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PAPER BY TARIK ABDULHAK, SENOIR ASSISTANT PROSECUTOR – EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA* PRESENTED AT LEGAL EAGLES CLE CONFERENCE HANOI VIETNAM 3/1/2014 – 8/1/2014

"CHALLENGES IN PROSECUTING & DEFENDING HEARS OF STATES"

THE CASE AGAINST THE PRESIDENT OF POL POT'S REGIME

You must rid yourselves of the view that beating the prisoners is cruel.

Kindness is misplaced in such cases.

You must beat them for national reasons, class reasons, and international reasons.

Kaing Gueak Eav *alias* Duch, Commander of Prison S-21, in a training session for interrogators[1]

On the morning of 20 July 77, we pounded him one more round.

This time he reacted, cursing, saying he was not a traitor. Those that implicated him were all traitors. ...

His health got weaker, but there was nothing remarkable.

On the afternoon of 21 July 77 we pounded him another round. Electrical wire and shit. This time he cursed those who hit him very much, [and said] "Go ahead and beat me to death." Had him eat two or three spoonfuls of shit

...

By nightfall, we went at him again with the electric wires, this time pretty seriously. He became delirious. He was alright. Later he confessed a bit as reported above.

From an S-21 report on the interrogation of Ke Kim Huot, former Chief of Sector 7, Democratic Kampuchea Northwest Zone[2]

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1 Quoted in David Chandler, *Voices from S-21: Terror and History in Pol Pot's Secret Prison,* 2001, at p.152.

Q. In what way are you responsible?

…

A. I didn't have any power…they can't accuse me of anything, because I didn't know anything. Why didn't I know anything? Why didn't I try to find out? Perhaps you can blame me for that. But for me, I didn't want to know because I respected the rules of the party.

Q. Did you feel cheated by Pol Pot that he didn't let you know?

A. No. Because afterwards still I felt he had reasons for it. What Pol Pot really did, he had certain reasons to do it.

Khieu Samphan, former President of Democratic Kampuchea, interviewed in "Facing Genocide: Khieu Samphan and Pol Pot"[3]

2 ECCC Case 002 Document E3/1705.

3 Documentary by David Aronowitsch and Staffan Lindberg, 2010.

Table of Contents

1. Key Terms 4

2. Key Personalities 6

2.1. Accused Before the ECCC 6

2.2. Other Important Members of the CPK Leadership 8

3. Introduction / Overview 10

4. The Khmer Rouge Regime 13

4.1. Origins and Rise to Power 13

4.2. Khmer Rouge Crimes and the Charges Against the Senior Leaders 15

5. Criminal Procedure before the ECCC 20

5.1. Structure of Judicial Chambers, Decision Making and Disagreements 21

5.2. Judicial Investigations Under the ECCC Model 24

5.3. Scope of the Co-Investigating Judges' Discretion 28

5.4. Use of Witness Statements at Trial – A Refinement of the Civil Law Model 32

5.5. Witness Examination at Trial – A Further Refinement of the Civil Law Model 38

6. Severance of Case 002 42

6.1. Severance of Case 002 and Appeal Decisions 42

6.2. Implications of the Severance Decisions 48

7. Conclusion 53

Key Terms

Angkar / Angkar Leu (in Khmer, 'the Organisation' / 'the Upper Organisation')

An enigmatic term used by the Communist Party of Kampuchea to refer to its obscure leadership. Generally government policies and orders to the civilian population were communicated in the name of "Angkar." For the entire period of the Khmer Rouge rule over Cambodia, the vast majority of Cambodians did not know whether Angkar was a single person or a group of individuals. The infamous proverb "Angkar has as many eyes as the pineapple" was used to remind all of Angkar's omnipresence and control over their lives.

Communist Party of Kampuchea (CPK)

The official name of the Cambodian communist party from 1966 to 1981. The CPK governed Cambodia from 17 April 1975 to 6 January 1979. In this paper, the term "CPK" is used interchangeably with "Khmer Rouge."

CPK Central Committee

The highest organisational unit of the CPK under the Party Statute, comprising 30 members. The Committee met on average once every six months to decide on major policy issues and review implementation.

CPK Standing Committee

A powerful subcommittee of the Central Committee comprising five full rights members and two alternate members. The Standing Committee had the responsibility to implement Party policy.

CPK Party Centre

A small group of Central and Standing Committee members based in Phnom Penh, who exercised the powers of these two Committees on a day to day basis. The CPK Party Centre acted as the *de facto* highest authority in Cambodia during Khmer Rouge rule. In Case 002, the Co-Prosecutors allege that the Party Centre comprised, *inter alia*, Pol Pot, **Nuon Chea**, **Khieu Samphan**, **Ieng Sary** and Son Sen.

Democratic Kampuchea (DK)

The official name of the state established by the CPK. The DK state was established in January 1976 and collapsed on 6 January 1979.

GRUNK and ***FUNK***[4]

The 1970 – 1975 government in exile and political front, respectively, representing a coalition between the deposed King Norodom Sihanouk and the Khmer Rouge. The

[4] GRUNK is the French acronym for the Royal Government of National Union of Kampuchea; FUNK is the French acronym for the National United Front of Kampuchea.

coalition was formed following Sihanouk's removal from power in March 1970. Sihanouk became the President of GRUNK. **Khieu Samphan** was its Deputy Prime Minister, and held the posts of Minister for Defence and Commander of the coalition's armed forces.[5]

Khmer

The largest ethnic group in Cambodia, accounting for approximately 90% of the country's population. Khmer is also the name of Cambodia's official language.

Khmer Rouge ("Red Khmers")

The term coined by the late King of Cambodia, Norodom Sihanouk, to refer to the communist opposition in the 1960s. In this paper, it is used interchangeably with Communist Party of Kampuchea / CPK.

[5] Known as CPNLAF (Cambodian People's National Liberation Armed Forces). CPNLAF was in reality a Khmer Rouge military force commanded by Pol Pot and other members of the CPK Party Centre who operated largely from behind the shadows. The only member of the Party Centre known to the public at the time was Khieu Samphan.

Key Personalities

Accused Before the ECCC

Khieu Samphan *alias* **Hem** *alias* **Nan** *alias* **Sy Lang** *alias* **Khang**

PhD in Economics (Sorbonne University, Paris, 1958); Succeeded Ieng Sary as President of the secret Marxist - Leninist Circle in Paris (1956 - 1959); One of the most influential leftist activists in Cambodia throughout the 1960s; Member of parliament (1962-1966) and Minister for Commerce in Prince Norodom Sihanouk's government (1962/3); Fled Phnom Penh in 1967 and joined the Khmer Rouge leaders in the countryside; Deputy Prime Minister and Minister for Defence of GRUNK (1970-1975/6); President of Democratic Kampuchea (1976-1979); Member of the CPK Central Committee and Party Centre; *De facto* member of the CPK Standing Committee; Chairman of Political Office 870, a powerful executive arm of the CPK Party Centre. On trial before the ECCC.

Nuon Chea (name at birth: Lao Kim Lorn)

Read law at Thammasat University in Thailand; Joined Thai Communist Party in the late 1940s; Trained by Vietnamese communists in the early 1950s; Deputy Secretary of the CPK Central and Standing Committees and of the CPK Party Centre (1960 – 1998); In charge of Party Affairs (including internal security) and propaganda; Supervisor of the CPK security apparatus; President of the DK People's Representative Assembly. On trial before the ECCC.

Leng Sary *alias* **Van** (name at birth: Kim Trang)

Studied politics at the *École Normale Supérieure* in Paris in the early 1950s; Founded the secret Marxist-Leninist Circle in Paris; Member of the CPK Central and Standing Committees and of the CPK Party Centre from 1960; DK Minister of Foreign Affairs. Died on 14 March 2013, while his trial at the ECCC was ongoing.

Ieng Thirith (nee Khieu Thirith) *alias* **Phea**

Wife of Ieng Sary, and Pol Pot’s sister in law; Obtained a degree in English Literature at Sorbonne University in Paris in (1952-1956); Member of the Marxist - Leninist Circle; Held two ministerial positions in GRUNK; Minister of Social Affairs of DK; Found unfit to stand trial due to advanced dementia, and released conditionally on 16 September 2012.

Kaing Guek Eav *alias* **Duch**

Former mathematics teacher who became Chief of the notorious S-21 Security Centre (also known as the “Tuol Sleng” prison); Went into hiding and was discovered by western journalists at a refugee camp on the Cambodia / Thailand border in 1999, where he was working as a relief worker; Brought before the ECCC in 2007 where he admitted criminal responsibility for the torture and execution of at least 12,273 registered prisoners at S-21 (the actual number of victims being over 15,000). Convicted of Crimes Against Humanity and Grave Breaches of the Geneva Conventions and sentenced to life imprisonment. Gave evidence against **Nuon Chea**, **Khieu Samphan** and **Ieng Sary**.

Other Important Members of the CPK Leadership

Pol Pot (name at birth: Saloth Sar)

Studied radio technology at *École Française d'Électronique et d'Informatique* in France (1949 – 1953) but failed to complete his studies; Member of the secret Marxist-Leninist Circle in Paris; One of the first Cambodian radical students to return to Cambodia in 1953; Worked as a teacher in Phnom Penh upon return from France; Member of the CPK leadership from 1960; General Secretary and leader of the CPK from 1963 to 1998; DK Prime Minister (1976-1979). Died in 1998 under Khmer Rouge-imposed house arrest.

Son Sen

Educated in France (early 1950s), where he obtained a teaching certificate; Member of the Marxist-Leninist Circle in the early 1950s; Following return to Cambodia, became director of studies at a teachers’ college in Phnom Penh; Rose to the position of Khmer Rouge military commander and eventually the DK Minister of Defence; Member of the CPK Central and

Standing Committees and of the Party Centre; Direct supervisor of S-21. Executed with his family on the orders of Pol Pot in 1998.

Introduction / Overview

1. The regime led by Pol Pot's Communist Party of Kampuchea (CPK) lasted only three years, eight months and 20 days (from 17 April 1975 to 6 January 1979). Nevertheless, it resulted in the deaths of at least 1.75 and as many as 2.2 million people out of a population of less than eight million.[6] The abuses inflicted by the CPK on Cambodia's population include: the forced evacuation of all cities and urban centres; the enslavement of the entire civilian population within rural cooperatives; the imposition of forced labour, starvation, inhumane conditions, and widespread psychological and physical abuse on the civilian population; the executions of Buddhist monks and other religious leaders; the extermination of ethnic minorities; and the establishment of hundreds of security centres in which the regime's perceived enemies were subjected to extra-judicial torture and execution. S-21, the prison referred to in the opening section of this paper, was the most sophisticated and (from the regime's perspective) most important of these security centres. Its 12,273 recorded victims include 1,698 women and 89 children.[7]

2. The Extraordinary Chambers in the Courts of Cambodia (ECCC) is a specialised criminal tribunal, set up by the United Nations (UN) and the Royal Government of Cambodia in 2006 to provide a measure of justice for the victims of the above crimes and facilitate the process of reconciliation in Cambodia. It is an *ad hoc* judicial body with a limited mandate. Its temporal jurisdiction is restricted to the 1975 - 1979 period, while its personal jurisdiction covers only the senior leaders of the regime, and others considered *most responsible* for its atrocities.[8] The Court has jurisdiction over several categories of core international crimes, including Genocide, Crimes Against Humanity and Grave Breaches of the 1949 Geneva Conventions.

3. The ECCC Co-Prosecutors have initiated a total of four mass crime investigations (known as Cases 001, 002, 003 and 004):

    (a) Case 001 focused on the criminal responsibility of **Kaing Guek Eav** *alias* **Duch**, the Chief of the notorious S-21 Security Centre (see Section 2.1 above).

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[6] Dr. Ewa Tabeau & They Kheam, Demographic Expert Report: Khmer Rouge Victims in Cambodia, April 1975-January 1979: A Critical Assessment of Major Estimates, Case 002 Document Number E3/2413, at p.19.

[7] Trial Chamber Judgment, 26 July 2010, Case 001 Document Number E188, at paragraph 141. The actual number of children killed at S-21 is considerably higher and likely runs into the hundreds. The incompleteness of the available records is due to the fact that S-21 did not record children arrested together with their parents as separate prisoners. See paragraph 142 of the Trial Chamber's Judgment.

[8] Article 1 of the *Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea*, 2004 (the "Law on the ECCC") provides: "The purpose of this law is to bring to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979; See also Article 2 of the *Agreement Between the United Nations and the Royal Government Of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea* (2003) (the "ECCC Agreement").

(b) Case 002, the Court's most complex and important case, Case 002 has been severed into a series of trials (See Section 6), the first of which, Case 002/01, was finalised on 31 October 2013. This case focuses on the criminal responsibility of the surviving leaders of CPK and DK: **Khieu Samphan** and **Nuon Chea**. Together with Pol Pot, these men formed the "Party Centre," a small group of individuals who led the CPK / DK regime throughout its reign (see brief biographies in Section 2.1 and key terms in Section 1). **Ieng Sary**, the third Accused and also a former member of the Party Centre, died before the conclusion of the first trial, on 14 March 2013. His wife, **Ieng Thirith**, the fourth Accused who was the DK Minister of Social Affairs, has been found unfit to stand trial,[9] and released from detention subject to ongoing judicial supervision.[10]

(c) Cases 003 and 004 are under judicial investigation (see Section 5.1).

4. The ECCC is often described as a hybrid or "internationalised" tribunal because it comprises national and international judges, prosecutors and support staff, and operates independently of the Cambodian legal system.[11] The defence also has an international dimension: the accused have the right to be represented by international (as well as national) counsel of their choice.[12] These counsel, like international judges, prosecutors and staff, are funded by the United Nations.

5. The Law on the ECCC, which established the Court, requires it to apply the existing Cambodian criminal procedure, which follows the French civil law inquisitorial model. A key feature of this system is that criminal investigations are conducted (or rather supervised) by investigating judges, who have the exclusive power to issue indictments. In a typical civil law proceeding, the judicial investigation constitutes the central phase of a criminal case. If the investigating judge finds sufficient evidence to indict a suspect, he / she drafts an indictment and forwards the case to a trial court. Trial proceedings are generally brief and focus primarily on the evidence that has already been collected. As discussed in Section 5, as a result of the need to resolve inconsistencies between domestic rules and international standards, the Court's procedure has undergone a relatively significant shift towards an adversarial model at the trial stage, while retaining the inquisitorial nature of the investigations.

6. There are numerous challenges involved in prosecuting a head of state and other senior political leaders in a hybrid tribunal setting, and particularly at the ECCC which applies

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9 Trial Chamber Decision on Reassessment Of Accused Ieng Thirith's Fitness to Stand Trial Following Supreme Court Chamber Decision of 13 December 2011, 13 September 2012, Case 002 Document E138/1/10.

10 Supreme Court Chamber Decision On Immediate Appeal Against the Trial Chamber's Order to Unconditionally Release The Accused Ieng Thirith, 14 December 2012, Case 002 Document E138/1/10/1/5/7.

11 See Pre Trial Chamber Decision on Appeal Against Provisional Detention Order of Kaing Guek Eav *alias* "Duch," 4 December 2007, Case 001 Document C5/45, at paragraphs 18-20, and Pre-Trial Chamber's Decision on Nuon Chea Co-Lawyers' Application for the Disqualification of Judge Ney Thol, 4 February 2008, Case 002 Document C11/29, at paragraph 30.

12 See Rules 11 and 22 of the Internal Rules.

the civil law model of criminal procedure. These challenges include (not in the order of priority):

Organisational / structural

(a) The passage of time since the alleged commission of crimes, and the inevitable impact on witness memories and availability of documentary evidence

(b) Technical challenges, such as the need to translate large amounts of evidence among the three official languages of the Court (Khmer, English and French); and

(c) The need to secure sufficient funding to ensure the Court's uninterrupted operation.

Procedural / legal

(d) A lack of control by the parties over the collection of evidence during the judicial investigation and selection of witnesses at trial

(e) The fact that investigating judges, as not prosecutors, frame the indictments

(f) A lack of control by the prosecutor over what charges are selected for trial in the event of severance

(g) The absence of a universally accepted criminal procedure for international trials, and conflicting interpretations of fair trial standards; and

(h) The need to continuously clarify and adapt civil law rules to comply with international fair trial standards.

7. Some of these challenges (such as (a), (b) and (c) above) are relatively self-evident. Their resolution depends primarily on effective advance planning and the allocation of adequate resources – matters beyond the scope of this paper. The remaining challenges listed above arise out of uncertainties in the procedural law applicable before an *ad hoc* tribunal. These uncertainties are compounded by the fact that the ECCC is the first mass crime tribunal to apply the civil law model, and that it operates in a country whose legal system was completely destroyed during the Khmer Rouge period.

8. At the same time, the ECCC model may present interesting lessons and potential benefits. From a defence perspective at least, the concept of a judicial investigation may be favourable since it gives the defence access to the case file during the collection of the evidence, and enables the defence to participate in the investigation, albeit to a limited extent. It also enables the defence to challenge the conduct and outcome of the investigations in ways that would not be possible in the common law system. It is arguable that some of these features are already becoming apparent in the pre-trial proceedings of the International Criminal Court where prosecutors have a positive responsibility to investigate both inculpatory and exculpatory evidence.

9. This paper will first provide an overview of the case against the senior leaders of Pol Pot's regime. It will then discuss: a) the key features of the criminal procedure applicable before the ECCC; b) the evolution of the rules governing the collection of evidence during investigations and the testing of that evidence at trial; and c) challenges arising in the context of severance of proceedings. By considering these features of the prosecution of the senior leaders of the CPK, the Author will seek to highlight both the strengths and weaknesses of the ECCC's hybrid model of criminal procedure.

The Khmer Rouge Regime

Origins and Rise to Power [13]

10. The Communist Party of Kampuchea has its origins in the Indochinese Communist Party (ICP), which was established in Vietnam in 1930. The ICP was dissolved in 1951, and separate communist parties were established for Vietnam, Cambodia and Laos. The Cambodian Party, which operated under Vietnamese tutelage, was named the Khmer People's Revolutionary Party (KPRP).[14]

11. On 9 November 1953, Cambodia's King, Norodom Sihanouk, proclaimed Cambodia's independence from France, marking the end of the French protectorate over the Kingdom. In 1955 Sihanouk abdicated the thrown, and formed a political party which won a landslide victory at Cambodia's first democratic elections. Sihanouk became Prime Minister. He presided over a period of relative stability and economic development in Cambodia in the late 1950s and early 1960s, while pursuing a foreign policy of non-alignment. However, Sihanouk's regime allowed little room for domestic opposition. The increasing oppression of the opposition in the early 1960s caused leading communists to flee the capital and set up bases deep in the Cambodian jungles, from which they would eventually initiate an armed struggle.

12. Seeking to charter a course independent of their Vietnamese sponsors (who advocated a policy of appeasement towards Sihanouk), Cambodian communists convened a secret congress in September 1960. The congress adopted a series of key resolutions, including a resolution to use "revolutionary violence" against the Party's enemies -

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[13] The following summary is based on the Co-Prosecutors' Final Trial Brief in Case 002/01, 27 September 2013, Case 002 Document E295/6/1 [A public copy is available on the ECCC website (www.eccc.gov.kh)], and Philip Short, *Pol Pot: The History of a Nightmare*, 2005. See also David Chandler, *Brother Number One: A Political Biography of Pol Pot*, 1999; Ben Kiernan, *The Pol Pot Regime: Race, Power, and Genocide in Cambodia under the Khmer Rouge, 1975-79*, 1996; Ben Kiernan, *How Pol Pot Came to Power: A History of Communism in Kampuchea, 1930-1975*, 1986; Stephen Heder, *Cambodian Communism and the Vietnamese Model: Imitation and Independence, 1930-1975*, 2004; Elizabeth Becker, *When the War Was Over*, 1998; and David Chandler, *Tragedy of Cambodian History*, 1991.

[14] Although technically a Cambodian party, the KPRP was under Vietnamese tutelage and its programs and organisation largely controlled by the more experienced Vietnamese communist cadres who had emerged from the ICP. This domination of the nascent Cambodian communist party by the Workers Party of Vietnam was one of the early causes of tension between Cambodian and Vietnamese communists. Cambodian communists' paranoia about being dominated by Vietnam, combined with a territorial dispute, ultimately resulted in a break of relations and an international armed conflict between Cambodia and Vietnam in the mid-1970s, when both countries were ruled by communist parties.

namely the monarchy and the ruling classes, as well as other privileged classes which were seen as oppressing the Cambodian peasantry. The leaders determined that the poor peasant class was their natural support base. The KPRP was renamed the Workers' Party of Kampuchea (WPK).

13. In 1963 Saloth Sar (who later came to be known by his revolutionary alias, Pol Pot), became Party Secretary. He would lead the communist movement for the next 35 years. In 1966, the WPK was re-named the Communist Party of Kampuchea. By 1967 all of the leading Khmer communists had fled Phnom Penh and were operating out of clandestine bases in the countryside. In 1968, following a series of peasant revolts against the government's oppressive policies, the communists commenced their own armed struggle against Sihanouk's regime.

14. Up to 1970, the CPK conducted a relatively small insurgency. This changed in March 1970, when Sihanouk was deposed in a bloodless coup d'état by his own Prime Minister, General Lon Nol. In due course, Lon Nol and his cohorts abolished the Cambodian monarchy and formed a new regime, the Khmer Republic.

15. Norodom Sihanouk was in Moscow at the time of the coup. He travelled to Beijing where, on the encouragement of the Chinese leadership, he formed FUNK and GRUNK - a coalition and a government in exile comprising his own followers and the Khmer communists (the Khmer Rouge). This was a turning point in Cambodia's modern history. While Sihanouk had enormous prestige among the Cambodian population, he had no army. He therefore called on young Cambodians to join the Khmer Rouge and help restore the monarchy. Tens of thousands of young people joined the in-country resistance in response to this call, and a bloody five-year civil war ensued.

16. The FUNK and GRUNK were never a true coalition. Sihanouk was only a nominal head and the Khmer Rouge leaders considered the former King their natural enemy. Over the 1970-1975 period, Sihanouk became increasingly marginalised at his headquarters in Beijing, while the communist movement grew in strength. The communists' popularity (particularly among the youth) also rose as a result of the corruption and incompetence of the Khmer Republic regime, which was supported by the United States. The United States' massive bombing of the Cambodian countryside, which targeted Vietnamese and Khmer Rouge bases, inflicted heavy casualties on the civilian population and further increased support for the Khmer Rouge.

17. Operating from their secret headquarters, the Khmer Rouge leaders conducted an increasingly successful military campaign against the Khmer Republic with the support of China and the Vietnamese communists. The leadership of the Khmer Rouge was itself a coalition of sorts between radical intellectuals (such as Pol Pot, **Nuon Chea**, **Khieu Samphan**, Ieng Sary and Son Sen) and indigenous military commanders. The former controlled the Party headquarters, the military command, communications and propaganda. The latter commanded the armed forces in different parts of the country.

18. It was during the civil war period (and primarily from 1972 to 1975) that the Khmer Rouge adopted some of their most draconian policies, including forced evacuations of captured urban areas, the confinement of civilian populations to rural cooperatives, the imposition

of forced collectivisation, and the use of extra-judicial torture and executions. In this period, Kaing Guek Eav *alias* Duch, a former mathematics teacher, operated M-13, a security centre in which dissenters, suspected traitors and captured Khmer Republic soldiers were systematically tortured and executed. Duch, who largely accepted his criminal responsibility at trial (the civil law system does not provide for guilty pleas), described the methods employed at M-13 as follows:

At M-13, we were allowed to first beat the prisoners; secondly, used the…electric telephone as the method of torturing; and water-boarding and plastic bag to cover the detainee's face to suffocate them.[15]

…

Vorn Vet [a member of the CPK Central Committee], himself, instructed me the way to torture those people. The best way he liked…was to use a plastic bag to cover the heads of those people. He said: You, Comrade, need to look at their neck and see if it's shaking or it's vibrating…the pulse at the neck; if it was vibrating very strongly…they would be considered as spies.[16]

19. The Khmer Rouge laid a siege to Phnom Penh as early as 1973 but their victory was delayed by a heavy American bombing that year. The final offensive on the capital began on 1 January 1975. In the morning of 17 April 1975 the defences around the capital collapsed and the Khmer Rouge forces entered the city. The remaining Khmer Republic generals issued a formal surrender. The Khmer Rouge rule over Cambodia began.

20. Within months, Sihanouk, who had returned to Cambodia as the Khmer Rouge's supposed ally, was put under house arrest. The CPK established their new state, Democratic Kampuchea (DK). Pol Pot became the DK's Prime Minister and **Khieu Samphan** was appointed the President of the DK State Presidium.

Khmer Rouge Crimes and the Charges Against the Senior Leaders [17]

21. The population of Phnom Penh had swelled to 2.5 million people in the months preceding 17 April 1975 as hundreds of thousands of people from surrounding provinces had sought refuge in the capital to escape Khmer Rouge violence. The city's hospitals and refugee centres were overflowing with thousands of war casualties, the sick and infirm. On 17 April, the International Committee of the Red Cross, the United Nations and numerous humanitarian organisations offered their help to the new regime. Their requests were refused and all foreigners were expelled.

22. By the early afternoon of 17 April, the communists began evacuating the capital by force. The entire urban population was sent to the countryside. No exceptions were allowed.

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15 Case 002 Transcript, Document E1/50.1, 19 March 2012, at 15.58.39.

16 Ibid, at 15.40.48.

17 The following summary is based largely on: Co-Prosecutors' Rule 66 Submission, 18 August 2010, Case File 002 Document D390 (A Rule 66 submission is filed at the conclusion of the judicial investigation and contains the Co-Prosecutors' analysis of the evidence collected by the Co-Investigating Judges), and the Co-Prosecutors' Closing Arguments in Case 002/01 (See Case 002 Transcript, E1/229.1, 17 October 2013).

The forced marches were to continue for weeks and in some cases months, during the hottest period of the year. Thousands died from exhaustion, starvation and illness. Those who failed to comply with the evacuation order were executed on the spot. At the same time, the Khmer Rouge military conducted searches for members of the toppled regime and executed thousands of Khmer Republic soldiers, officers and public servants. The same pattern - forced evacuations, deaths from starvation and exhaustion, and executions of members of the Khmer Republic regime - followed in all other cities and urban centres as they succumbed to Khmer Rouge forces in April 1975.

23. The following four extracts from testimonies before the ECCC Trial Chamber describe the evacuation of Phnom Penh:

Yim Sovan:

[T]hey were armed, including men and women with the red scarf...They told us that the Upper Angkar asks us to leave…They gave us only 15 minutes…one of the houses was locked when I returned from the market. When they knocked the door and the door was not open…they shot the lock, and when the people came out, they shot the people to death.[18]

Nou Hoan:

There was a huge crowd of people en route and it was in the middle of the dry season and the weather was very hot. People were shocked…Some of them lost their children and their families and the situation was chaotic...And there were flies, flies were everywhere like a cloud of bees…Some people died and [were] left along the street. And those who were sick could not seek any help from anyone. And we were forced by Angkar to just keep going.[19]

Pech Srey Phal:

I had no breast milk to feed my young baby and I did not have medicine and I did not also have milk…my baby died during the evacuation, and I did not even know what to do with my dead baby. I was instructed to bury my baby in the forest. It was like an animal.[20]

Chheng Eng Ly:

When we were leaving Phnom Penh and we were travelling along National Road Number 1 crossing Monivong Bridge, I saw a crying baby. He was actually crawling over the dead body of his mum. I wanted to carry that baby. I wanted to take the baby…But all of a sudden…the

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18 Testimony of Yim Sovan, 19 October 2012, Case 002 Transcript E1/135.1, at 14.14.03 to 14.16.35.

19 Testimony of Nou Hoan, 30 May 2013, Case 002 Transcript E1/199.1, at 09.14.07 to 09.18.02.

20 Testimony of Pech Srey Phal, 5 December 2012, Case 002 Transcript E1/148.1, 5 December 2012, at 10.04.59.

soldier carried this baby, they just tore the baby apart. It was a very horrifying scene. I could not imagine any human being who would do that.[21]

24. The primary reason for the forced evacuations was the CPK's view that, by virtue of their association with the ruling classes, the urban populations had become real or potential enemies of the revolution. The evacuations were designed to destroy the remnants of the Khmer Republic and other perceived enemies, break up supposed spy networks in the cities, and subject the rest of the evacuees to CPK's absolute rule.

25. This is how **Nuon Chea**, one of the Accused in Case 002, explained the reasons for the evacuation in a 1978 interview:

It is more widely known that the USA planned to seize power from us six months after liberation. The plan involved ***joint action on the part of the USA, the KGB and Vietnam****. There was to be combined struggle from inside and outside.* ***But we smashed the plan****. Immediately after liberation,* ***we evacuated the cities****. The CIA, KGB and Vietnamese agents there left for the countryside and were unable to implement the plan.*[22] (emphases added)

26. Immediately upon arrival in CPK-run rural cooperatives, all evacuees were required to write autobiographies which were used to weed out those who, in the eyes of the Party, qualified for immediate execution. In this first wave of killings which lasted several months, the new regime targeted primarily Khmer Republic soldiers and officials, as well as those identified as belonging to or being associated with the imperialist, capitalist or feudalist classes. The surviving evacuees were reduced to the status of mere slaves in the CPK's agrarian program which was to be marked by extreme autarky (or, in the CPK leaders' words, "self-mastery and independence"). They were labelled "New People" or "17 April People" and subjected to systematic persecution, constant psychological and physical abuse and inhumane conditions in forced labour camps.

27. The Khmer Rouge rule over Cambodia involved oppression and terror by a government over its citizens that arguably have no parallel in modern history. The Khmer Rouge broke up families and abolished private property, religion, education, law courts, markets, money, music, newspapers and television. All citizens were confined to cooperatives in which every aspect of their lives was controlled by CPK cadres – from their food rations, to their movements, their working hours, and even their right to speak. The evacuees' personal belongings were confiscated. Their children were sent to youth work brigades. The rules imposed on the population were so draconian that, when foraging for food was banned, those who contravened the prohibition were killed on the spot or sent to a security centre. Furthermore, in a bid to rapidly increase the population, the Khmer Rouge subjected hundreds of thousands of people to forced marriages in which women were routinely raped.

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21 Testimony of Chheng Eng Ly, 29 May 2013, Case 002 Transcript E1/198.1, at 15.32.22 to 15.34.52.

22 Nuon Chea's Interview by a Delegation of the Communist Workers' Party of Denmark, 30 July 1978, Case File 002 Document E3/196.

28. Hundreds of security offices and thousands of execution sites were established. The role of this security apparatus was to enforce the CPK rule and weed out and destroy any real or perceived opponents of the regime. The methods of interrogation, torture and execution at the security centres were consistent throughout the country. Interrogators tortured suspected enemies of the revolution into confessing crimes against the regime and implicating their supposed co-conspirators. The written confessions were then used to justify the arrests of additional “strings of traitors” in an ever expanding, self-perpetuating cycle of purges.

29. As the regime’s paranoia with external enemies intensified, the security services arrested and executed people on the basis of the most far-fetched accusations. Perhaps the best illustration of this is the fact that many individuals were accused of spying simultaneously for the CIA and the KGB. In his trial, Kaing Guek Eav *alias* Duch, the Chief of S-21, admitted that the vast majority of these confessions were false, having been obtained under extreme torture.[23]

30. On 30 March 1976, the CPK Central Committee issued a decision ratifying the existing policy on executions and delegating to cadres at various levels of the CPK / DK hierarchy “the right to smash” the enemies of the revolution. The following is an extract from the official ECCC translation of that document:[24]

> **30-3-76**
>
> **Decision of the Central Committee**
> **Regarding a Number of Matters**
> **សេចក្តីសំរេច របស់គណៈមជ្ឈិម**
> **អំពី បញ្ហាមួយចំនួន**
>
> 1. <u>The right to smash, inside and outside the ranks</u>
>
> <u>Objective សំណូមពរ</u>:
>
> 1. That there is a framework in absolute implementation of our revolution,
> 2. To strengthen our socialist democracy,
>
> All this to strengthen our state authority.
>
> - If in the base framework, to be decided by the Zone Standing Committee.
> - Surrounding the Center Office, to be decided by the Central Office Committee.
> - Independent Sectors, to be decided by the Standing Committee.
> - The Center Military, to be decided by the General Staff.

31. While the CPK regime destroyed most of its documentation and archives in the days immediately preceding its collapse, a small cache of documents emanating from the Central and Standing Committee did survive. The Central Committee directive of 30 March 1976 is one of those documents.

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23 Testimony of Kaing Guek Eav *alias* Duch, 25 June 2009, Case 001 Transcript E1/38.1, at 11.01.33.

24 Decision of the Central Committee Regarding a Number of Matters, 30 March 1976, Case File 002 Document E3/12.

32. The Khmer Rouge's treatment of the ethnic and religious minorities was arguably even more brutal. Some 200,000 ethnic Vietnamese were deported in the first months of the new regime. In an extermination campaign which commenced in 1977 (coinciding with the intensification of an armed conflict between the CPK and Vietnam), CPK cadres sought out and executed almost the entire remaining Vietnamese population of Cambodia.

33. The Cambodian Muslim Cham community was also targeted. The persecution of this group occurred in stages. Cham communities were first broken up and dispersed throughout the country. Their religion and cultural practices were prohibited. Many Cham community leaders were executed. Starting from 1977, almost the entire remaining Cham population of Cambodia's eastern Kampong Cham Province (the historical base of Cambodian Chams) was exterminated.

34. ECCC Co-Prosecutors' case against the CPK senior leaders seeks to address a representative sample of these atrocities. The crime sites / criminal episodes which were investigated in this case, and in respect of which the Accused were ultimately charged, include the following:

(a) Three forced transfers of civilian populations

(b) 11 security centres

(c) Three mass executions

(d) Six forced labour sites

(e) Forced marriage

(f) Persecution of Buddhists

(g) Genocide of the Vietnamese national / ethnic group

(h) Genocide of the Cham ethnic / religious group; and

(i) Massacres of civilians committed by Cambodian military forces during incursions into Vietnamese territory.

35. The judicial investigation in Case 002 was opened on 18 July 2007. On 16 September 2010, the Co-Investigating Judges (CIJ) issued their Closing Order (effectively, the Indictment). This 749 page document contains the CIJ's detailed findings on the evidence and the applicable law, and sets out the specific charges against the Accused.[25]

36. The four Accused (**Nuon Chea**, **Khieu Samphan**, **Ieng Sary** and **Ieng Thirith**) were charged with the crimes of Genocide, Crimes Against Humanity, Grave Breaches of the 1949 Geneva Conventions and violations of the 1956 Cambodian Criminal Code. The

[25] A redacted public version of the Closing Order is available at http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/D427Eng.pdf.

case against them is based on an alleged joint criminal enterprise (JCE) within which all of the above crimes were planned, orchestrated and executed. It is alleged that the Accused were members of the JCE, that they intended all of the underlying crimes, and made significant contributions to the JCE through their senior positions and activities in the CPK / DK regime.[26]

37. The Closing Order alleges, in the alternative, that the Accused bear criminal responsibility for planning, instigating, aiding and abetting and ordering the crimes, as well as through the principle of superior responsibility (as superiors who had effective control over the direct perpetrators of the crimes and failed to prevent the commission of crimes, or to punish the perpetrators).[27]

38. As discussed in the Introduction (Section 3), the proceedings against **Ieng Sary** were terminated following his death, while the proceedings against **Ieng Thirith** have been stayed due to a finding that she is unfit to stand trial. The case against the remaining two Accused was separated into small trials, the first of which dealt only with select charges of Crimes Against Humanity. This is discussed in Section 6.

Criminal Procedure before the ECCC

39. As noted in the Introduction, the ECCC applies the civil law criminal procedure. However, this procedure is subject to the fair trial provisions of the *International Covenant on Civil and Political Rights* (ICCPR), and other rules established at the international level.[28] The latter include the statutes, rules of procedure and case law of, *inter alia*, the International Criminal Court (ICC), the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Tribunal for Rwanda (ICTR). In the event of an inconsistency between the domestic rules and international fair trial standards, the latter will prevail.[29]

[26] See Co-Investigating Judges' Closing Order (Indictment), Case 002 Document D427, 15 September 2010, at paragraphs 1521 – 1540.

[27] Ibid, at paragraphs 1544 – 1560. The allegations of superior responsibility are narrower in scope with respect to Ieng Thirith, as the CIJ found that she only had effective control over her subordinates at the Ministry of Social Affairs. See paragraphs 1561 – 1563.

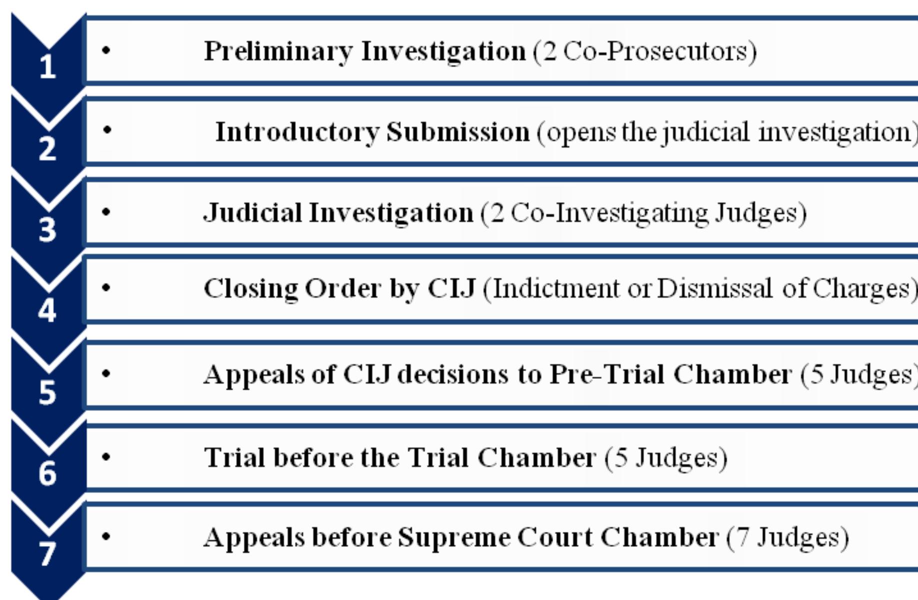
[28] Article 33 new of the ECCC Law: "The Extraordinary Chambers of the trial court shall ensure that trials are fair and expeditious and are conducted in accordance with existing procedures in force, with full respect for the rights of the accused and for the protection of victims and witnesses. If these existing procedure do not deal with a particular matter, or if there is uncertainty regarding their interpretation or application or if there is a question regarding their consistency with international standard, guidance may be sought in procedural rules established at the international level. The Extraordinary Chambers of the trial court shall exercise their jurisdiction in accordance with international standards of justice, fairness and due process of law, as set out in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights." See also the minimum guarantees set out in Article 35 new and fundamental principles in Rule 21 of the ECCC Internal Rules.

[29] This is implicit in the language of Article 33 new, quoted above. It also follows from the provisions of the Cambodian Constitution. Article 31 of the Constitution provides: "The Kingdom of Cambodia shall recognize and respect human rights as stipulated in the United Nations Charter, the Universal Declaration of Human rights, the covenants and conventions related to human rights, women's and children's rights."

40. In order to consolidate the applicable Cambodian procedures, address gaps in these procedures, and resolve foreseeable inconsistencies with international standards, the Plenary of ECCC Judges has adopted the ECCC Internal Rules.[30] These Rules represent the primary document governing the procedure and admission of evidence before the ECCC.[31]

Structure of Judicial Chambers, Decision Making and Disagreements

41. Each judicial body at the ECCC comprises national and international judges and staff. The judicial investigations are carried out by two Co-Investigating Judges - one national and one international.[32] The Pre-Trial Chamber and Trial Chamber are comprised of five judges each (three national and two international),[33] while the Supreme Court Chamber, the ECCC's final appellate court, comprises seven judges (four national and three international).[34] The following graph provides a basic overview of the Court's offices and phases of criminal proceedings:



42. The Law on the Court puts in place super-majority voting rules within the Chambers. Pursuant to these rules, an affirmative decision by the Pre-Trial or Trial Chamber requires at least four votes, while a Supreme Court decision requires five votes.[35] This

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[30] ECCC Internal Rules (Rev.8), 3 August 2011.

[31] Pre-Trial Chamber's Decision on Nuon Chea's Appeal Against Order Refusing Request for Annulment, 26 August 2008, Case 002 Document D55/I/8, at paragraph 14; ECCC Trial Chamber, Decision on Nuon Chea's Preliminary Objection Alleging the Unconstitutional Character of the ECCC Internal Rules, 8 August 2011, Case 002 Document E51/14, at paragraph 7.

[32] Article 23 new of the Law on the ECCC.

[33] See Article 20 new (for the composition of the Pre-Trial Chamber) and Article 9 new (for the composition of the Trial Chamber) of the Law on the ECCC.

[34] Article 9 new of the Law on the ECCC.

[35] Articles 14 new, 20 new and 23 new of the Law on the ECCC.

ensures that no affirmative decision can be rendered by only national or international judges of any of the Chambers.

43. The Office of the Co-Prosecutors is headed by one national and one international Co-Prosecutor, who, like the CIJ, are generally expected to act jointly / by consensus.[36] Disagreements between the Co-Prosecutors or Co-Investigating Judges can be referred to the Pre-Trial Chamber for resolution.[37] The Law on the Court contains specific provisions for the resolution of disagreements relating to the initiation or continuation of an investigation / prosecution: if the Pre-Trial Chamber does not reach an affirmative decision on such a disagreement, the prosecution or investigation must proceed.[38] This was the outcome of a disagreement between the National and International Co-Prosecutor with respect to opening judicial investigations in Cases 003 and 004. The National Co-Prosecutor opposed the International Co-Prosecutor's proposal to open the investigations, and the latter forwarded the two matters to the Pre-Trial Chamber. Unable to attain a super majority, the Pre-Trial Chamber ruled that, under the applicable law, the proposed Introductory Submissions should be filed (see Section 5.2 below for more details on Introductory Submissions), and judicial investigations were opened in Cases 003 and 004.[39]

44. For completeness, it should be noted that a degree of controversy has accompanied the proceedings in Cases 003 and 004. The Cambodian Government has stated openly its opposition to these investigations.[40] On 20 May 2012 the International Reserve Co-Investigating Judge Laurent Kasper-Ansermet issued a note pointing to "egregious dysfunctions" within the ECCC which impeded the proper conduct of investigations in Cases 003 and 004.[41] The Judge asserted that his national counterpart had "opposed all actions" to progress the judicial investigations.[42] For his part, the National Co-

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[36] Sub-rules 71(3) and 72(3) of the ECCC Internal Rules; Articles 5(4) and 6(4) of the ECCC Agreement.

[37] Articles 20 new and 23 new of the Law on the ECCC; See also Internal Rules 71 and 72 and Article 7 of the ECCC Agreement.

[38] Article 20 New of the Law on the ECCC provides, in relevant part: "A decision of the Pre-Trial Chamber, against which there is no appeal, requires the affirmative vote of at least four judges….If there is no majority as required for a decision, <u>the prosecution shall proceed</u>" (emphasis added). Note that there is a potential inconsistency between this Article and Sub-rule 71(4)(c), pursuant to which the outcome would turn on what action was done or proposed by the Co-Prosecutor who initiated the disagreement: "If the required majority is not achieved before the Chamber, in accordance with Article 20 new of the ECCC Law, <u>the default decision shall be that the action or decision</u> done by one Co-Prosecutor <u>shall stand</u>, or that the <u>action or decision proposed</u> <u>to be done</u> by one Co-Prosecutor <u>shall be executed</u>" (emphases added). Insofar as the rule could result in the termination of a prosecution by default (in the absence of a Pre-Trial Chamber super majority), it is inconsistent with Article 20 new (and article 23 new with respect to disagreements between the Co-Investigating Judges). The Rule is therefore invalid to the extent of this inconsistency.

[39] Considerations of the Pre-Trial Chamber Regarding the Disagreement Between the Co-Prosecutors Pursuant to Internal Rule 71, 18 August 2009, Case 003, at paragraphs 44 - 45.

[40] Open Society Justice Initiative Report, *The Future of Cases 003/004 at the Extraordinary Chambers in the Courts of Cambodia*, October 2012, at pp.2 - 3.

[41] Note of the International Reserve Co-Investigating Judge to the Parties on the Egregious Dysfunctions Within the ECCC Impeding the Proper Conduct of Investigations in Cases 003 and 004, 21March 2012, Case 003 Document D38.

[42] Ibid, paragraph 13.

Investigating Judge You Bunleng refused to recognise the authority of the International Reserve Judge to act.[43] Judge Kasper-Ansermet resigned in May 2012 and a replacement International Co-Investigating Judge, Mark Harmon, was sworn in on 26 October 2012. As at the time of writing, the investigations in Cases 003 and 004 are ongoing but, unlike the investigations in Cases 001 and 002, no suspect has been placed in pre-trial custody. There have been several public allegations of government interference in, or at least failure to facilitate, the judicial investigations in these two cases.[44]

45. There has also been a degree of controversy in Case 002. During the judicial investigation, acting on a request by the Defence for **Nuon Chea**, the then International Co-Investigating Judge Marcel Lemonde issued summonses to six senior members of the Cambodian Government and Parliament, whom he proposed to interview as witnesses.[45] All of these individuals failed to comply with their summonses. The Judge declined to order any coercive measures to ensure compliance with the summonses, ruling that such measures would be "fraught with significant practical difficulties, and…would unduly delay the conclusion of the judicial investigation."[46] He held that it would be preferable to "defer to the Trial Chamber - should an indictment be issued - for it to decide whether employing such coercive measures is warranted."[47] The Pre-Trial Chamber dismissed the Defence's appeal against this decision.[48] However, in a separate decision, the International Judges on the Pre-Trial Chamber found that statements by Cambodia's Minister for Information, to the effect that it was the Government's position that the senior officials should not respond to the Court's summonses, amounted to a potential attempt to interfere with the administration of justice in Case 002 and warranted

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[43] See Press Statement by National Co-Investigating Judge, 26 March 2012, available at http://www.eccc.gov.kh/en/articles/press-statement-national-co-investigating-judge-0.

[44] Open Society Justice Initiative Report, *The Future of Cases 003/004 at the Extraordinary Chambers in the Courts of Cambodia*, October 2012, at pp.2 – 3, 9-12; Statement by the Spokesperson for the Secretary-General on the Extraordinary Chambers in the Courts of Cambodia, 30 March 2012, New York, available at http://www.un.org/sg/statements/?nid=5961; International Federation for Human Rights, *ECCC: Call for transparency and independence of proceedings in Cases 003 and 004, and for an effective implementation of victims' rights to participate*, 5 August 2011, available at http://www.fidh.org/en/asia/cambodia/ECCC/ECCC-Call-for-transparency-and; Nisha Valabhji, *Political Interference and Judicial Misconduct Impede Justice in Cambodia*, JURIST - Hotline, 6 December 2011, available at http://jurist.org/hotline/2011/11/nisha-valabhji-cambodian-interference.php.

[45] See, for example, Co-Investigating Judge's Letter to Heng Sarmin, President of the National Assembly, Case 002 Document D136/3.

[46] Note by the Co-Investigating Judge, 11 January 2010, Case 002 Document D301, quoted in the Second Decision On Nuon Chea's And Ieng Sary's Appeal Against OCIJ Order on Requests to Summons Witnesses, 9 September 2010, Case 002 Document D314/1/2, at paragraph 8.

[47] Ibid.

[48] Pre-Trial Chamber Confidential Decision on Nuon Chea and Ieng Sary's Appeal Against OCIJ Order on Requests to Summons Witnesses, 9 June 2010, Case 002 Document D314/1/8 and D314/2/7, summarised in Second Decision On Nuon Chea's And Ieng Sary's Appeal Against OCIJ Order on Requests to Summons Witnesses, 9 September 2010, Case 002 Document D314/1/2, at sub-paragraph 14(iii).

further investigation.[49] Because the Chamber did not attain a super majority, no further action could be taken with respect to this matter.[50]

46. During the trial in Case 002, the Defence for **Nuon Chea** made requests for the Trial Chamber to call one of the above six individuals as a witness, submitting that his evidence was potentially exculpatory.[51] The Co-Prosecutors did not oppose the requests as a matter of principle, but argued that there was no basis to conclude that the evidence given by these witnesses would be exculpatory.[52] The Chamber declined the Defence's requests. In their Closing Brief, the Defence have argued that this refusal amounted to a breach of Nuon Chea's right to a fair trial.[53] The Chamber's reasoning for the refusal will be provided in its judgement which is expected in mid-2014.

Judicial Investigations Under the ECCC Model

47. As discussed in the Introduction, the ECCC applies the civil law model of criminal procedure, in which cases are initiated by the prosecutor, but the bulk of the evidence is collected in an investigation conducted and supervised by investigating judges.

48. The purpose of the Co-Prosecutors' preliminary investigation (see Graph in Section 5.1 above) is to identify crimes within the jurisdiction of the ECCC and identify suspects and potential witnesses.[54] These investigations are limited in scope and tend to focus on the collection of available documentary materials and initial interviews of potentially important witnesses. If the Co-Prosecutors form the view that a prosecution is warranted, they may open a judicial investigation by filing an Introductory Submission.[55] The Introductory Submission in Case 002 comprised several thousand documents, including CPK / DK directives, meeting minutes and communications, records from DK security centres and cooperatives, photographs and video footage, witness statements, and secondary materials such as UN / non-governmental organisation reports, contemporaneous media coverage, books and academic papers.

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[49] See Second Decision On Nuon Chea's And Ieng Sary's Appeal Against OCIJ Order on Requests to Summons Witnesses, 9 September 2010, Case 002 Document D314/1/2, Opinion of Judges Catherine Marchi-Uhel and Rowan Downing, at paragraph 7: "In surveying this material we are of the view that no reasonable trier of fact could have failed to consider that the above-mentioned facts and their sequence constitute a reason to believe that one or more members of the RGC may have knowingly and wilfully interfered with witnesses who may give evidence before the CIJs."

[50] Pre-Trial Chamber Second Decision On Nuon Chea's And Ieng Sary's Appeal Against OCIJ Order on Requests to Summons Witnesses, 9 September 2010, Case 002 Document D314/1/2, paragraph 41.

[51] These requests are summarised in: Sixth and Final Request to Summons TCW-223, 22 July 2013, Case 002 Document E236/5/1/1.

[52] See, for example, Co-Prosecutors' Final Trial Brief in Case 002/01, 27 September 2013, Case 002 Document E295/6/1, at paragraph 319.

[53] Nuon Chea's Closing Submissions in Case 002/01, 26 September 2013, Case 002 Document E295/6/3, paragraphs 41 - 47.

[54] Sub-rule 50(1) of the ECCC Internal Rules.

[55] Sub-rule 53(1).

49. Once a judicial investigation is opened, the Co-Investigating Judges may (but do not have to) notify the suspects that they are under investigation.[56] At this point, the suspects attain the status of "Charged Persons,"[57] although they are not technically charged with any criminal offence. If charged at the end of the investigation, the Charged Persons are referred to as the Accused.[58]

50. The following are the key features of the judicial investigation at the ECCC:

(a) The Co-Investigating Judges have the exclusive power to conduct the investigation with the aim of ascertaining the truth of the allegations in the Introductory Submission.[59]

(b) The judicial investigation is limited to the factual allegations in the Introductory Submission,[60] although the CIJ may include additional suspects against whom "there is clear and consistent evidence" indicating that they may be criminally responsible for the crimes identified in the Introductory Submission.[61]

(c) The Co-Investigating Judges may admit, as a Civil Party to the proceedings, any person who can demonstrate that they have suffered physical, material or psychological injury as a direct consequence of at least one of the crimes alleged against the Charged Person.[62] The purpose of civil party participation is to enable victims to seek moral and collective reparations, and support the prosecution.[63] In the civil law system, the inclusion of victims, as civil parties, effectively combines a criminal trial and related civil actions for damages.[64]

(d) The Parties (Co-Prosecutors, Charged Persons and Civil Parties, if any) have the right of access to the case file throughout the investigations, and may request the Co-Investigating Judges to carry out specific investigative acts.[65]

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[56] See Rule 57.

[57] For definitions of "Suspect" and "Charged Person," see Dictionary annexed to the Internal Rules.

[58] Sub-rule 67(2) and the definition of "Accused" in the Dictionary annexed to the Internal Rules.

[59] Rule 55 (1) and (5); Co-Investigating Judges' Memorandum, 10 January 2008, Case 002 Document A110/II, at p.2.

[60] Sub-rule 55(2).

[61] Sub-rule 55(4) states: "The Co-Investigating Judges have the power to charge any Suspects named in the Introductory Submission. They may also charge any other persons against whom there is clear and consistent evidence indicating that such person may be criminally responsible for the commission of a crime referred to in an Introductory Submission or a Supplementary Submission, even where such persons were not named in the submission. In the latter case, they must seek the advice of the Co-Prosecutors before charging such persons."

[62] Sub-rule 23*bis* (1) of the Internal Rules.

[63] Sub-rule 23(1) of the Internal Rules.

[64] M. E. I. Brienen and E. H. Hoegen, *Victims of Crime in 22 European Criminal Justice Systems* (2000), p. 1069.

[65] Rule 55(6): "The Greffier of the Co-Investigating Judges shall keep a case file, including a written record of the investigation. At all times, the Co-Prosecutors and the lawyers for the other parties shall have the right to examine and make

(e) The parties may not conduct their own investigations but may:

i. Request the CIJ to carry out investigative actions that they consider would be conducive to ascertaining the truth;[66] and

ii. Carry out preliminary enquiries, such as searches within publicly available materials, and request the CIJ to place any additional materials on the Case File.[67]

(f) The decisions of the CIJ, including refusals of investigative requests, are subject to appeal to the Pre-Trial Chamber.[68]

(g) The investigation is concluded by the issuance of a Closing Order, which may indict a Charged Person and send him / her to trial, or dismiss the case. The CIJ are not bound by the Co-Prosecutors' submissions on the matter.[69]

51. In their search for the truth, the Co-Investigating Judges are under a duty to act impartially and collect relevant evidence, whether it be inculpatory or exculpatory.[70] The Co-Prosecutors also have an ongoing duty to disclose to the CIJ any material that may suggest the innocence or mitigate the guilt of the Suspect / Charged Person, or affect the credibility of the prosecution evidence.[71] This standard is consistent with the exculpatory disclosure rules of other international tribunals, although at the *ad hoc* tribunals (ICTY and ICTR) it applies only after the confirmation of indictment.[72]

52. The CIJ may undertake a variety of investigative acts, including questioning witnesses and suspects, seising potential evidence, obtaining expert opinions, conducting on-site investigations, taking measures to provide for the protection of witnesses, and seeking

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copies of the case file under the supervision of the Greffier of the Co-Investigating Judges, during working days and subject to the requirements of the proper functioning of the ECCC."

[66] Sub-rule 55(10): "At any time during an investigation, the Co-Prosecutors, a Charged Person or a Civil Party may request the Co-Investigating Judges to make such orders or undertake such investigative action as they consider useful for the conduct of the investigation. If the Co-Investigating Judges do not agree with the request, they shall issue a rejection order as soon as possible and, in any event, before the end of the judicial investigation. The order, which shall set out the reasons for the rejection, shall be notified to the parties and shall be subject to appeal."

[67] Co-Investigating Judges' Memorandum, 10 January 2008, Case 002 Document A110/II, at p.2; Co-Investigating Judges' Order on the Request for Investigative Action to Seek Exculpatory Evidence in the SMD, 19 June 2009, Case 002 Document D164/2, paragraph 14.

[68] See Rules 73 and 74 of the Internal Rules. It is noteworthy, however, that only the Co-Prosecutors may appeal "all orders" of the Co-Investigating Judges, while the Defence may only appeal specific types of orders: see Sub-rules 74(2) and (3).

[69] Sub-rule 67(1); See also sub-rule (4): "The Closing Order shall state the reasons for the decision. A Closing Order may both send the case to trial for certain acts or against certain persons and dismiss the case for others."

[70] Sub-rule 55(5): "In the conduct of judicial investigations, the Co-Investigating Judges may take any investigative action conducive to ascertaining the truth. In all cases, they shall conduct their investigation impartially, whether the evidence is inculpatory or exculpatory."

[71] Rule 53(4) of the Internal Rules.

[72] See Article 67(2) of the ICC Statute, Rule 68 of the ICTY Rules of Procedure and Evidence and Rule 68(A) of the ICTR Rules of Procedure and Evidence.

the cooperation of the UN, governments and international organisations.[73] Witness statements taken by the CIJ or their investigators are recorded in writing (and optionally audio recorded[74]) and sworn by their authors.[75] CIJ have the power to compel witnesses to answer questions (even where the answer may incriminate the witness), provided that they issue an assurance to the witness that their responses will be kept confidential and / or will not be used either directly or indirectly against them in any subsequent prosecution at the ECCC.[76]

53. As noted above, the Co-Investigating Judges are required to keep a written record of their investigation, to which the parties have continuous access.[77] The case file is therefore akin to a work-in-progress brief of evidence, and includes all official results of the investigation – such as investigators' reports, documentary evidence (including audio visual materials), witness statements and official correspondence. This continuous access to the file enables the parties to file targeted requests for investigative action, such as requests for interviews (or re-interviews) of specific witnesses, site visits and forensic analyses.

54. The Co-Investigating Judges have the power to detain suspects or Charged Persons.[78] At the ECCC, pre-trial detention can last up to three years.[79] In all cases, there is a presumption in favour of liberty[80] and detention may only be ordered if there is a well-founded reason to believe that the Charged Person may have committed the crimes alleged against them, and if one of the specific grounds enumerated in the Rules are met (such as a risk of flight or the need to prevent interference with witnesses / evidence).[81]

55. One particularly interesting investigative technique available to the CIJ is the "confrontation" procedure. Here, the CIJ conduct a hearing where a Charged Person and a witness who have given inconsistent accounts of the same event may be confronted with each other and questioned in each other's (and the judges') presence. A good example of this procedure was provided in Case 002. Through their investigations the CIJ had been able to locate an individual who, according to Kaing Guek Eav *alias* Duch (see Section 2), was one of **Nuon Chea's** bodyguards. The bodyguard, Saut Toeung, was in a position to give important evidence against **Nuon Chea** because he was alleged to have personally carried correspondence between **Nuon Chea** and Duch (including S-21 prisoners' confessions submitted by Duch to **Nuon Chea** for review). As

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[73] See Rule 29 and Sub-rule 55(5) of the Internal Rules.

[74] Sub-rule 25(1) and (4). In Case 002, the CIJ placed on the Case File audio recordings of all witness interviews, which enabled the parties to scrutinise the witness statements for any potential inconsistencies or inaccuracies.

[75] Rule 24.

[76] Before such an assurance is given, the CIJ must consult the Co-Prosecutors. See Sub-rules 28(3) - (5).

[77] Rule 55(6) of the Internal Rules.

[78] Rule 63.

[79] Sub-rules 63(6) and (7).

[80] See, for example, Supreme Court Chamber's Decision on Immediate Appeal by Khieu Samphan on Application for Release, 6 June 2011, Case 002 Document E50/3/1/4, at paragraphs 46 – 47,

[81] Sub-rule 63(3).

such, Saut Toeung could potentially corroborate Duch's evidence as to **Nuon Chea's** oversight of the torture and execution of the regime's perceived enemies.

56. When questioned by investigators, however, Saut Toeung denied that he was a bodyguard to any of the CPK leaders.[82] When confronted with Duch in the presence of the Co-Investigating Judges at the ECCC, he initially maintained that position, alleging that Duch had confused him with another individual of the same name.[83] However, the following day Saut Toeung admitted that he was indeed the right person and that Duch's evidence was truthful.[84] He later confirmed that evidence in his testimony at trial, admitting also that he was initially reluctant to tell the truth before the CIJ due to fear of prosecution.[85]

57. While confronting witnesses with the evidence of other individuals in the course of an investigation is not unique to the civil law model, it is submitted that, in a civil law setting, it can be particularly effective because it is presided over by judges who: a) have more extensive powers to compel testimony than law enforcement officials or prosecutors; and b) by virtue of their impartial and independent judicial status are arguably more likely to succeed in securing the cooperation of reluctant witnesses.

58. As noted in Section 4.2, the judicial investigation in Case 002 lasted three years. It produced thousands of statements by witnesses, civil parties and complainants, 36 site reports, and more than 220,000 pages of other evidentiary material.[86]

Scope of the Co-Investigating Judges' Discretion

59. A matter that should be considered in any analysis of the civil law model of judicial investigations is the scope of CIJ's discretion in determining what actions are conducive to ascertaining the truth. The Pre-Trial Chamber has ruled that the CIJ enjoy a wide discretion and are not bound by the parties' investigative requests:

[T]he Co-Investigating Judges have a broad discretion when deciding on requests for investigative actions...the Co-Investigating Judges have discretion to decide on the usefulness or the opportunity to accomplish any investigative action, even when it is requested by a party...In other words, the parties can suggest, but not oblige, the Co-Investigating Judges to undertake investigative actions.[87]

60. As a corollary to the above position, and in recognition of the CIJ's organic familiarity with cases under investigation, the Pre-Trial Chamber has held that its own review of CIJ

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82 Saut Toeung's Statement to CIJ Investigators, 4 December 2007, Case 002 Document E3/103.

83 Written Record of Confrontation, Kaing Guek Eav *alias* Duch and Saut Toeung, 2 December 2009, Case 002 Document E3/431; Saut Toeung's Statement to CIJ Investigators, 2 – 4 December 2009, Case 002 Document E3/423, at p.3.

84 Saut Toeung's Statement to CIJ Investigators, 2 – 4 December 2009, Case 002 Document E3/423, at pp.5, 13 - 16.

85 Testimony Saut Toeung, 18 April 2012, Case 002 Transcript E1/63.1, at 13.42.47; 19 April 2012, Case 002 Transcript E1/64.1, at 09.31.11 - 09.46.20, 11.10.37.

86 Closing Order, Case 002 Document D427, at paragraph 17.

87 Pre Trial Chamber Decision on Appeal from the Order on the Request to Seek Exculpatory Evidence in the Shared Materials Drive, 12 November 2009, Case 002 Document D164/3/6, paragraph 21 (internal references omitted).

decisions on investigative requests would be limited.[88] Rather than substitute its decision for that of the CIJ, the Chamber only reviews whether the CIJ's decision amounted to an error of law, was based on a patently erroneous conclusion of fact, or constituted an abuse of its discretion.[89]

61. Given the CIJ's broad discretion, one may pose the question of how, in practice, can the parties satisfy the judges that a particular line of inquiry should be pursued. To the extent that parties will develop their own case theories, divergence between their respective positions and the views of the CIJ on what investigations are useful or even necessary is almost inevitable.

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[88] Ibid at paragraph 24: "As a decision on a request for investigative action is a discretionary decision which involves questions of fact, the Pre-Trial Chamber considers that in the particular cases before the ECCC, the Co-Investigating Judges are in a best position to assess the opportunity of conducting a requested investigative action in light of their overall duties and their familiarity with the case files. In these circumstances, it would be inappropriate for the Pre-Trial Chamber to substitute the exercise of its discretion for that of the Co-Investigating Judges when deciding on an appeal against an order refusing a request for investigative action."

[89] The Pre-Trial Chamber has adopted the following test enunciated by the ICTY Appeals Chamber in a decision dealing with the imposition of counsel on the accused in the *Milosevic* case:

> *In reviewing this exercise of discretion, the question is not whether the Appeals Chamber agrees with the Trial Chamber's conclusion, but rather "whether the Trial Chamber has correctly exercised its discretion in reaching that decision." In order to challenge a discretionary decision, appellants must demonstrate that "the Trial Chamber misdirected itself either as to the principle to be applied or as to the law which is relevant to the exercise of the discretion," or that the Trial Chamber "[gave] weight to extraneous or irrelevant considerations, ... failed to give weight or sufficient weight to relevant considerations, or ... made an error as to the facts upon which it has exercised its discretion," or that the Trial Chamber's decision was "so unreasonable or plainly unjust that the Appeals Chamber is able to infer that the Trial Chamber must have failed to exercise its discretion properly." In practice, this array of factors boils down to the following simple algorithm: a Trial Chamber's exercise of discretion will be overturned if the challenged decision was (1) based on an incorrect interpretation of governing law; (2) based on a patently incorrect conclusion of fact; or (3) so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion. Absent an error of law or a clearly erroneous factual finding, then, the scope of appellate review is quite limited: even if the Appeals Chamber does not believe that counsel should have been imposed on Milosevic, the decision below will stand unless it was so unreasonable as to force the conclusion that the Trial Chamber failed to exercise its discretion judiciously*.

Pre-Trial Chamber's Decision on Appeal from the Order on the Request to Seek Exculpatory Evidence in the Shared Materials Drive, 12 November 2009, Case 002 Document D164/3/6, paragraph 26, quoting ICTY, *Prosecutor v Milosevic*, Decision on Interlocutory appeal of the Trial Chamber's Decision on the Assignment of Defence Counsel, 1 November 2004, IT 02-54-AR73.3, paragraph 10 (internal references omitted).

62. Some guidance on how the CIJ's investigative powers can be properly invoked was provided by the Pre-Trial Chamber in a decision dealing with the Shared Materials Drive ("SMD"). The SMD was an electronic drive created by the Co-Prosecutors and made accessible to all the parties as well as the CIJ. It contained more than 17,000 documents potentially relevant to the investigation.[90] Asserting that the SMD may contain exculpatory material (but failing to point to any specific examples), the Defence requested the CIJ to examine all documents on the SMD and "[p]roduce a sufficiently detailed report of their analysis to enable the defence to ensure that all necessary investigative actions have been undertaken to identify potential exculpatory evidence."[91] The Defence argued that the CIJ "have the duty to ascertain the truth, and to ensure that all reasonable exculpatory leads have been explored."[92] The CIJ refused the request, ruling, *inter alia*, that: a) the request was not sufficiently specific; and b) that investigations are governed by a "principle of sufficiency," so that the CIJ may close the investigation as soon as they collect sufficient evidence to indict the individuals under investigation.[93]

63. On appeal, the Pre-Trial Chamber held that the CIJ had not erred in refusing the Defence request because it was not "sufficiently specific" and failed to explain the relevance of the requested investigative action to ascertaining the truth.[94] However, the Pre-Trial Chamber found that the CIJ's reliance on the so-called principle of sufficiency amounted to an error of law because it did not fully account for the CIJ's independent obligation to investigate exculpatory evidence. The Chamber ruled that the CIJ were under a duty to review any material that may be *prima facie* exculpatory, irrespective of whether or not they have formed a view that they have collected sufficient evidence to indict:

The Pre-Trial Chamber notes that the Co-Investigating Judges have a duty, pursuant to Internal Rule 55(5), to investigate exculpatory evidence. ***To fulfil this obligation, the Co-Investigating Judges have to review documents or other materials when there is a prima facie reason to believe that they may contain exculpatory evidence****. This review shall be undertaken before the Co-Investigating Judges decide to close their investigation,* ***regardless of whether the Co-Investigating Judges might have, or not have, sufficient evidence to send the case to trial****. In this respect, the Internal Rules indicate that the Co-Investigating Judges first have to conclude their investigation, which means that they have*

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[90] Pre-Trial Chamber's Decision on Appeal from the Order on the Request to Seek Exculpatory Evidence in the Shared Materials Drive, 12 November 2009, Case 002 Document D164/3/6, paragraph 27; Co-Prosecutors' Combined Response to the Appeals by Ieng Thirith, Nuon Chea, Khieu Samphan and Ieng Sary Against the Co-Investigating Judges' Order Denying a Joint Defence Request for Investigative Action to Seek Exculpatory Evidence in the Shared Materials Drive, 10 August 2009, Case File 002 Document D164/4/2, paragraph 6.

[91] Urgent Joint Defence Request for Investigative Action to Seek Exculpatory Evidence in the Shared Materials Drive, *Nuon Chea and others* (002/19-09-2007-ECCC/OCIJ), Charged Persons, 20 April 2009, paragraph 25.

[92] Ibid, paragraph 5 (footnotes omitted).

[93] Order on the Request for Investigative Action to Seek Exculpatory Evidence in the SMD, 19 June 2009, Case 002 Document D164/2, paragraphs 6, 9 - 11, 15.

[94] Pre-Trial Chamber's Decision on Appeal from the Order on the Request to Seek Exculpatory Evidence in the Shared Materials Drive, 12 November 2009, Case 002 Document D164/3/6, paragraphs 43 - 45.

accomplished all the acts they deem necessary to ascertaining the truth…before assessing whether the charges are sufficient to send the Charged Person to trial or whether they shall dismiss the case… By reasoning that "an investigating judge may close a judicial investigation once he has determined that there is sufficient evidence to indict a Charged Person," the Co-Investigating Judges have overlooked this preliminary obligation to first conclude their investigation before assessing whether the case shall go to trial or not. This first step is necessary to ensure that the Co-Investigating Judges have fulfilled their obligation to seek and consider exculpatory evidence, which shall equally be sent to the Trial Chamber.[95] (emphases added)

64. As a matter of principle, therefore, it appears that, as long as a party can demonstrate that a particular investigative action is *prima facie* conducive to ascertaining the truth (whether inculpating or exculpating the suspect), the CIJ should uphold the request. The test is, however, inherently open to subjective interpretation, and the procedure to challenge CIJ's decisions on investigative requests is slow and cumbersome. Appeals to the ECCC Pre-Trial Chamber are usually determined on the papers and involve extensive legal and factual submissions, which must be translated among the three official languages of the Court.

65. In practice, the timeline for the final determination of any investigative request has run into several months. By way of example, the original Defence request in the SMD matter was filed on 20 April 2009. It was dismissed by the CIJ on 19 June 2009, and the matter was finally determined by the Pre-Trial Chamber on 12 November 2009. The entire transaction therefore lasted almost seven months – a timeline clearly not conducive to the efficient conduct of a criminal investigation, particularly where the Charged Persons are held in pre-trial detention.

66. At the international level, there has been a tendency to move towards criminal investigations that are seen as independent and impartial. The Rome Statute of the ICC requires the Prosecutor of that Court to "*establish the truth*" by extending investigations to cover "all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, *investigat[ing] incriminating and exonerating circumstances equally*" (emphasis added).[96] The civil law model of judicial investigations is arguably well suited to achieving such aims. However, to meet the requirements of large criminal cases, it must be made more efficient, and less bureaucratic. This requires, at a minimum, a significant reduction in the amount of written litigation on investigative and other interlocutory requests. Many interlocutory appeals could be dealt with by way of oral applications and decisions (particularly where matters under appeal are largely factual), which has not been the practice at the ECCC. This should be complemented by provisions prescribing short deadlines for decisions on

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[95] Re-Trial Chamber's Decision on Appeal from the Order on the Request to Seek Exculpatory Evidence in the Shared Materials Drive, 12 November 2009, Case 002 Document D164/3/6, paragraph 35.

[96] Article 54(1)(a) of the Rome Statute of the ICC.

investigative requests and putting in place expedited schedules for the determination of any appeals.[97]

67. Ultimately, prosecutors and defence counsel trained in the common law system may take the view that the civil law procedure does not sufficiently safeguard their respective rights and interests during investigations. The procedure does not allow the parties to pursue freely all potential investigative leads. An investigating judge, seeking to complete an investigation within a reasonable time, may be less likely to consider or pursue every conceivable route that may be of interest to either the prosecution or the defence. From a prosecution perspective, the procedure is less than ideal as it leaves the framing of the indictment in the hands of a judicial body which is not required to prove the case at trial. The civil law procedure does, however, offer the obvious benefit of investigations which are designed to be entirely impartial.

Use of Witness Statements at Trial – A Refinement of the Civil Law Model

68. When applied to complex cases of international crime, the civil law procedure can potentially result in significant duplication of the evidence gathering process. This is because international law guarantees a right for an accused to challenge testimonial evidence against them at trial.

69. The judicial investigation lies at the centre of civil law's inquisitorial procedure.[98] As discussed in Section 5.3 above, the civil law procedure places significant emphasis on the preparation of a written record of the judicial investigation, to which the parties have access throughout the investigation. The investigation therefore represents both the evidence gathering phase of the process, and the phase during which an official court dossier is created. As a corollary of this, the typical civil law trial is a brief affair whose primary focus is not the formal admission and testing of all evidence, but rather the giving of an opportunity to counsel to make submissions on the evidence that is already on the record:

As a result of the thoroughness of the examining [investigation] phase, the trial itself differs significantly from a common-law criminal trial. Perhaps the most striking difference is that the record already has been made and is equally available to the defense and the prosecution well in advance of trial. The main function of a criminal trial is to present the case to the trial judge and, in certain cases, the jury, and to allow the lawyers to present oral argument in public.[99]

70. Because civil law investigations are judicially controlled, witness statements may be placed on the Case File and relied upon by the trial court without calling the witnesses to

[97] The Cambodian Criminal Procedure Code already imposes a deadline of 15 days for rulings on investigative requests by the Prosecutor and one month for rulings on requests made by the Charged Persons or Civil Parties. Where the Investigating Judge fails to rule within the prescribed period, the requesting party may seise an Investigating Chamber of the matter (Articles 132 – 134 of the Code). Such deadlines were omitted from the ECCC Internal Rules.

[98] See, for example, Francis Pakes, *Comparative Criminal Justice*, 2004, p.74.

[99] James G. Apple & Robert P. Deyling, *A Primer on the Civil-Law System*, US Federal Judicial Center, 1995, at p.28.

be examined in the courtroom. A 1998 study of five criminal trials in France emphasised this feature of the civil law trial:

The evidence against the defendant was to be found in the dossier, not in testimony and exhibits at the hearing. In this sample of cases the statements of 17 people, apart from defendants, were included in the dossiers but only one of those appeared at a hearing, and that because he was a civil party claiming damages.[100]

71. At the ECCC, witness interviews during the judicial investigation are generally conducted in the absence of the parties.[101] Furthermore, the written statements are not produced in a verbatim transcript form, but rather as detailed summaries of the statements given by the witnesses to the Co-investigating Judges or their investigators.[102]

72. In these circumstances, admitting witness statements without an opportunity for counsel to examine or cross examine the witnesses at trial could constitute a contravention of one of the core fair trial rights recognised in the ICCPR and other international human rights instruments.[103] Admitting witness statements without in-court examinations would also frustrate one of the key purposes of any international criminal tribunal: to raise community awareness and foster reconciliation through open and transparent judicial proceedings in which evidence is heard in open court.[104]

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[100] Bron McKillop, *Readings and Hearings in French Criminal Justice: Five Cases in the Tribunal Correctionel*, The American Journal of Comparative Law, Vol 46, 1998, p.774.

[101] Sub-rule 60(2) provides: "Except where a confrontation is organised, the Co-Investigating Judges or their delegates shall interview witnesses in the absence of the Charged Person, any other party, or their lawyers, in a place and manner that protects confidentiality."

[102] Pre Trial Chamber Decision on Nuon Chea Appeal Against OCIJ Order on Request for Transcription, 20 April 2010, Case 002 Document D194/3/2, at paragraph 26.

[103] The right of an accused to question witnesses against them is guaranteed in Article 15(3)(e) of the ICCPR, which provides that, in the determination of any criminal charge, all accused shall be entitled to "<u>examine, or have examined, the witnesses against him</u> and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him" (emphasis added). As indicated in the Introduction, this provision is directly applicable at the ECCC. See also Article 6(3)(d) of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

[104] All of the legal instruments applicable in the proceedings before ECCC recognise this important principle. The Preamble to the Agreement between the United Nations and the Royal Government of Cambodia on the ECCC links the establishment of the ECCC to "the pursuit of justice and national reconciliation, stability, peace and security" in Cambodia. Sub-article 12(2) of the Agreement states: "The Extraordinary Chambers shall exercise their jurisdiction in accordance with international standards of justice, fairness and due process of law, as set out in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights, to which Cambodia is a party. In the interest of securing a fair and public hearing and credibility of the procedure, it is understood that representatives of Member States of the United Nations, of the Secretary-General, of the media and of national and international non-governmental organizations will at all times have access to the proceedings before the Extraordinary Chambers. Any exclusion from such proceedings in accordance with the provisions of Article 14 of the Covenant shall only be to the extent strictly necessary in the opinion of the Chamber concerned and where publicity would prejudice the interests of justice." See also: Article 34 new of the Law on the ECCC ("Trials shall be public and open to representatives of foreign States, of the Secretary-General of the United Nations, of the media and of national and international nongovernment organizations unless in exceptional circumstances the Extraordinary Chambers decide to close the proceedings for good cause in accordance with existing procedures in force where publicity would prejudice the interests of justice."); Sub-rule 21(1) of the

73. The ECCC Internal Rules protect the right of the Accused to test the evidence given by witnesses against them in the following terms: "The Accused shall have the absolute right to summon *witnesses against him or her* whom the Accused had no opportunity to examine during the pre-trial stage" (emphasis added).[105] However, the Rules do not provide any guidance on the meaning of the phrase "witnesses against him or her." The Defence for **Nuon Chea** have argued that the phrase should be interpreted to mean "any individual whose testimony tends to prove any aspect of the prosecution case."[106] The **Khieu Samphan** Defence argued that, despite the ECCC's civil law model, there is a presumption in favour of oral testimony at trial and the admission of witness statements in lieu of such testimonies should be permitted only on an exceptional basis.[107]

74. Such broad interpretations would result in the re-hearing of virtually all the witnesses whose statements were placed on the Case File during the judicial investigation. It would significantly extend the overall length of the proceedings.

75. To the extent that, in the civil law model, the witness interviews are undertaken by, or under the supervision of, independent and impartial judicial officers who have no interest in the outcome of the case, they are entitled to a rebuttable presumption of reliability:

"[A]s they are prepared under the judicial supervision of the Co-Investigating Judges with safeguards as to their authenticity and reliability, witness statements, particularly those referred to in the Closing Order, taken during the judicial investigation by the OCIJ are entitled to a presumption of reliability. This presumption may be rebutted only where cogent reasons are provided by the parties, supported by clear evidence that the statements in question are unreliable or inaccurate."[108]

76. This would seem to militate against a broad interpretation of a right to cross examine all witnesses at trial as suggested by the Defence. But it obviously cannot go so far as to displace the Defence's right to an adequate opportunity to challenge the case against their client. The ECCC Trial Chamber has sought to resolve the tension between the accused's rights and the need to conduct the proceedings expeditiously by adopting (and partly adapting) the rules in force at the ICTY and ICTR – the international tribunals for

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Internal Rules ("The applicable ECCC Law, Internal Rules, Practice Directions and Administrative Regulations shall be interpreted so as to always safeguard the interests of Suspects, Charged Persons, Accused and Victims and so as to ensure legal certainty and transparency of proceedings, in light of the inherent specificity of the ECCC, as set out in the ECCC Law and the Agreement."); and Sub-rule 79(6).

105 Sub-rule 84(1). A level of confusion arises from the fact that only the English language version of the rule uses the adjective "absolute" in reference to the right to summon witnesses.

106 Response to OCP Submission Regarding the Admission of Written Witness Statements, 21 July 2011, Case 002 Document E96/1, at paragraph 4(b).

107 Observations in Response to Co-Prosecutors' Submission Regarding the Admission of Written Witness Statements, 22 July 2011, Case 002 Document E96/4, at paragraph 30.

108 Trial Chamber Decision on Defence Requests Concerning Irregularities Alleged to Have Occurred During the Judicial Investigation, 7 December 2012, Case 002 Document E251, at paragraph 22 (internal references omitted); See also Decision on Nuon Chea's Request For a Rule 35 Investigation Regarding Inconsistencies in the Audio and Written Records Of OCIJ Witness Interviews, 13 March 2012, Case 002 Document E142/3, at paragraph 12.

the former Yugoslavia and Rwanda. Relying on those rules, the Chamber held that witness statements taken by the CIJ (and other bodies[109]) are *prima facie* admissible but that they may be given little probative value in the absence of an opportunity for the Accused's counsel to cross examine the authors of the statements.[110] Factors which militate in favour of admitting a statement include the extent to which the statement is: of a cumulative nature; relates to relevant historical, political or military background; concerns crime-base evidence; goes to proof of threshold elements of international crimes (such as the existence of an international armed conflict); consists of a general or statistical analysis; or concerns the impact of crimes upon victims.[111]

77. In any event, a statement that goes to proof of the acts and conduct of the accused as charged in the indictment is inadmissible absent an opportunity for an Accused and his / her counsel to cross examine the witness.[112] The ICTY Appeals Chamber has essentially equated the phrase "acts and conducts of the accused as charged in the indictment" to the modes of liability applicable in international criminal law - namely, committing (directly or by way of JCE), ordering, aiding and abetting or instigating a crime, and superior responsibility. According to the Appeals Chamber, a statement may not be admitted in lieu of oral testimony if it goes to proof of any act or conduct of the accused upon which the prosecution seeks to establish one or more of the following:

    (a) that the accused committed (that is, personally physically perpetrated) any of the crimes charged himself

    (b) that the accused planned, instigated or ordered the crimes charged

    (c) that the accused otherwise aided and abetted those who actually did commit the crimes in their planning, preparation or execution of those crimes

    (d) in a JCE case, that the accused:

        i. participated in the joint criminal enterprise, or

        ii. shared with the person who committed the crimes charged the requisite intent

    (e) in a command / superior responsibility case, that the accused:

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109 It is a common feature of international criminal trials that statements of potential witnesses will have been taken by a variety of human rights organisations, researchers and journalists. In the case of the ECCC, hundreds of such statements were obtained by the Documentation Centre of Cambodia (http://www.dccam.org/), a non-profit organisation which holds the world's largest archive of Khmer Rouge-era documentary materials.

110 Trial Chamber Decision on Co-Prosecutors' Rule 92 Submission Regarding the Admission of Witness Statements and Other Documents Before the Trial Chamber, 20 June 2012, Case 002 Document E96/7, at paragraphs 17 – 20, 27, 29.

111 Ibid, at paragraph 24. These criteria are taken from the ICTY Rule 92*bis*.

112 Ibid, at paragraph 22. Adopting the ICTY approach, the Chamber found that such statements are excluded under the ECCC Internal Rule 87(3)(d), which provides that evidence may be excluded if it is "not allowed under the law." Such statements may nevertheless be admitted if the authors are deceased or unavailable – see Trial Chamber's decision at paragraph 32 and ICTY rule *92quater*.

i. was a superior to those who actually did commit the crimes

ii. knew or had reason to know that those crimes were about to be or had been committed by his/her subordinates, or

iii. failed to take reasonable steps to prevent such acts or to punish those who carried out those acts; or

(f) the accused's state of mind in relation to any of the above modes of liability or substantive criminal offence (e.g. genocidal intent).[113]

78. In a case such as the ECCC Case 002, where senior political leaders are alleged to be responsible for a range of criminal policies and practices targeting an entire civilian population, the "acts and conduct" test will essentially exclude any (inculpatory) evidence which describes the activities of the accused in the establishment or operation of the regime. This represents a wide exclusion in relation to the admission of witness statements at trial.

79. On the other hand, the principle excludes only the evidence that relates to the acts and conduct of the accused. Thus, in a JCE case, statements containing evidence of the acts and conduct of members of the JCE *other than the accused* may be admitted.[114] The prosecution can also seek to have admitted written statements describing the acts and conduct of others on the basis of which it seeks to establish an accused's state of mind (e.g. knowledge of a widespread and systematic attack against a civilian population in cases involving Crimes Against Humanity).[115] Finally, where an accused is charged with liability on the basis of the acts of others (e.g. in superior responsibility cases), evidence of the acts and conduct of those others may be admitted by way of written statements, whereas evidence of the acts of the accused which would establish the accused's responsibility for those acts is inadmissible.[116]

80. It would appear that this approach strikes an appropriate overall balance between the right of the accused to a fair opportunity to test the evidence against them, and the need to ensure that complex criminal trials can be conducted expeditiously. The approach is also consistent with the case law of the European Court of Human Rights (ECHR), which has held that the admission of pre-trial statements in lieu of oral testimony does not contravene the relevant fair trial guarantees provided that: a) the Accused has had "an

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[113] *Prosecutor v. Galić*, IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule *92bis* (C), 7 June 2002, paragraphs 10 - 11.

[114] See, for example, *Prosecutor v. Stanišić and Simatović*, Case No. IT-03-69-T, Decision on Prosecution's Motion for Admission of Written Evidence, 7 October 2010, paragraph 42.

[115] *Prosecutor v. Galić*, IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule *92bis* (C), 7 June 2002, paragraph 11.

[116] *Prosecutor v. Karadžić,* Case No. IT-95-5/18-PT, Decision on Prosecution's Third Motion for Admission of Statements and Transcripts of Evidence in Lieu of Viva Voce Testimony Pursuant to Rule 92*bis* (Witnesses for Sarajevo Municipality), 15 October 2009, paragraph 5; *Prosecutor* v. *Hadžić,* Case No. IT-04-75-T, Decision on Prosecution Omnibus Motion for Admission of Evidence Pursuant to Rule 92*bis* and Prosecution Motion to Admit GH-139's Evidence Pursuant to Rule 92*bis,* 24 January 2013, paragraph 15.

adequate and proper opportunity" to challenge the evidence presented against him / her; and b) the written statement is not relied upon "solely or to a decisive degree" as evidence for the conviction.[117] The latter part of the ECHR test in particular reflects the principle that witness statements should only be admitted if they are corroborative of other evidence before the Court - a core feature of the rules applicable at the ICTY/R and now at the ECCC.

81. The Trial Chamber's approach in Case 002 introduces a significant departure from the traditional civil law model and has resulted in a far greater number of witnesses being heard at trial than would normally be the case in a civil law trial.[118] It has, nevertheless, ensured compliance with a core fair trial norm by giving the Accused the opportunity to challenge the key testimonial evidence put forward against them. At the same time, this approach has enabled the hearing of important evidence in open court and in full view of the public. In a country whose legal system is still in a process of transition, this has the potential to present major benefits for the development of the rule of the law and improvement of judicial standards. Public interest in the ECCC trials in Cambodia is extremely high. More than 100,000 Cambodians came to view the trial in Case 002.[119]

82. The admission of written statements in lieu of oral testimony at trial reflects the fact that international criminal trials are presided over by experienced professional judges who are able to scrutinise carefully the written material against a complex evidential matrix and ensure that it is given its appropriate weight. As Judge Kwon of the ICTY held in the *Milošević* case:

[B]y having a more flexible approach to the admission of witness statements, a Trial Chamber's ability to manage trials of a vast scale...more efficiently would be improved...While the risk will always exist that a statement may not provide a truthful account of events, or only a partially true one, this should not preclude the general admission of witness statements into evidence. Professional judges will be alert to such dangers, and have the ability to note discrepancies between written witness statements and actual testimony, and determine what weight should be granted to the evidence.[120]

83. However, the issue of the admission of written statements at the ECCC also highlights one of the challenges that the tribunal and the parties appearing before it have faced. Unlike the ICTY and ICTR, the ECCC did not have a rule dealing with the admission of

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[117] See *Unterpertinger v. Austria*, 24 November 1986, Application no. 9120/80, at paragraph 31; *Windisch v. Austria*, 27 September 1990, Application no. 1249/86, paragraphs 26 and 31; *Delta v. France*, 19 December 1990, Application no. 11444/85, paragraphs 36-37; *Asch v. Austria*, 26 April 1991, Application no. 12398/86, paragraphs 25, 27 and 30; *Saidi v. France*, 20 September 1993, Application no. 14647/89, paragraph 43; *Van Mechelen and Others v. the Netherlands*, 18 March 1997, Case no. 55/1996/674/861-864, paragraphs 49, 51, 55 and 76.

[118] In this trial, the Chamber heard the evidence of 92 individuals, including three expert witnesses, 53 fact witnesses, five character witnesses and 31 Civil Parties.

[119] See ECCC Press Release "Closing statements conclude in Case 002/01," 31 October 2013, available at http://www.eccc.gov.kh/en/articles/closing-statements-conclude-case-00201

[120] *Prosecutor v. Milosevic*, IT-02-54-T, Decision on Prosecution's Request to Have Written Statements Admitted Under Rule *92bis,* 21 March 2002, Declaration of Judge O-Gon Kwon paragraph 3.

witness statements in lieu of oral testimony. Nor do such specific rules exist in the Cambodian Code of Criminal Procedure. This meant that the judicial investigation in Case 002 was conducted without a clear legal position as to what use may be made at trial of the hundreds of statements that were being taken. The issue only arose for determination as a result of a motion filed by the Co-Prosecutors before the Trial Chamber.[121] The Trial Chamber's above decision, which dealt only with the applicable principles, was delivered in June 2012, by which time the trial was already in progress for over six months and the parties had already submitted their proposed lists of trial witnesses.[122] Following that decision, the defence were instructed to file their objections to the prosecution's proposed witness statements, and the prosecution was given an opportunity to respond.[123]

84. As with the issue of severance of the case (see Section 6), the issue of admission of witness statements continued to be litigated throughout the trial. A final decision on the admission of hundreds of proposed witness statements was delivered on 15 August 2013,[124] one month after the conclusion of the evidentiary proceedings and at a stage at which the parties were already engaged in the drafting of their closing briefs. It would certainly have been far more preferable for the Trial Chamber to have dealt with these matters at a much earlier stage of the proceedings. However, the delay in the rendering of a final decision is attributable at least in part to the absence of clear procedural rules (as well as the complexity of the case), a matter beyond the Chamber's control.

Witness Examination at Trial – A Further Refinement of the Civil Law Model

85. In a typical civil law trial, witnesses to be heard at trial are selected by the court. This reflects the civil law rule that "any witnesses or expert witnesses are the court's, not the parties'."[125] During trial proceedings, witnesses (and accused if they chose to testify) are examined first by the judges and then by the parties.[126]

86. These procedures may well be appropriate in domestic criminal trials which usually do not involve extensive documentary evidence and large numbers of witnesses. However,

[121] Co-Prosecutors' Rule 92 Submission Regarding the Admission of Written Witness Statements Before the Trial Chamber, 15 June 2011, Case 002 Document E96.

[122] The Co-Prosecutors' list of proposed trial witnesses was submitted in January 2011: see Co-Prosecutors' Rule 80 Expert, Witness and Civil Party Lists, Including Confidential Annexes 1,2,3, 3A, 4 and 5, 28 January 2011, Case 002 Document E9/4.

[123] Trial Chamber Memorandum entitled "Forthcoming document hearings and response to Lead Co-Lawyers' memorandum concerning the Trial Chamber's request to identify Civil Party applications for use at trial (E208/4) and KHIEU Samphan Defence request to revise corroborative evidence lists (E223)," 19 October 2012, Case 002 Document E223/2, at paragraph 14.

[124] Trial Chamber Decision on Objections to the Admissibility of Witness, Victim And Civil Party Statements and Case 001 Transcripts Proposed by the Co-Prosecutors and Civil Party Lead Co-Lawyers, 15 August 2013, Case 002 Document E299.

[125] Maximo Langer, "The Rise of Managerial Judging in International Criminal Law," *American Journal of Comparative Law*, Vol. 53, at p.843.

[126] This is reflected in the provisions dealing with the trial proceedings: see Internal Rules 90 and 91, and was the practice in the trial of Kaing Guek Eav *alias* Duch, Case 001.

in a complex mass crime trial, such as Case 002, this approach is far less practical. By the time Case 002 reached the Trial Chamber, it had gone through a comprehensive three year investigation in which hundreds of thousands of pages of evidence were placed on the Case File. Parties, unlike the trial judges, had extensive involvement in the judicial investigation and were intimately familiar with that evidence. In these circumstances, an adaptation of the civil law procedure to place the primary responsibility for the presentation of the case on the prosecution was not only appropriate but also necessary in order to ensure the expeditious conduct of the proceedings. The ECCC Plenary and the Trial Chamber have adopted provisions and procedures which make some progress toward this goal, but which, in the author's submission, do not go far enough.

87. In a shift towards an adversarial model of proceedings, the ECCC Plenary has adopted rules providing for the filing, in the pre-trial stage, of parties' lists of proposed witnesses and documentary evidence.[127] Within three months of Case 002 being forwarded to the Trial Chamber, the Co-Prosecutors submitted their lists of 6,500 exhibits and 295 proposed witnesses with brief factual summaries and an indication of the relevance of each item to specific allegations.[128] This enabled the Trial Chamber judges and the other parties to see the prosecution's case in an organised fashion.

88. In preparation for the commencement of evidentiary proceedings in Case 002, the Trial Chamber indicated that the President of the Chamber "may, by memorandum, assign to the Co-Prosecutors, individual Defence teams or [Civil Party] Lead Co-Lawyers the primary responsibility for examining specified witnesses, experts or Civil Parties."[129] In practice, the Chamber directed that the prosecutors, civil party lawyers and defence lawyers lead the examination of all the witnesses they had proposed.[130] This procedure enabled the examinations to be more focused and efficient as counsel were more familiar with the evidence which the witnesses were expected to give[131] and with the overall structure of the case. It also freed up the judges to absorb the evidence, while ruling on a myriad of procedural issues as the trial unfolded. At the same time, the judges took the opportunity to put additional questions to the witnesses whenever they felt that was necessary.

89. It is submitted that, even with these useful adaptations, the trial proceedings at the ECCC suffer from a degree of procedural complexity that would appear to be entirely

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127 See Rule 80.

128 See Co-Prosecutors' Rule 80 Witness, Civil Party and Expert Summaries, 23 February 2011, Case 002 Document E9/13; Co-Prosecutors' Rule 80 (3) Trial Document List, 29 April 2011, Case 002 Document E9/31.

129 Trial Chamber memorandum entitled "Response to issues raised by parties in advance of trial and scheduling of informal meeting with Senior Legal Officer on 18 November 2011," 17 November 2011, Case 002 Document 141, p.3.

130 See, for example: Trial Chamber Memorandum entitled "Next group of witnesses and experts to be heard in Case 002/01," 15 December 2011, Case 002 Document E155; Trial Chamber Memorandum entitled "Updated memorandum for next document hearing (12 – 19 March 2012), 2 March 2012, Case 002 Document E172/2, paragraph 7; Trial Chamber Memorandum entitled "Consolidated schedule of witnesses and experts for early 2013," 8 January 2013, Case 002 Document E236/4.

131 Counsel at the ECCC are not permitted to proof their witnesses.

unnecessary. While witnesses are now questioned primarily by counsel, they are still selected by the Trial Chamber. This means that, while the prosecution has the onus to prove the guilt of the Accused beyond a reasonable doubt,[132] it has no control over what witnesses are called in support of its case.[133] In practice, the prosecution has to monitor the Trial Chamber's selection of witnesses as the trial progresses, and file additional requests where it is felt that the Chamber has omitted important witnesses. Given the complexity of the case, such requests have to be made in writing and are extremely time consuming.[134] The Defence are in a similar position: they can only propose the witnesses to be heard in support of their case, but have no control over their final selection.

90. The process of witness selection and scheduling proceeds primarily on the papers, with the Chamber issuing tentative lists of witnesses to be heard, and then informing the parties of any changes in the schedule.[135] The witnesses are selected in phases as the trial progresses. This means that the parties do not have a clear view, at the start of the trial, of all of the witnesses who will be heard. Furthermore, witness scheduling is handled by the Chamber's staff and changes in the order of call are communicated to the parties on an *ad hoc* basis as and when they arise.

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[132] Sub-rule 87(1).

[133] This procedural reality is not reflected in the language of Sub-rule 80(1), which provides, in part: "The Co-Prosecutors shall submit to the Greffier of the Chamber a list of the witnesses…and experts *they intend to summon* 15 (fifteen) days from the date the Indictment becomes final." (emphasis added). Sub-rule 84(2) clarifies the position somewhat: "After the schedule is decided, the Greffier of the Chamber shall summon all the *approved* witnesses and experts, who shall respond to such summons and appear during the proceedings before the Chamber in accordance with these IRs." (emphasis added).

[134] Several such filings were made by the parties throughout the trial. They include: Nuon Chea Defence Request to Hear Defence Witnesses and to Take Other Procedural Measures in Order to Properly Assess Historical Context, 16 March 2011, Case 002 Document E182; Co-Prosecutors' Request To Hear a Further 2 Experts And 13 Witnesses in the First Phase of the Trial and Notice of Intention to Put 7 Video-Clips Relating to Nuon Chea Before the Trial Chamber Pursuant To Rule 87(4) (Confidential Filing), 5 July 2011, Case 002 Document E93/7.

[135] The first tentative list was issued by the Trial Chamber at the initial hearing on 27 June 2011(Case 002 Transcript E1/4.1, 27 June 2011, at 09.22.10). The evidence of these witnesses related primarily to contextual issues and the roles of the Accused. Several of the witnesses were ultimately not heard. These and other changes, as well as changes in scheduling, were communicated on an ongoing basis as the trial progressed. See, for example: Trial Chamber Memorandum entitled "Witness lists for early trial segments, deadline for filing of admissibility challenges to documents and exhibits, and response to Motion E109/5, 25 October 2011, Case 002 Document E131/1; Trial Chamber Memorandum entitled "Revised order of witnesses for current segment of Case 002/01," 28 March 2012, Case 002 Document E172/10; Trial Chamber memorandum entitled "Further information regarding scheduling of proposed experts," 11 April 2012, Case 002 Document E172/17; Trial Chamber Memorandum entitled "Order of witnesses for current segment of Case 002/01," 11 May 2012, Case 002 Document E194; Trial Chamber Memorandum entitled "Next witnesses in current segment of Case 002/01," 15 June 2012, Case 002 Document E172/27; Trial Chamber Memorandum entitled "Next witnesses in current segment of Case 002/01," 7 August 2012; Trial Chamber Memorandum entitled "Individuals sought by the parties to be heard at trial," 2 October 2012, Case 002 Document E236; Trial Chamber Memorandum entitled "Announcement of Upcoming Witnesses," 26 November 2012, Case 002 Document E236/2. A tentative list for witnesses relating to the crime base was issued on 2 October 2012, some 10 months into the trial: see Trial Chamber Memorandum entitled "Preliminary indication of individuals to be heard during population movement trial segments in Case 002/01," 2 October 2012, Case 002 Document E236/1.

91. These features of the proceedings make counsel's preparation throughout the trial significantly more difficult.[136] Sufficient preparation at the ECCC is crucial not only because of the complexity of the cases, but also because the legal teams (prosecution, defence and civil parties) all comprise national and international lawyers who must work together (often through interpreters) in preparing their witness examinations. The Trial Chamber requires counsel to upload copies of all the exhibits which they intend to use in their examination of witnesses onto an electronic interface 24 hours before the examination.[137] This further shortens the time available to counsel for the identification of relevant exhibits and preparation for the examination of individual witnesses.

92. The Trial Chamber's exclusive control over the selection of witnesses also has the potential to extend significantly the overall length of proceedings before the Court. The decisions on the selection of witnesses are not subject to appeal other than as part of an appeal against the judgment.[138] This means that any significant omissions which unfairly prejudice a party's case cannot be remedied while the trial is still in progress. On appeal, the Supreme Court Chamber has no power to remit the case back to the Trial Chamber.[139] Therefore, if it finds that the Trial Chamber committed a significant error, it would have no option but to re-open the evidentiary proceedings.

93. It is submitted that it would be far more preferable for the ECCC to adopt an approach whereby the parties would be permitted to select their own witnesses and present their evidence within overall time allocations determined by the Chamber after hearing the parties.[140] The Trial Chamber may be able to provide for this within the existing trial management provisions.[141] The Chamber would in any event retain its power to call any

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136 See, for example, Co-Prosecutors' Trial Management Request, 14 December 2011, Case 002 Document E153, stating, at paragraph 4: "The Co-Prosecutors remain concerned that there is a 'need to provide the Parties with sufficient notice of the future scheduling of the trial proceedings, including an indication of when witnesses and experts will be called to testify.' This is particularly the case with witnesses who will testify to both the structure of the CPK or DK and the roles of the Accused. Aside from substantive preparation and the time needed for proper consultation and coordination among the national and international staff of their Office, the Co-Prosecutors anticipate the need to put multiple documents to such witnesses, which entails a number of practical preparatory steps in the interests of efficient use of trial time" (internal references omitted).

137 See, for example, Trial Chamber Memorandum entitled "Scheduling of Trial Management Meeting to enable planning of the remaining trial phases in Cases 002/01 and implementation of further measures designed to promote trial efficiency," 3 August 2012, Case 002 Document E218, at paragraph 23.

138 The limited grounds for interlocutory appeals set out in Rule 104(4).

139 See Sub-rules 104(2) and (3) and 111(3).

140 See Sub-rules 73*bis* (C) and 73*ter* (D) and (E) of the ICTY Rules of Procedure and Evidence, which empower ICTY trial chambers to determine the number of witnesses the Prosecutor and the Defence may call and the time available to the parties to present their evidence.

141 See, for example: Sub-rule 91 ("The Chamber shall hear the Civil Parties, witnesses and experts in the order it considers useful."); Sub-rule 91*bis* ("The President of the Trial Chamber shall determine the order in which the judges, the Co-Prosecutors and all the other parties and their lawyers shall have the right to question the Accused, the witnesses, experts and Civil Parties."); and Sub-rule 21(4) ("Proceedings before the ECCC shall be brought to a conclusion within a reasonable time.").

additional witnesses whose appearance it considers necessary,[142] and to supplement counsel's examinations of witnesses by questions from the bench, as it has done in Case 002. It would also be prudent to amend the ECCC Internal Rules to provide for interlocutory appeals, with leave, against decisions which may have a material impact on the fair and expeditious conduct of the proceedings or the outcome of the trial, as is the case at the ICTY and ICTR.[143]

94. Civil law purists may criticise this proposed change as forcing adversarial features into the inquisitorial trial. However, this proposal reflects the reality that complex international trials are conducted more efficiently where the prosecution is put to proof of its case, and the judges freed up to oversee the proceedings, and hear (as opposed to adduce) the evidence. Certainly, this approach assumes that the Judges would retain an active role in managing the proceedings, which is a core feature of the civil law trial. In this regard, it is relevant to note that the ICTY, whose procedures were initially more akin to the traditional adversarial model, adopted a number of provisions to enable the judges to more actively manage the proceedings, thus moving more towards hybrid procedures.[144]

Severance of Case 002

95. While a detailed discussion of the history of severance of Case 002 is beyond the scope of this paper, the severance decisions will be dealt with briefly as they further demonstrate the challenges which arise from a lack of universally accepted principles of criminal procedure, and the use of an untested civil law model to prosecute cases of international crime. The severance decisions have proved to be particularly controversial as they have narrowed the scope of the first and possibly only trial of the senior leaders to charges which are far from representative of the Khmer Rouge atrocities. These decisions may significantly limit the ECCC's ability to render justice for the Cambodian people and the international community as a whole.

Severance of Case 002 and Appeal Decisions

96. On 22 September 2011, some eight months after being seised of the case, and two months before the start of the trial, the Trial Chamber ordered the severance of Case 002 into a series of trials. The first of these, Case 002/01, was intended to set a foundation for subsequent trials and deal only with some of the crimes alleged against

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142 See Sub-rules 87(1) and (4). The Chamber also has the power to initiate additional investigations. Sub-rule 93(1) provides: "Where the Chamber considers that a new investigation is necessary it may, at any time, order additional investigations. Such order shall indicate which judge or judges shall conduct the new investigation."

143 Sub-rule 73(B) of the Rules of Procedure and Evidence of ICTY provides: "Decisions on all motions are without interlocutory appeal save with certification by the Trial Chamber, which may grant such certification if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings." ICTR Sub-rule 73(B) is in identical terms

144 See, for example, Sub-rule 90 (F) of the ICTY Rules of Evidence and Procedure, which provides: The Trial Chamber shall exercise control over the mode and order of interrogating witnesses and presenting evidence so as to (i) make the interrogation and presentation effective for the ascertainment of the truth; and (ii) avoid needless consumption of time.

the Accused.[145] The scope of Case 002/01 (incorporating a subsequent expansion) included:

Contextual issues

(a) The structure of Democratic Kampuchea and the regime's lines of communication

(b) Roles of the Accused during the period prior to and during DK, their responsibilities and the extent of their authority; and

(c) Policies of Democratic Kampuchea on the issues raised in the Indictment.

Specific crimes

(a) The forced evacuation of Phnom Penh in April 1975

(b) A mass execution of Khmer Republic soldiers, officers and officials at a site in Cambodia's Pursat Province, known as Tuol Po Chrey, immediately following the evacuations of urban centres; and

(c) A second forced transfer of up to half a million of people to the North and Northwest of the country in late 1975 and 1976.[146]

97. As a result of the above severance decision, the first trial before the ECCC did not include charges of Genocide and Grave Breaches of the Geneva Conventions, but focused solely on select Crimes Against Humanity.

98. On 8 February 2013, the severance of Case 002 (which comprised a series of decisions made during the first year of the trial) was quashed by the ECCC Supreme Court Chamber (SCC) on appeal by the Co-Prosecutors.[147] As urged by the Co-Prosecutors, the SCC endorsed the test of "reasonable representativeness" in the severance / selection of charges, which the Trial Chamber had found to be inapplicable at the ECCC.[148]

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[145] Severance Order Pursuant to Internal Rule 89ter, 22 September 2011, Case 002 Document E124; Trial Chamber Decision on Co-Prosecutors' Request for Reconsideration of the Terms of the Trial Chamber's Severance Order (E124/2) and Related Motions and Annexes, 18 October 2011, Case 002 Document E124/7, at paragraph 10.

[146] Severance Order Pursuant to Internal Rule 89ter, 22 September 2011, Case 002 Document E124, paragraphs. 1, 5; Trial Chamber Memorandum titled "Notification of Decision on Co-Prosecutors' Request to Include Additional Crime Sites within the Scope of Trial in Case 002/01 (E163) and deadline for submission of applicable law portion of Closing Briefs," 8 October 2012, Case File 002 Document E163/5, paragraph 3.

[147] Supreme Court Chamber Decision on the Co-Prosecutors' Immediate Appeal of the Trial Chamber's Decision Concerning the Scope of Case 002/01, 8 February 2013, Case 002 Document E163/5/1/13.

[148] Ibid, paragraph 42, stating: "The…consideration of the possibility to sever a criminal case such that the cases as severed are reasonably representative of an indictment, particularly where there is real concern about having more than one

99. The test of reasonable representativeness emerges from the jurisprudence of the ICTY. Unlike the Internal Rules of the ECCC, the Rules of Procedure and Evidence (RoPE) of the ICTY provide detailed guidance to the Court in deciding on narrowing the scope of charges to be heard at trial. Under Rule 73*bis* (D) of the RoPE, a trial chamber may, after hearing the Prosecutor:

[F]ix a number of crime sites or incidents comprised in one or more of the charges in respect of which evidence may be presented by the Prosecutor which, having regard to all the relevant circumstances, including the crimes charged in the indictment, their classification and nature, the places where they are alleged to have been committed, their scale and the victims of the crimes, are reasonably representative of the crimes charged. (emphases added)

100. The SCC found that the Trial Chamber had committed an error of law and an error in the exercise of its discretion by failing to:

(a) invite the parties' submissions prior to severing the case; and

(b) consider whether the severed trial was reasonably representative of the Indictment as a whole.[149]

101. The SCC was also critical of the Trial Chamber's decision to keep the scope of Case 002/01 under consideration for an entire year while the evidentiary proceedings were in progress, as well as the Trial Chamber's failure to formulate a plan for the adjudication of the remaining charges.[150] The SCC held that, should the Trial Chamber seek to sever the case again in the expectation that all the charges could not be heard during the lifespan of the Accused, it had to ensure that the charges included in the first trial are reasonably representative of the Indictment.[151]

102. Following this decision, the Trial Chamber severed the case in the same manner as it had done prior to the SCC appeal decision.[152] The Trial Chamber confirmed that its decision was directed at arriving at a judgment within the lifetime of the elderly Accused:

Mindful that an attempt to try the entirety of the Case 002 Closing Order would be unlikely to result in a timely verdict, the Trial Chamber, in opting for the severance of proceedings and

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case arrive at a judgment on the merits, is dictated by common sense and the interests of meaningful justice, and conforms with comparable international legal standards."

149 Ibid, paragraphs 40 - 44, 48 - 49.

150 Ibid, paragraphs 46 - 47.

151 Ibid, at paragraph 50: "If, however, faced with the deteriorating health of the Co-Accused, the principal motivation is that justice is better served by concluding with a judgement, whether in a conviction or acquittal, of at least one smaller trial on some portion of the Indictment, then the Trial Chamber should state this clearly and give due consideration to reasonable representativeness of the Indictment within the smaller trial(s). (emphasis added).

152 Trial Chamber Decision on Severance of Case 002 following Supreme Court Chamber Decision of 8 February 2013, 26 April 2013, Case 002 Document E284.

the continuation of the trial, clearly seeks to ensure that at least a portion of the Indictment is heard within the natural lifespan of the Accused or while they remain fit to be tried.[153]

103. Nevertheless, despite the legal guidance given in the above SCC decision, the Trial Chamber dismissed the principle of reasonable representativeness. It found that, because this legal test emerged from the jurisprudence of the ICTY and ICTR, which apply an adversarial procedure, it was "meaningless" in the context of the ECCC's inquisitorial proceedings. According to the Trial Chamber, this conclusion followed from the fact that ECCC indictments are judicial acts and that (unlike the case at the ICTY / ICTR), criminal charges at the ECCC cannot be withdrawn.[154] The Trial Chamber held that, in any event, the charges it had selected were reasonably representative of the Indictment as a whole, although they did not include a single security centre, forced labour site or a Genocide charge.[155]

104. In the Author's respectful submission, the Trial Chamber's reasoning in the second severance decision represented a triumph of form over substance and a failure to apply correctly the relevant legal principles. The test of reasonable representativeness is grounded in the rationale that, where it may not be impossible to try an accused for all the crimes they may have committed, the trial court should seek to narrow down the charges to those that are most reflective of the scope and nature of the accused's alleged criminality. This is done by reference to such matters as the types of charges, the number of alleged incidents and the number and composition of victims.[156] The principle of reasonable representativeness is relevant universally in cases of mass atrocities, and its content has little if anything to do with the procedural framework of the ICTY.

105. The fact that the ECCC legal framework does not provide for a withdrawal of charges is irrelevant to the consideration of what charges an Accused should face when it is unlikely (as the Trial Chamber recognised) that a trial encompassing all the charges can be completed within his / her lifespan. In other words, the immediate procedural consequences of severance (whether withdrawal, termination or deferral of charges) are irrelevant when it is likely that the eventual death of the Accused will lead to the termination of proceedings before all the charges can be adjudicated. As the SCC held in its decision on the first severance appeal:

Even if the ECCC could be said to operate under a strictly inquisitorial system [a proposition which the Chamber dismissed], the Supreme Court Chamber finds no basis for the Trial

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[153] Ibid, paragraph 95.

[154] Ibid, at paragraphs 98 - 99.

[155] Ibid, at paragraphs 108 – 120.

[156] ICTY, *Prosecutor v Haradinaj*, Decision Pursuant to Rule 73*bis* (D), 22 February 2007, Case IT-04-84-PT, at paragraph 11; ICTY, *Prosecutor v. Vojislav Šešelj*, Decision on the Application of Rule 73*bis*, 8 November 2006, Case No. IT-03-67, at paragraphs 27 – 32; ICTY, *Prosecutor v. Milutinović*, Decision on Application of Rule 73*bis*, 11 July 2006, Case No. IT-05-87, at paragraphs 7, 10 - 12.

Chamber's implication that this inherently renders it unnecessary to…consider whether the cases as severed can be reasonably representative of the Indictment.[157]

106. In light of the SCC's specific instruction as to the applicable legal standard, and the possibility that the Accused will not be fit to stand future lengthy trials, the Trial Chamber was obliged to sever the case in a manner that ensures that the first trial is reasonably representative of the entire indictment. This may not have even required the inclusion of samples of <u>every</u> underlying crime. However, it certainly would have required the inclusion of charges that were representative of <u>at least</u> the main underlying themes of the case. For example, in *Milutinović*, the ICTY Trial Chamber narrowed down the scope of trial to those charges that it considered to be representative of the "fundamental nature or theme of the case"[158] in order to satisfy the requirement of reasonable representativeness. In Case 002, allegations concerning the CPK's network of security centres, and especially S-21, which operated under the leaders' direct supervision, lie at the core of the joint criminal enterprise.[159] These sites also represented the single largest category of criminal events included in the Indictment (11 sites in total). Yet, not a single one of them was included in trial 002/01.

107. In their appeal of the Trial Chamber's second severance decision, the Co-Prosecutors urged the Supreme Court Chamber to order the Trial Chamber to include in the scope of the first trial the S-21 crime site as it represented the pinnacle of the Khmer Rouge slave state. The Co-Prosecutors stated:

The fair and proper resolution of this Appeal is the last opportunity for the ECCC to seek the accountability of these Accused for some of the most serious crimes under international humanitarian law…The Co-Prosecutors cannot seek accounting for all crimes committed during the period of Democratic Kampuchea. However, they do firmly believe that it is their duty to ensure in Case 002 that there is a reasonable and realistic attempt to more accurately represent the total criminality that was the policies of the Khmer Rouge. The window to obtain this more representative justice is fast closing.[160]

108. The Trial Chamber decision was also appealed by the Nuon Chea Defence who argued, *inter alia*, that the allegations in Case 002 are "too closely related to permit meaningful separation into distinct trials," and that the limited scope of Case 002/01 had

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157 Supreme Court Chamber Decision on the Co-Prosecutors' Immediate Appeal of the Trial Chamber's Decision Concerning the Scope of Case 002/01, 8 February 2013, Case 002 Document E163/5/1/13, paragraph 42.

158 *Prosecutor v. Milutinović*, Decision on Application of Rule 73*bis*, 11 July 2006, Case No. IT-05-87, at paragraphs 7, 10.

159 In his book, Expert Witness Philip Short described S-21 as "the distillation, the reflection in concentrated form of the slave state which Pol [Pot] had created" (See Philip Short, *Pol Pot: The History of a Nightmare*, 2005, at p.365) . When asked about this passage in his evidence before the Court, he testified: "[I]n the dystopian vision that the Communist Party of Kampuchea had, freedoms were equated with individuality and were suppressed throughout the country. And the place where freedoms were most completely suppressed, including eventually the freedom to live, was Tuol Sleng. In that sense, it was the apex of that pyramid." Testimony of Philip Short, 8 May 2013, Case 002 Transcript E1/191.1, at 09.20.46.

160 Co-Prosecutors' Immediate Appeal of Second Decision on Severance of Case 002, 10 May 2013, Case 002 Document E284/2/1, at paragraph 2.

prejudiced Nuon Chea "most seriously by hindering his ability to mount a full and effective defence."[161]

109. Ruling on these appeals (initially) by way of summary reasons, the Supreme Court Chamber held that the Trial Chamber's failure to comply with its instructions as to the applicable legal test constituted an error of law and an error in the exercise of its discretion.[162] It also held:

[C]onsidering the advanced age of the accused and their deteriorating health, the notion of representativeness of the Indictment is valid for the question of severance of Case 002 in so far as it determines priority in addressing the severed charges. Case 002/01 could be reasonably representative of the Indictment not just by expanding its scope to include S-21, as per the Co-Prosecutors' request, but also by including the genocide charges, a cooperative, and a worksite, as per Nuon Chea's request.[163]

110. In its full reasons rendered shortly prior to the completion of this paper, the Supreme Court Chamber specifically dismissed the Trial Chamber's reliance on procedural differences between the ICTY / ICTR and the ECCC as the basis for a finding that reasonable representativeness was not a valid criterion in the severance of charges before the ECCC.[164] The SCC further stated:

[T]he Trial Chamber cannot genuinely claim, on the one hand, that the declining health and physical frailty of the Co-Accused requires that Case 002 be severed so that at least one timely verdict within the lifespan of the Co-Accused may be reached while deciding, on the other hand, that the fact that no future charges or trials are legally discontinued renders it unnecessary, even meaningless, to ensure that the scope of what is being selected for trial and adjudication is reasonably representative of the Indictment.[165]

111. However, citing the Trial Chamber's apparent unpreparedness to adjudicate a broader set of charges at this advanced stage of the trial, the SCC declined to order an expansion of Case 002/01. It found that such an order would, in all the circumstances, "inevitably result in unnecessary delays."[166] The SCC held instead that an expanded set of charges must be included in a subsequent trial (Case 002/02), which must commence as soon as possible. It directed the Court's Office of Administration to "immediately explore the establishment of a second panel of national and international judges within

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[161] Immediate Appeal Against Trial Chamber's Second Decision on Severance and Response to Co-Prosecutors' Second Severance Appeal, 27 May 2013, Case 002 Document E284/1/1, see paragraphs 12 and 13.

[162] Supreme Court Chamber Decision on Immediate Appeals Against Trial Chamber's Second Decision on Severance of Case 002 - Summary Of Reasons, 23 July 2013, Case 002 Document E284/417, at paragraph 9.

[163] Ibid, at paragraph 10.

[164] Supreme Court Chamber Decision on Immediate Appeals Against Trial Chamber's Second Decision on Severance of Case 002, 25 November 2013, Case 002 Document E284/4/8, at paragraphs 63 and 64.

[165] Ibid, at paragraph 65.

[166] Supreme Court Chamber Decision on Immediate Appeals Against Trial Chamber's Second Decision on Severance of Case 002 - Summary Of Reasons, 23 July 2013, Case 002 Document E284/417, at paragraphs 10 - 11.

the Trial Chamber to hear and adjudicate Case 002/02."[167] In its full reasons, the SCC stated:

The Supreme Court Chamber is therefore compelled to exercise its corrective jurisdiction in order to ensure that at least the irreducible minimum of the remaining charges in the Closing Order is adjudicated appropriately. The Supreme Court Chamber considers that the most appropriate course of action would be to instruct that those charges that should have been included within the scope of Case 002/01 will instead form the limited scope of Case 002/02, so that the combination of Cases 002/01 and 002/02 will be reasonably representative of the Indictment.[168]

112. The SCC also gave specific indication of the types of charges that would need to be included in a second trial to achieve the goal of reasonable representativeness. These include Genocide, crimes committed at S-21, and charges relating to CPK worksites and cooperatives.[169]

113. The Trial Chamber scheduled a trial management hearing for 11-13 December 2013, at which it will hear the parties' submissions on the scheduling of a second trial.[170] The Chamber has thereby kept itself seised of the remaining portions of the Indictment. It remains unclear how the Chamber intends to implement the SCC's instruction, although the SCC has now made it clear that the formation of a second trial panel is within the mandate of the President of the Trial Chamber.[171] At the same time, the dispositive of the SCC Decision does not include an *order* for the formation of a second panel but only an order that proceedings in Case 002/02 commence as soon as possible.[172]

Implications of the Severance Decisions

114. The above decisions have resulted in significant uncertainty with respect to the adjudication of the remaining charges against the Accused. As at the time of writing, a second panel for Case 002/02 has not been established. The ECCC has experienced ongoing funding challenges and no provision has been made for a second trial panel in the Court's budget for 2014/15.[173]

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167 Ibid, at paragraph 11; See also Order Regarding the Establishment of a Second Trial Panel, 23 July 2013, Case 002 Document E284/4/7/l.

168 Supreme Court Chamber Decision on Immediate Appeals Against Trial Chamber's Second Decision on Severance of Case 002, 25 November 2013, Case 002 Document E284/4/8, at paragraph 70.

169 Ibid, at paragraph 71.

170 Case 002 Draft Transcript, 31 October 2013, at 14.18.37. The hearing was in progress at the time of finalisation of this paper.

171 Supreme Court Chamber Decision on Immediate Appeals Against Trial Chamber's Second Decision on Severance of Case 002, 25 November 2013, Case 002 Document E284/4/8, at paragraph 74.

172 Ibid, at paragraph 76.

173 UN Document A/68/532, Request for a subvention to the Extraordinary Chambers in the Courts of Cambodia: Report of the Secretary-General, 16 October 2013, at paragraphs 3 and 20.

115. The author submits that, despite the SCC's excellent reasoning on the issues of substantive legal principle, the relief granted by the SCC has the potential to further delay rather than expedite the conclusion of all proceedings before the ECCC. As the SCC itself recognised, starting a second trial (rather than simply expanding the scope of Case 002/01) will involve inevitable delays. Those delays will likely be even greater if a completely new panel is convened to preside over the second trial. New Judges may not consider themselves bound by decisions rendered by the first panel (in particular in relation to the admission of documentary evidence which applies to the case as a whole) and may decide to (re)hear numerous witnesses.

116. The President of the Trial Chamber could in principle propose to form a second panel with some or all of the judges who sat on Case 002/01. However, these judges (and their legal officers) also face a significant workload in drafting the judgment in Case 002/01, and the delivery of that judgment should not be delayed. The judgment in Case 001 (against **Kaing Guek Eav *alias* Duch**), a case significantly less complex than Case 002/01, was issued nine months after the conclusion of the parties' closing arguments.[174] The SCC's judgment in that case was issued a year and a half later.[175]

117. There is significant pressure on the Court to commence a second trial as soon as possible.[176] Taking into account the advanced ages of the remaining two Accused and the Court's funding constraints, the opportunity to adjudicate a more representative set of charges against **Nuon Chea** and **Khieu Samphan** is fast disappearing. A recent SCC decision also made it clear that any prolongation in the start of a second trial may result in a release of the Accused from trial detention.[177]

118. The Defence for **Khieu Samphan** have opposed the commencement of a second trial before any appeals against the judgment in the first case are dealt with. They argue that, given the interconnectedness of the charges in the Case 002 Indictment, they should not be required to formulate a defence strategy in Case 002/02 until Case 002/01 has been finally determined.[178]

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174 The closing arguments concluded on 27 November 2009 and the judgement was rendered on 26 July 2010: Trial Chamber Judgment, 26 July 2010, Case 001 Document E188.

175 Appeal Judgment, 3 February 2012, Case 001 Document F28.

176 See, for example, Open Society Justice Initiative Position Paper, *Planning and Leadership Now Needed at ECCC*, November 2013.

177 Supreme Court Chamber Decision On Immediate Appeal Against The Trial Chamber's Decision On Khieu Samphan's Application For Immediate Release, 22 August 2013, Case 002 Document E275/2/3, at paragraph 40: "The abovementioned considerations and conclusions [as to the need to continue Khieu Samphan's detention] are only valid, however, provided that the need to guarantee Khieu Samphan's presence at trial persists in order to ensure the expeditious conduct of proceedings. The need to ensure Khieu Samphan's presence at trial may therefore diminish, if not extinguish, should there be no court activity, such as during the drafting of the judgment in Case 002/01, and this, coupled with an unjustified delay in the commencement of proceedings in Case 002/02, could constitute grounds for replacing detention with less stringent measures such as judicial supervision."

178 Draft Transcript, Case 002, 12 December 2013, at 11.38.03 – 11.49.03.

119. In *Mladić*, the ICTY Trial Chamber declined a prosecution motion to sever the indictment into back-to-back trials in circumstances similar to those in Case 002 (an elderly accused facing a set of charges involving mass crimes in different locations).[179] The Chamber held that the conduct of consecutive trials could prejudice the Accused's ability to participate personally in his defence: "[P]articipating in the pre-trial preparations of one case while simultaneously participating in the judgement or appeal stage of the first trial could unfairly overburden the Accused and limit his ability to participate effectively in either."[180] In the Author's submission, this particular problem could be overcome by assigning additional resources to the Defence and scheduling the appeal (in the first case) and trial proceedings (in the second) in a way that ensures that the Defence have sufficient time to prepare for, and effectively participate in, both sets of proceedings.

120. What is of particular interest, however, is the ICTY Trial Chamber's finding that the conduct of back-to-back trials would in any event make the proceedings considerably less efficient, including by virtue of:

(a) A possible repetition of Defence arguments in separate trials, where the Defence's theory of the case is the same for all the charges

(b) The need to recall witnesses, particularly where it would be inappropriate to admit the transcripts from the first trial in the second trial without an opportunity for the Defence Counsel to cross examine the witnesses on specific factual allegations arising in the second trial; and

(c) The fact that the procedures of the tribunal would make the overall process significantly longer when conducted in two trials rather than in one trial.[181]

121. In the Author's view, the *Mladić* Trial Chamber's views on the issue of expeditiousness are entirely correct. Similar concerns were expressed by the SCC in Case 002.[182] The Chamber held in its decision on the second severance appeal that "[s]pecific concerns of expeditious proceedings are generally not addressed by adjudicating materially-related charges through multiple trials."[183] In light of that reasoning, the SCC's decision to opt for the formation of a second panel rather than order the expansion of Case 002/01 is unfortunate.

122. A particularly tragic aspect of the Case 002 severance decisions lies in the following. Having heard, in Case 002/01, extensive evidence of the history, policies and structures of the CPK regime, the Trial Chamber could have completed the hearing of evidence on

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[179] ICTY, *Prosecutor v Mladić*, Decision on Consolidated Prosecution Motion to Sever the Indictment, to Conduct Separate Trials, and to Amend the Indictment, 13 October 2011, Case IT -09-92-PT.

[180] Ibid, at paragraph 31.

[181] Ibid, at paragraph 34; See also paragraph 35 on the issue of impartiality if the same Trial Chamber conducts the first and the second trial.

[182] Supreme Court Chamber Decision on Immediate Appeals Against Trial Chamber's Second Decision on Severance of Case 002, 25 November 2013, Case 002 Document E284/4/8, at paragraphs 37 - 40.

[183] Ibid, at paragraph 43.

any additional crime site(s) in a relatively short of period of time. For example, the Co-Prosecutors estimated that the charges relating to the S-21 Security Centre could have been heard with only a handful of additional witnesses.[184]

123. In most mass crime trials, evidence that goes to the existence of the JCE and role of the Accused therein is far more complex and time consuming than the evidence relating to the crime base. In Case 002/01, the Trial Chamber heard extensive evidence relating to the history of the Khmer Rouge movement, its policies and practices, as well as its structures and communication systems. Extensive evidence was also heard regarding the roles of the Accused within the CPK and the DK regime. The Chamber sat for a total of 222 trial days. At least 75% of that time was dedicated to hearing evidence on the contextual and liability issues, while (less than) 25% of the trial time was spent on the crime base evidence.

124. In these circumstances, and particularly where the Trial Chamber and the parties had settled into a pace where most crime base witnesses were heard in a day or less, additional crime sites could have easily been dealt with efficiently in the first trial. Any further contextual witnesses (such as experts or important insider witnesses) would not have taken significant extra time because their evidence would have built on the foundations of a two-year trial that was still in progress, at a time when evidence was still fresh in the minds of both the judges and counsel. Not all of these savings will be available to the Chamber if and when it starts a second trial afresh. And, as noted above, if a second panel is appointed, there may be a need for a significant re-hearing of the contextual evidence because judges on the new panel may not be satisfied with "reading into" the case, and may instead prefer to hear the evidence afresh.

125. The severance decisions in Case 002 demonstrate how the absence of universally accepted rules of criminal procedure, and the fact that the Court's judges come from different legal systems, can result in significant legal uncertainty. For one thing, it would be extremely unlikely, in a domestic legal system, for a trial court to ignore a specific legal direction of an appeal court. In internationalised *ad hoc* tribunals, such situations can occur because judges may feel that the gaps in the law justify the introduction of novel (and often untested) solutions; or because they may simply feel that the holdings of their brethren on an appeal chamber are not persuasive.

126. The severance decisions also demonstrate the confusion that can arise within the ECCC's civil law framework when the Court confronts matters which do not frequently arise in domestic jurisdictions. In this case, Trial Chamber judges erroneously held that the civil law framework rendered the jurisprudence of other tribunals on the issue of defining the scope of the trial irrelevant. Further, because the civil law procedure is largely untested in international trials, there were few jurisprudential solutions available to the judges to fill the (perceived) gap in the existing law. This situation was made worse

[184] Notice of Co-Prosecutors' Position on Key Issues to be Discussed at 17 August 2012 Trial Management Meeting, 15 August 2012, Case 002 Document E218/2, at paragraph 16.

by the fact that judges in civil law jurisdictions are not accustomed to following precedent.[185]

[185] In the civil law system, judgments tend to be very brief and do not contain detailed reasoning, which does not enable the development of principle through judicial pronouncements: see Ioannis Papadopoulos, *Introduction to comparative legal cultures: the civil law and the common law on evidence and judgment*, (2004), Cornell Law Faculty Working Papers, Paper 15, at pp.3-4.

Conclusion

127. The ECCC is dealing with one of the largest and most complex criminal cases since the Nuremberg trials, and it is doing so by applying a procedural model which was essentially untested in international criminal proceedings. This has meant that significant procedural adaptations have had to be made throughout the proceedings before the Court. Some critics will argue that this has resulted in legal uncertainty and delays. It is certainly true that the ECCC Internal Rules would have benefited from a process of harmonisation, at the outset, with the rules and practices applicable at the pre-existing international tribunals. Nevertheless, even without this, the ECCC, as a whole, has remained flexible and sensitive to procedural standards applicable at the international level.

128. The resulting procedural evolution, which has taken place through judicial decision-making, is one of the Court's major achievements. It must be remembered that the ECCC is operating in a country whose legal system is still in an early stage of development and often criticised for its lack of independence from the executive government.[186]

129. Together with similar hybrid tribunals, such as those established in Bosnia Herzegovina, East Timor and Kosovo, the ECCC presents an important (albeit imperfect) model for the prosecution of alleged perpetrators of mass atrocities in the countries in which those atrocities were committed. These hybrid tribunals can play an important role in advancing the fight against impunity and establishing preconditions for reconciliation in countries affected by serious violations of human rights. They can also facilitate the development of legal systems that have been severely affected by years of war, dictatorship and / or unrest. Continued development of universally accepted rules of criminal procedure (a process that began only in the 1990s with the establishment of the ICTY and the ICTR) will make these tribunals significantly more efficient, cheaper to run and more responsive to the expectations of the communities which they are set up to serve.

130. The final verdict on the ECCC's successes and challenges is yet to be delivered. Cases 003 and 004 are under judicial investigation and it is yet to be seen whether the Cambodian government's publicly stated opposition to the prosecution of these cases may affect their final outcome.

131. It is also to be hoped that the consequences of the Trial Chamber's erroneous severance decisions in Case 002 will be addressed in future proceedings, and that further trials can be completed while the Accused are fit to stand trial. However, even if that does not happen, it is submitted that the ECCC will have delivered significant outcomes by conducting fair trials of the senior leaders of the Khmer Rouge, providing a measure of small justice for the Cambodian people, producing a judicial record of the history, causes and origins of the Khmer Rouge crimes, and making a contribution towards the development of the rule of law in Cambodia.

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[186] See, for example, Report of the United Nations Special Rapporteur on the Situation of Human Rights in Cambodia, 5 August 2013, UN Document Number A/HRC/24/36, at pp.7-9.