary to envisage certain forms of reparations in line with the Internal Rules, which could distinguish Civil Parties from non-Party victims. There also appeared to be a pressing need for the ECCC and NGOs to transfer accurate information about reparations to victims and manage their expectations.<sup>189</sup>

Another important issue that remains unresolved is the implementation of reparations. The Internal Rules stipulate that any reparations shall be financed by the Accused, should the Accused be found guilty of the crimes.<sup>190</sup> Since the Accused has been declared indigent, it seems unlikely that he will be able to bear any financial burden relating to the reparations requested. The Civil Party Lawyers thus suggested State involvement and the establishment of a voluntary trust fund, both of which imply an amendment to the Court's Internal Rules. Though the prospect of a voluntary trust fund remains remote, the call for involvement of Cambodian Government could find solid basis in international law. Treaty-based and customary law, as well as State practice, reflect the principle that States have the duty to provide a remedy to victims of gross violations of international human rights law and serious violations of international humanitarian law committed within a State's territory.<sup>191</sup> However, the difficulty of implementing this form of order may mean that the Judges determine such a request to be unfeasible.

Greater discussion and deliberation on the notion of moral and collective reparations and how it can be meaningfully applied in the Cambodian context clearly needs to be undertaken. It is hoped that the Trial Chamber will set a positive precedent in Case 001, that can be utilized to enable Civil Parties and victims more generally to ensure that the Court has acknowledged and affirmed the significance of their individual suffering, regardless of how symbolic such reparations may end up being.

#### **(D) Witness Participation, Protection and Support**

Overall, witness participation in the Duch trial proceeded in an orderly fashion and without any major security incidents. However, the extremely public nature of the proceedings (which were televised daily at various points during the trial), the temporal gap since the crimes had occurred, and the civil law procedural system under which the trial operated, all posed challenges to the Court's management of witnesses.

##### **(i) Examination of Evidence and the Public Nature of Proceedings**

The Trial Chamber's decision to organize the examination of evidence, including the testimony of witnesses and experts, according to the subject matter being covered triggered debates on the relevance of questions posed to witnesses and their response.<sup>192</sup> This particularly affected the conduct of inquiry of expert witnesses who were asked about matters beyond the topic on which they were summoned to testify.<sup>193</sup> Additionally, due to the fact that witnesses before the ECCC testify as witnesses of the Chamber in accordance with the civil law system, Parties did not have the prerogative to prepare witnesses whose testimony was expected to bolster their position. While this may prevent witnesses from being unduly influenced by the Parties, some witnesses appeared ill prepared to take the stand. In some instances, witnesses gave testimony that was largely inconsistent with the statements they gave before the Office of the Co-Investigating Judges, which may have been as a result of the length of time between giving testimony to the Co-Investigating Judges and at trial, or the fact that witnesses were not familiar with the way in which questions were being asked of them.<sup>194</sup> Some witnesses also appeared unable to provide a basis for their assertions or seemed intimidated by the Courtroom environment.<sup>195</sup>

A number of witnesses were found to have been following media coverage of the trial on television,<sup>196</sup> and some were discovered watching the proceedings from the public gallery prior to giving their testimony.<sup>197</sup> Judge Cartwright noted that in proceedings of

this nature – which are broadcast everyday on television and when the public gallery holds 500 seats – a pragmatic approach was required when dealing with contamination of witnesses’ testimonies.<sup>198</sup> She was also aware of the impact of time on the memories of witnesses. The passage of time, she commented, tends to ‘edit’ one’s recollection of certain events.<sup>199</sup> While witnesses’ exposure to others’ testimony to some extent seemed inevitable, the ECCC is required by the Internal Rules to ensure that experts and witnesses are prevented from watching or listening to the proceedings prior to their appearance before the Trial Chamber.<sup>200</sup> The Coordinator of the Court’s Witness and Experts Support Unit (‘WESU’), Ms Wendy Lobwein, noted that the Court was adopting a similar approach to that of the ICTY.<sup>201</sup> Ms Lobwein noted that when a trial is public and broadcast, it is not reasonable to demand that witnesses have no exposure to the trial. Instead, witnesses must answer truthfully if asked by the Chamber what they have seen of the trial. Similarly to the ICTY, witnesses at the ECCC are advised of their responsibility not to discuss their testimony with other persons, particularly if they know of others who will also be, or, have been witnesses, and of course if asked about this in the Court, they must reply truthfully.<sup>202</sup>

### **(ii) Right Against Self-Incrimination vs Obligation to Tell the Truth**

Rule 28(1) of the Internal Rules guarantees witnesses’ right to object to making any statement that might tend to incriminate them at all stages of the proceedings. The issue of protection against self-incrimination was raised during the trial stage of Case 001 when several former employees of S-21 took the stand. International Defense Counsel Roux brought up this ‘concern’ in response to the Co-Prosecutor’s intention to propose JCE as a mode of liability for which Duch could be charged. Should Duch be found responsible under JCE, Roux asserted, all of his former subordinates would be caught by the net of the JCE and thus subjected to possible prosecution.<sup>203</sup> Roux also warned that while immunity had been offered from the ECCC prosecution to certain witnesses, this did not preclude them from being prosecuted by national courts.<sup>204</sup>

While the Chamber did not provide specific reminders to witnesses regarding the JCE issue, it did inform the witnesses of their right against self-incrimination as well as their concomitant obligation to tell the truth under rule 36(1). Additionally, a Lawyer for Witnesses was appointed.<sup>205</sup> This lawyer continued to be present in Court throughout the hearings involving former employees of S-21.<sup>206</sup>

### **(iii) Witness Protection and Psycho-social Support**

The Duch trial was largely free from incidents regarding witness protection. Nevertheless, at instances during the trial, witnesses appeared to be intimidated by the Accused, largely stemming from the more active role the Accused played in responding to their testimony than he would have in a common law trial. Some victim-witnesses cowered or were even driven to tears in the face of Defense questioning.<sup>207</sup> Additionally, some of Duch’s former subordinates seemed to be thrown off-balance by comments from the Accused during their testimonies.<sup>208</sup> Similarly, at points when Duch addressed Civil Parties directly, they became agitated and emotional.<sup>209</sup> During most of these occurrences, however, the Chamber immediately instructed the Parties to assist or control their clients.<sup>210</sup>

The Court has been fortunate to have the Cambodian NGO, Transcultural Psycho-social Organization (‘TPO’), able to act as consultant in psychological support services, as well as advisers to staff working both in the WESU and the Victims Unit. Its services

are clearly required, given a relative lack of expertise in dealing with psycho-social issues in Cambodia's national sector. To date, however, the Court has not provided funding for TPO staff. TPO staff noted that they provided support not only during a witness' testimony, but also before and after.<sup>211</sup> However, the lack of resource support from the Court had limited their services somewhat.<sup>212</sup> Should this concern remain unaddressed, it may lead to more challenging problems during Case 002, when there are likely to be more instances of witness intimidation or distress from testifying. Coordinator for WESU, Ms Lobwein, noted that WESU is currently in the process of reviewing its operations in light of the experience obtained during the first trial. She further added, however that WESU acts prior to testimony as well as responding to any issues that arise during or after the trial stage.<sup>213</sup>

### **(E) Lessons Learned from Civil Party and Witness Participation, Protection and Support in Case 001**

As it had in so many other respects, the Duch trial proved to be a 'test' case for Civil Party participation at the ECCC. Throughout the course of Case 001, the Court would grapple with various significant issues relating to implementing this novel mechanism, not least of which was how best to define the role Civil Party Lawyers would play in the Courtroom, as well as how best to serve the interests of victims. The Chamber appears largely to have tackled the issue of defining the Civil Party Lawyers' role with reference to a quantitative analysis of participation, rather than a qualitative one. As a result, Civil Party Lawyers have largely been instructed to keep within time limits and avoid repetitive questions, rather than being given guidance from the Judges pointing to relevant civil law or international legal jurisprudence as to how best to consider their role. This may have been in part, due to the time constraints facing the Chamber, and the number of competing issues of concern the Judges had to deal with on a daily basis.

While the Judges clearly hope to reform this participation in Case 002 by simply streamlining the role of Civil Party lawyers and reducing the number of active counsels in the Courtroom, it might also be worth reflecting on effective means of addressing some of the more fundamental, definitional concerns raised by Case 001. Clearly, a practice directive that deals with defining both the notion of 'supporting the Prosecution' as provided in Rule 23(1) and the extent to which Civil Party Lawyers should question witnesses as a result, would be of benefit to the Parties. Additionally, giving the Court's Victims Unit a mandate to provide information to victims on what they should expect from the trial, as well as to implement further non-legal measures that support victims generally, would likely assist in managing their expectations of the proceedings and enhancing their experience of the Court.

With regard to witness protection and support, the Duch trial proceeded well. However, greater resources for psychosocial support in Case 002 are imperative, given the magnitude of the case and the greater number of Accused.

## 5. Part Five: Trial Management

Throughout the twenty-two weeks of Duch's trial, the Trial Chamber generally showed great care in managing the proceedings.<sup>214</sup> Initially, this meant that the Chamber adopted a cautious approach to the trial, likely due to the fact that this was the first time the bench had convened to hear a case that was being tried at the ECCC. During this period, Parties were given extensive leeway when questioning the witnesses and engaging in procedural debates.<sup>215</sup> By Week 8, however, proceedings were lagging decidedly behind schedule, and the Chamber estimated that the trial would be completed only in December 2009.<sup>216</sup> This led to a trial management meeting during which all Parties agreed that they needed to take measures to pick up the trial's pace.<sup>217</sup>

Steps were subsequently taken by the Judges to ensure the expeditiousness of the proceedings. This included imposing time limits on the Parties when questioning witnesses and allocating time for additional management meetings to resolve issues in an orderly manner.<sup>218</sup> The President of the Chamber, Judge Nil Nonn, also showed increasing confidence in issuing proactive directives to ensure the trial ran smoothly, abandoning the more reactionary approach in maintaining order in the courtroom he had adopted in the earlier weeks. Despite implementing these measures, certain challenges to time management persisted: at various points throughout the trial, both the Judges and the Parties continued to ask either irrelevant or repetitive questions. Similarly, the Judges continued to allow witnesses and the Accused to provide them with protracted (and often convoluted) answers to questions.<sup>219</sup> Additionally, delays were sometimes caused by technical glitches in the courtroom but these issues were usually resolved promptly.

Aside from this, the Chamber also appeared to face some challenges when endeavoring to issue rulings and decisions in a timely manner. Although the Judges appeared to place a premium on efficiency, at times, the Chamber issued rulings without clearly identifying the basis upon which they were made, or delayed the issuance of decisions on crucial matters over significant periods. Delayed decisions were usually justified on the grounds that the matter being considered was complex, the translation process was time consuming, or the Chamber was seeking responses from organizations who had crucial information for its determinations.<sup>220</sup> Nevertheless, when compared with the Trial Chambers of other international(ized) tribunals, such as the Special Court for Sierra Leone, the Trial Chamber at the ECCC can be said to have managed Duch's trial professionally and in accordance with international standards.

This section of the report is divided into four parts: (A) Judicial Management; (B) General Management; (C) Public Participation; and (D) Parties' Attendance and Performance. Part A presents an analysis related to the Chamber's rulings, including those pertaining to scheduling, as well as the steps taken to ensure the expeditiousness of the trial. It also touches briefly on any unprofessional conduct that occurred throughout the 21 weeks, as well as any steps taken to improve this conduct. Part B contains a discussion on the physical composition and management of the Courtroom. It also covers interpretation and translation-related problems and as technical issues the Chamber had to contend with during the proceedings. Part C on public attendance is not an issue directly managed by the Chamber. However, it will still be discussed here, given trials of this nature cannot completely fulfill their objectives without public awareness and involvement in the process. The final part of this section outlines the

attendance of the Parties or their Lawyers makes and a general assessment related to their performance during the trial.

## **(A) Judicial Management**

### **(i) Overall Trial Management**

As previously indicated, proceedings moved slowly during the first few weeks of trial. As a result, by the eighth week of proceedings, the Chamber projected that if such a pace were to be maintained, the hearings for Case 001 would only be concluded in December 2009.<sup>221</sup> At times, these delays were caused by the need to resolve procedural issues and technical problems. However, it seemed clear to Monitors that the proceedings were likewise drawn out due to repetitive and irrelevant questioning, as well as prolonged, irrelevant accounts provided by the Accused and a number of witnesses and Civil Parties taking the stand.<sup>222</sup>

As the weeks progressed, however, the Chamber increasingly took proactive measures to expedite the hearings. Overall, a clear trend toward improving punctuality and avoiding taking lengthy breaks or early adjournments became apparent across the twenty-one weeks. Additionally, the Chamber took several measures to improve the pace of proceedings. As has been the practice at other international(ized) tribunals, the Chamber removed some witnesses from its witness list during the course of the trial, opting instead to have their sworn affidavits read into the record.<sup>223</sup> The witnesses the Chamber retained were those it considered more likely to give relevant testimony.<sup>224</sup> International Defense Counsel François Roux commended this particular measure but nonetheless noted, that the trial still seemed unduly prolonged for a case in which the Accused already admitted his responsibility.<sup>225</sup>

The Trial Chamber also took measures to prevent Parties from asking irrelevant questions and ensuring that questions were focused on particular evidentiary topics being discussed. Initially however, the Chamber's reminders and interruptions were not specific enough and were often sparked by objections from the Parties.<sup>226</sup> At one point it even seemed that the burden of determining whether a question was repetitive was shifted to the Accused, as he was given broad instructions by the Chamber not to answer questions *he* deemed as being repetitive.<sup>227</sup> Commendably, this situation improved at a later stage of the trial, with the Chamber exhibiting more assertiveness in rebuking parties who raised issues that had already been addressed. However, while the Chamber was increasingly determined in limiting the questions posed by the Parties, there seemed far less action taken to prevent members of the bench from asking irrelevant or repetitive questions.<sup>228</sup>

The Judges also appeared to be reluctant to interrupt irrelevant answers to questions.<sup>229</sup> This was particularly the case with regard to the Accused and the Civil Parties who took the stand. Their statements at times clearly went beyond the scope of the evidentiary topic under discussion or the scope of facts being adjudicated in the case.<sup>230</sup> Arriving at a balance between ensuring that time was spent efficiently and a coherent flow in the testimony also proved to be challenging.<sup>231</sup>

By Week 9 of trial, the Chamber also set time allocations for Parties when questioning the witnesses and Civil Parties.<sup>232</sup> This measure was generally enforced quite strictly, with requests for additional time often rejected.<sup>233</sup> Nevertheless, the Chamber demonstrated its willingness to be flexible in certain circumstances.<sup>234</sup> The Judges were

particularly flexible with the Defense, which initially objected to the time allotted to it, arguing that in order to uphold the principle of equality of arms, the Defense should be granted an equal questioning time to the total of the Co-Prosecutor's and Civil Parties (*i.e.* 70 minutes), as opposed to its 40-minute allotment equivalent to the time allocated to the Civil Parties. The Chamber acknowledged this, and while it did not agree to the Defense's request, it was willing to grant Duch's lawyers additional time on a 'case by case basis.'<sup>235</sup>

## **(ii) Arbitrary Rulings and Delayed Decisions**

Although more the exception than the rule, the Chamber, on a number of occasions, issued rulings without explaining the grounds for their findings. This seemed to be especially the case when the Judges attempted to ensure the Parties stuck to their time limits for questioning witnesses and Civil Parties. This practice is regrettable because it meant that the Chamber's determinations could be criticized as being either inconsistent or without foundation.<sup>236</sup> In light of the Court's broader goal to set an example for the Cambodian domestic sector, efforts should be made to avoid ostensibly arbitrary rulings so far as is reasonable and feasible for the Judges to do so.

Conversely, there seemed to be prolonged delays in the Chamber's issuance of decisions over crucial topics. Based on the Monitors' own calculations, the average length of time taken for the Chamber to respond to submissions from the Parties with a written decision is 56 days.<sup>237</sup> Upon inquiry by the Parties, the Chamber often cited the complexity of the issue,<sup>238</sup> the lack of required information,<sup>239</sup> and the time needed for document translation<sup>240</sup> as the cause of the delay. However, given the crucial nature of some of the determinations, Parties were found to express discontent about these delays.

## **(iii) Courtroom Etiquette**

Overall, both the Judges and the Parties acted professionally throughout the trial. However, the Monitors noted certain instances when either Parties or Judges appeared to be falling asleep during the proceedings.<sup>241</sup> Additionally, unprofessional courtroom conduct was at times exhibited by the Parties in the heat of debate or questioning, with lawyers speaking without leave or after ignoring directions from the Chamber.<sup>242</sup> This display of unruly conduct usually resulted in stern admonishments from the President.

The Chamber also showed consistency in ensuring that the Accused behaved with the proper decorum throughout the trial. The Chamber found his addressing witnesses directly as inappropriate and directed him to address his comments to the Chamber.<sup>243</sup> While the Accused was rebuked for his disrespectful behavior towards a certain expert witness and Counsel,<sup>244</sup> the Chamber was also vigilant in safeguarding the dignity of the Accused.<sup>245</sup>

## **(B) General Management**

### **(i) Seating Arrangements in the Courtroom**

Despite being a fairly large chamber, the number of Parties participating in Duch's trial resulted in challenges relating to seating arrangements in the courtroom.<sup>246</sup> For example, in Week 13, both the International Defense Counsel and an International Civil Party Lawyer objected to having a Counsel for Witnesses seated on the same side of the room with the Defense. Both asserted that this would prejudice the witnesses testifying

as it gave the appearance that they were somehow aligned with the Defense. The Trial Chamber pointed out, however, that this arrangement was inevitable due to space limitations and the Counsel in question was seated in a different row from that of Duch's counsel.<sup>247</sup>

Apart from this concern regarding seating arrangements, however, the Chamber endeavored to ensure that all the Parties and other persons required for the smooth running of the trial were allocated seats.<sup>248</sup> For instance, psychosocial staff was allocated a seat close to the Civil Parties to facilitate the performance their duty of providing psychological support to witnesses and Civil Parties.<sup>249</sup> Nevertheless, given the large number of Civil Parties participating in proceedings, it seemed inevitable that limited seats in the Chamber would be unable to accommodate all of them. Hence, only 10 seats were made available to the 90 Civil Parties in Case 001.<sup>250</sup> Spatial arrangements in the Courtroom are likely to become more of a concern in Case 002, where four Accused Persons will be standing trial and over 1,000 Civil Parties are likely to participate. It is therefore anticipated that very few Civil Parties will be able to sit in the courtroom in Case 002. Concrete steps to manage this matter have yet to be determined. In an interview, Judge Cartwright stated that the Chamber is aware of the issue and will address it in the eventuality that Case 002 reaches the trial stage.<sup>251</sup>

## **(ii) Interpretation and Translation Issues**

In all trials operating in multiple languages, ensuring that interpretation and translation is of the highest caliber is essential. In the context of international(ized) criminal trials, this issue becomes even more crucial, due to the magnitude of the case being tried and the charges faced by the accused. Inaccurate translation of court documents can have a serious detrimental impact on the its ability to weigh and assess evidence, thereby offending the presumption of innocence. Moreover, inaccurate interpretation of testimony and oral argument may at best, cause serious delays to the proceedings, and at worst, subvert an accused person's right to a fair trial.

There seems no doubt that translation and interpretation issues were the cause for serious concern throughout Duch's trial. Under the Court's Internal Rules, there are three official languages of the Court, namely Khmer, English, and French.<sup>252</sup> Ensuring that simultaneous translation during proceedings, and that the translation of documents was done efficiently and with a high degree of accuracy proved difficult. At some points in the proceedings, it seemed that even basic accuracy had been compromised.

Inaccuracies in the translation of documents cast doubt on whether such documents should be used as evidence.<sup>253</sup> In Week 10, the Trial Chamber ruled that the impact on admissibility of erroneously translated documents should be considered on a 'case by case' basis. However, since many of the documents were inculpatory in nature, this seemed to shift the burden of sifting through the translated documents to ensure their accuracy to the Accused.<sup>254</sup> The Chamber also requested that the Parties correct mistakes in interpretation and translation during the proceedings. This was effective to a certain extent, but at times, Monitors found the approach to be time-consuming and causing serious delays at trial.<sup>255</sup> Additionally, it cast a shadow of doubt over the extent to which the Judges and the Parties were actually able to understand what was being said during proceedings. At times, Judges, Co-Prosecutors, the Defense, and Civil Parties clearly failed to understand the translation,<sup>256</sup> which led to confused responses during the questioning and witness frustration, among others.<sup>257</sup>

Another complication relating to translation was the absence of direct interpretation from Khmer to French and vice versa. Thus, all portions of the proceedings in Khmer had to be interpreted into English first and then from English into French. The same process applied in the reverse. The relayed interpretation system posed a risk that much of the content of French-Khmer testimony became confusing, if not incomprehensible, due to the different nuances between the language of origin, the relaying language, and the target language. The Interpretation and Translation Unit of ECCC ('ITU') explained that they had initially had tried to provide direct Khmer to French translation and vice-versa but found the result to be deficient.<sup>258</sup> The relay system was chosen to overcome this defect, and the ITU strongly emphasized that it was commonly used in other international settings such as at other international tribunals.<sup>259</sup>

The Parties raised issues relating to translation and requested the Chamber to order the ITU to remedy the situation.<sup>260</sup> Aside from undertaking this request, the Chamber also took care of instructing parties and witnesses to speak slowly, clearly, and in short sentences to ensure the accuracy of language interpretation. In Week 12, the Chamber finally took a technical measure to control the speed of testimonies and statements by activating the microphones only after the translation of the question was completed.<sup>261</sup> Unfortunately, interpretation problems continued, although not on the same scale as in the earlier stage of trial.<sup>262</sup> The ITU acknowledged that improving translation and interpretation is a work in progress, and expressed their plan to send the interpreters to a six-month interpretation course for basic and intermediary levels to prepare them for their workload in 2010-2011.<sup>263</sup>

### **(iii) Technical Issues**

There were minor audio-visual technical problems during the proceedings, resulting in varying degrees of delay.<sup>264</sup> Malfunctioning headsets were often distributed in the public gallery and the pressroom, causing the audience to have to seek replacements after the court session was declared open.<sup>265</sup> There were also instances when the quality of video conferencing facilities was questionable.<sup>266</sup> Overall, however, these problems were kept to a minimum and the Court's Audio-visual Unit should be commended for its performance and efforts in this regard.

## **(C) Public Participation**

### **(i) Public Attendance**

The ECCC Public Affairs Section ('PAS') noted that 27,000 members of the public and 3,000 journalists had attended the substantive hearing of Case 001. Both PAS and civil society facilitated the attendance of the local audience by organizing transportation for villagers from outside of Phnom Penh. PAS also provided introductory information for the members of the public.<sup>267</sup> PAS also took care to invite people from far-flung areas that had never attended the hearings.<sup>268</sup>

### **(ii) Public Facilities**

Unfortunately, the sharp increase in public attendance during the trial did not correspond to a sufficient increase in facilities to accommodate the large numbers of audience members. Mr Reach Sambath, Head of PAS, acknowledged these problems and noted that the Court had expanded the public cafeteria three times in an effort to accommodate the increase in numbers.<sup>269</sup> He also highlighted the installation of a screen

in the cafeteria so that the members of the public who could not find seats in the public gallery could still follow the proceedings via live feed, although this took place during the last week of the substantive hearings.<sup>270</sup> Moreover, the fact that there is only one entrance to the Court and that the public must be screened prior to entering, meant that there were long queues both in the morning and afternoon breaks in order to attend proceedings. The restroom facilities were also severely limited.<sup>271</sup> With regard to this matter, Mr Sambath noted that further physical adjustments to the court compound will likely be made, but the extent that this was feasible depended on the budget the Court's administration was willing to allocate for this purpose.<sup>272</sup>

#### **(D) Parties Attendance and Performance**

In general, all Parties maintained a good attendance record. Counsel François Roux was, however, absent a number of times during the proceedings, and initially, his absence appeared to have had an adverse impact on the protection of rights of the Accused.<sup>273</sup> In week 5, during Roux's first absence, Duch seemed to have to take the matter of his own defense into his own hands due to noticeable inaction of the available Counsels at the time.<sup>274</sup> The performance of Duch's other lawyers, however, improved during Roux's subsequent absences from Court.

The Office of the Co-Prosecutors employed a rotating system for counsels present in Court, with different lawyers in charge of different sections of the trial. Acting International Co-Prosecutor William Smith remarked that dividing the workload of a case to a number of prosecutors is a common practice in a trial involving massive crimes.<sup>275</sup> While this is indeed true, more often than not, the Office of the Prosecutor at other international tribunals has assigned at least one senior trial attorney to attend the entire duration of a particular trial, to ensure the overall coherence and efficient management of a particular case. This management structure, however, was clearly lacking during the Duch trial. As a result, there seemed to be a noticeable lack of coordination between the different prosecutors assigned to different stages of the proceedings. In particular, in Week 20, a prosecuting attorney addressed requests that he thought the Defense had made the day before, which in fact had never been made.<sup>276</sup> Smith acknowledged that the rotation between prosecutors had had its share of problems during this trial, but through no fault of the system itself. He identified the resignation of four prosecuting attorneys (including the International Co-Prosecutor) during the course of the trial as the major obstacle to the smooth implementation of this approach.<sup>277</sup>

#### **(E) Lessons Learned from Trial Management in Case 001**

Overall, the Judges of the Trial Chamber should be given due credit for their efforts in Case 001. The trial ran with reasonable efficiency, and the Chamber appeared to work coherently and in a relatively coordinated fashion throughout the case. Nevertheless, given the complexity of the cases before them, the Judges will likely need to draw from the lessons learned during Duch's trial when managing the courtroom. In a trial involving more than one accused who are likely to contest the charges, the Trial Chamber will need to control the courtroom with firm but just hands. In doing so, it will also need to maintain consistency in its directives and provide reasoned decisions. While the Judges made commendable efforts to ensure they adhered to this principle in Case 001, avoiding arbitrary rulings in Case 002 would further enhance the trial process and the Court's ability to act as an example for Cambodia's national judicial sector.

Additionally, taking further steps to curtail irrelevant questioning and testimony will likely enhance both the quality and the pace of proceedings.

The Monitors also suggest that the Court undertake greater efforts to secure financial resources to accommodate the very commendable efforts of the PAS to ensure the attendance of the Cambodian public. However, PAS would also do well to ensure invitations extended to the public are adjusted to the physical realities of the Court: it would seemingly be a shame to invite large numbers of visitors if they are unable to sit in the public gallery itself.

With regard to document translation and the interpretation of proceedings, greater efforts should be taken to ensure the quality of both, given the crucial role they play in ensuring the proper administration of justice. As evidentiary documents and the facts revealed during the proceedings are the sole bases upon which the Chamber will reach its judgment, guaranteeing accuracy should be of paramount concern. It is commendable that the ITU is planning to strengthen the capacity of its staff. Further efforts need to be made to ensure that these services can be provided as flawlessly as possible.

Finally, the Office of the Co-Prosecutors seems to be in need of improving its case management strategy. Efforts need to be made to ensure greater coordination between attorneys, and encourage a lower level of staff turnover during the trial stage. This will be especially important in a trial with a higher degree of complexity than Case 001, where there is only one Accused who is not contesting the majority of the allegations in the Closing Order.

## 6. Part Six: Conclusion

The first case before the ECCC ran smoothly and relatively efficiently. In many respects, the Judges and the Parties should be commended for this. Given the many difficulties associated with trying cases of this complexity and magnitude in general, and the *in situ* status of the Court in particular, ensuring that Duch's trial proceeded in a fair and effective manner required the bench to adopt a principled pragmatism which they generally succeeded in doing. Additionally, given the many novel circumstances and procedures under which all the Parties were operating, the largely cooperative and facilitative approach adopted by them (and the extent to which this improved throughout the trial) undoubtedly contributed towards the trial's overall success. The efforts of the Court's Translation Unit, General Management, Public Affairs and Witness and Experts Support Unit also need to be acknowledged as contributing to a general sense that the trial complied with international fair trial standards.

However, as has been identified throughout this report, despite this success, the trial did highlight certain important areas in which there is room for improvement in the trial process underway at the ECCC. In particular, the manner in which testimony is organized for future cases before the Court may need to be re-visited, to ensure that repetitive and irrelevant questioning is kept to a minimum. Additionally, further efforts to avoid arbitrariness in decision-making, to ensure a more qualitative analysis to curtailing questions, and to avoid asking repetitive questions themselves, is required from the bench. With regard to the Parties – greater coordination by the Office of the Co-Prosecutors to ensure the system of rotating counsel is managed effectively would enhance the Prosecution's performance. For the Defense, given the surprising turn of events during the week of Closing Submissions, and the seeming reversal of Duch's plea, determining the Accused appoints a lead counsel for his/her Defense team would seem necessary to ensure consistent Defense strategy. Greater co-ordination amongst co-defense counsels is also clearly required. With regards to the units supporting the Court, funding for a comprehensive psychosocial support service should be given priority, as should ensuring greater efforts are made to enhance the speed and accuracy of translation and interpretation.

Perhaps of most pressing concern, however, is better delineating the role of Civil Party Lawyers in the courtroom and better serving the interests of victims as a whole. The ECCC's Judges have clearly shown that they see this to be a priority, and it seems likely that the judges will make important amendments to the Court's Internal Rules in this regard. Perhaps the important 'lesson learned' from Case 001, is that any changes should be undertaken in close consultation with the existing Civil Party Lawyers and NGO intermediaries, to ensure that a more coordinated and facilitative approach to their participation is adopted, and one which most benefits their clients. In addition, facilitating greater lawyer-client interaction and ensuring that any amendments take into account the lawyers' need to meet with their clients, is likely to enhance the process as a whole. As well as this, greater focus on considering how best to define moral and collective reparations and considering avenues through which this could be meaningfully implemented at the ECCC is clearly required.

Furthermore, any measures to curtail the role of Civil Parties' rights within the Courtroom and to streamline the procedure of Civil Party participation should be complemented by further efforts to ensure victims more generally have access to information about the court and the justice process underway. The Victims Unit should

adopt a greater role in ensuring non-legal measures that facilitate greater access to information about the ECCC and a greater sense of engagement with the justice process underway. At the same time, however, victims' expectations should be managed with care. Balancing both these interests will likely be a demanding, yet significant, task: if the Court is to be part of an ongoing process of reconciling with the past within Cambodia, it needs to ensure it remains accessible to the people it is most seeking to serve.

Managing the expectations placed on the ECCC was never going to be easy. The twin goals of ensuring that the trial both lives up to international fair trial standards and remains meaningful to Cambodians are undoubtedly difficult to achieve in the context within which it operates. Yet as former S-21 detainee, Vann Nath, put it during his testimony in the Duch trial, 'What I seek is intangible, it's justice...I hope justice becomes tangible, one that everyone can see'.<sup>278</sup> Moving towards a visible, visceral form of justice – that resonates with the Cambodian community – will undoubtedly continue to pose challenges for the Court. Yet if the ECCC is to ensure it leaves a legacy that allows Cambodians to 'move forward', it is perhaps this priority that should remain paramount.

<sup>1</sup> See Press Release, “Statement of the Acting International Co-Prosecutor”, 8 September 2009, available at [http://www.eccc.gov.kh/english/press\\_release.list.aspx](http://www.eccc.gov.kh/english/press_release.list.aspx). (Last accessed 1 December 2009). Additionally, unless otherwise stated, all documents relating to the ECCC can be considered as accessed from the ECCC’s website: <[www.eccc.gov.kh](http://www.eccc.gov.kh)>.

<sup>2</sup> We use the term ‘international(ized) tribunal’ in this report to refer to both the international tribunals (for the Former Yugoslavia and Rwanda, as well as the International Criminal Court) and the United Nations-administered or treaty-based courts in Kosovo, East Timor, Bosnia, Sierra Leone and of course, Cambodia.

<sup>3</sup> Profiles of the monitors, past and present, can be viewed at: [www.eastwestcenter.org/aiji](http://www.eastwestcenter.org/aiji). (Last accessed 20 November, 2009). They are: Vineath Chou (Cambodia), Sovannith Nget (Cambodia), Savornt Pheak (Cambodia), Sovanna Sek (Cambodia), Binxin Zhang (China), Guo Cai (China), Florian Hansen (Germany), Aviva Nababan (Indonesia), Mary Kristerie Baleva (The Philippines), Yvette Anthony (Singapore), Delphia Lim (Singapore), Sibylle Dischler (Switzerland), Romana Weber (Switzerland), Caroline Ehlert (Switzerland), Jaspreet Dosanjh (USA) and Deepika Sharma (USA). The team was also ably assisted over the summer of 2009 by Mariko Miyahira (Japan).

<sup>4</sup> *Prosecutor v Kaing Guek Eav alias ‘Duch’* (Case No. 001/18-07-2007-ECCC/TC) (hereinafter, ‘**Case 001**’) ‘Direction on the Scheduling of the Trial’, 20 March 2009, paras 9.1 and 9.2. (hereinafter, ‘**Scheduling Direction**’). Available at <[http://www.eccc.gov.kh/english/court\\_doc.list.aspx?courtDocCat=case\\_docs](http://www.eccc.gov.kh/english/court_doc.list.aspx?courtDocCat=case_docs)> last accessed on 18 November 2009. Hereafter, all references to documents from the Duch trial can be considered as accessed from this web address as at this date.

<sup>5</sup> Law on the Establishment of the Extraordinary Chambers, with the inclusion of amendments dated 27 October, 2004 (NS/RKM/1004/006), Article 35(new), section (a) (hereafter, ‘**ECCC Law**’).

<sup>6</sup> Extraordinary Chambers in the Courts of Cambodia, Press Release, ‘Sixth ECCC Plenary Session Concludes’, 11 September 2009, paras 2 and 3.

<sup>7</sup> Extraordinary Chambers in the Courts of Cambodia, Case Information Sheet for Case 001, available online at: <http://www.eccc.gov.kh/english/caseInfo001.aspx>.

<sup>8</sup> Testimony of the Accused, as reported in *KRT Trial Monitor*, Report No. 3 (week ending 12 April 2009) pp 1-2. However, see also Annexure A to that report, which further details the Accused Person’s direct supervision of only one section (namely, M-13A) of this security office.

<sup>9</sup> Testimony of the Accused, as reported in *KRT Trial Monitor*, Report No.5 (week ending May 2 2009) pp 2-3. See also the accompanying Annexure A to that report.

<sup>10</sup> See *Case 001*, ‘Closing Order Indicting Kaing Guek Eav alias “Duch”’ (8 August 2008) (hereafter ‘**Closing Order**’), at para 29. According to the judicially agreed facts which were read out during trial proceedings, this fact is not contested by the Defense. See *KRT Trial Monitor*, Report No. 2 (week ending April 1 2009), Annexure A, Table 4. Note that the Closing Order should also be read in conjunction with the Pre-trial Chamber’s decision following an appeal from the order as lodged by the Prosecution. Hence, see also Case 001, ‘Pre-trial Chamber Decision on Appeal Against Closing Order Indicting Kaing Guek Eav, alias “Duch,”’ (5 December 2008).

<sup>11</sup> Closing Order, at para 30 and *KRT Trial Monitor*, Report No. 2 (week ending 1 April 2009) Annexure A, Table 4.

<sup>12</sup> Closing Order, at para 139.

<sup>13</sup> This includes the initial hearings, held on 17 and 18 February 2009. Throughout this report, we refer generally to the twenty weeks of hearings when referring to the bulk of the proceedings and the twenty-one weeks when referring to substantive proceedings as a whole.

<sup>14</sup> Opening Statement of the Prosecution (as read by International Co-Prosecutor, Robert Petit), as reported in *KRT Trial Monitor*, Report No. 2 (week ending 1 April 2009).

<sup>15</sup> *KRT Trial Monitor*, Report No.2 (week ending 1 April 2009).

<sup>16</sup> Opening Statement of the Defense (as read by International Defense Lawyer, François Roux), as reported in *KRT Trial Monitor*, Report No.2 (week ending 1 April 2009).

<sup>17</sup> Opening Statement of the Defense (as read by National Defense Lawyer, Kar Savuth), as reported in *KRT Trial Monitor*, Report No.2 (week ending 1 April 2009).

<sup>18</sup> Opening Statement of the Defense (as read by International Defense Lawyer, François Roux), as reported in *KRT Trial Monitor*, Report No. 2 (week ending 1 April 2009).

<sup>19</sup> The expert witness who testified with regard to victim’s psychological state and reparations was Mr Chhim Sotheara, a psychologist working at the Cambodian Transcultural-Psychosocial Organization (‘**TPO**’) in Phnom Penh. TPO was engaged as a consultant by the ECCC to undertake psychosocial support for the Court’s witnesses throughout the duration of the Duch trial. Additionally, Justice Richard Goldstone (former Prosecutor of the International Criminal Tribunals for Rwanda and Yugoslavia) and

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Stephane Hessel testified to aggravating and mitigating circumstances to be considered at sentencing, particularly in light of the Accused Person's plea of remorse. The Monitors interviewed staff from TPO during the course of their interviews, on 8 October 2009 (hereafter, 'Interview with TPO').

<sup>20</sup> ECCC Trial Chamber 'Transcript of Proceedings' (18 February 2009), comments made by Judge Cartwright, p 4 lines 1-8. See also *KRT Trial Monitor*, Report No.1 (Initial Hearings, 17-18 February 2009). In this regard, testimony about M-13 may play a part in determining the degree of culpability held by the Accused for the crimes alleged to have been committed under the Closing Order.

<sup>21</sup> See *KRT Trial Monitor*, Report No. 3 (week ending 12 April 2009).

<sup>22</sup> See *KRT Trial Monitor*, Report No. 3 (week ending 12 April 2009) for the testimony of François Bizot and Uch Sorn; and *KRT Trial Monitor*, Report No.4 (week ending 26 April 2009) for the testimony of Chan Voeun and Chan Korn.

<sup>23</sup> *KRT Trial Monitor*, Report No. 3 (week ending 12 April 2009).

<sup>24</sup> See for example, Testimony of Craig Etcheson, as reported in *KRT Trial Monitor*, Report No. 6 (week ending 24 May 2009), and related transcripts; Testimony of David Chandler, as reported in *KRT Trial Monitor*, Report No.16 (week ending 10 August 2009) and related transcripts.

<sup>25</sup> The Accused is charged as a superior under Part IV (Dispositive) of the Closing Order.

<sup>26</sup> Closing Order, para 32.

<sup>27</sup> Testimony of the Accused, as reported in *KRT Trial Monitor*, Report No. 4 (week ending April 26, 2009), and Annexure A.

<sup>28</sup> Some commentators have noted that the Chamber will need to assess the extent to which the definition of crimes against humanity had crystallized as part of customary international law in 1975, as well as the extent to which this legal category is applicable in Cambodia. See, for example, Anne Heindel's essay in John Ciorciari and Anne Heindel (eds), *On Trial: The Khmer Rouge Accountability Process* (Phnom Penh: Documentation Center of Cambodia, 2009).

<sup>29</sup> See *Prosecutor v Semanza* (Case No. ICTR-97-20-A) Appeals Chamber 'Judgment' (20 May 2005) at paras 268-269; *Prosecutor v Kunarac et al* (Case No. IT-96-23/1-A) Appeals Chamber, "Judgment," (12 June 2002) at para 98; *Prosecutor v Brdanin*, (Case No. IT-99-36-T, T. Ch II) Trial Chamber "Judgment" (1 September 2004) para 137.

<sup>30</sup> The most obvious example in this regard is Son Sen, a former Khmer Rouge Deputy Prime Minister responsible for Defense, who figured prominently in the Accused Person's testimony. He was killed in 1997 during a factional split in the Khmer Rouge. See for example, *KRT Trial Monitor*, Report No. 5 (week ending 2 May 2009) and Annexure A. Additionally, evidence in support of anything other than a strictly vertical superior-subordinate structure existing between the Accused and his superiors is lacking. According to expert witness Craig Etcheson (who affirmed the Accused Person's view), horizontal communication was only permitted if authorized by the upper echelon. See Testimony of Craig Etcheson, as reported in *KRT Trial Monitor*, Report No.7 (week ending 31 May 2009).

<sup>31</sup> Testimony of Craig Etcheson, as reported in *KRT Trial Monitor*, Report No. 6, (week ending 26 May 2009).

<sup>32</sup> Testimony of Craig Etcheson, as reported in *KRT Trial Monitor*, Report No. 6, (week ending May 26, 2009) and Raul Marc Jennar, as reported in *KRT Trial Monitor*, Report No. 21, (week ending September 20, 2009).

<sup>33</sup> *Prosecutor v Brdanin*, (Case No. IT-99-36-T, T. Ch II) Trial Chamber "Judgment" (1 September 2004), para 121.

<sup>34</sup> Testimony of Nayan Chanda as reported in *KRT Trial Monitor*, Report No.7 (week ending 31 May 2009) and relevant transcripts.

<sup>35</sup> See for example Testimony of the Accused Person, as reported in *KRT Trial Monitor*, Report No. 9 (week ending 21 June 2009) and related transcripts; Testimony of Him Huy, as reported in *KRT Trial Monitor*, Report No. 14 (week ending 26 July 2009) and related transcripts; Testimony of Kach Mean, Nhem En and Kung Pai (all former employees of S-21) as reported in *KRT Trial Monitor*, Report No. 16 (week ending 10 August 2009) and Annexure A, and related transcripts.

<sup>36</sup> Former interrogators who testified in this category were: Mam Nay (see *KRT Trial Monitor*, Report No.13, week ending 16 July 2009) Him Huy, and Prak Khorn (see *KRT Trial Monitor*, Report No.14, week ending July 26 2009). Former guards who testified in this category were: Kok Sros (see *KRT Trial Monitor*, Report No.14, week ending 26 July 2009), Cheam Sou and Kheav Yet (see *KRT Trial Monitor*, Report No. 16, week ending 10 August 2009). Former administrative officers who testified were: Suos Thy (see *KRT Trial Monitor*, Report No.15, week ending 2 August 2009); and Lach Mean (see *KRT Trial Monitor*, Report No.16, week ending 10 August 2009). The former medic who testified was Sek Dan (see *KRT Trial Monitor*, Report No.16, week ending 10 August 2009). Nam Mun also claimed to be a former medic at S-21. However, her status as a medic is contested by the Accused. See *KRT Trial Monitor*, Reports No. 12 and 13, weeks ending 9 and 16 July 2009).

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<sup>37</sup> Testimony of Prak Khorn as reported in *KRT Trial Monitor*, Report No.14 (week ending 26 July 2009) and related transcripts (note however, that the Accused disputed the extent to which this practice took place).

<sup>38</sup> Testimony of the Accused Person as reported in *KRT Trial Monitor*, Report No. 9 (week ending 21 June 2009) and related transcripts.

<sup>39</sup> Testimony of Prak Khorn as report in *KRT Trial Monitor*, Report No.14 (week ending 26 July 2009).

<sup>40</sup> Testimony of Cheam Soeu as reported in *KRT Trial Monitor*, Report No.16 (week ending 10 August 2009), Annexure A.

<sup>41</sup> This appeared to be somewhat disputed by Civil Party Lawyers Silke Studzinsky and Kong Pisey during their closing submissions.

<sup>42</sup> *KRT Trial Monitor*, Report No.9 (week ending 21 June 2009).

<sup>43</sup> See for example Testimony of Kok Sros as reported in *KRT Trial Monitor*, Report No.15 (week ending 2 August 2009).

<sup>44</sup> See for example, *KRT Trial Monitor*, Report No.9 (week ending 21 June 2009).

<sup>45</sup> Testimony of David Chandler, as reported in *KRT Trial Monitor*, Report No. 16 (week ending 10 August 2009), pp 4-6, and related transcripts.

<sup>46</sup> For the testimony (in affidavit form) of Kaing Pan and Phach Siek see *KRT Trial Monitor*, Report No.17 (week ending 14 August 2009) and related transcripts; for the testimony of Chum Neou see *KRT Trial Monitor*, Report No.19 (week ending 30 August 2009) and related transcripts.

<sup>47</sup> For evidence relating to the Accused Person's character prior to 1968, see testimonies of Sou Sat, Tep Sem and Tep Sok as reported in *KRT Trial Monitor*, Report No.20 (week ending 4 September 2009) and related transcripts. For evidence relating to the Accused Person's character during the 1990s, see testimonies of Chou Vin, Hun Smien and Peng Poan in the same report, and the testimony of Christopher Lapel are reported in *KRT Trial Monitor*, Report No.21 (week ending 20 September 2009) and related transcripts.

<sup>48</sup> Testimony of David Chandler, as reported in *KRT Trial Monitor*, Report No.16 (week ending 10 August 2009) and related transcripts.

<sup>49</sup> See *KRT Trial Monitor*, Report No.20 (week ending 4 September 2009) and related transcripts.

<sup>50</sup> See *KRT Trial Monitor*, Report No.18 (week ending 23 August 2009) and related transcripts.

<sup>51</sup> For testimony of Mr Chhim Sotheara see *KRT Trial Monitor*, Report No.19 (week ending 30 August 2009) and for testimony of Mr Stephane Hessel and Justice Richard Goldstone, see *KRT Trial Monitor*, Report No. 21 (week ending 20 September 2009) and related transcripts.

<sup>52</sup> Closing submissions of International Civil Party Lawyer, Karim Khan, 23 November 2009 (Monitor Staggs Kelsall's own notes). See also *KRT Trial Monitor*, Report No.22 (week ending 29 November 2009).

<sup>53</sup> Closing submissions of Acting International Co-prosecutor, William Smith, 24 November 2009 (Monitor Staggs Kelsall's own notes). *KRT Trial Monitor*, Report No.22 (week ending 29 November 2009).

<sup>54</sup> See Extraordinary Chambers in the Courts of Cambodia, Internal Rules (Rev.4), 11 September 2009, at Rule 89.2, which mandates jurisdictional challenges should be brought. Available online at: [http://www.eccc.gov.kh/english/internal\\_rules.aspx](http://www.eccc.gov.kh/english/internal_rules.aspx). (Last accessed 1 December 2009). Hereafter, all references to this or any other version of the Court's internal rules will be identified as '**Internal Rules**'.

<sup>55</sup> Closing submissions of the Defense, 26-27 November 2009 (Monitor Staggs Kelsall's own notes).

<sup>56</sup> See *KRT Trial Monitor*, Report No. 5 (week ending 2 May 2009) and Report No. 8 (week ending 14 June 2009).

<sup>57</sup> See *KRT Trial Monitor*, Report No.10 (week ending 28 June 2009).

<sup>58</sup> A counter-argument to the inclusion of more abstract or conceptual questions may be the fact that the civil law model allows for greater leeway amongst the judges to ascertain the truth of what happened, and the extent to which such ideologies have bearing on the Accused Person's state of mind at the time. However, given the time pressure the Chamber is under and the length of time since the events occurred, it seems more appropriate to avoid extensive questioning in this regard.

<sup>59</sup> Email correspondence with former Senior Trial Attorney from the International Criminal Tribunal for the Former Yugoslavia (10 November 2009).

<sup>60</sup> Author Staggs Kelsall's own observations from monitoring the trials at the Special Court for Sierra Leone between September 2004 – August 2005.

<sup>61</sup> The Agreement establishing the Extraordinary Chambers in the Courts of Cambodia ('**ECCC Agreement**') provides that the ECCC *may* seek 'guidance from procedural rules established at the international level' in the event that Cambodian law does not deal with a particular matter, there is uncertainty regarding the application of a particular domestic law rule or there is uncertainty regarding the extent to which that rule complies with international standards. See ECCC Agreement, Article 12(1). As

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such, the ECCC's judges are under no obligation to follow the guidance of international precedents when reaching their determinations.

<sup>62</sup> Robert Cryer et al. (2007) *An Introduction to International Criminal Law and Procedure*, (Cambridge: Cambridge University Press) (hereafter, 'Cryer') p 50.

<sup>63</sup> Roux, François. Personal Interview. 19 October 2009 (hereafter, '**Interview with International Defense Lawyer, Roux**').

<sup>64</sup> Interview with International Defense Lawyer, Roux.

<sup>65</sup> Interview with Justice Silvia Cartwright (7 October 2009). (Hereafter, '**Interview with Judge Cartwright**').

<sup>66</sup> Smith, William. Personal Interview (7 October 2009) (hereafter, '**Interview with International Co-Prosecutor William Smith**').

<sup>67</sup> See *Prosecutor v Dusko Tadić* (Case No. IT-94-1-A) Appeals Chamber "Judgment" (15 July 1999), at paras 190-220. For still arguably the most comprehensive overview of the controversial nature of the doctrine's application at the international level, see Alison Marston Danner and Jenny S. Martinez (2005) 'Guilty Associations: Joint Criminal Enterprise, Command Responsibility and the Development of International Criminal Law' *California Law Review* vol.93 p.75-169.

<sup>68</sup> *Case 001 ECCC* "Public Information by the Co-Prosecutors Pursuant to Rule 54 Concerning their Rule 66 Final Submission Regarding Kaing Guek Eav alias 'Duch'" (18 July 2008) (Hereafter '**OCP Final Submission**') para 250.

<sup>69</sup> See OCP Final Submission, para 251.

<sup>70</sup> Rule 98(2) provides that the Chamber may change the legal characterization of the crimes as set out in the Closing Order provided no new constitutive elements are introduced. (See Internal Rules, Rule 98(2)).

<sup>71</sup> Cryer, p 376.

<sup>72</sup> See ICC Regulations, No. 55.

<sup>73</sup> *Prosecutor v. Lubanga Dyilo* (Case No. ICC-01/04-01/06) ICC PTC I "Decision on the Prosecution and Defense Applications for Leave to Appeal the Decision on the Confirmation of Charges," (24 May 2007). See also *Case 001 ECCC* "Co-Prosecutors' Request for the Application of Joint Criminal Enterprise" (9 June 2009), para 17.

<sup>74</sup> *Prosecutor v. Kupreškić, et al.*, (IT-95-16) ICTY Trial Chamber "Judgment" (14 January 2000) para 740.

<sup>75</sup> See *Case 001 ECCC* Pre-Trial Chamber "Decision on Request for Release" (15 June 2009) (hereafter '**Decision on Request for Release**').

<sup>76</sup> See *Case 001 ECCC* Office of the Co-Investigating Judges 'Order of Provisional Detention (Kaing Guek Eav, alias 'Duch')' (31 July 2007).

<sup>77</sup> *KRT Trial Monitor*, Report No.1 (Initial Hearing, 17-18 February 2009).

<sup>78</sup> The Defense used as its basis Art. 503 of the Cambodian Code of Criminal Procedure which provides that the duration of any provisional detention shall be deducted from the sentence decided by the court, or the total duration of the sentences that has been imposed. See also, Rome Statute, Art. 77.2; ICTY Rules of Procedure and Evidence Art. 101.B (iv) and 101.C; ICTR Rules of Procedure and Evidence 101.B (4) and 101.C; Special Court for Sierra Leone Rules of Procedure and Evidence 101.B (iii) and 101.D. (Hereafter, Rules of Procedures and Evidence shall be referred to as '**RPE**' and the Special Court for Sierra Leone shall be referred to as '**SCSL**').

<sup>79</sup> See Article 210 of the Cambodian Code of Criminal Procedure.

<sup>80</sup> See *Case 001 ECCC* Trial Chamber Decision on Request for Release, Dispositive.

<sup>81</sup> This assumes the first three years of his incarceration will be considered legal, in accordance with Cambodian law. See also Decision on Request for Release, Dispositive.

<sup>82</sup> Cambodian Code of Criminal Procedure, Arts. 193 to 194; sec. 5. See also UN Human Rights Council, Seventh Session. *Technical Assistance and Capacity Building, Report of the Special Representative of the Secretary-General for Human Rights in Cambodia, Yash Ghai* (A/HRC/7/42) 29 February 2008 (hereafter, '**2008 Gai Report**').

<sup>83</sup> 2008 Gai Report.

<sup>84</sup> *KRT Trial Monitor*, Report No. 2 (30 March to 1 April 2009).

<sup>85</sup> See *Case 001 ECCC* Trial Chamber 'Transcript of Proceedings' (31 March 2009); *KRT Trial Monitor* Report No. 2 (30 March to 1 April 2009).

<sup>86</sup> See Code of Criminal Procedure of the Kingdom of Cambodia; cf Rome Statute of the ICC, Art 65; ICTY RPE Rules 62bis and 100; ICTR RPE Rule 100; SCSL RPE Rules 61.v, 62.

<sup>87</sup> Internal Rules Rev. 3, Rule 87(1). See *KRT Trial Monitor*, Report No. 21 (week ending 20 September 2009) Annexure B.

<sup>88</sup> The duration of the trial from the first days of hearing on 17-18 February 2009 and 30 March 2009 to 20 September 2009 excluding adjournments due to holidays is 25 weeks. However, the entire proceedings from the initial hearing on 17 February to 20 September 2009 lasted 30 weeks.

<sup>89</sup> See *Prosecutor v. Babić* (IT-03-72); *Prosecutor v. Banović* (IT-02-65/1); *Prosecutor v. Bralo* (IT-95-17); *Prosecutor v. Češić* (IT-95-10/1); *Prosecutor v. Deronjić* (IT-02-61); *Prosecutor v. Došen, et al.*, (IT-98-8); *Prosecutor v. Erdemović* (IT-96-22); *Prosecutor v. Jokić* (IT-01-42/1); *Prosecutor v. Kolundžija, et al.* (IT-95-8); *Prosecutor v. Mrđa* (IT-02-59); *Prosecutor v. Nikolić* (IT-94-2); *Prosecutor v. Nikolić* (IT-02-60/1); *Prosecutor v. Obrenović* (IT-02-60/2); *Prosecutor v. Plavšić* (IT-00-39 & 40/1); *Prosecutor v. Rajić* (IT-95-12); *Prosecutor v. Sikirica, et al.* (IT-95-8); *Prosecutor v. Simić* (IT-95-9/2); *Prosecutor v. Todorović* (IT-95-9/1), ICTY Case Information Sheets available at <[www.icty.org](http://www.icty.org)>.

<sup>90</sup> See *Prosecutor v. Mrđa* (IT-02-59) and *Prosecutor v. Sikirica, et al.* (IT-95-8 ICTY) Case Information Sheets available at <[www.icty.org](http://www.icty.org)>.

<sup>91</sup> *Case 001 ECCC Trial Chamber 'Transcript of Proceedings'* (31 March 2009).

<sup>92</sup> In *Prosecutor v. Erdemović* the Trial Chamber explained that the International Tribunal, in addition to its mandate to investigate, prosecute and punish serious violations of international humanitarian law, has a duty, through its judicial functions, to contribute to the settlement of the wider issues of accountability, reconciliation and establishing the truth behind the evils perpetrated in the former Yugoslavia. See *Prosecutor v. Erdemović* (IT-96-22-Tbis) ICTY Trial Chamber 'Sentencing Judgment' (5 March 1998).

<sup>93</sup> *Prosecutor v. Delalic* (IT-96-21) ICTY Trial Chamber (4 February 1998) para 49.

<sup>94</sup> *Prosecutor v. Kordic* (IT-94-14/2) ICTY Appeals Chamber (11 September 2001) citing *Dombo Beheer BV v The Netherlands*, [(1993) 18 EHRR 213 para 33] para 6.

<sup>95</sup> Internal Rules Rev. 3, Rule 23(1) (a).

<sup>96</sup> *KRT Trial Monitor*, Reports No. 7 (week ending 31 May 2009); 9 (week ending 21 June 2009); and 21 (week ending 21 September 2009).

<sup>97</sup> *KRT Trial Monitor*, Reports No. 7 (week ending 31 May 2009); 9 (week ending 21 June 2009); and 21 (week ending 21 September 2009). Additionally, the Defense claimed that the CPs had overstepped their role in "supporting the prosecution" by attempting to submit documents that made no direct reference to their clients. See *KRT Trial Monitor*, Reports No. 9 (week ending 21 June 2009) and 21 (week ending 21 September 2009).

<sup>98</sup> Interview with International Defense Lawyer Roux, 19 October 2009.

<sup>99</sup> *Case 001 ECCC Trial Chamber "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) (hereafter, '**9 October 2009 Decision**') para 26

<sup>100</sup> 9 October 2009 Decision para 27.

<sup>101</sup> Internal Rules Rev. 3, Rule 87(1) and 87(3).

<sup>102</sup> *KRT Trial Monitor*, Reports No. 6 (week ending 24 May 2009); 9 (week ending 21 June 2009); 16 (week ending 10 August 2009) and 21 (week ending 20 September 2009).

<sup>103</sup> See *KRT Trial Monitor*, Report No. 9 (week ending 21 June 2009).

<sup>104</sup> Interview with International Co-Prosecutor William Smith.

<sup>105</sup> The amendment was considered and adopted during the ECCC's Sixth Plenary Session which was held on 7-11 September 2009. For more information on this topic, ECCC Press Releases dated 3 September 2009 and 11 September 2009 available at <[www.eccc.gov.kh](http://www.eccc.gov.kh)>.

<sup>106</sup> DC-Cam, a non-governmental organization established in 1995 by Yale University's Cambodian Genocide Program, is an archival and research center which houses copies of several of the documents that form part of Duch's Case File.

<sup>107</sup> *Case 001 ECCC Trial Chamber 'Decision on Admissibility of Material on Case File as Evidence'* (26 May 2009) (hereinafter '**Decision on Admissibility of Material on Case File as Evidence**'), para 2. See *KRT Trial Monitor* Reports No. 3 (week ending 12 April 2009); 4 (week ending 26 April 2009); 6 (week ending 24 May); 12 (week ending 9 July); and 16 (week ending 10 August).

<sup>108</sup> *Decision on Admissibility of Material on Case File as Evidence*, para 16.

<sup>109</sup> *Decision on Admissibility of Material on Case File as Evidence*, para 16. To reach this conclusion, the Trial Chamber referred to the following factors that both the ICTY and SCSL considered in determining the admissibility of statements made by a deceased or untraceable witness: (a) the circumstances in which the statement was made or recorded; (b) whether the statement was subject to examination by a party against whom the evidence is to be used; and (c) whether the statements are cumulative in nature. The Chamber referred to Rule 92bis of the ICTY and Rule 92quater of the SCSL, as well as the decisions rendered by the ICTY Trial Chamber in the *Popovic* and *Milutinović* cases and by the Special Court of Sierra Leone in the *Taylor* case. See *Decision on Admissibility of Material on Case File as Evidence*, para 15.

<sup>110</sup> *Decision on Admissibility of Material on Case File as Evidence*, para 16.

- <sup>111</sup> Email correspondence with Silke Studzinsky, 19 November, 2009.
- <sup>112</sup> Decision on Admissibility of Material on Case File as Evidence, para 20.
- <sup>113</sup> See *KRT Trial Monitor*, Report No. 7 (week ending 31 May 2009) Cambodia acceded to the CAT on 15 October 1992. Article 15 of CAT reads: “[E]ach State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.” Article 15 is incorporated in Article 38 of the Cambodian Constitution and Rule 21(3) of the Internal Rules.
- <sup>114</sup> *KRT Trial Monitor*, Report No. 7 (week ending 31 May 2009).
- <sup>115</sup> *Case 001* ECCC TC ‘Decision on Parties Requests to Put Certain Materials Before the Chamber pursuant to Internal Rule 87(2)’ (28 October 2009) para 8.
- <sup>116</sup> *Case 002* ECCC Office of the Co-Investigating Judges “Order on the Use of Statements which were or may have been Obtained by Torture” (28 July 2009) (hereafter ‘**OCIJ Order on the Use of Statement Obtained by Torture**’) para 27.
- <sup>117</sup> OCIJ Order on the Use of Statement Obtained by Torture, paras 21-22.
- <sup>118</sup> ICTY RPE Rule 95; ICTR RPE Rule 95.
- <sup>119</sup> SCSL RPE Rule 95.
- <sup>120</sup> Rule 21(3) of the Internal Rules reads, ‘[N]o form of inducement, physical coercion or threats thereof, whether directed against the interviewee or other, may be used in any interview. If such inducements, coercion or threats are used, the statements recorded shall not be admissible as evidence before the Chambers, and the person responsible shall be appropriately disciplined in accordance with Rules 35 to 38.’
- <sup>121</sup> UN Committee against Torture, 31<sup>st</sup> Session. *Conclusions and Recommendations of the Committee against Torture: Cambodia*. (CAT/C/CR/31/7) 5 February 2004.
- <sup>122</sup> *KRT Trial Monitor* Report No. 16 (week ending 10 August 2009).
- <sup>123</sup> *Prosecutor v. Erdemović* (IT-96-22-Tbis) ICTY Trial Chamber ‘Sentencing Judgment’ (5 March 1998).
- <sup>124</sup> For ICTR case law on guilty plea, see *Prosecutor v. Kambanda* (ICTR 97-23-S) ICTR Trial Chamber ‘Judgment and Sentence’ (4 September 1998); *Prosecutor v. Serushago* (ICTR 98-39-S) ICTR Trial Chamber I ‘Sentence’ (5 February 1999); *Prosecutor v. Ruggiu* (ICTR-97-32-I) ICTR Trial Chamber I ‘Sentence’ (1 June 2000); *Prosecutor v. Rutanagira* (ICTR-95-1C-T) ICTR Trial Chamber III ‘Judgment and Sentence’ (14 March 2005); *Prosecutor v. Bisengimana* (ICTR-00-60-T) ICTR Trial Chamber I ‘Judgment and Sentence’ (13 April 2006). See also *Prosecutor v. Todorović* (IT-95-9/1-S) ICTY Trial Chamber ‘Sentencing Judgment’ (31 July 2001) para 81.
- <sup>125</sup> *KRT Trial Monitor*, Report No. 21 (week ending 20 September 2009) Annexure A.
- <sup>126</sup> ICTY Statute, Art. 7; ICTR Statute, Art. 6; Rome Statute, Art. 33. See also *Case No. 001* Trial Chamber ‘Transcript of Proceedings’ (31 March 2009).
- <sup>127</sup> *Prosecutor v. Erdemović* (IT-96-22-Tbis) ICTY Trial Chamber ‘Sentencing Judgment’ (5 March 1998).
- <sup>128</sup> Email correspondence with Silke Studzinsky, 18 November 2009.
- <sup>129</sup> For Duch’s good character, see *KRT Trial Monitor*, Report No. 20 (week ending 4 September 2009); and for his desire to be rehabilitated and reintegrated, see *KRT Trial Monitor*, Report No. 20 (week ending 4 September 2009). See also *KRT Trial Monitor*, Report No. 21 (week ending 20 September 2009) for a summary of Pastor Christopher Lapel’s testimony on Duch’s conversion to Christianity. For discussions on personal circumstances as a mitigating factor, refer to *Prosecutor v. Erdemović*, where the Trial Chamber considered, *inter alia*, the age and character of the accused (IT-96-22-Tbis) ICTY Trial Chamber ‘Sentencing Judgment’ (5 March 1998).
- <sup>130</sup> Jones, John RWD and Powles, Steven (2003) *International Criminal Practice*, Third Edition, Oxford University Press, 783 (hereinafter cited as “Jones and Powles”). See also *KRT Trial Monitor*, Report No. 16 (week ending 10 August 2009) and ICC RPE, Rule 145.2 (b)(iii).
- <sup>131</sup> *Prosecutor v. Krstić* (IT-98-33-T) ICTY Trial Chamber ‘Judgment’ (2 August 2001).
- <sup>132</sup> Some examples of likely hundreds of stories in the international media covering the victim participation process at the ECCC include: ‘Khmer Rouge Victims Participate in Historic Day’ (5 February 2008), *Scoop News (New Zealand)* available <<http://www.scoop.co.nz/stories/WO0802/S00053.htm>>; Mydans, Seth ‘Khmer Rouge Victims Given a Voice in Cambodia Trials’ (16 June 2008), *New York Times*; ‘Cambodia: Justice in Sight for Khmer Rouge Victims’, 13 February 2009, *IPS Bangkok* available at <<http://www.ipsnews.net/news.asp?idnews=45755>>; Mellen, Greg ‘Cambodians Seek Justice’ (23 March 2009), *Contra Costa Times (California)* available at <[http://www.contracostatimes.com/california/ci\\_11981705](http://www.contracostatimes.com/california/ci_11981705)>; Kurczy, Christian ‘For former Khmer Rouge Victims, Reparations are Key to Justice’ (3 July 2009) *Christian Science Monitor*.
- <sup>133</sup> However, somewhat confusingly, Article 35 of the ECCC Law does assert victims’ right to appeal from judgments handed down by the Trial Chamber, tending to suggest that including victims in the

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process may have been considered when that document was being drafted. This may very well have been the basis upon which the Judges determined victims should be included in the trial process.

<sup>134</sup> See ‘Table S.2.e: Resource Requirements by Object of Expenditure’ and ‘Table S.2.f: Post Requirements for Defence Support Section and Victims Unit’ and paras S.82 – 89 of the budget estimates produced by the ECCC in *Revised Budget Estimates for 2005 – 2009 (July 2008)*, available online at: <[http://www.unakrt-online.org/04\\_documents.htm#Budget](http://www.unakrt-online.org/04_documents.htm#Budget)>. The tables show that the Court’s original budget did not provide for any funding for a victims participation scheme. Funding initially sought (in 2008) was extremely modest: the Court requested funding (at para s.84) for a national Head of the Victims Unit at L-4 level and an International Deputy at L-3 level, as well as funding for six applications clerks, based on the assumption that each clerk would process 4 applications per day. Given the Court has, to date, received over 4,000 applications for participation (either as civil parties or complainants), this estimate now appears somewhat unrealistic.

<sup>135</sup> Internal Rules Rev. 3, Rule 23. 2.

<sup>136</sup> These Civil Parties were granted interim recognition as Parties to the proceedings. On 26 August 2009, the Defense withdrew its objections to the applications of two Civil Parties, D25/20 and E2/57. See *KRT Trial Monitor*, Report No.19 (week ending 30 August, 2009).

<sup>137</sup> *KRT Trial Monitor*, Report No.19 (week ending 30 August 2009); see also *Case 001* ECCC Trial Chamber ‘Transcript of Proceedings’ (25 August 2009).

<sup>138</sup> *KRT Trial Monitor*, Report No.18 (week ending 23 August 2009).

<sup>139</sup> For example, it was submitted that Civil Party D25/15 destroyed and burned down identification “in order to escape from being spied on.” See *Case 001* ECCC Trial Chamber ‘Transcript of Proceedings’ (26 August 2009), p 27.

<sup>140</sup> Argument made by Ms Fabienne Trusse-Napouse, with whom all other Civil Party Lawyers agreed, also supported by the International Co-Prosecutor. See *Case 001* ECCC Trial Chamber ‘Transcript of Proceedings’ (26 August 2009), p 6.

<sup>141</sup> *The Prosecutor v. Jean-Pierre Bemba* (hereafter ‘Bemba’) (ICC-01/05-01/08-320) ICC Pre-Trial Chamber III, ‘Fourth Decision on Victims’ Participation’ (12 December 2008) (hereafter ‘**Bemba, 4<sup>th</sup> Decision on Victims’ Participation**’) para 31. In the matter of the Democratic Republic of Congo, ICC’s Pre-Trial Chamber I would first examine applicants’ statements, and then check ‘whether the victim’s account of event is consistent with official reports (particularly United Nations reports)’ to make assessment. See *The Situation in the Democratic Republic of the Congo*, ICC Pre-Trial Chamber I, “Decision on the Applications for Participation in the Proceedings on VPRS1, VPRS2, VPRS 3, VPRS 4, VPRS 5, and VPRS 6” (17 January 2006) Case No. ICC-01/04-101-tEN-Corr, para 101.

<sup>142</sup> *Bemba*, 4th Decision on Victims’ Participation, para 35.

<sup>143</sup> *Bemba*, 4th Decision on Victims’ Participation, para 36.

<sup>144</sup> Werner, Alain. Personal Interview (13 October 2009), hereafter “**Interview with Civil Party Lawyer for Group 1 Werner**”.

<sup>145</sup> Interview with International Defense Counsel Roux. The Defense seemed to hold the view that “kinship” only encompasses “husband, wife, son, daughter, mother, father” of the alleged victim, see *Case 001*, ECCC Trial Chamber ‘Transcript of Proceedings’ (26 August 2009), p 12. See also Section 395.2(1) of the German Criminal Procedural Code, which provides that the right to “join as a private accessory prosecutor” shall vest in “the parents, children, siblings, and the spouse of a person killed through an unlawful act.”

<sup>146</sup> *Bemba*, 4th Decision on Victims’ Participation, para 72.

<sup>147</sup> Adopted and proclaimed by General Assembly, Resolution 60/147 (16 December 2005); Principle 8 provides that “the term “victim” also includes the immediate family or dependants of the direct victim.”

<sup>148</sup> Email correspondence with Silke Studzinsky, 19 November 2009.

<sup>149</sup> Interview with Dr. Jarvis. She further noted that “people might regard each other brothers or sisters without necessarily having direct kinships. Here “the notion of household is stronger than the actual relationship.”

<sup>150</sup> *The Prosecutor v. Katanga and Mathieu Ngudjolo Chui* (hereafter, ‘Katanga et al.’) (ICC-01/04-01/07-474) ICC Pre-Trial Chamber I “Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case” (13 May 2008) footnote 39.

<sup>151</sup> Interview with TPO.

<sup>152</sup> Chum Neou, Personal Interview (8 October 2009) (hereafter, “**Interview with Civil Party Chum Neou**”).

<sup>153</sup> Interview with Civil Party Lawyer for Group 1 Werner.

<sup>154</sup> Chum Mei, Personal Interview (6 October 2009) (hereafter “**Interview with Civil Party Chum Mei**”).

<sup>155</sup> Interview with Civil Party Chum Mei.

<sup>156</sup> On the first 2 hearing days, 63 out of 93 Civil Parties either sat in the courtroom or in the public gallery; see *KRT Trial Monitor*, Report No.2 (week ending 1 April 2009).

<sup>157</sup> *KRT Trial Monitor*, Report No. 7 (week ending 31 May 2009).

<sup>158</sup> See also Studzinsky, Silke, Personal Interview ( 21 October 2009) (hereafter “**Interview with Civil Party Lawyer Studzinsky**”). Studzinsky said that “a lot more Civil Parties would like to come but unfortunately it is primarily a financial problem for them to come.”

<sup>159</sup> See *KRT Trial Monitor*, Reports No. 8 (week ending 14 June 2009); 9 (week ending 21 June 2009); 10 (week ending 28 June 2009); 11(week ending 5 July 2009); 14 (week ending 26 July 2009); 15 (week ending 2 August 2009); 16 (week ending 10 August 2009); 18 (week ending 23 August 2009); 19 (week ending 30 August 2009); 21 (week ending 20 September 2009).

<sup>160</sup> ECCC Law.

<sup>161</sup> Interview with Dr Jarvis.

<sup>162</sup> Internal Rules Rev.3, Rule 82.3; Rule 89 *bis*2.

<sup>163</sup> See “Letter of Civil Parties in Case 001 to the President of Trial Chamber;” Interview with Civil Party Chum Mei; Interview with Civil Party Chum Neou.

<sup>164</sup> *Case 001* ECCC Trial Chamber (9 October 2009) Decision, para 25.

<sup>165</sup> *Case 001* ECCC Trial Chamber (9 October 2009) Decision, para 42.

<sup>166</sup> *Case 001* ECCC Trial Chamber (9 October 2009) Decision, para 46.

<sup>167</sup> *Case 001* ECCC Trial Chamber Decision (9 October 2009), Judge Lavergne’s Dissenting Opinion (hereafter cited as “**Judge Lavergne’s Dissenting Opinion**”) para 27; Office of the Co-Prosecutors, Staff Interview (13 October 2009), (hereafter “**Interview with the OCP**”).

<sup>168</sup> Judge Lavergne’s Dissenting Opinion para 35; Interview with the OCP.

<sup>169</sup> Judge Lavergne’s Dissenting Opinion para 31.

<sup>170</sup> Judge Lavergne’s Dissenting Opinion; see also Dr Chhim Sotheara, *Case 001* ECCC Trial Chamber ‘Transcript of Proceedings’ (25 August 2009), p 20. Dr Chhim Sotheara confirmed that victims could hardly overcome their traumatization without identifying “those people behind the intangibility.”

<sup>171</sup> Interview with Civil Party Lawyer for Group 1 Werner; Ty Srinna, Personal Interview (30 October 2009), (hereafter “**Interview with Civil Party Lawyer for Group 1 Ty Srinna**”); see also *KRT Trial Monitor*, Report No. 12 (week ending 9 July), where Ms Studzinsky explained she only met Nam Mun three times prior to their appearance before the Chamber in response to Judge Cartwright’s inquiry why Nam Mun’s full account had been discovered only very near to her taking the stand.

<sup>172</sup> Interview with Civil Party Lawyer for Group 1 Werner. See also Interview with Civil Party Lawyers for Group 1 Ty Srinna and Mr Hong Kimsuon, Personal Interview (29 October 2009).

<sup>173</sup> Interview with Civil Party Chum Neou.

<sup>174</sup> Interview with Dr Jarvis.

<sup>175</sup> *KRT Trial Monitor*, Reports No. 10 (week ending 28 June 2009); 13 (week ending 16 July 2009); 14 (week ending 26 July 2009); and 15 (week ending 2 August 2009).

<sup>176</sup> *KRT Trial Monitor*, Report No.12 (week ending 9 July).

<sup>177</sup> For example, Civil Party from Group 3, Mr Pok Khorn, was examined on the discrepancies between the version of events in his application and the account he provided before the Chamber; see *KRT Trial Monitor*, Report No. 12 (week ending 9 July).

<sup>178</sup> For example, Ly Hor was clearly upset throughout the proceedings. According to Internal Civil Party Lawyer for Group 1 Werner, Ly Hor was put in a “very difficult situation, feeling people point to his back and accuse him a liar.”

<sup>179</sup> Interview with Civil Party Lawyer for Group 1 Werner.

<sup>180</sup> Interview with Judge Cartwright and *KRT Trial Monitor*, Report No. 7 (week ending 31 May 2009) and 8 (week ending 14 June 2009). See also *KRT Trial Monitor*, Report No. 4 (week ending 26 April 2009).

<sup>181</sup> *KRT Trial Monitor*, Reports No. 9 (week ending 21 June 2009); 11 (week ending 5 July 2009) and 4 (week ending 26 July 2009).

<sup>182</sup> *KRT Trial Monitor*, Report No. 15 (week ending 2 August 2009).

<sup>183</sup> See ECCC News “Sixth ECCC Plenary Session Concludes,” (11 September 2009) available at <[http://www.eccc.gov.kh/english/news.view.aspx?doc\\_id=311](http://www.eccc.gov.kh/english/news.view.aspx?doc_id=311)>.

<sup>184</sup> Interview with Dr Jarvis.

<sup>185</sup> Interview with Civil Party Lawyer for Group 1 Werner.

<sup>186</sup> Internal Rules Rev.3, Rule 23.11.

<sup>187</sup> Civil Party Lawyers were careful to stress that these requests are the minimum and the Chamber shall remain at its liberty to find appropriate forms of reparation in line with Civil Parties’ request. See *Case 001* ECCC “Civil Parties’ Co-Lawyers’ Joint Submission on Reparations” (14 September 2009), para 46.

<sup>188</sup> Interview with Civil Party Chum Mei; Interview with Civil Party Chum Neou.

<sup>189</sup> Interview with TPO; Sambath, Reach, Personal Interview (9 October 2009), (hereinafter “**Interview with Head of PAS Reach Sambath**”).

<sup>190</sup> Internal Rules Rev.3, Rule 23.11.

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<sup>191</sup> Bassiouni, M. Cherif (2006) “International Recognition of Victims’ Rights,” 6 Human Rights Law Review 209, pp 211-223.

<sup>192</sup> See for instance, report on the testimony of Craig Etcheson, *KRT Trial Monitor*, Report No. 6 (week ending 24 May 2009).

<sup>193</sup> *KRT Trial Monitor*, Report No. 13 (week ending 16 July 2009). During his testimony, Mam Nay provided accounts contradictory to previous statement to ECCC investigators; Him Huy also seemed unable to affirm his earlier statement to the OCIJ.

<sup>195</sup> For example, expert witness Nayan Chanda was questioned on his use of sources in his book. He indicated that his memory was unclear and it became apparent that he had never set foot in Cambodia, revealing the usage of a number of third party sources. See *KRT Trial Monitor*, Report No. 7 (week ending 31 May 2009); see also *Case 001* ECCC Trial Chamber ‘Transcript of Proceedings’ (25 and 26 May 2009).

<sup>196</sup> *KRT Trial Monitor*, Report No. 14 (week ending 26 July 2009).

<sup>197</sup> *KRT Trial Monitor*, Report No. 15 (week ending 2 August 2009).

<sup>198</sup> Interview with Judge Cartwright.

<sup>199</sup> Interview with Judge Cartwright.

<sup>200</sup> Internal Rules Rev.3, Rule 88.2.

<sup>201</sup> For example, the Victims and Witnesses Section of the ICTY prepared an *Information Booklet for ICTY Witnesses*, available at [http://www.icty.org/x/file/About/Registry/Witnesses/witnesses\\_booklet\\_en.pdf](http://www.icty.org/x/file/About/Registry/Witnesses/witnesses_booklet_en.pdf).

<sup>202</sup> Email correspondence with Coordinator of the Witness and Experts’ Support Unit Ms Lobwein, Wendy, 27 November 2009. (Hereafter, ‘**Email correspondence from Lobwein**’).

<sup>203</sup> *Case 001* ECCC Trial Chamber ‘Transcript of Proceedings’ (13 July 2009), p 78-79.

<sup>204</sup> *KRT Trial Monitor*, Report No. 13 (week ending 16 July 2009).

<sup>205</sup> *KRT Trial Monitor*, Reports No. 13 (week ending 16 July 2009); 14 (week ending 26 July 2009); 15 (2 August 2009).

<sup>206</sup> Mr Kung Sam On, whose assistance was sought by WESU and other unspecified units, seemed to be representing all the insider witnesses appearing before the Chamber. He has represented Mam Nai, Him Huy, Prak Khorn, Kok Sros, Sek Dan, Chiem Seu, Lach Mean, Chuun Phal, and Soam Met. See *KRT Trial Monitor*, Report No. 13 (week ending 16 July 2009); 14 (week ending 26 July 2009); 16 (week ending 10 August 2009); and 17 (week ending 14 August 2009).

<sup>207</sup> Interview with the TPO; see also *KRT Trial Monitor*, Report No.13 (week ending 16 July 2009).

<sup>208</sup> See *KRT Trial Monitor*, Report No. 14 (week ending 26 July 2009) where the Accused vigorously rebutted Prak Khorn’s statement.

<sup>209</sup> *KRT Trial Monitor*, Report No. 17 (week ending 14 August 2009).

<sup>210</sup> See *KRT Trial Monitor*, Report No. 13 (week ending 16 July 2009), when National Defense Counsel Mr Kar Savuth seemed to be taking a somewhat aggressive stance towards Ms Nam Mun; the Chamber subsequently urged him to speak more “gently,” in light of the Civil Party’s emotional state. See also *KRT Trial Monitor*, Report No. 17 (week ending 14 August 2009), after Duch directly spoke to Civil Party Bou Thon, the President reminded Duch to refrain from giving observations that tended to exacerbate the suffering of the witness.

<sup>211</sup> Interview with Dr Jarvis; Interview with TPO. TPO staff noted that their relationship with Civil Parties was closer compared to other victim witnesses due to their frequent interaction throughout 2008. They added that as a general rule, they would also meet the witnesses prior to their testimony, accompany them from the hotel (sometimes from the village) to the Court. Follow-up evaluation was also provided after the hearing, with particular concern about the witnesses’ security in the community. The Head of Victims Unit, Dr Jarvis, confirmed this.

<sup>212</sup> Interview with TPO. According to TPO staff, the Court provides no funding for their services, and that no transportation is available to permit a more flexible schedule. In addition, the monitor in TPO’s standby room did not work so that the staff must go up and down to check whether the last witness had finished. Such technical problems also influenced the extent to which TPO could prepare witnesses.

<sup>213</sup> Hence, she noted further, ‘WESU is currently active during the investigative stage of Case 002 and preparations for Case 002 commenced long ago. In addition WESU has prepared to enable additional staff to be taken on if necessary during the trial stage of Case 002.’ (Email correspondence from Lobwein).

<sup>214</sup> The first *KRT Trial Monitor* covered the initial hearings in the case of the *Prosecutor v Kaing Guek Eav* in February 2009, prior to the commencement of the substantive proceedings on 20 March 2009, which, when taken together with substantive hearings and closing submissions, amounts to 22 weeks of trial. Note however, that our assessment of trial management largely pertains to the 20 weeks of trial from 30 March 2009 – 17 September 2009.

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<sup>215</sup> By week 8, the Trial Chamber acknowledged that the discussion of the initial two topics of the closing order had been discussed lengthier than expected. See *KRT Trial Monitor*, Report No. 8 (week ending 14 June 2009).

<sup>216</sup> See *KRT Trial Monitor*, Report No. 8 (week ending 14 June 2009).

<sup>217</sup> *KRT Trial Monitor*, Report No. 8 (week ending 14 June 2009).

<sup>218</sup> The Trial Chamber determined that the Thursday of the third week of every month is allotted for the Trial Chamber to resolve pending issues, such as time allocation for Parties in questioning the witnesses. See *KRT Trial Monitor*, Report No. 9 (week ending 21 June 2009).

<sup>219</sup> For example see *KRT Trial Monitor*, Reports No. 4 (week ending 26 April 2009); 9 (week ending 21 June 2009); 11 (week ending 5 July 2009); 13 (week ending 16 July 2009); 14 (week ending 26 July 2009), 19 (week ending 30 August 2009).

<sup>220</sup> See *KRT Trial Monitor*, Reports No. 5 (week ending 2 May 2009); 4 (week ending 26 April 2009); 20 (week ending 4 September 2009); and 21 (week ending 20 September 2009).

<sup>221</sup> See *KRT Trial Monitor*, Report No. 8 (week ending 14 June 2009). This projection however, had been estimated even during the third week of the proceedings by observers of the trial, since each week, an average of only two witnesses could be examined.

<sup>222</sup> For example see *KRT Trial Monitor*, Reports No. 4 (week ending April 26, 2009); 9 (week ending 21 June 2009); 11 (week ending 5 July 2009); 13 (week ending 16 July 2009); 14 (week ending 26 July 2009); and 19 (week ending 30 August 2009).

<sup>223</sup> See *KRT Trial Monitor*, Reports No. 10 (week ending 28 June 2009) and 11 (week ending 5 July 2009).

<sup>224</sup> Interview with Judge Cartwright. See also *KRT Trial Monitor*, Report No. 11 (week ending 5 July 2009)

<sup>225</sup> Interview with International Defense Counsel Roux.

<sup>226</sup> See *KRT Trial Monitor*, Reports No. 4 (week ending 26 April 2009) and 5 (week ending 2 May 2009).

<sup>227</sup> See *KRT Trial Monitor*, Reports No. 5 (week ending 2 May 2009) and 8 (week ending 14 June 2009).

<sup>228</sup> For example, in week 9, Judge Ya Sokhan pursued details on Choeung Ek that had been covered in earlier questioning and Judge Thou Mony did the same with regard to operations of Prey Sar in week 10. See *KRT Trial Monitor*, Reports No. 9 (week ending 21 June 2009); 10 (week ending 28 June 2009); and 11 (week ending 5 July 2009).

<sup>229</sup> See *KRT Trial Monitor*, Report No. 19 (week ending 30 August 2009).

<sup>230</sup> For example, see *KRT Trial Monitor*, Report No. 7 (week ending 31 May 2009), discussing how the Accused in his statement clearly wandered off the questions provided to him. See also, *KRT Trial Monitor*, Report No. 12 (week ending 9 July 2009), discussing how Civil Party Chin Met's statement addressed events that occurred beyond the temporal jurisdiction of the Court. In a similar vein, see *KRT Trial Monitor*, Report No. 19 (week ending 30 August 2009).

<sup>231</sup> Duch's testimony on his character was interrupted to accommodate the schedule hearing of the two psychologist-experts. Moreover, Civil Party Chum Neou's statement was also interrupted to accommodate scheduled videoconferences. See *KRT Trial Monitor*, Reports No. 20 (week ending 4 September 2009) and 21 (week ending 20 September 2009)

<sup>232</sup> When questioning the witness, the Co-Prosecutors were given 30 minutes, the Civil Parties, 40 minutes and the Defense, 40 minutes. Concerning the submission, five minutes were given for both questions and objections and another five minutes were given for any responses. The Chamber suggested that the four Civil Parties Groups collectively assigned one national and one international lawyer for witness questioning. For the questioning of the Accused, the Co-Prosecutors and the Civil Parties were allowed three hours each, and the Defense, four hours.

<sup>233</sup> Curiously, the rejection of time extension most often applied to Civil Parties, for example, Ms Silke Studzinsky and Ms Matine Jacquin's request for an extension of time on 29 June and 1 July, respectively. See *KRT Trial Monitor*, Report No. 11 (week ending 5 July 2009).

<sup>234</sup> For example, Ms Ty Srinna's request for additional time to question Mr Chum Mei was granted. See *KRT Trial Monitor*, Report No. 11 (week ending 5 July 2009). When questioning witness Sek Dan, the Defense was given 10 additional minutes. See *KRT Trial Monitor*, Report No. 16 (week ending 10 August 2009). During Expert witness David Chandler's testimony, Co-Prosecutors' request of extra 15 minutes to complete the questioning was allowed; the same time was granted offered to Civil Parties upon request. See *KRT Trial Monitor*, Report No. 16 (week ending 10 August 2009).

<sup>235</sup> See *KRT Trial Monitor*, Report No. 15 (week ending 2 August 2009). The Chamber noted that, as a point of fact, the Defense had never before requested for additional time, nor registered any particular concerns upon the conclusion of the testimony. Proceeding from this premise, the Chamber determined that it would maintain the given time allocations but declared that the Defense was at liberty to "request for a further period of time to put questions necessary for the preservation of its rights" on a "case-by-case basis."

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<sup>236</sup> To cite a few examples, in week 3, the Trial Chamber attempted to limit the Civil Party Lawyers; questioning time to 30 minutes without providing the grounds for such determination. There was also never any public explanation as to why the pseudonyms of the witnesses were dropped in the proceedings, starting from week 4. In week 11, The National Lawyer for CP Group 1 Ty Srinna was given additional time to question Chun Mei without any clear explanation, while a similar request was forwarded by International Lawyer for CP Group 2 in the previous week but was rejected, also without clear grounds. In week 14, Deputy Co-Prosecutor William Smith asked for leave to inquire upon the alleged rift between the Accused and Hor when Duch was giving his comment on Him Huy's testimony. The Trial Chamber rejected this request was rejected without providing any grounds. A major issue that was resolved without timely reasoning was on the prohibition of Civil Party Lawyers from questioning character witnesses. This ruling which announced in Court in 20 August 2009, was substantiated with a written judgment only on 9 October 2009. See *KRT Trial Monitor*, Reports No. 3 (week ending 12 April 2009); 4 (week ending 26 April 2009), 10 (week ending 28 June 2009); 11 (week ending 5 July 2009); 14 (week ending 26 July 2009); 19 (30 August 2009); and 20 (4 September 2009).

<sup>237</sup> This calculation is based on the length of time between the initial submission and the decision being handed down, and hence, includes the time taken for other Parties to respond. The shortest length of time the Chamber has taken to respond to Parties' submissions is four days. (See *Case 001*, ECCC Trial Chamber "Decision on Request to Reconsider Decision on Proof of Identify for Civil Party Application (E2/36)" dated 10 August 2009). The Civil Party Lawyers filed this motion on 6 August 2009). The longest is 128 days. (See *Case 001*, ECCC Trial Chamber "Decision on the Vietnamese Film Footage Filed by the Co-Prosecutors and on Witnesses CP3/3/2 and CP3/3/3" dated 29 July 2009. Submissions were filed by the Defense on 24 March 2009).

<sup>238</sup> In week 5, the President explained that the lack of clear instruction on the admissibility of the untested portions of the Case File was due to the complexity of the matter. See *KRT Trial Monitor*, Report No. 5 (week ending 2 May 2009).

<sup>239</sup> This was cited as the reason for delay in issuing the decision on the provisional detention of the Accused. It was explained that the Military Court had not submitted the required documents. See *KRT Trial Monitor*, Report No. 4 (week ending 26 April 2009).

<sup>240</sup> In particular, this was cited with regard to the 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," which finally was issued in writing on 9 October 2009, four months after the Civil Party Lawyers filed its submission on this matter, See *KRT Trial Monitor*, Reports No. 20 (week ending 4 September 2009); and 21 (week ending 20 September 2009).

<sup>241</sup> See for example, *KRT Trial Monitor*, Reports No. 3 (week ending 12 April 2009) , 9 (week ending 21 June 2009); and 21(week ending 20 September 2009)

<sup>242</sup> For example in week 4, Ms. Studzinsky seemed to oblivious to the President's direction not to use a particular document as basis of her questioning, and similarly did not heed the Trial Chamber's warning not to pose irrelevant questions in week 10. In week 16, the President sternly rebuked the Parties when they stood and posed arguments without seeking leave from the Chamber. See *KRT Trial Monitor*, Report No. 4 (week ending 26 April), 10 (week ending 28 June 2009) and 16 (week ending 10 August 2009)

<sup>243</sup> See *KRT Trial Monitor*, Reports No. 14 (week ending 26 July 2009) and 17 (week ending 14 August 2009)

<sup>244</sup> In week 5, the Accused called Dr. Etcheson a "crazy author," and addressed the International Lawyer for CP Group 2 in a sarcastic manner. See *KRT Trial Monitor*, Report No. 5 (week ending 2 May 2009)

<sup>245</sup> For example, the Court reminded Civil Party Chum Mei to not issue threats against the Accused. See *KRT Trial Monitor*, Report No. 11 (week ending July 5, 2009)

<sup>246</sup> Interview with Judge Cartwright.

<sup>247</sup> See *KRT Trial Monitor*, Report No. 13 (week ending July 16, 2009).

<sup>248</sup> Interview with Judge Cartwright.

<sup>249</sup> Interview with Dr Jarvis.

<sup>250</sup> Only 10 seats were available in the Courtroom, while there were 90 Civil Parties to the proceedings. See Interview with Civil Party Chum Mei.

<sup>251</sup> Interview with Judge Cartwright.

<sup>252</sup> ECCC Law, Article 45 Provides, that, "[T]he official languages of the Extraordinary Chamber shall be Khmer, English, and French."

<sup>253</sup> International Defense Lawyer François Roux raised objections to the DC-CAM interview on the ground that the Khmer and French translations refer to different dates and thus, cast doubt on whether the documents refer to the same interview. Roux opined that the documents were unsuitable to be used during the proceedings. See *KRT Trial Monitor*, Reports No. 4 (week ending 26 April 2009) and 7 (week ending 31 May 2009).

<sup>254</sup> See *KRT Trial Monitor*, Report No. 10 (week ending 28 June 2009).

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- <sup>255</sup> See *KRT Trial Monitor*, Report No. 5 (week ending 2 May 2009).
- <sup>256</sup> See *KRT Trial Monitor*, Report No. 3 (week ending April 12, 2009).
- <sup>257</sup> *KRT Trial Monitor*, Report No. 4 (week ending 26 April 2009), Cambodia Monitors noticed that discrepancies in the translation from English or French into Khmer, rendering some parts either difficult to understand or inaccurate. The Civil Parties Lawyer for Group 4 addressed this problem by stating that he may have not fully understood the arguments raised by the other Parties due to translation problems, See *KRT Trial Monitor*, Report No. 7 (week ending 31 May 2009).
- <sup>258</sup> E-mail correspondence with ITU (30 October 2009).
- <sup>259</sup> In an e-mail correspondence dated 30 October 2009, the ECCC's ITU stated, "[W]e strongly emphasize this point in light of concerns raised as to the reliability of relay interpreting. Relay is also used at the ICTY (for the languages of former Yugoslavia), the ICTR (*Kinyarwanda*) and the ICC (*Kiswahili and Lingala*). Relay is also systematically used at the United Nations for Chinese and Arabic, and at the European Commission for "exotic" languages like Finnish, Estonian, Hungarian and the like, or where large numbers of languages are used in a particular meeting."
- <sup>260</sup> International Defense Lawyer François Roux raised the translation issue and supported by all the parties See *KRT Trial Monitor*, Report No. 4 (week ending 26 April 2009).
- <sup>261</sup> See *KRT Trial Monitor*, Report No. 12 (week ending 9 July 2009)
- <sup>262</sup> As reported in *KRT Trial Monitor*, Reports No. 2 until No. 21, various interpretation-related issues were noted, and in week 20 and 21 certain witnesses' accounts were difficult to understand or the translation of their testimony was found inaccurate.
- <sup>263</sup> E-mail correspondence with ECCC ITU (30 October 2009)
- <sup>264</sup> For instances of these, see *KRT Trial Monitor*, Reports No. 2 (week ending 1 April 2009), 3 (week ending 12 April 2009), 9 (week ending 21 June 2009), 10 (week ending 28 June 2009), 11 (week ending 5 July 2009).
- <sup>265</sup> See *KRT Trial Monitor*, Report No. 7 (week ending 31 May 2009).
- <sup>266</sup> The delay was during Civil Party Ou Savrith's statement in week 18, and the poor quality was very noticeable during Justice Goldstone and Stephane Hessel's testimony in week 21. See *KRT Trial Monitor*, Reports No. 18 (week ending 23 August 2009) and 21 (week ending 20 September 2009).
- <sup>267</sup> Interview with Head of PAS Reach Sambath.
- <sup>268</sup> Interview with Head of PAS Reach Sambath.
- <sup>269</sup> Interview with Head of PAS Reach Sambath.
- <sup>270</sup> Interview with Head of PAS Reach Sambath.
- <sup>271</sup> There were only five public toilets for each gender, all in the form of water closets, whereas squat toilets are more commonly used in rural Cambodia.
- <sup>272</sup> Interview with Head of PAS Reach Sambath.
- <sup>273</sup> See Point 12 of Direction on the Scheduling of the Trial, 20 March 2009, available at <[http://www.eccc.gov.kh/english/court\\_doc.list.aspx?courtDocCat=tc\\_docs](http://www.eccc.gov.kh/english/court_doc.list.aspx?courtDocCat=tc_docs)>. See also, *KRT Trial Monitor*, Report No. 5 (week ending 2 May 2009)
- <sup>274</sup> See *KRT Trial Monitor*, Report No. 5 (week ending 2 May 2009) and 8 (week ending 14 June 2009). The Accused personally objected to questions, refused to answer to questions he deemed irrelevant or repetitious, and requested for additional documents when he was questioned by the Parties.
- <sup>275</sup> Interview with International Co-Prosecutor William Smith.
- <sup>276</sup> See *KRT Trial Monitor*, Report No. 20 (week ending 20 September 2009).
- <sup>277</sup> Interview with International Co-Prosecutor William Smith.
- <sup>278</sup> See *KRT Trial Monitor*, Report No. 11 (week ending July 5, 2009).