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EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

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CO-PROSECUTORS' RULE 92 SUBMISSION ON APPLICABLE SUBSTANTIVE LAW

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INTRODUCTION

1. Internal Rule 87(1) places the onus on the Co-Prosecutors to prove the case against the Accused **DUCH** beyond a reasonable doubt. To discharge that onus, and with a view to assist the Trial Chamber in its search for the truth, the Co-Prosecutors file this written submission to place before the Chamber the law applicable to the crimes charged in the Indictment. This filing, in the Co-Prosecutors submission, will assist the Trial Chamber in applying the relevant law to the evidence heard at trial.
2. The Indictment issued by the Co-Investigating Judges, as modified by the Pre-Trial Chamber, charges **DUCH** with 1) **CRIMES AGAINST HUMANITY**, punishable under Articles 5, 29 (new) and 39 (new) of the ECCC Law; 2) **GRAVE BREACHES OF THE GENEVA CONVENTIONS OF 12 AUGUST 1949**, punishable under Articles 6, 29 (new) and 39 (new) of the ECCC Law; and 3) violations of the **1956 PENAL CODE**, punishable under Articles 3 (new), 29 (new) and 39 (new) of the ECCC Law.
3. This submission places before the Trial Chamber the relevant law on each of these three categories of crimes.¹

APPLICABLE LAW

4. Crimes against humanity and grave breaches of the Geneva Conventions are part of international criminal law and have been applied primarily by international tribunals. While in recent years states have increasingly incorporated elements of international criminal law into their national legal systems, the jurisprudence of the international and hybrid criminal tribunals established since World War II provides the primary source of authority on the elements of these offences.

¹ The Co-Prosecutors cite the law as of the date of the Closing Order of the Co-Investigating Judges. The legal authorities cited in this filing are already on the Case File 001 as annexes to the Co-Prosecutors' Rule 66 Final Submission Regarding Duch, 18 July 2008, D96. Accordingly, no table of authorities is filed with the current filing.

5. The decisions of the International Military Tribunal at Nuremberg (“IMT”); the International Military Tribunal for the Far East (“IMTFE”); the International Criminal Tribunals for the Former Yugoslavia and for Rwanda (“ICTY” and “ICTR”); the Special Court for Sierra Leone (“SCSL”); and the International Criminal Court (“ICC”) are the most relevant for the application of crimes against humanity and the Geneva Conventions at the ECCC. No Cambodian jurisprudence is available because, as far as the Co-Prosecutors are aware, crimes against humanity and grave breaches of the Geneva Conventions have not been prosecuted by the courts of the Kingdom of Cambodia.

CRIMES AGAINST HUMANITY

6. Article 5 of the ECCC Law authorises the ECCC to try individuals suspected of committing crimes against humanity. The specific offences listed in Article 5 include murder, extermination, enslavement, imprisonment, torture, persecution on political, racial or religious grounds, and other inhumane acts. Similarly, the ICTY,² ICTR,³ SCSL⁴ and ICC⁵ all have the power to prosecute the same specific crimes as provided by Article 5 of the ECCC Law, namely murder,⁶ extermination,⁷ enslavement,⁸ imprisonment,⁹ torture,¹⁰ persecutions on political, racial and religious grounds,¹¹ and other inhumane acts.¹² The elements of each of these offences are discussed below.
7. For the commission of these offences to constitute crimes against humanity, certain jurisdictional elements must also be present.¹³ The specific offences must be committed:

² Statute of the International Criminal Tribunal for the former Yugoslavia, S.C. Res. 827, U.N. Doc. S/Res/827 (1993) Art. 5 (“ICTY Statute”).

³ Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, U.N. Doc. S/Res/955 (1994), Art. 3 (“ICTR Statute”).

⁴ Statute of the Special Court for Sierra Leone, S.C. Res. 1315, U.N. Doc. S/Res/1315 (2000), Art. 2, (“SCSL Statute”).

⁵ Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9, (1998) Art. 7, (“Rome Statute”).

⁶ ICTY Statute, Art. 5(a); ICTR Statute, Art. 3(a); SCSL Statute, Art. 2(a); Rome Statute, Art. 7(a).

⁷ ICTY Statute, Art. 5(b); ICTR Statute, Art. 3(b); SCSL Statute, Art. 2(b); Rome Statute, Art. 7(b).

⁸ ICTY Statute, Art. 5(c); ICTR Statute, Art. 3(c); SCSL Statute, Art. 2(c); Rome Statute, Art. 7(c).

⁹ ICTY Statute, Art. 5(e); ICTR Statute, Art. 3(e); SCSL Statute, Art. 2(e); Rome Statute, Art. 7(e).

¹⁰ ICTY Statute, Art. 5(f); ICTR Statute, Art. 3(f); SCSL Statute, Art. 2(f); Rome Statute, Art. 7(f).

¹¹ ICTY Statute, Art. 5(h); ICTR Statute, Art. 3(h); SCSL Statute, Art. 2(h); Rome Statute, Art. 7(h).

¹² ICTY Statute, Art. 5(i); ICTR Statute, Art. 3(i); SCSL Statute, Art. 2(i); Rome Statute, Art. 7(k).

¹³ The jurisdictional requirements are not elements of the specific offences, but the specific offences must be “part of” an attack that meets the jurisdictional requirements. See *Prosecutor v. Deronjic*, Judgement, ICTY Appeals Chamber, Case No. IT-02-61, 20 July, 2005, para. 109 (“*Deronjic* Appeal Judgement”), “[T]his

(1) as part of; (2) a widespread or systematic; (3) attack; (4) directed against a civilian population; (5) on national, political, ethnical, racial or religious grounds.

JURISDICTIONAL REQUIREMENTS

1. WIDESPREAD OR SYSTEMATIC

8. The attack must be either widespread or systematic. These requirements are disjunctive.¹⁴ The term “widespread” refers to “the large-scale nature of the attack and the number of targeted persons”¹⁵ and may be established by the “cumulative effect of a series of inhumane acts or the singular effect of an inhumane act of extraordinary magnitude.”¹⁶ An attack can therefore be constituted by a single act, but it must have had a substantial effect or affect a large number of people.
9. The term “systematic” does not require the attack to be large-scale but relates to the “organised nature of the acts of violence and the improbability of their random occurrence.”¹⁷ Systematicity may be established by evidence of a “non-accidental repetition of similar criminal conduct”.¹⁸
10. Other indicators which would tend to prove the occurrence of a widespread or systematic attack are “the consequences of the attack upon the targeted population, the number of victims, the nature of the acts, the possible participation of officials or authorities or any

requirement [of a widespread or systematic attack] only applies to the attack and not to the individual acts of the accused”; *Prosecutor v. Dario Kordic & Mario Cerkez*, Judgement, ICTY Appeals Chamber, Case No. IT-95-14A, 17 December 2004, para. 94 (“*Kordic Appeal Judgement*”). “Only the attack, not the individual acts of the accused, must be widespread or systematic.”; *Prosecutor v. Kayishema and Ruzindana*, Judgement, ICTR Trial Chamber, Case no. ICTR-95-1-T, May 21, 1999, para. 135 (“*Kayishema Trial Judgement*”).

¹⁴ *Prosecutor v. Dragoljub Kunarac, Radomir Kovac & Zoran Vukovic*, Judgement, ICTY Appeals Chamber, Case No. IT-96-23 & IT-96-23/1-A, 12 June 2002, para. 93 (“*Kunarac Appeal Judgement*”); *See also, Prosecutor v. Brima, Kumara & Kanu*, Judgement, SCSL Trial Chamber, Case No. SCSL-04-16-T, 20 June 2007, para. 215 (“*Brima Trial Judgement*”).

¹⁵ *Kordic Appeal Judgement*, para. 94.

¹⁶ *Prosecutor v. Vidoje Blagojevic & Dragon Jokic*, Judgement, ICTY Trial Chamber, Case No. IT-02-60-T, 17 January 2005, para. 545, (“*Blagojevic Trial Judgement*”).

¹⁷ *Kordic Appeal Judgement*, para. 94.

¹⁸ *Kordic Appeal Judgement*, para. 94.

identifiable patterns of crimes.”¹⁹ Whilst no plan or policy is required to prove a widespread or systematic attack, the existence of such a plan may be further evidence of the nature of the attack.²⁰

2. ATTACK

11. Acts constituting crimes against humanity must be committed as part of an “attack”. An attack has been defined as “a course of conduct involving the commission of acts of violence”²¹ such as murder, extermination and enslavement. An “attack” for the purposes of establishing crimes against humanity is not required to be a military attack nor be part of an armed conflict.²² An attack may be non-violent in nature, such as the imposition of a system of apartheid or repression, or the exerting of pressure on the population to act in a particular manner, particularly “if orchestrated on a massive scale or in a systematic manner.”²³

3. DIRECTED AGAINST A CIVILIAN POPULATION

12. A crime against humanity must be “directed against” a civilian population which requires that the civilian population be the primary object of the attack.²⁴ The factors determining whether an attack was directed against a civilian population include: the means and methods used in the course of the attack; the status of the victims; their number; the discriminatory nature of the attack; the nature of the crimes committed in its course; the resistance to the assailants at the time; and the extent to which the attacking force may be

¹⁹ *Kunarac Appeal Judgement*, para. 95; *See also, Prosecutor v. Fatmir Limaj, Haradin Bala & Isak Musliu*, Judgement, ICTY Trial Chamber, Case No. IT-03-66-T, 30 November 2005, para. 183 (“*Limaj Trial Judgement*”).

²⁰ *Kunarac Appeal Judgement*, para. 98.

²¹ *Blagojevic Trial Judgement*, para. 543.

²² *Brima Trial Judgement*, para. 214; *Prosecutor v. Mitar Vasiljevic*, Judgement, ICTY Trial Chamber, Case No. IT-98-32-T, 29 November 2002, para. 30 (“*Vasiljevic Trial Judgement*”).

²³ *Prosecutor v. Jean-Paul Akayesu*, Judgement, ICTR Appeals Chamber, Case No. ICTR-96-4-T, 1 June 2001, para. 581 (“*Akayesu Appeal Judgement*”); *Kunarac Appeal Judgement*, para. 86: “[T]he attack in the context of a crime against humanity is not limited to the use of armed force; it encompasses any mistreatment of the civilian population.”

²⁴ *Prosecutor v. Mile Mrksic, Miroslav Radic & Veselin Sljivancanin*, Judgement, ICTY Trial Chamber, Case No. IT-95-13/1-T, 27 September 2007, para. 440 (“*Mrksic Trial Judgement*”) citing *Kunarac Appeal Judgement*, para. 91; *Kordic Appeal Judgement*, para. 96; *Limaj Trial Judgement*, para. 185; *Prosecutor v. Radoslav Brdjanin*, Judgement, ICTY Trial Chamber, Case No. IT-99-36-T, 1 September 2004, para. 134 (“*Brdjanin Trial Judgement*”); *Prosecutor v. Stanislav Galic*, Judgement, ICTY Trial Chamber, Case No. IT-98-29-T, 5 December 2003, para. 142 (“*Galic Trial Judgement*”); *Prosecutor v. Milomir Stakic*, Judgement, ICTY Trial Chamber, Case No. IT-97-24-T, 31 July 2003, para. 624 (“*Stakic Trial Judgement*”); *Prosecutor v. Mladen Naletilic aka “Tuta” and Vinko Martinovic aka “Stela”*, Judgement, ICTY Trial Chamber, Case No. IT-98-34-T, 31 March 2003, para. 235 (“*Naletilic Trial Judgement*”).

said to have complied or attempted to comply with the precautionary requirements of the laws of war.²⁵

13. The term “civilian” refers to “persons not taking part in hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention or any other cause.”²⁶ Therefore, members and former members of the military are classified as civilians for the purposes of crimes against humanity if they did not take an active part in any hostilities during the attack. This is also the case if they are in detention at the time they become the victims of the attack. The “civilian population” is not required to include the entire population of the particular geographical area attacked.²⁷ Similarly, a “civilian population” may include non-civilians as long as the population is predominately civilian.²⁸

4. DISCRIMINATORY GROUNDS

14. Crimes against humanity require that the attack be committed on a discriminatory basis. This discrimination must be based on national, political, ethnical, racial or religious grounds.²⁹ This element refers to the nature of the attack but is not an element of the specific offences.³⁰

5. KNOWLEDGE OF THE ATTACK

15. In order for the specific offences to be “part of” a crime against humanity, the perpetrator must have the knowledge of the acts that constitute the attack and must know that his or her

²⁵ *Mrksic* Trial Judgement, para. 440; *Kunarac* Appeal Judgement, para. 91; *Prosecutor v. Tihomir Blaskic*, Judgement, ICTY Appeals Chamber, Case No. IT-95-14-A, 29 July 2004, para. 106 (“*Blaskic* Appeal Judgement”).

²⁶ *Blagojevic* Trial Judgement, para. 544; *Brima* Trial Judgement, para. 216, citing *Prosecutor vs. Jean-Paul Akayesu*, Judgment and Sentence, ICTR Trial Chamber, Case No. ICTR-96-4-T, 2 September 1998, para. 582 (“*Akayesu*” Judgment and Sentence).

²⁷ *Kunarac* Appeal Judgement, para. 90.

²⁸ *Mrksic* Trial Judgement, para. 442, citing *Prosecutor v. Goran Jelusic*, Judgement, ICTY Trial Chamber, Case No. IT-95-10-T, 14 December 1999, para. 54 (“*Jelusic* Trial Judgement”); *Prosecutor v. Zoran Kupreskic, Mirjan Kupreskic, Vlatko Kupreskic, Drago Josipovic, Dragan Papic & Vladimi Santic aka “Vlado”*, Judgement, ICTY Trial Chamber, Case No. IT-95-16-T, 14 January 2000, paras. 547-549 (“*Kupreskic* Trial Judgement”); *Blagojevic* Trial Judgement, para. 544.

²⁹ Law on the Extraordinary Chambers in the Courts of Cambodia, Art. 5 (“ECCC Law”).

³⁰ *Akayesu* Appeal Judgement, para. 466, “[D]iscrimination is not a requirement for the various crimes against humanity, except where persecution is concerned”; *Prosecutor v. Baglishema*, Judgement, ICTR Trial Chamber, Case No. ICTR-95-1A-T, 7 June 2001, para. 81 (*Baglishema* Trial Judgment).

acts are part of that attack.³¹ Knowledge of the details of the attack is not required,³² but it will be sufficient if the perpetrator knew of the overall context within which his or her acts took place.³³ The motive of the perpetrator is irrelevant,³⁴ and it is not necessary for the perpetrator to have approved of the attack.³⁵

SPECIFIC OFFENCES

1. IMPRISONMENT

16. Imprisonment as a crime against humanity requires three elements to be established namely that: (1) an individual is deprived of his or her liberty; (2) the deprivation of liberty is imposed arbitrarily; and (3) the act or omission by which the individual is deprived of his or her physical liberty is performed by the accused, or a person or persons for whom the accused bears criminal responsibility, with the intent to deprive the individual arbitrarily of his or her physical liberty or in the reasonable knowledge that his or her act or omission is likely to cause arbitrary deprivation of physical liberty.³⁶ Imprisonment is defined as arbitrary where it is imposed without a justifiable legal basis and without due process of law.³⁷ Those in charge of a prison with effective or constructive knowledge that the detainees were unlawfully detained may be held liable of imprisonment as a crime against humanity.³⁸

³¹ *Kunarac* Appeal Judgement, para. 99; *Kordic* Appeal Judgement, para. 99; *Kayishema* Trial Judgement para. 133-134.

³² *Kunarac* Appeal Judgement, para. 102, "This requirement [that the accused have knowledge of the attack] does not entail knowledge of the details of the attack;" *Blagojevic* Trial Judgement, para. 548, "The *mens rea* requirement . . . does not entail knowledge of the details of the attack."

³³ *Limaj* Trial Judgement, para. 190.

³⁴ *Kordic* Appeal Judgement, para. 99.

³⁵ *Limaj* Trial Judgement, para. 190.

³⁶ *Prosecutor v. Blagoje Simic, Miroslav Tadic & Simo Zaric*, Judgement, ICTY Trial Chamber, Case No. IT-95-9, 17 October 2003, para. 64 ("*Simic* Trial Judgement"); *See also, Prosecutor v. Milorad Krnojelac*, Judgement, ICTY Trial Chamber, Case No. IT-97-25-T, 15 March 2002, para. 115 ("*Krnojelac* Trial Judgement").

³⁷ *Kordic* Appeal Judgement, para. 116; *Simic* Trial Judgement, para. 64; *Prosecutor v. Dario Kordic & Mario Cerkez*, Judgement, ICTY Trial Chamber, Case No. IT-95-14, 26 February 2001, para. 302 ("*Kordic* Trial Judgement").

³⁸ See conclusion in *Krnojelac* Trial Judgement, para. 124.

2. OTHER INHUMANE ACTS

17. “Other inhumane acts” is a residual category of crimes against humanity which criminalises acts of similar gravity to those that are specifically enumerated.³⁹ The following elements are required for an act to be considered as inhumane: (1) the victim must have suffered serious bodily or mental harm (the degree of severity being assessed on a case-by-case basis with due regard for the individual circumstances); (2) the suffering must be the result of an act or omission of the accused or his subordinate; and (3) when the offence was committed, the accused or his subordinate must have been motivated by the intent to inflict serious bodily or mental harm upon the victim.⁴⁰ The severity of the act must be of “similar seriousness” to the enumerated crimes against humanity,⁴¹ but the victim does not need to suffer long-term effects.⁴²
18. Jurisprudence specifically relating to prison camps has established that serious physical or psychological harm including beatings, torture, sexual violence, humiliation, harassment, mental abuse and detention in deplorable conditions constitute inhumane acts.⁴³ Regular beatings, mistreatment of detainees during their interrogation, recurring brutality and the constant fear of being beaten have also been held to constitute inhumane treatment.⁴⁴

3. ENSLAVEMENT

19. Enslavement is defined as the intentional exercise of powers of ownership over a person.⁴⁵ The consent or free will of the victim is absent.⁴⁶ Factors which indicate the existence of enslavement include: “the control of someone’s movement, control of physical

³⁹ *Blagojevic* Trial Judgement, para. 624; *Kordic* Appeal Judgement, para. 117; *Galic* Trial Judgement, para. 152.

⁴⁰ *Kordic* Appeal Judgement, para. 117.

⁴¹ *Prosecutor v. Mitar Vasiljevic*, Judgement, ICTY Appeals Chamber, Case No. IT-98-32-A, 25 February 2004, para. 165 (“*Vasiljevic* Appeal Judgement”); *Blagojevic* Trial Judgement, para. 627.

⁴² *Vasiljevic* Appeal Judgement, para. 165; *Blagojevic* Trial Judgement, para. 627.

⁴³ *Krnjelac* Trial Judgement, para. 133; *Prosecutor v. Kvočka*, Judgement, ICTY Trial Chamber, Case No. IT-98-30/1-T, 2 November 2001, para. 164-165, 720 (“*Kvočka* Trial Judgement”).

⁴⁴ *Prosecutor v. Aleksovski*, Judgement, ICTY Trial Chamber, Case No. IT-95-14/1, 25 June 1999, para. 228 (“*Aleksovski* Trial Judgement”). In this case those acts were qualified as “outrage upon personal dignity” within Article. 3 of the ICTY Statute, this mirrors common Article. 3 of Geneva Conventions. In the Judgement, at para. 54, the trial chamber considers that “outrage upon personal dignity” is a species of “inhuman treatment”. The trial chamber considers also that those acts constitute degrading or humiliating treatment.

⁴⁵ *Kunarac* Appeal Judgement, para. 116.

⁴⁶ *Prosecutor v. Kunarac, Kovac and Vukovic*, Judgement: Applicable Law, ICTY Trial Chamber, Case No. IT-96-23-T, 22 February 2001, para. 542 (“*Kunarac* Trial Judgement”).

environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour.”⁴⁷

4. TORTURE

20. Torture as a crime against humanity requires three elements: (1) there must be an act or omission inflicting severe pain or suffering, whether physical or mental; (2) the act or omission must be intentional; and (3) the act or omission must have been carried out with a specific purpose such as to obtain information or a “confession,” to punish, intimidate or coerce the victim or a third person, or to discriminate, on any ground, against the victim or a third person.⁴⁸ Permanent injury is not a requirement for torture,⁴⁹ nor is a minimum level of pain which must be inflicted: torture depends on the circumstances of each individual case.⁵⁰ Additionally, the perpetrator need not have acted in an official capacity.⁵¹
21. Jurisprudence specifically relating to prison camps has established that conditions of detention, absence of medical care and repetitive and systematic abuse of detainees can be indicia of torture.⁵² Extreme abuse during interrogation, coupled with an intention to extract a “confession” or information from the detainee, also amounts to torture as a crime against humanity.⁵³ Prison commanders have a responsibility under international law to protect detainees from unlawful abuse and to ensure that living conditions are humane. Prison commanders who personally mistreat detainees set an example for their subordinates, contributing to “an environment of impunity,” and may thus be criminally responsible.⁵⁴

⁴⁷ *Kunarac* Appeal Judgement, para. 119; citing *Kunarac* Trial Judgement, para. 543.

⁴⁸ *Limaj* Trial Judgement, para. 235; *Kunarac* Appeal Judgement, paras. 142, 144; citing *Kunarac* Trial Judgement, para. 497. See also, *Brdjanin* Trial Judgement, para. 481; *Krnjelac* Trial Judgement, para. 179.

⁴⁹ *Brdjanin* Trial Judgement, para. 484.

⁵⁰ *Brdjanin* Trial Judgement, para. 483.

⁵¹ *Kunarac* Appeal Judgement, para. 148.

⁵² *Kvočka* Trial Judgement, para. 151.

⁵³ *Krnjelac* Trial Judgement, para. 255.

⁵⁴ *Prosecutor v. Dragan Nikolic*, Sentencing Judgement, ICTY Trial Chamber II, Case No. IT-94-2-S, 18 December 2003, para 179 (“*Nikolic* Sentencing Judgement”).

5. MURDER

22. Murder as a crime against humanity requires three elements: (1) the death of the victim; (2) the death was caused by an act or omission of the accused, or of a person or persons for whose acts or omissions the accused bears criminal responsibility; and (3) the act was done, or the omission was made, by the accused, or a person or persons for whose acts or omissions he/she bears criminal responsibility, with an intent to kill or to inflict grievous bodily harm or serious injury, in the reasonable knowledge that such act or omission was likely to cause death.⁵⁵ The victim's body is not required as evidence to prove death.⁵⁶

6. EXTERMINATION

23. Extermination as a crime against humanity requires two elements to substantiate the offence: (1) that an act or omission resulted in the death of persons on a massive scale; and (2) the accused intended to kill persons on a massive scale or to create conditions of life that lead to the death of a large number of people.⁵⁷ Mass killings may be proved by evidence that victims were subjected to conditions that contributed to their death, such as the deprivation of food and medicine, which was calculated to cause the destruction of part of the population.⁵⁸ There is no minimum number of victims needed to satisfy the requirement that the scale of deaths must be "massive"; this must be assessed on a case-by-case basis in light of the proven criminal conduct and all relevant factors.⁵⁹

7. PERSECUTION

24. Persecution is a crime defined by discrimination on "political, racial and religious grounds." To substantiate the offence two elements must be satisfied: (1) the act or omission discriminated in fact and either denied or infringed upon a fundamental right defined in either customary international law or treaty law; and (2) the act or omission was carried out deliberately with the intention to discriminate on one of the listed grounds.⁶⁰ A

⁵⁵ *Brdjanin* Trial Judgement para. 381.

⁵⁶ *Brdjanin* Trial Judgement, para. 383; *Krnjelac* Trial Judgement para. 326.

⁵⁷ *Blagojevic* Trial Judgement, para. 572; *Brdjanin* Trial Judgement, para. 388.

⁵⁸ *Brdjanin* Trial Judgement, para. 389; *See also, Prosecutor v. Radislav Krstic*, Judgement, ICTY Trial Chamber, Case No. IT-98-33-T, 2 August 2001, para. 503 ("*Krstic* Trial Judgement").

⁵⁹ *Blagojevic* Trial Judgement, para. 573; *Brdjanin* Trial Judgement, para. 391; *Stakic* Trial Judgement, para. 640; *Prosecutor v. Krajisnik*, Judgement, ICTY Trial Chamber, Case No. IT-00-39-T, 27 September 2006, para. 716 ("*Krajisnik* Trial Judgement").

⁶⁰ *Deronjic* Appeal Judgement, para. 109; *see also Prosecutor v. Miroslav Kvočka, Mlado Radic, Zoran Zigic & Dragoljub Prcac*, Judgement, ICTY Appeals Chamber, Case No. IT-98-30/1-A, 28 February 2005, paras.

single act may be sufficient to constitute persecution as long as both elements are proved,⁶¹ but the particular persecutory acts must be specified.⁶²

25. Persecutory acts include acts which are of equal gravity to the enumerated acts of crimes against humanity⁶³ and thus include murder, extermination, enslavement, imprisonment and torture. Humiliating treatment can constitute persecution,⁶⁴ and being forced to witness or hear torture, interrogation and random brutality in a prison camp has been found to constitute psychological abuse and a form of persecution.⁶⁵ Prolonged imprisonment may also constitute persecution where it is clearly carried out with the intent to discriminate on religious, political, or ethnic grounds.⁶⁶ Beatings or torture committed because of the political or religious affiliation of the victims can prove the requisite discriminatory intent.⁶⁷ The discriminatory intent required can also be inferred from the discriminatory character of a detention centre as a whole.⁶⁸

GRAVE BREACHES OF THE GENEVA CONVENTIONS

26. Article 6 of the ECCC Law authorises the ECCC to bring to trial individuals suspected of committing grave breaches of the Geneva Conventions ('grave breaches'). The specific offences listed in Article 6 include wilful killing, torture or inhumane treatment, wilfully causing great suffering or serious injury to body or health, wilfully depriving a prisoner of war or civilian the rights of fair and regular trial and unlawful confinement of a civilian.

⁶¹ 320, 454 ("Kvočka Appeal Judgement"); *Kordic* Appeal Judgement, para. 101; *Blaskic* Appeal Judgement, para. 131; *Vasiljevic* Appeal Judgement, para. 113; *Prosecutor v. Milorad Krnojelac*, Judgement, ICTY Appeals Chamber, Case No. IT-97-25-A, 17 September 2003, para. 185 ("Krnojelac Appeal Judgement"); *Blagojevic* Trial Judgement, para. 579; *Brdjanin* Trial Judgement, para. 992; *Simic* Trial Judgement, para. 47.

⁶² *Kordic* Appeal Judgement, para. 102; *Blaskic* Appeal Judgement, para. 135; *Vasiljevic* Appeal Judgement, para. 113; *Blagojevic* Trial Judgement, para. 582.

⁶³ *Blaskic* Appeal Judgement, para. 139.

⁶⁴ *Kordic* Appeal Judgement, paras. 102, 671; *See also*, *Kvočka* Appeal Judgement, para. 321; *Blaskic* Appeal Judgement, para. 135.

⁶⁵ Humiliating treatment has been defined as acts that are intended to inflict psychological harm, including keeping detainees in cramped and dirty conditions, making them beg for water, and subjecting them to constant beating, threats and demoralizing treatment, *Kvočka* Trial Judgement, para. 190; *Kvočka* Appeal Judgement, para. 324-325; *Nikolic* Sentencing Judgement, para. 69.

⁶⁶ *Kvočka* Trial Judgement, para. 192.

⁶⁷ *Kvočka* Appeal Judgement, para. 366.

⁶⁸ *Kvočka*, Appeal Judgement, para. 364, 366.

Similarly, the ICTY⁶⁹ and the ICC⁷⁰ have the power to prosecute the same crimes as provided in Article 6 namely the unlawful confinement of a civilian;⁷¹ deprivation of a fair and regular trial;⁷² wilfully causing great suffering or serious injury to body or health;⁷³ torture or inhumane treatment;⁷⁴ and willful killing.⁷⁵ The elements of these offences are discussed below.

27. For the commission of these offences to constitute grave breaches, certain jurisdictional elements must exist: (1) the specific offences must be committed in the context of and be associated with an international armed conflict; (2) the perpetrator was aware of the factual circumstances that established the existence of an armed conflict; (3) the acts were committed against person(s) or property that was protected under one or more of the Geneva Conventions of 1949; and (4) the perpetrator was aware of the factual circumstances that established this protected status.⁷⁶

JURISDICTIONAL REQUIREMENTS

1. INTERNATIONAL ARMED CONFLICT

28. An international armed conflict must exist in fact. Additionally, there must be a nexus between the international armed conflict and the crimes alleged.⁷⁷ An armed conflict exists “whenever there is a resort to armed force between States or protracted armed violence between government authorities and organized armed groups or between such groups within a State.”⁷⁸ An armed conflict becomes an international armed conflict when the conflict involves two or more States. The nexus requirement between the armed conflict

⁶⁹ ICTY Statute, Art. 2.

⁷⁰ Rome Statute, Art. 8.

⁷¹ ICTY Statute, Art. 2(g); Rome Statute, Art. 2(a) (vii).

⁷² ICTY Statute, Art. 2(f); Rome Statute, Art. 2(a) (vi).

⁷³ ICTY Statute, Art. 2(c); Rome Statute, Art. 2(a) (iii).

⁷⁴ ICTY Statute, Art. 2(b); Rome Statute, Art. 2(a) (ii).

⁷⁵ ICTY Statute, Art. 2(a); Rome Statute, Art. 2(a) (i).

⁷⁶ Preparatory Commission for the International Criminal Court, PCNICC/2000/L.1/Rev.1/Add.2, (2000) Annex III; *see also*, Book by Knut DORMANN with contributions by Louise DOSWALD-BECK and Robert KOLB entitled *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary* (Cambridge University Press, 2002), page 17.

⁷⁷ *Prosecutor v. Sefer Halilovic*, Judgement, ICTY Trial Chamber, Case No. IT-01-48-T, 16 November 2005, para. 29 (“*Halilovic* Trial Judgement”); *Brdjanin* Trial Judgment, para. 128.

⁷⁸ *Prosecutor v. Dusko Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-A, ICTY Appeals Chamber, 2 October 1995, para. 70.

and the crimes alleged is met when the alleged crimes were “*closely related*” to the hostilities. It is not necessary to establish that the crimes were committed in the same area as the actual combat activities.⁷⁹

2. PROTECTED PERSON

29. Geneva Convention IV extends “protected person” status to civilians from one of the belligerent states that are “in the hands of a party to the conflict or Occupying Power of which they are not nationals.”⁸⁰ This protects civilians who find themselves on territory controlled by an enemy state.⁸¹ Usually protected person status is determined by the citizenship of the person but it can also be determined by applying the “allegiance” test, which focuses on the allegiance of the person to a party to the armed conflict rather than their nationality.⁸² Protected status may apply to individuals who have the same nationality as their captors because in modern conflicts victims may be “assimilated” to the external State involved in the conflict, despite the fact that they formally have the same nationality as their captors.⁸³ Geneva Convention III extends protection to “members of the armed forces of a Party to the conflict” who have “fallen into the power of the enemy.”⁸⁴ This class of protected persons is usually referred to as “prisoners of war.”

3. AWARENESS OF FACTUAL CIRCUMSTANCES

30. The perpetrator, in addition to having the requisite *mens rea* for the specific crimes, must: (1) be aware of the factual circumstances of the existence of an international armed conflict; and (2) be aware of the factual circumstances that established the protected status. Knowledge that a foreign State was involved in the armed conflict will satisfy the first

⁷⁹ *Vasiljevic* Trial Chamber, para. 25.

⁸⁰ Geneva Convention (IV), relative to the Protection of Civilian Persons in Time of War, 12 August 1949, Art. 4(1) (“Geneva Convention IV”) The Convention starts by extending protection to all people “in the hands of a party to the conflict or Occupying Power of which they are not nationals.” The Convention then excludes nationals from neutral or co-belligerent states, those who can claim protection under any of the other Geneva Conventions, and various other groups from protected status. Those who are not excluded have protected status. In practice the most common group entitled to protection is civilians of enemy states.

⁸¹ *Naletilic* Trial Judgement, para. 208.

⁸² *Kordic* Appeal Judgement, paras. 322-323, 328-330.

⁸³ *Blaskic* Appeal Judgement, para. 174; *Kordic* Appeal Judgement, paras. 329-330; See also *Prosecutor v. Dusko Tadic*, Judgement, ICTY Appeals Chamber, Case No. IT-94-1-A, 15 July 1999, para. 166 (“*Tadic* Appeal Judgement”).

⁸⁴ Geneva Convention (III), Relative to the Treatment of Prisoners of War, 12 August 1949, Art. 4, (“Geneva Convention III”).

element regarding the existence of an international armed conflict.⁸⁵ Knowledge that the victim belonged to an adverse party to the conflict will satisfy the second element regarding the status of the victim.⁸⁶

SPECIFIC OFFENCES

1. UNLAWFUL CONFINEMENT OF A CIVILIAN

31. The elements of unlawful confinement are identical to the elements of imprisonment as a crime against humanity.⁸⁷

2. DEPRIVATION OF A FAIR AND REGULAR TRIAL

32. Depriving a protected person(s) of a fair and regular trial by denying judicial guarantees as defined, in particular, in the Third and Fourth Geneva Conventions of 1949 is a grave breach of those conventions. The following rights cannot be denied: (1) the right of the accused to be judged by an independent and impartial court;⁸⁸ (2) the right to be promptly informed of the offences with which the accused is charged;⁸⁹ (3) the protection against collective penalty;⁹⁰ (4) the right to protection under the principle of legality;⁹¹ (5) the right not to be punished more than once for the same act or on the same charge (*ne bis in idem*);⁹² (6) the right to be informed of rights of appeal;⁹³ and (7) the right not to be sentenced or executed without previous judgement pronounced by a regularly constituted court.⁹⁴

3. WILFULLY CAUSING GREAT SUFFERING OR SERIOUS INJURY TO BODY OR HEALTH

33. This crime is defined as an intentional act or omission which causes serious mental or physical suffering or injury.⁹⁵ This category of crimes includes acts which do not fulfill the

⁸⁵ *Kordic* Appeal Judgement, para. 311.

⁸⁶ Book by Knut DORMANN with contributions by Louise DOSWALD-BECK and Robert KOLB entitled *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary* (Cambridge University Press, 2002), page 29.

⁸⁷ *Kordic*, Trial Chamber Judgement, para. 292, 301; *Simic* Trial Judgment, para. 63.

⁸⁸ Geneva Convention III, Art. 84(2).

⁸⁹ Geneva Convention III, Art. 104; Geneva Convention IV, Art. 71(2).

⁹⁰ Geneva Convention III, Art. 87; Geneva Convention IV, Art. 33.

⁹¹ Geneva Convention III, Art. 99(1); Geneva Convention IV Art. 67.

⁹² Geneva Convention III, Art. 86; Geneva Convention IV, Art. 117(3).

⁹³ Geneva Convention III, Art. 106; Geneva Convention IV, Art. 73.

⁹⁴ Geneva Convention III, Art. 3; Geneva Convention IV, Art. 3.

⁹⁵ *Prosecutor vs. Kordic and Cerkez*, Judgement, ICTY Trial Chamber, Case No. IT-94-14/2-T, 26 February 2001, para. 245 (“*Kordic* Trial Judgement”); *Prosecutor v. Tihomir Blaskic*, Judgement, ICTY Trial

requirements of torture, although all acts of torture could fall within the scope of this offence.⁹⁶ Although the victim must be “seriously” harmed, there is no need to prove that the injury or injuries suffered are permanent or irremediable.⁹⁷ This crime is distinguished from that of inhumane treatment because it requires a showing of serious mental or physical injury. Injuries to an individual’s human dignity are not included within this offence.⁹⁸

4. TORTURE OR INHUMANE TREATMENT

Torture

34. The elements of torture as a grave breach of the Geneva Conventions are identical to the elements of torture as a crime against humanity.⁹⁹

Inhumane Treatment

35. Inhumane treatment is defined as an intentional act or omission which causes serious mental harm or physical suffering or injury or constitutes a serious attack on human dignity, committed against a protected person.¹⁰⁰ All acts found to constitute torture or wilfully causing great suffering or serious injury also constitute inhumane treatment. However, this third category of offence also extends to other acts which violate the basic principle of humane treatment, particularly the respect for human dignity. The question of whether any particular act constitutes inhumane treatment is a question of fact to be judged in light of all the circumstances.¹⁰¹

Chamber, Case No. IT-95-14-T, 3 March 2000, para. 156 (“*Blaskic* Trial Judgement”); *Prosecutor v. Zejnil Delalic, Zdravko Mucic, aka “Pavo”, Hazim Delic and Esad Landzo aka “Zenga” Delalic*, Judgement, ICTY Trial Chamber, Case No. IT-96-21-T, 16 November 1998, para. 511 (“*Delalic* Trial Judgement”).

⁹⁶ *Delalic* Trial Judgement, para. 511; *Blaskic* Trial Judgement, para. 156.

⁹⁷ *Naletilic* Trial Judgement, paras. 340-342.

⁹⁸ *Kordic* Trial Judgement, para.245

⁹⁹ *Brdjanin* Trial Judgement, para. 482 “The definition of ‘torture’ remains the same regardless of the Article of the Statute under which the Accused has been charged.”

¹⁰⁰ *Kordic* Appeal Judgement, para. 39; *Blaskic* Appeal Judgement, para. 665; *Kordic* Trial Judgement, para. 256; *Blaskic* Trial Judgement, paras. 154-155; *Naletilic* Trial Judgement, para. 246.

¹⁰¹ *Delalic* Trial Judgement, para 544.

5. WILFUL KILLING

36. The definition of wilful killing as a grave breach of the Geneva Conventions is identical to the definition of the crime of murder as a crime against humanity (described above)¹⁰² except that it must be proved the victim was a “protected person.”

NATIONAL CRIMES

37. **DUCH** is charged for acts of torture and premeditated homicide at S-21 under Article 3 (new) of the ECCC Law, which provides this Court jurisdiction over offences against Articles 500, 501 and 506 of the Cambodian Penal Code of 1956.

1. TORTURE

38. Torture is an offence pursuant to Article 500 of the 1956 Penal Code. Torture occurs when acts of torture are committed: (1) with the intent to obtain information useful for the commission of a felony or misdemeanour by causing pain; or (2) in a spirit of repression or barbarity.

2. MURDER

39. Homicide or premeditated murder is an offence pursuant to Articles 501 and 506 of the Penal Code of 1956. Homicide occurs when death results from acts committed or deliberately attempted with the intent to cause death. If the homicide results from acts accomplished or undertaken deliberately with the aim of causing injury but not death, the act is characterized as homicide without murderous intent pursuant to Articles 501 and 506 of the Penal Code.

LIABILITY

40. Article 29 of the ECCC Law on individual criminal liability states that suspects who “planned, instigated, ordered, aided and abetted, or committed” crimes within the jurisdiction of the ECCC shall bear individual criminal responsibility. Criminal responsibility is also attributed to superiors who fail to prevent or punish crimes committed or committed by their subordinates. The other international or internationalized criminal tribunals such as the ICTY, ICTR, SCSL and the ICC have the power to convict individuals

¹⁰² *Kordic* Appeal Judgement, para. 38; *See also*, *Kordic* Trial Judgement, para 229; *Brdjanin* Trial Judgement, paras. 380, 381.

on the same modes of liability namely planning,¹⁰³ instigating,¹⁰⁴ ordering,¹⁰⁵ aiding and abetting¹⁰⁶ and committing¹⁰⁷ as well as failing to prevent or punish crimes as a superior.¹⁰⁸ The elements of these modes of liability and their applicability to **DUCH** in this case are discussed below.

1. COMMITTED

PHYSICAL COMMISSION

41. Whilst a crime is typically committed by a single person, several perpetrators can be guilty of committing a crime if “the conduct of each one of them fulfills the requisite elements” of the crime(s) charged.¹⁰⁹ The *actus reus* of commission is when the Accused “physically perpetrates the relevant criminal act or engenders a culpable omission.”¹¹⁰ As for the required *mens rea* for commission, the Accused must have intended the act or omission and intended for the crime to occur.¹¹¹ Alternatively, an Accused’s knowledge or awareness of a “substantial likelihood” that a criminal act or omission would result from his or her conduct is sufficient.¹¹²

VIA JOINT CRIMINAL ENTERPRISE

42. Committing an offence through a joint criminal enterprise (“JCE”) has been recognised in the case law of the ICTY, ICTR and the SCSL.¹¹³ As the ECCC Law was drafted after the creation of the ICTY and ICTR Statutes and contains very similar language on modes of

¹⁰³ ICTY Statute, Art. 7(1); ICTR Statute, Art. 6(1); SCSL Statute, Art. 6(1).

¹⁰⁴ ICTY Statute, Art. 7(1); ICTR Statute, Art. 6(1); SCSL Statute, Art. 6(1).

¹⁰⁵ ICTY Statute, Art. 7(1); ICTR Statute, Art. 6(1); SCSL Statute, Art. 6(1); Rome Statute, Art. 25(3b).

¹⁰⁶ ICTY Statute, Art. 7(1); ICTR Statute, Art. 6(1); SCSL Statute, Art. 6(1); Rome Statute, Art. 25(3c).

¹⁰⁷ ICTY Statute, Art. 7(1); ICTR Statute, Art. 6(1); SCSL Statute, Art. 6(1); Rome Statute, Art. 25(3a).

¹⁰⁸ ICTY Statute, Art. 7(2); ICTR Statute, Art. 6(3); SCSL Statute, Art. 6(3); Rome Statute, Art. 28(b).

¹⁰⁹ *Prosecutor v. Kajelijeli*, Judgement and Sentence, ICTR Trial Chamber, Case No. ICTR-98-44A-T, 1 Dec. 2003, para. 764 (“*Kajelijeli* Trial Judgement”); *Kunarac* Trial Judgement, para. 390.

¹¹⁰ *Kunarac* Trial Judgement, para. 390; *Tadic* Appeal Judgement, para. 188; *Krstic* Trial Judgement, para. 601.

¹¹¹ *Limaj* Trial Judgement, para. 509; *Simic* Trial Judgement, para. 137.

¹¹² *Kvočka* Trial Judgement, para. 251.

¹¹³ See *Prosecutor v. Milutinovic, et al.*, Decision on Dragoljub Ojdanic’s Motion Challenging Jurisdiction – Joint Criminal Enterprise, ICTY Appeals Chamber, Case No. IT-99-37-AR72, 21 May 2003, para. 20 (*Milutinovic* JCE Appeal) “The Appeals Chamber... regards joint criminal enterprise as a form of ‘commission’ pursuant to Article 7(1) of the Statute.”; *Prosecutor v. Gacumbitsi*, Judgement, ICTR Appeals Chamber, Case No. ICTR-2001-64-A, 7 July 2006, para. 158 “The Appeals Chamber, following ICTY precedent, has recognized that an accused before this Tribunal may be found individually responsible for ‘committing’ a crime within the meaning of Article 6(1) of the Statute under one of three categories of ‘joint criminal enterprise’ (‘JCE’) liability.”; *Prosecutor v. Fofana & Kondewa*, Judgement, SCSL Trial Chamber, Case No. SCSL-04-14-T, 2 August 2007, para. 208 “‘committing’ [as used in the Statute] is sufficiently protean in nature as to include participation in a joint criminal enterprise to commit the crime”.

liability, it is very likely that the language of Article 29 of the ECCC Law was also intended to encompass joint criminal enterprise.¹¹⁴

43. JCE is a mode of liability that imposes criminal responsibility on individuals for actions perpetrated by a collectivity of persons in furtherance of a common criminal design.¹¹⁵ While the technical term “JCE” is quite modern, the underlying legal concepts have existed in both national and international law since at least World War II. There were thousands of criminal trials that arose out of crimes committed during World War II, both national and international in character. These trials established that individuals could be criminally liable as co-perpetrators for their participation in a common criminal plan or design, even if the mode of liability was not called JCE.
44. In 1945, Article 6 of the Charter of the International Military Tribunal (IMT)¹¹⁶ stated that individuals “participating in the formulation or execution of a common plan or conspiracy” to commit war crimes, crimes against humanity or crimes against peace would be “responsible for all acts performed by any persons in execution of such plan.” A similar provision appeared in Article 5 of the International Military Tribunal for the Far East in 1946.¹¹⁷ Article II of Control Council Law No. 10 (1945) also extended liability to individuals who were “connected with plans or enterprises” to commit crimes against peace, war crimes or crimes against humanity.¹¹⁸ As the ICTY Appeals Chamber

¹¹⁴ This interpretation would also be consistent with the object and purpose of the ECCC Law. The primary purpose of the ECCC is to try “senior leaders of Democratic Kampuchea” and “those who were most responsible” for the crimes that occurred in DK, Law on the ECCC, Art. 1. To prosecute senior leaders and those most responsible, it is critical that the ECCC have jurisdiction over those who devised and planned the CPK’s criminal policies, not just the physical perpetrators. Consequently, interpreting Article 29 to include joint criminal enterprise would be consistent with the object and purpose of the ECCC Law. *See Tadic Appeal Judgement paras. 189-190.*

¹¹⁵ *Tadic Appeal Judgement paras. 193, 187-226. See also Vasiljevic Appeal Judgement, paras. 95, 96.*

¹¹⁶ *See Charter of the International Military Tribunal, annexed to Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, Art. 6, 8 August 1945, reprinted in 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 10-11 (1947).*

¹¹⁷ *See Charter of the International Military Tribunal for the Far East, 19 January 1946 available in Gabrielle Kirk McDonald & Olivia Swaak-Goldman eds., Substantive and Procedural Aspects of International Criminal Law, Volume II: Documents and Cases (2000) at 73-77.*

¹¹⁸ *Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, 20 December 1945, 3 Official Gazette, Control Council for Germany, at 50-55 (1946).*

demonstrated in *Tadic*, there were numerous World War II trials where people were held to be liable for their participation in a common criminal plan or purpose.¹¹⁹

45. While the concept of JCE first appeared in international law shortly after World War II, it was not a new idea at that time. Rather, the concept that multiple individuals can be equally liable for criminal acts resulting from participation in a common criminal plan or design had its origins in the domestic laws of various countries and exists in both common law and civil law jurisdictions.¹²⁰ A similar idea was also present in Cambodian law prior to the commission of the crimes described in this final submission. The 1956 Penal Code made any voluntary participant in a crime, whether a direct or indirect participant, equally liable with the principal author of the crime.¹²¹ Consequently, **DUCH** could reasonably have foreseen that he would be directly liable for the acts of other S-21 staff if they were carried out pursuant to a common criminal plan or design.¹²²
46. There are three different but interrelated forms of JCE. Basic: all Accused participants act pursuant to a common criminal design, and all possess the same criminal intent when acting in fulfillment of the common criminal design.¹²³ Systematic: all Accused participants act pursuant to a common criminal design, all possess the same criminal intent when acting in fulfillment of the common criminal design, and the charged crimes occurred in the context of a common criminal design *usually* carried out by members of a military or

¹¹⁹ *Tadic* Appeal Judgement paras. 195-220.

¹²⁰ *Tadic* Appeal Judgement para. 224 discussing the origins of concepts similar to joint criminal enterprise in the jurisprudence of various States.

¹²¹ Code Pénal et Lois Pénales, Art. 82 (1956). “Toute personne participant volontairement, soit directement, soit indirectement, à la perpétration d’un crime ou d’un délit, est passible des peines applicables à l’auteur principal.”

¹²² **DUCH** can be held liable for participation in a joint criminal enterprise if that liability was sufficiently foreseeable and the law of joint criminal enterprise was sufficiently accessible at the time the criminal acts were committed, *Milutinovic* JCE Appeal, para. 37. The statutes of the IMT and IMTFE, Control Council Law no. 10, as well as the large number of WWII trials involving a common criminal purpose or design discussed above demonstrate that liability was foreseeable and that the basis for that liability was accessible, *Milutinovic* JCE Appeal, para. 41. This conclusion is strengthened by the fact that the charged acts were also criminal under the 1956 Penal Code, *Milutinovic* JCE Appeal, para. 40. Finally, the nature and scope of the crimes perpetrated at S-21 undercuts any argument that the participants did not realize their acts were criminal, *Milutinovic* JCE Appeal, para. 42.

¹²³ *Tadic* Appeal Judgement, para. 196; *Vasiljevic* Appeal Judgement, para. 97. See also, *Krnjelac* Appeal Judgement, paras. 83-84 discussing the interplay between the basic form of JCE and the extended form of JCE.

administrative unit.¹²⁴ Typically, this form of JCE is associated with concentration or extermination camps or any “organized system of ill-treatment.”¹²⁵ The existence and/or membership in a military or administrative unit is not a formal requirement, but merely an indicator of an organized system of ill-treatment.¹²⁶ Extended: all Accused participants act pursuant to a common criminal design, all possess the same criminal intent when acting in fulfilment of the common criminal design, and one of the participants carries out an act that, despite being outside of the original criminal purpose, is nevertheless attributed to the other members because the act was a “natural and foreseeable consequence” of the criminal design.¹²⁷

47. The *actus reus* of all types of JCE is comprised of three elements. First, a “plurality of persons” is required.¹²⁸ The group of people need not be organized in any formal or informal structure, such as a military, political, or administrative organization.¹²⁹ Second, a common criminal design or purpose must entail criminal activity prohibited under the statute of the tribunal with jurisdiction over the Accused(s).¹³⁰ The common criminal purpose, design, or plan need not be previously arranged or formulated.¹³¹ The perpetrator of the crime and the Accused need not have an express understanding or agreement between them in regards to committing the crime(s).¹³² Additionally, the common criminal plan or purpose may materialize extemporaneously and can be inferred from the facts.¹³³

¹²⁴ *Tadic* Appeal Judgement, para. 202.

¹²⁵ *Vasiljevic* Appeal Judgement, para. 98.

¹²⁶ *Krnjelac* Appeal Judgmet, para. 89; *Kvočka* Appeal Judgement, para. 182.

¹²⁷ *Tadic* Appeal Judgement, para. 204. An example of this would be a common criminal purpose to ethnically cleanse a certain area by gunpoint, but with the common criminal intent *only* to deport unwanted people out of the area. During the operation, someone is shot and killed. While the common criminal purpose might be to ethnically cleanse the area, not commit murder, it is a predictable and foreseeable consequence that someone might be killed if the perpetrators of the ethnical cleansing campaign are armed with guns, *Vasiljevic* Appeal Judgement, para. 99.

¹²⁸ *Vasiljevic* Appeal Judgement, para. 100; *See also Prosecutor v. Stakic*, Judgement, ICTY Appeals Chamber, Case No. IT-97-24-A, 22 March 2006, para. 64 (“*Stakic* Appeals Judgement”).

¹²⁹ *Krnjelac* Appeals Judgement, para. 31; *Vasiljevic* Appeal Judgement, para. 100.

¹³⁰ *Tadic* Appeal Judgement, para. 227; *Vasiljevic* Appeal Judgement, para. 100.

¹³¹ *Tadic* Appeal Judgement, para. 227; *Stakic* Appeal Judgement, para. 64.

¹³² *Tadic* Appeal Judgement, para. 227; *Vasiljevic* Appeal Judgement, para. 100; *Prosecutor v. Brdjanin*, Judgement, ICTY Appeals Chamber, Case No. IT-99-36-A, 3 April 2007, para. 418 (“*Brdjanin* Appeal Judgement”).

¹³³ *Tadic* Appeal Judgement, para. 227; *Krnjelac* Appeal Judgement, para. 31.

Third, the Accused must participate in some capacity with the common criminal design.¹³⁴ The Accused's contribution needs not be necessary,¹³⁵ but must be significant for carrying out the common criminal plan.¹³⁶ The presence of the Accused at the time when the crime is committed is not necessary.¹³⁷

48. Whereas the three forms of JCE share these same elements of *actus reus*, they do not share the same *mens rea*. The "basic" JCE form requires that the Accused has the intent to perpetrate the charged crime(s) and all participants of the common criminal design share this intent.¹³⁸ The "systematic" form of JCE requires a similar level of criminal intent: the Accused must have personal knowledge of the system of ill-treatment and the intent to further that system.¹³⁹ Members of a JCE can be liable for crimes physically committed by outsiders to the JCE if these crime(s) form a part of the common criminal purpose and one member of the JCE uses the outside perpetrator(s) as a tool to carry out the common criminal purpose.¹⁴⁰
49. As for the extended JCE form, the accused must have the intention to take part in and contribute to the common criminal purpose. Liability for those crimes which were not part of the common criminal purpose, but which were nevertheless a natural and foreseeable consequence of it, requires two additional elements. The accused must know that such crimes might be perpetrated by a member of the group and willingly took that risk by joining or continuing to participate in the enterprise.¹⁴¹ If an outside perpetrator commits a crime beyond the scope of the JCE, the Accused is responsible under extended JCE whenever:
- (a) the Accused participated in the common criminal design with the requisite intent;

¹³⁴ *Tadic* Appeal Judgement, para. 227; *Stakic* Appeal Judgement, para. 64; *Brdjanin* Appeal Judgement, para. 418.

¹³⁵ *Kvocka* Appeal Judgement, para. 98.

¹³⁶ *Brdjanin* Appeal Judgement, para. 430.

¹³⁷ *Krnjelac* Appeal Judgement, para. 81.

¹³⁸ *Tadic* Appeal Judgement, para. 220, 228;.

¹³⁹ *Krnjelac* Appeal Judgement, para. 32; *Vasiljevic* Appeal Judgement, paras. 101, 105.

¹⁴⁰ *Brdjanin* Appeal Judgement, paras. 410, 413, 418, 430. "When a member of the JCE uses a person outside the JCE to carry out the *actus reus* of a crime, the fact that this person (*the outsider*) knows of the existence of the JCE, i.e. of the common purpose, may be a factor taken into consideration when determining whether the crime forms part of the common criminal purpose.", *Mrksic* Trial Judgement, para. 547 (*explanatory note added*).

¹⁴¹ *Kvocka* Appeal Judgement, para. 83; *Tadic* Appeal Judgement, para. 228; *Mrksic* Trial Judgement, para. 546.

- (b) the commission of such crime by an outside perpetrator was a natural and foreseeable consequence of the common criminal purpose; and
- (c) the Accused nevertheless willingly took this risk and decided to participate in the common criminal purpose.¹⁴²

50. Jurisprudence specifically relating to prison camps has established that where detainees have been unlawfully imprisoned, kept in inhumane conditions, beaten, tortured and executed, these crimes can be seen as manifestations of a JCE.¹⁴³ Accordingly, prison commanders or deputy commanders have been found to be co-perpetrators of JCEs within prison camps. At the ICTY the factors indicating such an enterprise have been identified as follows :

- (a) the fact that guards sought instructions from a commander and that he gave them orders that they then executed;¹⁴⁴
- (b) the significant contribution of the commander's presence during the early stage of the prison camp's existence, his participation in its formation, and his experience as a police officer;¹⁴⁵ and
- (c) the key role of the commander in the everyday functioning and maintenance of the camp which contributed to the continued discriminatory criminal practices.¹⁴⁶

2. ORDERED

51. The act of ordering occurs when "a person in a position of authority us[es] that position to convince another to commit an offence."¹⁴⁷ The order is not required to be illegal on its face nor is it necessary that the order be given directly or personally by the Accused to the perpetrator(s).¹⁴⁸ Reissuing an order by passing an illegal order down the chain of command similarly creates criminal liability.¹⁴⁹ The Accused must have the authority to order for liability to arise, however the jurisprudence is unsettled whether a formal

¹⁴² *Brdjanin* Appeal Judgement, paras. 411, 431.

¹⁴³ *Kvočka* Trial Judgement, para. 320; *Krnojelac* Appeal Judgement, para. 110-111.

¹⁴⁴ *Kvočka* Trial Judgement, Para. 396.

¹⁴⁵ *Kvočka* Trial Judgement, Para. 398-399.

¹⁴⁶ *Kvočka* Trial Judgement, Para. 406-407..

¹⁴⁷ *Krstić* Trial Judgement, para. 601; *Akayesu* Trial Judgement, para. 483; *Bagilishema* Trial Judgement, para. 31; *See also*, ECCC Law, Art. 29; ICTY Statute, Art. 7(1); ICTR Statute, Art. 6(1); SCSL Statute, Art. 6(1).

¹⁴⁸ *Blaskić* Trial Judgement, paras. 281-82.

¹⁴⁹ *Kupreskić* Trial Judgement, paras. 827, 613.

superior-subordinate relationship is necessary.¹⁵⁰ The order can either be explicit or implicit and be proved circumstantially.¹⁵¹ As to intent, the Accused must directly or indirectly have intended for the underlying crime(s) to be committed.¹⁵² He or she must have the knowledge that the execution of the order would lead to the substantial likelihood that a crime will be committed.¹⁵³

52. Jurisprudence specifically relating to prison camps has established that prison commanders can be held liable for ordering the mistreatment of detainees during interrogations¹⁵⁴ as well as for ordering serious violence towards detainees who were regularly beaten after the commander initially led the guards who beat them to their cells.¹⁵⁵ One prison commander was also convicted for ordering guards to continue beating detainees when they had initially stopped.¹⁵⁶

3. PLANNED

53. Planning a crime implies that one or several persons contemplate designing the commission of a crime at both the preparatory and execution stage.¹⁵⁷ The act of planning a crime must be sufficiently “substantial” to justify individual criminal liability, such as “formulating a criminal plan or endorsing a plan proposed by another.”¹⁵⁸ Evidence of “planning a crime” may be circumstantial.¹⁵⁹ Additionally, the Accused must have the criminal intent, directly or indirectly, that the planned crime be committed.¹⁶⁰

¹⁵⁰ *Akayesu* Trial Judgement, para. 483; *Blaskic* Trial Judgement, paras. 280-81; *Kajelijeli* Trial Judgement, para. 763; *Stakic* Trial Judgement, para. 444.

¹⁵¹ *Stakic* Trial Judgement, para. 444; *Kordic* Trial Judgement, para. 388.

¹⁵² *Blaskic* Trial Judgement, para. 278; *Bagilishema* Trial Judgement, para. 31.

¹⁵³ *Blaskic* Appeal Judgement, para. 42; *Kordic* Appeal Judgement, paras. 29-30.

¹⁵⁴ *Aleksovski* Trial Judgement, para. 89.

¹⁵⁵ *Aleksovski* Trial Judgement, para. 88.

¹⁵⁶ *Aleksovski* Trial Judgement, para. 88.

¹⁵⁷ *Krstic* Trial Judgement, para. 601; *Prosecutor v. Musema*, Judgement and Sentence, ICTR Trial Chambers, Case No. ICTR-96-3-T, 27 January 2000, para. 119 (“*Musema* Trial Judgement”).

¹⁵⁸ *Bagilishema* Trial Judgement, para. 30; *Prosecutor v. Semanza*, Judgement and Sentence, ICTR Trial Chamber, Case No. ICTR-97-20-T, 15 May 2003, para. 380, (“*Semanza* Trial Judgement”).

¹⁵⁹ *Blaskic* Trial Judgement, para. 279; *Kajelijeli* Trial Judgement, para. 761.

¹⁶⁰ *Blaskic* Trial Judgement, para. 278; *Bagilishema* Trial Judgement, para. 31.

4. INSTIGATED

54. Instigating a crime means to “prompt another to commit an offence” and is synonymous with “provoke” and “incite”.¹⁶¹ The *actus reus* of instigation is “urging, encouraging, or prompting.”¹⁶² A causal connection between the instigation and the underlying crime(s) is necessary.¹⁶³ The instigation must have been a “clear contributing factor to the conduct of the person who actually committed the crime.”¹⁶⁴ Instigation can be an act or an omission.¹⁶⁵ The mere presence of someone holding authority who fails to act has been held to be an act of instigation.¹⁶⁶ In terms of the *mens rea* element, the Accused must have “intended to provoke or induce the commission of the crime.” The awareness of the substantial likelihood that the crime(s) would be committed as a consequence of the Accused’s actions is sufficient.¹⁶⁷
55. Jurisprudence specifically relating to prison camps has found camp staff liable for instigating mistreatment on detainees during their interrogation and detention by bringing guards who beat the prisoners to their cells and by remaining silent when they could have opposed or repressed the abusive treatment.¹⁶⁸ Prison commanders have also been held liable for instigating persecutions, murder, torture, and beatings of detainees by not taking action while in a position of authority and influence,¹⁶⁹ and by virtue of the commander’s “approval, encouragement, acquiescence, and assistance in the development and continuation of the conditions in the camp and the on-going commission of crimes” against the prisoners within the prison.¹⁷⁰

¹⁶¹ *Krstic* Trial Judgement, para. 601; *Blaskic* Trial Judgement, para. 280; *Akayesu* Appeal Judgement, paras. 474-483.

¹⁶² *Semanza* Trial Judgement, para. 381.

¹⁶³ *Bagilishema* Trial Judgement, para. 30; *Semanza* Trial Judgement, para. 381; *Blaskic* Trial Judgement, para. 280.

¹⁶⁴ *Kvočka* Trial Judgement, para. 252; *See also, Prosecutor v. Nindabahizi*, Judgement and Sentence, ICTR Trial Judgement, Case No. ICTR-2001-71-I, 15 July 2004, para. 456 (“*Nindabahizi* Trial Judgement”).

¹⁶⁵ *Kordic* Trial Judgement, para. 387; *Blaskic* Trial Judgement, para. 280.

¹⁶⁶ *Musema* Trial Judgement, paras. 865, 894.

¹⁶⁷ *Naletilic* Trial Judgement, para. 60; *Blaskic* Trial Judgement, para. 278; *Bagilishema* Trial Judgement, para. 31; *Akayesu* Trial Judgement, para. 482.

¹⁶⁸ *Aleksovski* Trial Judgement, para. 88.

¹⁶⁹ *Kvočka* Trial Judgement, paras. 368, 393, 394.

¹⁷⁰ *Kvočka* Trial Judgement, Annex D, Amended Indictment, para. 26.

5. AIDED AND ABETTED

56. Aiding and abetting a crime is otherwise known as accessory or accomplice liability. To aid and abet is to give “practical assistance, encouragement, or moral support” to the perpetrator that “substantially contributes” to the commission of the crime.¹⁷¹ Substantial contribution means that the crime would most likely not have occurred in the same manner had it not been for the accused’s participation.¹⁷² However, the accused’s role need not be indispensable.¹⁷³ The mere presence of the accused can be an act of aiding and abetting if the presence is shown to have significantly encouraged the perpetrator(s).¹⁷⁴ The aiding and abetting can occur before, during, or after the commission of the crime(s).¹⁷⁵ Whilst it needs to be established at trial that the underlying crime(s) was in fact committed,¹⁷⁶ this should not be conflated with a simultaneous prosecution or conviction of the direct perpetrator(s).
57. As for the requisite criminal intent, the accused is not required to “share” the *mens rea* of the perpetrator(s),¹⁷⁷ nor to know the precise crime(s) that the perpetrator(s) intended to commit or actually did commit.¹⁷⁸ The accused, however, must: (1) be aware of or know that his or her acts will assist in the commission of a crime(s);¹⁷⁹ (2) be aware of the essential elements of the crime(s); and (3) know the intentions of the perpetrator(s).¹⁸⁰

¹⁷¹ *Prosecutor v. Aleksovski*, Judgement, ICTY Appeals Chamber, Case No. IT-95-14/1, 24 March 2000, para. 162 (“*Aleksovski* Appeal Judgement”); *Blaskic* Appeal Judgement, para. 46. However, a cause/effect relationship with the underlying crimes is not necessary: *Krnjelac* Trial Judgement, para. 88; *Kunarac* Trial Judgement, para. 391; *Blaskic* Trial Judgement, para. 285.

¹⁷² *Prosecutor v. Dusko Tadic*, Judgement, ICTY Trial Chamber, Case No. IT-94-1-T, 7 May 1997, paras. 688 (“*Tadic* Trial Judgement”).

¹⁷³ *Prosecutor v. Anto Furundzija*, Judgement, ICTY Trial Chamber, Case No.: IT-95-17/1-T, 10 December 1998, para. 209 (“*Furundzija* Trial Judgement”); *Bagilishema* Trial Judgement, para. 33.

¹⁷⁴ *Vasiljevic* Trial Judgement, para 70; *Aleksovski* Trial Judgement, paras. 64-65; *Blaskic* Trial Judgement, para. 284.

¹⁷⁵ *Blaskic* Appeal Judgement, para. 48; *Aleksovski* Trial Judgement, para. 62.

¹⁷⁶ *Stakic* Trial Judgement, para. 561; *Blagojevic* Trial Judgement, para. 638; *Musema* Trial Judgement, paras. 171-172.

¹⁷⁷ *Aleksovski* Appeal Judgement, para. 162; *Vasiljevic* Trial Judgement, para 71; *Semanza* Trial Judgement, para 388; *Kunarac* Trial Judgement, para. 392.

¹⁷⁸ *Blaskic* Trial Judgement, para. 287; *Kvocka* Trial Judgement, para. 255.

¹⁷⁹ *Aleksovski* Appeal Judgement, para. 162; *Blaskic* Appeal Judgement, paras. 46, 49-50; *Tadic* Appeal Judgement, para. 229; *Vasiljevic* Trial Judgement, para. 71.

¹⁸⁰ *Aleksovski* Appeal Judgement, para. 162; *Kunarac* Trial Judgement, para. 392; *Kvocka* Trial Judgement, paras. 255, 262; *Krnjelac* Trial Judgement, para. 90.

58. Jurisprudence specifically relating to prison camps has established that defendants are criminally liable who aided and abetted “recurring brutality” and violence in prisons.¹⁸¹ In the circumstances of the *Aleksovski* case, the accused was found to have led the guards to the cells of the detainees who were then beaten by the guards, in addition to being occasionally present during the frequent beatings or being nearby in his office. The presence of an accused during the systematic mistreatment of detainees created an inference that he was aware that such tacit approval would be construed as a sign of support and encouragement.¹⁸²

6. SUPERIOR RESPONSIBILITY

59. Superior or command responsibility is a form of criminal liability which is firmly entrenched in customary and conventional international law¹⁸³ and applies regardless of the nature of the underlying conflict, be it internal or international.¹⁸⁴ In order to establish criminal liability through superior responsibility, three elements must be satisfied:

- (a) a superior-subordinate relationship;
- (b) the superior knew or had reason to know that his or her subordinate had committed or was about to commit a crime;
- (c) the superior failed to prevent the commission of the crime or to punish the perpetrators.¹⁸⁵

60. As for the first element, a superior-subordinate relationship can exist either formally or informally, and either directly or indirectly between the accused and the alleged perpetrator(s) of the crime(s).¹⁸⁶ An accused must have either *de jure* or *de facto* authority

¹⁸¹ *Aleksovski* Trial Judgement, para. 88.

¹⁸² *Aleksovski* Trial Judgement, para. 87.

¹⁸³ *Prosecutor v. Delalic*, Judgement, ICTY Appeals Chamber, Case No. IT -96-21-A, 20 February 2001, para. 195 (“*Delalic* Appeal Judgement”).

¹⁸⁴ *Prosecutor v. Hadzihasanovic et al.*, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, ICTY Appeals Chamber, Case No. IT-01-47-AR72, 16 July 2003, paras. 13, 31, 16 (“*Hadzihasanovic* Appeal Decision”).

¹⁸⁵ *Aleksovski* Appeal Judgement, paras. 72, 76; *Prosecutor v. Bagilishema*, Judgement, ICTR Appeal Chamber, Case No. ICTR-95-1A-A, 3 July 2002, paras. 24-38 (“*Bagilishema* Appeal Judgement”); *Delalic* Appeal Judgement, paras. 189-198, 225-226, 238-39, 256, 263.

¹⁸⁶ *Delalic* Appeal Judgement, paras. 251-52, 303; *Krnjelac* Trial Judgement, para. 93; *Kordic* Trial Judgement, para. 416.

over the perpetrator(s)¹⁸⁷ which may apply to civilian as well as military commanders as long as the civilian exercises control similar to that of a military commander.¹⁸⁸ A superior-subordinate relationship exists if the accused had “effective control” over the perpetrator(s), meaning that the accused could have prevented the crime(s) from being committed or could have punished the perpetrator(s) who committed the crime(s).¹⁸⁹ This must be more than simply substantial influence.¹⁹⁰ An accused may possess either permanent or temporary “effective control” over the perpetrator(s), but this must have existed at the time of the commission of the crime(s).¹⁹¹

61. An accused failed to prevent and punish when he failed to exercise “necessary and reasonable measures to prevent or punish the crimes of his subordinates”.¹⁹² An individual determination must be made of the measures legally required of each accused,¹⁹³ but there are a number of basic obligations every superior must follow. As a minimum requirement, an accused must “investigate the crimes to establish the facts and report them to the competent authorities, if (he) does not have the power to sanction himself.”¹⁹⁴ A superior may be required to go beyond legal or structural formalities in an effort to prevent and/or punish the commission of crimes.¹⁹⁵ The failure to prevent or to punish must be the product of a deliberate, culpable, or wilful choice on the part of the accused to disregard his or her duty.¹⁹⁶ Mere negligence is not sufficient.¹⁹⁷
62. For both military and civilian commanders, the mental element of superior responsibility requires the accused to have known or have had reason to know that his subordinates had

¹⁸⁷ *Delalic* Appeal Judgement, para. 193, 197; *Prosecutor v. Niyitegeka*, Judgement and Sentence, ICTR Trial Chamber, Case No. ICTR-96-14-T, 16 May 2003, para. 472 (“*Niyitegeka* Trial Judgement”).

¹⁸⁸ *Bagilishema* Appeal Judgement, paras. 51-55; *Delalic* Appeal Judgement, para. 196; *Aleksovski* Appeal Judgement, para. 76.

¹⁸⁹ *Blaskic* Appeal Judgement, para. 375; *Bagilishema* Appeal Judgement, paras. 50, 56; *Delalic* Appeal Judgement, para. 256; *Kayishema* Appeal Judgement, para. 294; *Aleksovski* Appeal Judgement, para. 76; also on the ability to act: *Blaskic* Appeal Judgement, paras. 72, 417; *Bagilishema* Trial Judgement, para. 47.

¹⁹⁰ *Delalic* Appeal Judgement, paras. 257-266.

¹⁹¹ *Kunarac* Trial Judgement, para. 399.

¹⁹² *Delalic* Appeal Judgement, para. 226.

¹⁹³ *Blaskic* Appeal Judgement, para. 72; *Brdanin* Trial Judgement, para. 279.

¹⁹⁴ *Kordic* Trial Judgement, para. 446.

¹⁹⁵ *Kayishema* Appeal Judgement, para. 302; *Delalic* Trial Judgement, para. 395.

¹⁹⁶ *Bagilishema* Appeal Judgement, paras. 35, 36.

¹⁹⁷ *Blaskic* Appeal Judgement, paras. 61-63; *Bagilishema* Appeal Judgement, para. 35; *Delalic* Appeal Judgement para. 226.

been about to commit or had committed a crime.¹⁹⁸ “Knew” means actual knowledge, whereas “had reason to know” means that the accused “had in his possession information of a nature, which at the very least, would put him on notice of the risk of such offences by indicating the need for additional investigation in order to ascertain whether such crimes were committed or were about to be committed by his subordinates.”¹⁹⁹ The accused must not deliberately refrain from fulfilling his duty as a superior by ignoring or disregarding evidence of criminal activity.²⁰⁰ Knowledge²⁰¹ must correlate to the crimes for which the accused is prosecuted.²⁰²

63. Jurisprudence specifically relating to prison camps has established that an accused had reason to know that specific crimes inside a prison had been committed from both the external context (namely the circumstances in which the prison was established) and the internal context (namely the operation of the prison, in particular the widespread nature of the beatings and the frequency of the interrogations).²⁰³ Camp commanders have been found to have effective control because they had power to issue orders to their subordinates,²⁰⁴ held an elevated status within the prison, and had the right to report offences by their subordinates to superior authorities.²⁰⁵

¹⁹⁸ *Blaskic* Appeal Judgement, paras. 54-64; *Delalic* Appeal Judgement, paras. 196-197, 239-241.

¹⁹⁹ *Delalic* Appeal Judgement, para. 241; *Baglishema* Appeal Judgement, paras. 26-38, 42.

²⁰⁰ *Blaskic* Appeal Judgement, para. 406.

²⁰¹ Knowledge can be proven with direct or circumstantial evidence.: *See Blaskic* Trial Judgement, para. 308; *Krnjelac* Trial Judgement, para. 94; *Aleksovski* Trial Judgement, para. 80; For the relevant jurisprudence of factors for determining whether the Accused knew or had reason to know that crimes were committed or were going to be committed by his or her subordinates: *See Kordic* Trial Judgement, paras. 427, 437.

²⁰² *Krnjelac* Appeal Judgement, paras. 155-156.

²⁰³ *Krnjelac* Appeals Judgement, para. 171.

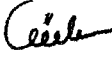
²⁰⁴ *Aleksovski* Trial Judgement, para. 104.

²⁰⁵ *Aleksovski* Trial Judgement, para. 105.

CONCLUSION

64. The Co-Prosecutors request that the Trial Chamber consider this law in determining the charges against **DUCH**.

Respectfully submitted,

Date	Name	Place	Signature
20 August 2009	YETH Chakriya Deputy Co-Prosecutor	Phnom Penh	
	William SMITH Deputy Co-Prosecutor	Phnom Penh	