

**BEFORE THE SUPREME COURT CHAMBER
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

FILING DETAILS

Case No.: 002/19-09-2007-ECCC/SC

Party Filing: Mr KHIEU Samphân

Filed to: The Supreme Court Chamber

Original Language: French

Date of Document: 23 September 2019

CLASSIFICATION

Classification of the document suggested by the filing party: Public

Classification by the Chamber:

Classification Status:

Review of the Interim Classification:

Records Officer's Name:

Signature:

KHIEU Samphân Defence Response to the Prosecution's Appeal in Case 002/02

Filed by:

Lawyers for Mr KHIEU Samphân
KONG Sam Onn
Anta GUISSÉ

Assisted by
SENG Socheata
Marie CAPOTORTO
Cécile ROUBEIX
Dounia HATTABI
Stéphane NICOLAÏ

Before:

The Supreme Court Chamber
Judge KONG Srim
Judge Chandra Nihal JAYASINGHE
Judge SOM Sereyvuth
Judge Florence Ndepele MWACHANDE-MUMBA
Judge MONG Monichariya
Judge Maureen HARDING CLARK
Judge YA Narin

The Co-Prosecutors
CHEA Leang
Brenda J. HOLLIS (Reserve)
William SMITH (Deputy)

All Civil Party Lawyers

MAY IT PLEASE THE SUPREME COURT CHAMBER

1. On 23 June 2019, the Prosecution (or the “Appellant”) filed its Notice of Appeal against the judgement rendered in Case 002/02, challenging a single finding of the Trial Chamber (the “Chamber”).¹ On 20 August 2019, it filed its Appeal Brief.²
2. On 23 August 2019, the Supreme Court Chamber (the “Supreme Court”) denied KHIEU Samphân’s Defence (the “Defence” or the “Respondent”) request to start the time limit for responding to the Prosecution from the filing of its own appeal brief. The Supreme Court gave the Defence 30 days from the notification of its decision.³
3. The Defence hereby responds to the Prosecution’s appeal, without prejudice to any arguments to be developed in its appeal brief.
4. The Appellant chose to appeal the Chamber’s finding that sexual violence suffered by men in the context of forced marriage did not constitute the crime against humanity of other inhumane acts.⁴
5. After failing to convince the Chamber to adopt an ultra-modern definition of rape (“more inclusive and gender-neutral”⁵), the Prosecution is now attempting to convince the Supreme Court that sexual violence suffered by men in the context of marriage under the Democratic Kampuchea regime must nevertheless be criminalised. Despite the impossibility of characterising the crime as other inhumane acts (I) and despite the patent lack of evidence (II).

¹ Co-Prosecutors’ Notice of Appeal of the Trial Judgement in Case 002/02, 21 June 2019, **E465/2/1**.

² Co-Prosecutors’ Appeal against the Case 002/02 Trial Judgement, 20 August 2019, **F50** (“Prosecution Appeal Brief”), notified in English and Khmer on 21 August 2019 and in French on 3 September 2019. The Defence received a courtesy copy of the French translation on 27 August 2019.

³ Decision on Khieu Samphân’s Request for Extensions of Time and Page Limits for Filing his Appeal Brief, 23 August 2019, **F49**, paras 23-28 and 36.

⁴ Prosecution Appeal Brief, paras 1-3, 40.

⁵ Prosecution Appeal Brief, para. 15.

I. NON-CHARACTERISATION OF THE CRIME

6. The Appellant alleges incorrectly that the Chamber conducted an incomplete analysis of the elements of the crime of other inhumane acts (1), in order to be able to articulate a flawed analysis of the elements of this crime in violation of the principle of legality, in an anachronistic approach characterised more by its militancy than its lawfulness (2).

1. THERE IS NO NEED FOR THE SUPREME COURT TO INTERVENE

7. The Appellant submits that the Chamber should have assessed whether the conduct in question constituted a serious attack on human dignity even if it caused no serious physical or mental suffering to men.⁶ In fact, the Chamber did consider this requirement.

8. Indeed, as the Prosecution notes, however, the Chamber considered whether this conduct “could be characterised as sexual violence of such serious gravity that it amounted to other inhumane acts”.⁷ It answered the question in the negative.⁸ In “acknowledging” that men had been subjected to acts that were “contrary to human dignity”,⁹ the Chamber did assess whether or not the acts resulted in a serious attack on human dignity. It found that there was an attack on human dignity, but that it was not serious enough to be characterised as other inhumane acts.

9. Thus, the Appellant alleges a non-existent error on the part of the Chamber, which, accordingly, requires no intervention by the Supreme Court. Accordingly, the Appellant’s appeal must be dismissed.

10. It is in order to make up for its own failure to prove the seriousness of the alleged acts that the Prosecution proposes that the Supreme Court leap into this non-existent flaw and then invites it to follow a line of reasoning opposed to the principle of legality.

⁶ Prosecution Appeal Brief, paras 2, 18-20.

⁷ Prosecution Appeal Brief, para. 16 and footnote 32.

⁸ Prosecution Appeal Brief, para. 17 and footnote 40.

⁹ Prosecution Appeal Brief, para. 17 and footnote 40.

2. PROSECUTION'S DISREGARD FOR THE PRINCIPLE OF LEGALITY

11. Under the principle of legality, no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed.¹⁰ As the Supreme Court has pointed out:

while the ECCC clearly benefits from the reasoning of the *ad hoc* Tribunals in their articulation and development of international criminal law, in light of the protective function of the principle of legality, Chambers in this Tribunal are under an obligation to determine that the holdings on elements of crimes or modes of liability therein were applicable during the temporal jurisdiction of the ECCC. Furthermore, they must have been foreseeable and accessible to the Accused. In addition, the Supreme Court Chamber stresses that careful, reasoned review of these holdings is necessary for ensuring the legitimacy of the ECCC and its decisions.¹¹

12. However, the Appellant suggests a test defining one of the elements of other inhumane acts that did not exist during the period of Democratic Kampuchea (A) and is advocating in favour of criminalising conduct that did not constitute an offence at the time of the facts (B).

A. A purely objective assessment of the attack on dignity did not exist at the time of the facts as it is today

13. The Prosecution claims, on the authority of the *Čelebići* judgement rendered by the ICTY in 1998, that “whether an act constitutes a “serious attack on human dignity” is an objective assessment that can be made [by the Trial Chamber] without evidence of suffering”.¹² This assessment of the second *actus reus* of the crime of “other inhumane acts” did not exist at the time of the alleged criminal conduct (1975-1979).

14. Indeed, in the *Aleksovski* judgement issued in 1999, the ICTY Trial Chamber completed the analysis undertaken in *Čelebići*.¹³ It acknowledged that “an objective component to the *actus reus* is apposite”.¹⁴ The Trial Chamber thus stated unequivocally that the assessment of the seriousness of the attack on human dignity had, up to that point, been purely subjective.

¹⁰ Article 15 of the International Covenant on Civil and Political Rights. See also article 3 of the Cambodian Criminal Code (“Conduct may give rise to criminal conviction only if it constituted an offence at the time it occurred.”) See also: KHIEU Samphân’s Closing Brief (002/02), 2 May 2017, amended on 2 October 2017, E457/6/4/1, paras 300-330.

¹¹ Duch Appeal Judgement, 3 February 2012, 001-F28, para. 97 and footnote 184.

¹² Prosecution Appeal Brief, paras 22 and 20.

¹³ *The Prosecutor v. Aleksovski*, IT-95-14/1-T, Judgement, 25 June 1999, (“*Aleksovski* Judgement”), paras 52-56.

¹⁴ *Aleksovski* Judgement, para. 56 (emphasis added).

15. In accordance with the principle of legality, in this case, the gravity of the attack on human dignity must therefore be assessed subjectively.

16. Nevertheless, were the Supreme Court to consider it necessary to intervene and objectively assess the level of gravity of the second constitutive element of “other inhumane acts”, it could not do so at the expense of subjective criteria specific to the alleged victims.

17. Contrary to the Appellant’s claim,¹⁵ the ICTY has never conducted an exclusively objective assessment of the gravity of the *actus reus*, in stark contrast with the approach that it adopted in the interests of the accused.

18. Indeed, in *Aleksovski*, the Trial Chamber unequivocally clarified that “the subjective element must be tempered by objective factors; otherwise, unfairness to the accused would result because his/her culpability would depend not on the gravity of the act but wholly on the sensitivity of the victim”.¹⁶

19. In this regard, subsequent ICTY judgements have set out the factors to be considered in determining the gravity of the alleged criminal act. In the *Krnojelac* judgement referred to by the Prosecution,¹⁷ the Trial Chamber envisaged the characterisation of “other inhumane acts” as follows:

The assessment of the seriousness of an act or omission is, by its very nature, relative. All the factual circumstances must be taken into account, including the nature of the act or omission, the context in which it occurs, its duration and/or repetition, the physical, mental and moral effects of the act on the victim and the personal circumstances of the victim, including age, sex and health. (emphasis added).¹⁸

20. These specific criteria have been repeatedly reaffirmed in identical wording.¹⁹

¹⁵ Prosecution Appeal Brief, para. 23.

¹⁶ *Aleksovski* Judgement, para. 56.

¹⁷ Prosecution Appeal Brief, footnote 45 (from para. 19), referring to para. 130 of the *Krnojelac* Judgement.

¹⁸ *The Prosecutor v. Krnojelac*, IT-97-25-T, Judgement, 15 March 2002, para. 131.

¹⁹ *The Prosecutor v. Simić*, IT-95-9-T, Judgement, 17 October 2003, para. 75, referring to the *Vasiljević* case, IT-98-32-T, Judgement, 29 November 2002, para. 235.

21. For these reasons, the purely objective assessment proposed by the Appellant is flawed and cannot justify the characterisation of other inhumane acts in the absence of proof of the gravity of the alleged criminal conduct. The Prosecution's ground of appeal must be dismissed.

B. The Prosecution's opportunistic militancy

22. According to the Appellant, referring to a 1998 ICTY case, "[t]he Trial Chamber's failure to find that, objectively, forcing men to have sexual intercourse *per se* constitutes a serious attack on human dignity violates the fundamental principle of international humanitarian law and human rights law, which is 'the protection of the human dignity of every person, *whatever his or her gender.*'"²⁰

23. The Prosecution is thus attempting to deconstruct "centuries of gender stereotypes" in order to entrench the sexual victimization of men in the context of Democratic Kampuchea,²¹ thereby creating a legal anachronism impelled by contemporary political considerations. However, the question is not whether it is legitimate today to change attitudes, but to determine the state of the law at the time of the facts.

24. Specifically, the Appellant points out that "[n]umerous countries have begun to recognise these misconceptions and have expanded their penal codes to criminalise situations in which a perpetrator forces a victim to commit a sexual act, including penetration, against his will, either on the perpetrator or on a third person".²² As shown by the Prosecution, the 11 national legislations it lists (not including Cambodia) have evolved to the point of criminalising such conduct starting in 2003 (most of them after 2010), i.e. more than a quarter of a century after the facts charged in Case 002/02²³. This simple fact should have led the Appellant to question the relevance of its submission on this point.

25. Moreover, these offences have still not been established under international law and cannot constitute customary international law. In any event, the stammering legislative steps cited by the

²⁰ Prosecution Appeal Brief, para. 24 (emphasis in original) and footnote 67.

²¹ Prosecution Appeal Brief, para. 38.

²² Prosecution Appeal Brief, para. 38 (emphasis added).

²³ Prosecution Appeal Brief, footnote 116 (para. 38) referring to acts criminalised in Croatia, Norway, Australia (Victoria), Singapore, United Kingdom, Germany, Russia, Denmark, Czech Republic, Finland in 2013, 2011, 2005, 2019, 2008, 2003, 2013, 2012, 2005, 2009, 2015 respectively.

Appellant cannot provide support for the criminalisation of acts that occurred during the period of Democratic Kampuchea because they were irrefutably unforeseeable. On the contrary, they only serve to demonstrate that this type of behaviour was by no means criminalised at the time of the facts.

26. The Prosecution's approach reflects its total disregard for the requirement of formal international unlawfulness which must be satisfied in order to reconcile the residual nature of other inhumane acts and the principle of legality, as recalled by the Supreme Court:

The Supreme Court Chamber is of the view that relating "other inhumane acts" to conduct infringing basic rights appertaining to human beings, as identified under international legal instruments, is a tenable concept in that, in addition to the material element traditionally identified through the criterion of *ejusdem generis*, it also introduces a requirement of formal international unlawfulness and, in this way, a further limitation on a blanket authorisation to interpret "other inhumane acts". Whereas this concept does not seem to have received broader acceptance, the Supreme Court Chamber notes its advantage for assuring the requirement of foreseeability. (...) the "formal unlawfulness" requirement is to be achieved by identifying affirmative articulation of rights and prohibitions contained in human rights instruments, applicable at the time relevant for charges of "other inhumane acts" (emphasis added).²⁴

27. In the present case, the Prosecution however wants to extend the scope of human rights protection to the benefit of the alleged victims instead of limiting itself to a careful assessment of the international legal instruments relevant at the time of the facts in question.

28. Although the Appellant claims that there is no legal presumption that men suffer less than women from forced sexual intercourse,²⁵ the fact remains that since 1949 women have been granted greater protection than men.

29. Geneva Convention IV explicitly grants special protection to women against any attack on their honour, including rape, enforced prostitution and any form of indecent assault.²⁶ In addition, the Commentary of the 1958 Geneva Convention IV states that:

A woman should have an acknowledged right to special protection, the special regard owed to women being, of course, in addition to the safeguards laid down in paragraph

²⁴ Case 002/01 Appeal Judgement, 23 November 2016, F36, para. 584.

²⁵ Prosecution Appeal Brief, para. 38.

²⁶ Geneva Convention of 12 August 1949 relative to the Protection of Civilian Persons in Time of War, Article 27.

1, which they enjoy equally with men. The Conference listed as examples certain acts constituting an attack on women's honour, and expressly mentioned rape, enforced prostitution, i.e. the forcing of a woman into immorality by violence or threats, and any form of indecent assault. These acts are and remain prohibited in all places and in all circumstances, and women, whatever their nationality, race, religious beliefs, age, marital status or social condition have an absolute right to respect for their honour and their modesty, in short, for their dignity as women. (emphasis added).²⁷

30. Thus, despite the masculinist proselytizing displayed by the Appellant, an attack on the dignity of men cannot be established solely based on an attack on the dignity of women.²⁸

31. The requirement of formal unlawfulness is not satisfied and the conduct in question could therefore not be characterised as "other inhumane acts" at the time of the facts.

32. Accordingly, the Appellant's argument must be dismissed.

33. Moreover, the Prosecution has failed to establish the gravity of the act in question. Because of the residual nature of the crime of other inhumane acts, the Defence emphasises that the assessment of the level of gravity requires the utmost rigour. This is even more justified since, at the time of the crimes charged, any denial of a human right was not of a similar nature or gravity to the crimes against humanity of murder, extermination, enslavement, deportation, imprisonment, torture and persecution on political, racial and religious grounds. Even today, not every denial of a human right is serious enough to constitute a crime against humanity.²⁹

34. In spite of this, the Appellant is attempting to proceed by analogy referring to judgements for which the serious attack on human dignity was established on the basis of the factual circumstances of those cases.³⁰ However, this recitation shows that the sexual relations alleged in Case 002/02 are indicative of a much lower level of gravity to those dealt with before the *ad hoc* tribunals.

35. Thus, in *Bagosora*, which is cited by the Prosecution, Prime Minister Agathe Uwilingiyimana was exposed naked in full public view in her official residence, her body riddled

²⁷ ICRC Commentary to Geneva Convention IV (Jean S. Pictet, general editor, 1958) on Article 27, pp. 205-206.

²⁸ Prosecution Appeal Brief, para. 40.

²⁹ *The Prosecutor v. Popović et al.*, IT-05-88-A, Appeal Judgement, 30 January 2015, para. 761: "The Trial Chamber correctly stated that '[n]ot every denial of a human right is serious enough to constitute a crime against humanity'".

³⁰ Prosecution Appeal Brief, para. 23, footnotes 59 to 65.

with bullets, a bottle inserted in her vagina.³¹ These facts are a far cry from the facts charged in Case 002/02 and the comparison cannot in any way raise a presumption of gravity of the acts alleged by the Prosecution. Moreover, considering the particular circumstances of this case, it should be noted that there is nothing in this situation that is likely to shed light on the issue of the consummation of marriage under the Democratic Kampuchea regime.³²

36. Moreover, with respect to *Kunarac*, for example, the Appellant proposes a truncated reading of the judgement. Contrary to what is alleged by the Prosecution, the Trial Chamber did not rely solely on the fact that the victims were forced to dance naked on a table.³³ Indeed, the seriousness of the humiliation was established by a series of acts perpetrated against them.³⁴

37. In addition, the age (15 years) and sex of the young girls served as additional indices of the gravity of the attack on their dignity.³⁵ This approach has been further elucidated in all subsequent judgements of the ICTY.³⁶

38. Nevertheless, the Appellant failed to mention these criteria, which are essential to demonstrate the gravity of the alleged acts, settling instead on a general deduction bereft of any factual and legal relevance. For these reasons, the Prosecution's argument must be rejected.

39. **In conclusion**, in law, the alleged acts of forced sexual intercourse against men do not constitute the crime of "other inhumane acts". In addition to its flawed legal analysis, the

³¹ Prosecution Appeal Brief, para. 23 referring to *Bagosora* Judgement, ICTR-98-41-T, Judgement, 18 December 2008, ("*Bagosora* Judgement"), para. 705.

³² It should also be noted that, in support of his conviction, the *Bagosora* Judgement explicitly referred to the *Niyitegeka* case because of its proven factual proximity. *Bagosora* Judgement, footnote 2372 (referring to *Niyitegeka*, ICTR-96-14-T, Judgement, 16 May 2003, paras 459-467): "In the *Niyitegeka* case, the accused was held responsible for other inhumane acts for his role in the desecration of a man's genitals and the insertion of a sharpened piece of wood in a woman's vagina after they were killed."

³³ Prosecution Appeal Brief, para. 23.

³⁴ *The Prosecutor v. Kunarac*, IT-96-23-T & IT-96-23/1-T, Judgement, 22 February 2001, ("*Kunarac* Judgement"), para. 781: "The Trial Chamber finds that Radomir Kovač's conduct towards the two women was wanton in abusing and humiliating the four women and in exercising his de facto power of ownership as it pleased him. Kovač disposed of them in the same manner. (...) The Trial Chamber is also satisfied that Kovač exercised the above powers over the girls intentionally. The Trial Chamber is satisfied that many of the acts caused serious humiliation, of which the accused was aware." (emphasis added).

³⁵ Prosecution Appeal Brief, para. 23; *Kunarac* Judgement, para. 773: "The accused Radomir Kovač certainly knew that, having to stand naked on a table, while the accused watched them, was a painful and humiliating experience for the three women involved, even more so because of their young age." (emphasis added).

³⁶ See *supra*, footnotes 18 and 19.

Prosecution has difficulty disguising the hollowness of the evidence that could prove the impact and seriousness of the alleged crime against the alleged victims.

II. LACK OF EVIDENCE

40. Having been unable to provide proof of the impact and gravity of the alleged crime on men, the Appellant takes issue with the Chamber for unreasonably contradicting the evidence adduced and its own findings, as well as ignoring a “large body” of relevant evidence on the record. The Chamber allegedly “ignored direct evidence that was materially relevant to the analysis”, and “neglected circumstantial evidence entirely or gave it inappropriately little weight”.³⁷

41. On the contrary, it should be noted that there is no direct evidence establishing the crime (1). The little circumstantial evidence provided by the Appellant is not relevant and has no probative value (2). Finally, the Chamber’s finding that the facts do not constitute the crime of other inhumane acts does not contradict its other findings (3).

1. LACK OF DIRECT EVIDENCE

42. It is striking that none of the live testimony substantiates the crime (A), nor do the two pieces of so-called direct evidence provided by the Appellant (B).

A. It is impossible to characterise the crime based on any of the in-court testimony

43. During the trial, many men (witnesses or civil parties) testified about marriage under the Democratic Kampuchea regime. Of the 12 witnesses and civil parties who appeared during the trial segment specifically concerning marriage, 4 men were heard (a). Of the remaining 55 men who were heard about marriage in other segments, 3 men testified having been married against their will (b). There is nothing in their evidence to support the alleged crime of other inhumane acts as a result of the forced consummation of marriage.

³⁷ Prosecution Appeal Brief, paras 2, 25-37, 39.

(a) Men who testified during the trial segment concerning marriage

44. During the trial segment concerning marriage, the Chamber heard 4 men, all civil parties, namely YOS Phal, SOU Sotheavy, SENG Soeun, and KUL Nem.³⁸ The Chamber referred to the first two (YOS Phal and SOU Sotheavy) in its finding that it was unable to conclude that the gravity of the suffering had reached the level required to constitute the crime of other inhumane acts.³⁹

45. The Prosecution was forced to admit that the Chamber was right in disregarding YOS Phal's testimony. Indeed, there was no link between the suffering described and the consummation of his marriage,⁴⁰ the Civil Party even explaining how feelings developed within his couple.⁴¹

46. SOU Sotheavy, a transgender woman, testified that her marriage to a woman and the forced consummation of the marriage occurred because of her transgender identity, which she explained, was the real reason for the sexual assaults she allegedly suffered.⁴² In this particularly atypical account, she states that the marriage was allegedly not consummated for several weeks.⁴³ Notably, the circumstances in which the consummation occurred – after the couple had drunk alcohol offered by the village chief who liked and considered the Civil Party as a member of his family – also do not provide any basis for concluding that there was violence constituting a crime that could be characterised as other inhumane acts.⁴⁴ Accordingly, there is no error on the part of the Chamber on this point.

47. SENG Soeun, married to a cousin of his chief at the chief's request, did not mention any suffering or possible impact resulting from his arranged marriage let alone from its consummation.

³⁸ The Chamber heard twelve persons, including two witnesses, nine civil parties on the facts, and three civil parties on the suffering endured.

³⁹ Prosecution Appeal Brief, para. 17.

⁴⁰ Prosecution Appeal Brief, para. 27, footnote 83. The Civil Party refers to his regrets that he was unable to marry his pre-Democratic Kampuchea fiancée because of his family connection with a former soldier under LON Nol. YOS Phal: T. 25 August 2016, **E1/464.1**, around [10.57.58]. On the other hand, he specifies that “some of them had good biographies. They were matched with their loved ones.” **E1/464.1**, at [10.38.59], around [11.11.10].

⁴¹ YOS Phal: T. 25 August 2016, **E1/464.1**, at [10.53.00].

⁴² SOU Sotheavy: T. 24 August 2016, **E1/463.1**, around [14.01.54] “... I was looked down upon. I was forced to get married. I was sexually abused due to my transgender nature.”

⁴³ SOU Sotheavy: T. 23 August 2016, **E1/462.1**, at [15.24.14], “A. No, we did not consummate the marriage on the first night, and it continued for several weeks. [...] We were questioned whether we had consummated the marriage and we said, yes, we had, and then they said, no, they did not believe me because I was a transgender and how could I sleep with my wife”.

⁴⁴ SOU Sotheavy: T. 23 August 2016, **E1/462.1**, around [15.26.42].

Although he makes no reference to feelings of love, he similarly does not refer to coercion.⁴⁵ In fact, at trial, he made no reference to his marriage in his statement of suffering.⁴⁶

48. KUL Nem, a Civil Party, claims to have had to agree to an arranged marriage even though he had had a fiancée in the past.⁴⁷ After taking three days to think it over, he decided to consummate his marriage because he and his wife were being monitored.⁴⁸ Yet, when he expresses the suffering he endured, he says: “I feel painful and that’s the reason why I lodged my complaint with counsel to express about the harms and suffering inflicted upon me and my wife. And such incident of having no children did not happen to only me, but also to other people” (emphasis added)⁴⁹. Again, it is thus not sexual intercourse that is presented as violence or the cause of suffering.

49. It is worth noting that these accounts, which are at the core of men’s experiences expressed in the trial segment concerning marriage, are not conclusive of a finding that the conjugal sexual intercourse suffered by men reach the level of gravity of suffering that would characterise it as other inhumane acts.

(b) Men who testified in trial segments other than the trial segment concerning marriage

50. Of the 55 other men who testified about marriage under the Democratic Kampuchea regime, only 3 claimed to have married against their will, namely MEAN Loey (Civil Party who testified on the impact of the crimes), MEY Savoeun (Civil Party) and CHEAL Choeun (witness).⁵⁰

⁴⁵ SENG Soeun: T. 29 August 2016, **E1/465.1**, between [15.23.38] and [15.26.20] “Q. During the period that you lived together with your wife, were you forced to live with her or was it voluntary? A. In my instance, it is difficult to say that whether we loved one another or whether we were forced [...] I was asked for three times to marry her. Finally, I decided – I agreed to the proposal.”

⁴⁶ SENG Soeun: T. 29 August 2016, **E1/465.1**, around [11.38.06].

⁴⁷ KUL Nem: T. 24 October 2016, **E1/488.1**, around [14.26.27] “And because of this sadness and I lodged a complaint to this court so that I could express all these things out. And I got married to my wife and I decided to take care of her because I took up the points that my mother was also a woman and the woman that I married to was also a woman, so I had to take care of her.”

⁴⁸ KUL Nem: T. 24 October 2016, **E1/488.1**, [15.08.17].

⁴⁹ KUL Nem: T. 24 October 2016, **E1/488.1**, around [14.35.12].

⁵⁰ The remaining 16 at least testified to unforced marriages, either voluntarily or arranged by parents or do not suggest that their marriages were forced: OM Chy, CHHUM Seng, CHHUY Huy, SOS Ponyamin, SENG Srun, HIM Man, SOS Romly, Duch, YUN Bin, HUON Chourn, CHIN Kimthong, CHIN Saroeun, SENG Lytheng, MAK Chhoeun, MEAS Soeun and CHUON Thi.

51. To MEAN Loeuy, whose marriage was arranged by *Angkar*, the duty to love each other is an obligation that is inherent to marriage.⁵¹ More importantly, he makes no reference to forced sexual intercourse as he states that he and his wife agreed to consummate their marriage.⁵² In fact, his statement of suffering deals with the death of this woman for whom he had strong feelings: “I actually missed my late wife. I missed the times that we were together although it was for a brief period of time but it was the happiest time that I had with her as a husband and wife”.⁵³

52. MEY Savoeun testified that he was married to a woman he did not know and never dared to refuse to marry her because of his status as a former Eastern Zone soldier. On the other hand, nothing in his evidence is conclusive of a finding that he allegedly suffered sexual violence because he states: “As for me personally, I did not touch her during the first night nor did I touch her during the second night. Only days after that, did I have feelings toward her, I had a pity for her.”⁵⁴

53. CHEAL Choeun testified that after refusing a previous marriage he could not dare again to refuse a marriage decided by *Angkar* for fear of the consequences.⁵⁵ On the other hand, he said nothing concerning the specific matter of the consummation of the marriage. The Prosecution which could have questioned him in this regard failed to do so. Accordingly, his account cannot be taken as being conclusive of the impact, if any, of sexual violence.

54. It is therefore evident that this direct evidence drawn from the men’s live testimony was not sufficient to enable the Chamber to find that there had been a serious attack on human dignity or to make a finding as to impact or suffering, if any, endured by the men as a result of any sexual violence. Given the weakness of this evidence, the Prosecution has attempted to show that the

⁵¹ MEAN Loeuy: T. 02 September 2015, **E1/340.1**, around [14.14.51]. “A. I have learnt a lot about the virtues, good deeds, and whatever that I had to do the good things. So, after the marriage, I had to love my wife.” **E1/340.1**, at [14.17.50].

⁵² T. 2 September 2015, **E1/340.1**, after [14.17.50] “Q. After the marriage, did you and your wife consummate the marriage? A. Yes, we did.”

⁵³ T. 2 September 2015, **E1/340.1**, around [14.53.28] and around [14.55.20].

⁵⁴ MEY Savoeun: T. 17 August 2016, **E1/459.1**, before [14.13.38]. On the first night, he told his wife that they had no choice but to follow *Angkar*’s instructions, around [14.20.50]. There is no reference to his marriage in his statement of harm suffered at the end of his appearance, **E1/459.1**, after [15.51.48]. “[...] And if the newlywed couples did not consummate the marriage, then they would take measures, although I did not know what measures they would take.” **E1/459.1**, after [14.12.00]. Her parents were present at the wedding. After the wedding, she introduced him to her family and they were able to eat together, **E1/459.1**, between [15.46.02] and [15.50.01].

⁵⁵ CHEAL Choeun: T. 17 October 2016, **E1/484.1**, before [10.02.38]. Responding to the Prosecution: “when I heard that it was the determination by *Angkar*, I kept quiet because I was afraid. I was afraid to die” T. 17 October 2016, **E1/484.1**, before [10.04.33].

Chamber erred by highlighting two other items that are not only not direct evidence but also fail to demonstrate the alleged crime.

B. It is impossible to establish the crime based on the two pieces of allegedly direct evidence put forward by the Appellant

55. In support of its flawed argument, the Appellant refers to the testimony of Civil Party EM Oeun (a) and the opinion of expert Kasumi NAKAGAWA (b).

(a) EM Oeun

56. According to the Appellant, EM Oeun's testimony would be one of the "plainly relevant" evidence of men's suffering by being both "a victim of coerced sexual intercourse and being required to inflict that suffering on another human being on pain of death". The Appellant thus criticizes the Chamber for disregarding this evidence without explaining why it allegedly did not include specific indications concerning the gravity of the suffering caused by the alleged crime.⁵⁶

57. However, as the Appellant was forced to acknowledge,⁵⁷ the evidence of this Civil Party was indeed considered and used (incorrectly, according to the Defence) repeatedly by the Chamber in its Written Judgement on the trial segment concerning marriage, in particular in section 14.3.12.3 entitled *Impact of "forced marriage"*.⁵⁸ It is important to note here that EM Oeun only appeared in Case 002/01 in which marriage was not supposed to be addressed. Questions concerning the Civil Party's marriage were asked by his lawyers. In fact, the President had to intervene twice to point out that these matters were excluded from the scope of Case 002/01.⁵⁹ As a result, the Defence could not cross-examine the Civil Party on this subject and that part of his testimony cannot be considered as having been subjected to adversarial debate. As stated in the Defence's Closing Brief, this part of EM Oeun's testimony therefore has very little probative value, much like a written

⁵⁶ Prosecution Appeal Brief, para. 29.

⁵⁷ Prosecution Appeal Brief, para. 29, "Em Oeun's evidence was relied upon in the Chamber's analyses of consent for forced marriage and the impact of forced marriage."

⁵⁸ The Chamber quoted him in paras 3537, 3621, and, in particular, at para. 3679, footnote 12274: "[...] T., 23 August 2012 (EM Oeun), E1/113.1, pp. 103 to 105, "As a youth, I believe that we want our freedom to choose our own wife, and if you were forced to get married to someone whom you do not love, that was very painful [...] My wife did not love me either, so, whenever we stayed together at night, we cry to each other.."

⁵⁹ EM Oeun: T. 23 August 2012, E1/113.1, between [16.04.47] and [16.08.02] The President intervenes when Civil Party lawyer questions the Civil Party about marriage.

statement in lieu of oral testimony.⁶⁰ It is therefore for good reason that the Chamber disregarded it.

58. However, the key issue with which we are left is the general lack of credibility and reliability of EM Oeun's testimony. Indeed, the Prosecution conveniently fails to address the numerous implausibilities and relentless contradictions of all kinds in the Civil Party's account, sufficiently noteworthy to have been noted by the Supreme Court in the 002/01 Appeal Judgement.⁶¹ EM Oeun, for example, said that he had himself set the date of his "forced" marriage: "I chose the 17th of April as the date when I got married because people who loved me, who attended my marriage, without their support or their presence during my wedding, I would never choose to get married."⁶²

59. Moreover, while EM Oeun did indeed refer to the suffering caused by his forced marriage in his testimony,⁶³ he did not refer to suffering resulting specifically from sexual intercourse with his wife either in his statement at the end of his appearance⁶⁴ or in his Civil Party Application.⁶⁵ Most importantly, the Defence was unable to cross-examine him on the alleged crime. The Appellant cannot therefore take issue with the Chamber for not using EM Oeun's evidence concerning the gravity of the alleged crime.

(b) Kasumi NAKAGAWA

60. With respect to Kasumi NAKAGAWA's expert testimony, the Appellant points to her personal findings regarding the effects of forced sexual intercourse on men.⁶⁶ This expert's opinion

⁶⁰ KHIEU Samphân's Closing Brief (002/02), 2 May 2017, amended on 2 October 2017, **E457/6/4/1**, paras 552-553.

⁶¹ Case 002/01 Appeal Judgement, 23 November 2016, **F36**, para. 347. Closing Statements in Case 002/01, T. 28 October 2013, **E1/235.1**, from [14.00.47].

⁶² EM Oeun: T. 23 August 2012, **E1/113.1**, around [16.04.47]. Among EM Oeun's other contradictions, in his Victim Information Form, he claims to still be married to his wife whom he married during the Democratic Kampuchea regime, but he appears to have divorced in 2002 and remarried according to his in-court testimony: T. 28 August 2012, **E1/116.1**, around [14.47.42], after [14.50.34] and around [14.56.16].

⁶³ EM Oeun: T. 23 August 2012, **E1/113.1**, after [15.57.58].

⁶⁴ EM Oeun: T. 29 August 2012, **E1/117.1**, around [10.17.45].

⁶⁵ Victim Information Form of EM Oeun, 29 January 2010, **E3/1729**, ERN EN 00751863.

⁶⁶ Prosecution Appeal Brief, paras 30-31.

was expressly admitted by the Chamber in its findings in section 14.3.12.2 *Impact of forced sexual intercourse on victims* even though there was no specific evidence supporting the opinion.⁶⁷

61. When asked about the impact of forced marriages on men, the expert states: “they didn’t show much emotions about their forced marriage. They accept it as it was and they didn’t have great remorse.”⁶⁸ She mainly pointed out that she interviewed few men about marriage as part of her research.⁶⁹

62. Under these circumstances, the expert’s opinion on men’s feelings in the context of marriage is more consistent with a personal opinion than with an extensive research-based finding. This opinion was not enough to convince the Chamber to make findings on the gravity required to characterise the crime as other inhumane acts and does not in any event constitute direct evidence of the suffering of male victims of sexual violence.

2. LACK OF RELEVANCE AND VALUE OF THE CIRCUMSTANTIAL EVIDENCE

63. In an attempt to cure the lack of direct evidence, the Appellant relies on evidence used to support a finding as to the suffering of women (A) and on statements and study reports on the record (B). This non probative evidence is insufficient to establish the alleged suffering of men.

A. Evidence used to support a finding of great suffering endured by women

64. The Appellant complains that the Chamber gave no weight to any of the evidence referred to in the sections entitled “Coercive environment” and “Forced sexual intercourse between spouses” in its analysis of male suffering, even though that is what it had done for women.⁷⁰ However, a careful review of the evidence considered by the Chamber in these two sections through

⁶⁷ Para. 3684 of the Written Judgement refers exclusively to NAKAGAWA’s opinion without any other supporting documents.

⁶⁸ T. 13 September 2016, E1/472.1, before [14.36.55].

⁶⁹ Kasumi NAKAGAWA: T. 13 September 2016, E1/472.1, before [15.35.32] “I don’t have many accounts from men who were married in the Khmer Rouge, how they felt about the wedding that their parents were not there.” She chose to focus her research on women: “I thought I could contribute by gathering the information and evidences of why it happened, particularly from women’s point of view, because so far we don’t have any historical evidence from women’s point of view.” T. 13 September 2016, E1/472.1, around [09.56.36].

⁷⁰ Para. 33 of the Appeal, these two sections of the Judgement show cadres monitored whether consummations were completed, couples risk their lives by going against *Angkar*, the negative consequences for couples who refused to consummate, and “[i]ndividuals were terrified and therefore neither men nor women genuinely consented.”

the lens of male suffering also does not support a finding as to the requisite gravity of the suffering to establish the crime of other inhumane acts.

65. PRAK Yut, Kampong Siem district chief, testified that after marriage, “it [was] common sense that they had to consummate their marriage. Then, if not, what was the purpose of marriage?”⁷¹ However, this same witness explains that marriages could not be organized arbitrarily without the consent of the individuals, otherwise “that would be a mistake”⁷². She further stated that: “[f]or couples who did not consummate their marriage, I did not have any measure to enforce upon them. However, they would be brought to the district to be educated so that they could understand each other and because they were already married. In my capacity as the district chef, I did not take those couples who did not consummate their marriage away for any mistreatment at all.” (emphasis added)⁷³. Whether or not this testimony is believed, one cannot draw any conclusions as to the suffering endured by anyone as a result of sexual violence.

66. As expert Peg Levine says, “consummation of marriage, typically in the Western world when we talk about the honeymoon period, is expected.”⁷⁴ This reflects the general notion of marriage according to which conjugal consummation is what is expected from marriage, including under Khmer tradition before the period of Democratic Kampuchea.⁷⁵

67. Civil Party NOP Ngim, who married under the Democratic Kampuchea regime, states: “If you spoke about after the marriage, what else we could do because *Angkar* organized us to get married. Then we had to live together so that we could live together as husband and wife and probably, later on, have children.”⁷⁶ She adds: “Personally, I was not forced and, as I said my

⁷¹ Witness cited at para. 3645 (Coercive environment), and para. 3656 (Forced sexual relations between spouses).

⁷² PRAK Yut: T. 19 January 2016, **E1/378.1**, around [11.26.00], « If I organized their marriage when they did not love each other and I had to force them, that would be a mistake. I read some documents too and I did not arbitrarily organize it [...]”. See also **E1/378.1 in camera**, at [11.26.00] “it [marriages] took place only when both parties consented to it”.

⁷³ PRAK Yut: T. 19 January 2016, **E1/378.1 in camera**, at [13.47.37]. It is important to note that this testimony is given in response to the Chamber’s partial quote at para. 3656 in section 14.3.8.2 *Forced sexual intercourse between spouses* that the newlyweds would have been educated in the district in case of non-consummation.

⁷⁴ Peg LEVINE: T. 1 [0] October 2016, **E1/48 [0].1**, after [15.50.01]. See **E1/48 [1].1**, after [11.00.18] “A. These were in-depth interviews [...] And other people thought that it was expected when you got married that you would then eventually have children. And at the same time, most people said they had no energy [...]”.

⁷⁵ Para. 3645 of the Written Judgement.

⁷⁶ NOP Ngim: T. 5 September 2016, **E1/469.1**, before [11.13.12]. “We were allowed to get married because we had biographies. My husband and I had good biographies. That’s why we were matched. Both of us did not have feeling toward one another at the beginning, but since we were put into the marriage, our marriage was organized, then we had to love each other after the wedding. [...]” **E1/469.1**, around [10.47.52].

husband was not forced either, we both abided by the organizational disciplines. I cannot say about other couples. But I could only say about our couple. We did not force one another.”⁷⁷ Her husband PREAP Kap, interviewed in Case Files 003-004, effectively referred to no suffering resulting from his spousal relationship.⁷⁸

68. Witness IN Yoeung, who still lives with her husband CHAN Kea, was “told by the cadre to consummate the marriage and that if they refused, she and her husband would be taken to the commune office to make sure that they would consummate there.”⁷⁹ However, in this particular case, it was a voluntary marriage⁸⁰ in which neither the witness nor her husband mentioned any related suffering in their intimate relationships. In fact, in his interview, CHAN Kea stated: “[t]he weddings would be held only when people volunteered to get married.”⁸¹

69. At paragraph 3645 of the Written Judgement, the Chamber relies on the testimony of PRAK Doeun and CHEANG Sreymom to find that local officials advised couples to consummate their marriage. PRAK Doeun referred to marriages that were allegedly organized either further to a proposal or arranged without consultation.⁸² He testifies that he heard that newly-married couples who did not agree would not have been punished but re-educated. They were allegedly advised to consummate their marriage, to live together and not to blame *Angkar*.⁸³ However, this is only hearsay, since PRAK Doeun himself did not marry during the regime.⁸⁴ As for CHEANG Sreymom, while she says she had no choice but to marry for fear of reprisals, she then discusses how their respective feelings evolved.⁸⁵ Thus, when asked why she considers her union to be a

⁷⁷ T. 5 September 2016, **E1/469.1**, around [14.18.35]. “I was afraid that they would come to eavesdrop on us and, for that reason, we went along pretty well with one another” **E1/469.1**, around [15.36.07] and at [14.14.26]; she never heard any instructions concerning monitoring, penalties or punishments in case of non-consummation, **E1/469.1**, after [14.17.20] and before [13.50.15].

⁷⁸ Written Record of Interview of PREAP Kap, 3 November 2014, **E3/9818**, Q/A76-77: “During that time, were you told that you had to consummate your marriage to have children? A76: No. Q Did the upper echelon ever tell you or give instructions as to what that regime wanted for you living as husband and wife? A77 No.”; Q/A53: They were not monitored to ensure that the marriage was consummated.

⁷⁹ Para. 3645 of the Written Judgement.

⁸⁰ IN Yoeung: T. 3 February 2016, **E1/387.1**, from [15.39.36] and around [14.18.24]

⁸¹ CHAN Kea CD-Cam Interview, 30 August 2005, **E3/7525**, in particular, ERN EN 00884999.

⁸² PRAK Doeun: T. 2 December 2015, **E1/361.1**, before [15.55.50].

⁸³ PRAK Doeun: T. 2 December 2015, **E1/361.1**, before [15.58.56]. “cadres who were in charge of organizing the marriage made a speech. They said that we had to follow the instructions of *Angkar*, and for that reason they organized this wedding ceremony, and whether we were satisfied with the arrangement. And we said yes, and then they said we had to follow and abide by all instructions by *Angkar*. And that’s all I heard.” **E1/361.1**, before [16.00.43].

⁸⁴ PRAK Doeun: T. 2 December 2015, **E1/361.1**, at [16.00.43].

⁸⁵ CHEANG Sreymom: T. 29 January 2015, **E1/254.1**, from [10.44.13] “Q. Actually, did you have choice to be made at that time, or you had no other choices? A. I had no choice, because we were husband and wife and if we did not

happy marriage, she replies that, despite the circumstances, she was not “forced” by her husband,⁸⁶ adding that while she had felt the initial frustration of her husband who was in love with another woman, he later told her that he considered her as his “destined partner” (*kou prean*).⁸⁷ The couple is still living together and there is nothing in this testimony to support a finding of sexual violence suffered by either of them.

70. SAY Narooun, a Civil Party who appeared before the court on the impact of the crimes in the trial segment concerning marriage, testified that she spent 3 days with her husband after their marriage and then being allowed to meet him about once a week at her mother’s house.⁸⁸ Although she testified that at first she had experienced the fear and modesty of a Khmer woman, she decided “to give [her] body to [her] husband”⁸⁹ and then at subsequent get-togethers, she states: “[...] since everything was over, then I just let myself go in a natural way of a man and a woman.”⁹⁰ Again, there is no evidence to support a finding of sexual violence of such gravity as to establish the crime of other inhumane acts.

71. At paragraph 3646 of the Written Judgement, the Chamber notes that in the case of Civil Party OM Yoeurn, it was her husband who allegedly wanted to force her to have sexual intercourse. Faced with her resistance, he allegedly went to complain to his military commander, who in turn allegedly raped her and threatened her with death if she divulged what had happened.⁹¹ She

accept each other, otherwise I would lose my life. I contemplated that I could not avoid this and I had to submit myself to it. I kept praying, actually, if this man was my destined partner, then I hope I would feel for him. I prayed to God every day. If this person was my destined partner, I prayed that I would feel for him and pity him. From time to time we could live along with each other, and I started to love him.”

⁸⁶ CHEANG Sreymom: T. 2 February 2015, **E1/255.1**, before [09.29.40] “I’d like to say that for my husband, he did not force upon me, but we decided to get along, to be together. Whoever selected by *Angkar* to marry, we could not oppose it. [...] Although we physically stayed together as a husband and wife, but inside, our feeling was different [...]”.

⁸⁷ T. 29 January 2015, **E1/254.1**, around [10.48.20] “I had the feeling that my husband did not love me, because he had someone in mind already. Looking from his outside appearance, he – it does not – it did not mean that he did not love me. He kept saying that that lady was not his destined partner.”

⁸⁸ SAY Narooun: T. 25 October 2016, **E1/489.1**, around [10.51.27].

⁸⁹ SAY Narooun: T. 25 October 2016, **E1/489.1**, at [10.48.09]. “[...] And as a Khmer woman, nothing is more important than our body. Although I was fearful and trembling, I thought to myself that I had to give my body to my husband in order to fulfill the requirement of *Angkar*.”

⁹⁰ SAY Narooun: T. 25 October 2016, **E1/489.1**, at [11.10.21].

⁹¹ Para. 3646 and para. 3658 of the Written Judgement address rapes that fall outside the scope of the charges in the Case. OM Yoeurn: T. 23 August 2016, **E1/462.1**, around [09.11.33] “I was not instructed anything [to consummate the marriage]. However, when I entered the room, my husband was there [...] I was frightened. I resisted his advance. He was upset, so he went out of the room and informed his chief who was his direct military commander. Q. Why did you resist your husband that night? A. Because I disliked him, and he – he didn’t try to console me or to comfort me at all. He simply wanted to rape me violently. Q. You said that you resisted, then your husband left the room. Where

allegedly had sexual intercourse with her husband one or two months after the rape.⁹² Apart from the issues concerning the factual scope of the case that will be raised in the Defence appeal brief, it should be noted that it is difficult to imagine any suffering on the part of this husband willing to consummate the marriage with violence.

72. MAM Soeurn mentioned two types of marriages, one voluntary, the other forced.⁹³ However, when asked about the monitoring of newlyweds, he replied: “I am not able to tell you because as I said, I did not get married at that time. And I did not know in detail about this matter because I could not go next to them.”⁹⁴ Thus, his general and vague evidence on the refusal to consummate, which would have put the lives of couples at risk, could not serve as a basis to substantiate the seriousness of the suffering endured by victims of sexual violence, whether male or female.

73. Civil Party PEN Sochan, far from mentioning her husband’s suffering, if any, talks instead about the violence and rape she allegedly suffered at her husband’s hands. While, according to her, a militiaman allegedly told her husband to do “do whatever he wanted” since they were husband and wife,⁹⁵ the Civil Party cannot say whether he would have been mistreated or re-educated following the failure to have sexual intercourse on their wedding night.⁹⁶ Indeed, she says she did leave him after she was raped on the third night and has not seen him since.⁹⁷ In any event, her evidence refers only to her own suffering.

74. Civil Party CHUM Samoeurn mentioned no suffering resulting from her marriage in her statement at the end of her appearance or in her Civil Party application.⁹⁸ While she described the fear she experienced on her wedding night as a young Khmer woman, she focused on the kindness

did he got to? A. He went to report the matter to his chief.” See also **E1/462.1**, after [13.41.52].

⁹² OM Yoeurn: T. 23 August 2016, **E1/462.1**, around [13.34.47].

⁹³ MAM Soeurn: T. 28 July 2015, **E1/325.1**, after [09.58.44]; “[...] and as I stated, men and women got married because they fell in love with each other; however, there were also certain cases where a man loved the girl, and the girl did not love him. And for that reason, you can say they were forced to get married.” **E1/325.1**, at [10.11.39].

⁹⁴ MAM Soeurn: T. 28 July 2015, **E1/324.1**, before [15.58.45].

⁹⁵ PEN Sochan: T. 13 October 2016, **E1/483.1**, at [09.56.33].

⁹⁶ It should be noted that the Civil Party reversed her previous statement that her husband was summoned to a meeting on the second night after the wedding night, and upon his return tried to take her by force and slapped her in the face when she refused: T. 12 October 2016, **E1/482.1**, before [15.50.30] and T. 13 October 2016, **E1/483.1**, around [11.42.47]. Victim Information Form, 26 August 2009, **E3/ [4]779**, ERN EN 00891279.

⁹⁷ T. 13 October 2016, **E1/483.1**, between [11.16.32] and [11.22.06].

⁹⁸ CHUM Samoeurn: T. 24 June 2015, **E1/321.1**, after [15.47.48]; Victim Information Form, 17 May 2008, **E3/6160**, ERN EN 00842141-00842142.

of her husband who agreed to wait before consummating the marriage.⁹⁹ Her evidence cannot be used to support a finding as to the gravity of suffering resulting from sexual violence in the context of marriage, whether endured by her or her husband.

75. At paragraphs 3646 and 3655 of the Written Judgement, the Chamber found that CHEA Dieb and PHAN Him had agreed to have sexual intercourse with their respective husbands. PHAN Him married further to her husband's proposal.¹⁰⁰ She claims to have felt pity for him after he confided in her about his family after their marriage, and to have decided to live with him "as husband and wife."¹⁰¹ In her own case, there is no evidence to show that her husband endured any particular suffering as a result of their intimate relations. As for CHEA Dieb, she replied that the decision to consummate her marriage was her husband's, and stated that after their marriage they met every 10 or 15 days.¹⁰² While she did disclose the suffering she endured as a result of her forced marriage and non-consensual sex, she says nothing about her husband's state of mind.¹⁰³ Accordingly, her evidence cannot be used in support of a finding that he endured any suffering.

76. Civil Party PREAP Sokhoeun claimed to have been raped by her husband, detailing what he did.¹⁰⁴ Afterwards, he allegedly claimed to have been following *Angkar*'s instructions¹⁰⁵. However, she took pains to clarify that "I did not know whether *Angkar* instructed him to do that

⁹⁹ CHUM Samoeurn: T. 24 June 2015, **E1/321.1**, between [14.31.35] and [14.34.47] "Q. And what did you fear would occur if they knew that you had not consummated your marriage? A. In fact we did not consummate our marriage as I was afraid of him. Of course we Cambodian girls would not willingly give ourselves to the men that we just knew and for that reason my body was trembled and I actually begged him to keep a secret that we did not consummate our marriage. Q. [...] why were you afraid to the point that [you] felt you needed to keep it a secret, that you had not consummated your marriage, what did you think would occur if the Khmer Rouge discovered that you had not consummated your marriage? A. I did not know what would happen if they would found out. At that time I told my husband that I was scared after the marriage and I told him to keep the secret that we did not consummate our marriage." **E1/321.1**, around [14.27.34]. See also "I told him, "please don't do anything to me", and the man did not do anything to me, I was fortunate enough for that." (emphasis added).

¹⁰⁰ PHAN Him: T. 1 September 2016, **E/468.1**, after [09.23.53] and before [09.29.05].

¹⁰¹ PHAN Him: T. August 31, 2016, **E1/467.1**, around [15.41.00]. They resumed living together after their reunion on Thai territory after the arrival of the Vietnamese, **E1/467.1**, before [15.45.11]; **E1/468.1**, before [09.27.54].

¹⁰² Para. 3646 of the Written Judgement, footnote 12194. CHEA Dieb: T. 30 August 2016, **E1/466.1**, around [14.07.17] "We were allowed to meet every 10 to 15 days. So when we met then that was the time that I consummated the marriage. [...] can you tell the Chamber whose choice was it to consummate the marriage? Was it your husband's or was it both? A. It was his choice." See also **E1/466.1**, before [15.34.23] and around [14.07.17].

¹⁰³ CHEA Dieb: T. August 30, 2016, **E1/466.1**, at [14.17.12].

¹⁰⁴ PREAP Sokhoeurn: T. 20 October 2016, **E1/487.1**, from [14.33.00]. When questioned about the rape committed by her husband which she belatedly mentioned, she answered: "I was told to speak it out and not to feel shy about the rape. I was told that if I still feel shy then there would be nothing as evidence. And for that reason, I speak everything from the beginning." T. 24 October 2019, **E1/488.1**, around [11.31.19].

¹⁰⁵ PREAP Sokhoeurn: T. 24 October 2016, **E1/488.1**, around [11.44.18] and after [13.51.50].

or not, the only thing I knew was that he, himself, did that to me for his own purpose. [...] I did not know whether *Angkar* instructed him to do or whether he did it on his own initiative.”¹⁰⁶ She even adds: “No one ordered me. At that time, I tried to defend myself not to have sexual intercourse with him; I am talking about the rape that occurred. [...] but I want to emphasize that there was no one ordering us to do so.”¹⁰⁷ Nothing she says can be used to support a finding that her husband endured any particular suffering. In fact, according to her, he was the initiator of sexual intercourse.

77. Additionally, PREAP Sokhoeurn clarified that after marriage, many couples got along well with each other “because they thought that they were arranged by *Angkar*, they obeyed the *Angkar*’s instruction, so many of them got along. And they lived together well [...] While the majority of the people agreed to get married because the marriage were arranged by *Angkar*, they did not dare to refuse, so I can say that many couples got along well.”¹⁰⁸

78. YOU Vann, a subordinate of PRAK Yut in Kampong Siem District, testified to marriages that occurred with the consent of the persons concerned, specifying that it was men who asked for marriage in accordance with tradition.¹⁰⁹ Above all, she points out that most of the time it was the men who complained to her that their wives had refused to consummate the marriage.¹¹⁰

79. SUN Vuth testified that he refused a marriage proposal without any consequences whatsoever¹¹¹. He refers to the monitoring of newlywed combatants in the military unit and the follow-up of couples in the event of disagreement: “The upper level would take them for re-education. If the woman didn’t love the husband, then the woman would be re-educated that she should love the husband based on the instruction of *Angkar* and that they had to listen and obey the orders of *Angkar*.”¹¹² Although he pointed to a couple who were re-educated to accept the marriage, he stated at the same time that “they were not beaten” (unofficial translation) and that they later

¹⁰⁶ PREAP Sokhoeurn: T. 20 October 2016, **E1/487.1**, before [15.15.38] and at [15.30.23].

¹⁰⁷ PREAP Sokhoeurn: T. 24 October 2016, **E1/488.1**, after [13.51.50].

¹⁰⁸ T. 24 October 2016, **E1/488.1**, before [09.37.05].

¹⁰⁹ YOU Vann: T. 14 January 2016, **E1/376.1 in camera**, before [14.34.36]; T. 19 January 2016, **E1/378.1 in camera**, after [11.28.21]; T. 18 January 2016, **E1/377.1 in camera**, around [11.31.21] and before [11.33.27] “That is our Cambodian’s tradition; the women do not propose to men, only the men do that to women.”

¹¹⁰ T. 14 August 2016, **E1/376.1**, at [15.40.03], when confronted with her Written Record of Interview, she replied “Yes, and after they were advised they agreed to do so. And this couple remains husband and wife at present time.” See also para. 3656 of the Written Judgement and PRAK Yut’s response to YOU Vann’s testimony *infra*.

¹¹¹ SUN Vuth: T. 30 March 2016, **E1/411.1**, at [14.40.12]; T. 31 March 2016, **E1/412.1**, after [09.07.47] and around [09.10.24].

¹¹² SUN Vuth: T. 31 March 2016, **E1/412.1**, after [09.14.49].

separated.¹¹³ Her testimony thus provides no evidence as to the suffering endured by men as a result of conjugal sexual relations.

80. Finally, MOM Vun testified to having been forced by militiamen to have sex in front of them.¹¹⁴ During her appearance, she did not mention the impact that these events would have had on her husband.¹¹⁵ In any event, her testimony did not provide the Chamber with anything to support a finding as to the gravity of the suffering endured by her husband.

81. It appears from a review of the evidence relied upon by the Chamber to conclude that women endured great suffering that the evidence is insufficient to determine the level of gravity of the suffering allegedly suffered by male victims of sexual violence in the context of marriage. The complaint made against the Chamber on this point is unfounded and must therefore be dismissed.

B. Statements and research study accounts describing the pressure and constraints men were under

82. The Appellant alleges that the Chamber did not give sufficient regard to the statements and research study accounts on the Case file describing the pressure men were under to consummate their marriages and their fear of the consequences they would face if they failed to do so.¹¹⁶

83. Thus, the Appellant points first to 4 written statements made by three men (SUM Pet, VAT Phat, MUOL Eng) and one woman (KEO Theary) in Cases 003 and 004.¹¹⁷

84. SUM Pet testified that he was worried about marrying a stranger: “we did not understand each other’s feelings. My wife also felt frightened, but we tried to compromise in the circumstances.”¹¹⁸ He adds that he and his wife, unlike other couples, were not re-educated. He claims that he had to consummate the marriage for fear of being accused of hostility towards

¹¹³ SUN Vuth: T. 31 March 2016, E1/412.1, before [09.39.45] “As I told you earlier, that comrade Ban (phonetic) and comrade Neav who protested not to get married. They were re-educated. They were re-educated to agree to get married although both parties did not want to get married. But then, they were separated. I did not know what happened.”

¹¹⁴ MOM Vun: T. 16 September 2016, E1/475.1, around [13.46.03].

¹¹⁵ About their sexual relations after that: T. 16 September 2016, E1/475.1, at [15.11.46] “R. [...] For three months and a half, whenever he came back from work, he slept with me.”

¹¹⁶ Prosecution Appeal Brief, paras 35-37.

¹¹⁷ Prosecution Appeal Brief, footnote 102 of para. 35.

¹¹⁸ Written Record of Interview of SUM Pet, 4 August 2014, E3/9824, Q/A31 and Q/A41.

Angkar after deciding with his wife to move in with his mother.¹¹⁹ However, he does not mention any likely physical or mental suffering resulting from the couple's sexual relations.

85. VAT Phat is a soldier who allegedly married in an individual ceremony. He says he was given a two-week break after the marriage and felt compelled to consummate the marriage. However, he claims to have threatened to execute a messenger who came to monitor him at night, and who allegedly dared not come back. He did not mention any possible suffering resulting from the consummation of the marriage and still lives with his wife and their child.¹²⁰

86. MUOL Eng, a Southwest Zone soldier married to a Khmer Rouge cadre, says he felt compelled to consummate his marriage because the "people who were nearby" (unofficial translation) allegedly monitored their relationship to see if something was out of the ordinary.¹²¹ A dozen days after the wedding, he was reportedly sent to work in the Northwest Zone with his wife.¹²² He did not mention any suffering endured as a result of sexual intercourse with his wife.

87. KEO Theary testified that her husband was allegedly forced to obey *Angkar* and to get married.¹²³ While she did mention her initial fear, she then states that she and her husband developed feelings for each other over time: "We slept together as other couples did, and we were happy to see each other."¹²⁴ She adds that her husband sometimes lied to his head of unit in order to go and be with her at home.¹²⁵ Thus, this statement does not refer to any suffering that the couple

¹¹⁹ Written Record of Interview of SUM Pet, 4 August 2014, **E3/9824**, Q/A45: "Did the other couples do this because they had been educated at the wedding ceremony, or before the wedding party, that those arranged to get married by *Angkar* had to live with each other or else be accused of disobeying the rules of *Angkar*? A 45 [...] we had to follow. If not, they would accuse us of opposing *Angkar*. Because of the previous experience, after they arranged the wedding ceremony for us, all of us understood ourselves that we had to live with each other as couples." Q/A43: It is up to the newlyweds to decide on their accommodation after marriage, and in his case, he decided to move in with his mother.

¹²⁰ Written Record of Interview of VAT Phat, 23 February 2015, **E3/9822**, Q/A352. Q/A358: "Q Do you feel that you were forced to consummate your marriage with your wife? A358 I feel that I was forced to therefore I had to consummate the marriage with my wife and then we had one child who is still living today." Q/A198 He went to live with his wife after he left prison in 1984.

¹²¹ Written Record of Interview of MUOL Eng, 4 May 2015, **E3/9833**, Q/A212. See also Q/A213-214.

¹²² Written Record of Interview of MUOL Eng, 4 May 2015, **E3/9833**, Q/A215-216.

¹²³ Written Record of Interview of KEO Theary, 8 December 2014, **E3/9662**, See Q/A44 on the obligation to obey *Angkar*. See Q/A45 concerning monitoring. KEO Theary says that she did not witness it herself but that it was the "elder people" and her mother who told her about it. See Q/A40-43 about her ignorance about sexuality and her mother's intervention: "They tried to convince me so I would agree to stay with him. When my mother left, my husband and I slept together."

¹²⁴ Written Record of Interview of KEO Theary, 8 December 2014, **E3/9662**, Q/A55-59 in particular Q/A59: "After our marriage, older people came to compromise and witness our issues. I felt I loved him one week after our wedding. Although we did not sleep with each other every day, I loved my husband."

¹²⁵ Written Record of Interview of KEO Theary, 8 December 2014, **E3/9662**, Q/A55: "[...] For example, if my husband

might have endured as a result of sexual relations. It is not insignificant to note, as indeed the Appellant itself does,¹²⁶ that this Witten Record of Interview of KEO Theory is the only one that was not considered by the Chamber in its Written Judgement on the trial segment concerning marriage. The Defence will return to this in its Appeal Brief.

88. Secondly, the Appellant refers to the story of an unidentified woman that appears in a book by Kasumi NAKAGAWA¹²⁷ which is somewhat similar to that of KEO Theory. According to this account, the woman allegedly agreed to have sex on the third night after the marriage after her husband told her that he was worried for her because of her refusal to consummate the marriage.¹²⁸ Here too, even without going into the issue of the reliability of the anonymous account, it is difficult to see how it could be used to provide evidence of the gravity of the suffering or the impact of sexual violence affecting the husband.

89. Thirdly, the Appellant relies on the accounts of unidentified persons in research study accounts (outside the judicial framework) who did not appear before the Chamber.¹²⁹ Thus, they are of extremely low if any probative value.

90. Fourthly, the Appellant points to the account of Civil Party MOM Vun,¹³⁰ referred to above.¹³¹ While the Prosecution could have questioned her at trial about the impact of the facts cited on her husband (although it would still have been hearsay), the Prosecution is merely “testifying” in his place in its appeal.

wanted to visit home, sometimes he could not tell his unit chief that he wanted to come to see me. He had to tell a lie that he needed to come to take his clothes home and so on, in order to get their permission”. Q/A86: After spending years together, they finally have the same feelings as other couples who were married of their own free will, and she jokes with her husband that they were not properly married because they had not followed the traditions. Victim Information Form, **E3/4963**, 15 January 2010, she did not mention her forced marriage as her suffering.

¹²⁶ Prosecution Appeal Brief, footnote 102 of para. 35.

¹²⁷ Prosecution Appeal Brief, footnote 102 of para. 35.

¹²⁸ Kasumi NAKAGAWA, Gender based violence during the Khmer Rouge Regime, December 2008, **E3/2959**, ERN EN 00421895.

¹²⁹ Prosecution Appeal Brief, footnotes 102-103 of para. 35: Book of Rochelle Braaf, Sexual Violence Against Ethnic Minorities During the Khmer Rouge Regime, March 2014, **E3/9240**, ERN EN 00992283; Bridgette Toy Cronin, “I want to tell you” Stories of Sexual Violence During Democratic Kampuchea, 18 December 2018, **E3/3416**, ERN EN 00449490; Theresa De Langis et al., Like Ghost Changes Body: A Study on the Impact of Forced Marriage Under the Khmer Rouge Regime, 2014, **E3/9614**, ERN EN 010378471.

¹³⁰ Prosecution Appeal Brief, paras 36-37.

¹³¹ See *supra*, para. 80.

91. It appears from the evidence allegedly overlooked by the Chamber that the Prosecution's complaint in support of its appeal is unfounded. Indeed, the Appellant relies on circumstantial evidence that is not only irrelevant but also of extremely low probative value. A detailed review of the various testimonies, statements and other accounts shows that there is insufficient evidence of the suffering endured by male victims of sexual violence in the context of forced marriage. In any event, there is no evidence of the requisite level of gravity to constitute a serious attack on human dignity.

3. THERE IS NO CONTRADICTION WITH THE CHAMBER'S OTHER FINDINGS

92. Accordingly, the Appellant errs when it blames the Chamber for contradicting the evidence adduced and its own findings by considering that they were "insufficient to establish serious suffering" endured by men.¹³² Yet, the Chamber could not have ruled otherwise despite the 5 findings – which are otherwise objectionable – on which the Prosecution relies taking into account the evidence on which they are based.

Finding that men "were forced to engage in sexual intercourse"¹³³

93. According to the Appellant, men and women were allegedly forced to have sexual intercourse. However, as noted above,¹³⁴ the analysis of the evidence in support of the Chamber's findings shows that it was essentially women who testified about their own experiences without referring to or providing sufficient evidence about the impact, if any, on their husbands to conclude as to the suffering endured by men at the level required to characterise the crime of other inhumane acts.

Finding that men "were forced to inflict sexual intercourse on their spouse, which caused the women serious mental and physical suffering or injury and constituted a serious attack on the women's human dignity"¹³⁵

¹³² Prosecution Appeal Brief, para. 26.

¹³³ Prosecution Appeal Brief, para. 26 and footnote 71, referring to paras 3660, 3661, 3691, 3692, 3692, 3696, 3698 and 3699 of the Written Judgement.

¹³⁴ See *supra*, paras 45-49 and 60-81.

¹³⁵ Prosecution Appeal Brief, para. 26, and footnote 72 which refers to paras 3684, 3691, 3697, 3698 of the Written Judgement.

94. It should be recalled here that this issue was explicitly addressed only once, when Kasumi NAKAGAWA expressed a general opinion while explaining that she had not focused her research on men.¹³⁶ Since there was far too little evidence to corroborate her opinion, the Chamber could not seriously rely on it to establish the crime of other inhumane acts.

Finding that men “were deeply traumatised as a result of forced sexual intercourse”¹³⁷

95. It should be noted that this finding is found in section 14.3.12.2 *Impact of forced sexual intercourse on victims*, in particular at paragraph 3683 of the Written Judgement, where the Chamber relies exclusively on PREAP Sokhoeun’s personal suffering.¹³⁸ While the suffering endured by men is mentioned at paragraph 3684 based solely on Kasumi NAKAGAWA’s speculations.¹³⁹ The Defence refers to the arguments developed above.

Finding that men “were threatened with death if they did not comply”¹⁴⁰

96. In reaching this conclusion, the Chamber makes another reference to the testimony of PREAP Sokhoeun in a skewed manner. As seen above, she states in fact that “[...] the only thing I knew was that he, himself, did that to me for his own purpose [...] he [her husband] said that what he did was following *Angkar*’s instructions otherwise we both would be killed. So I did not know whether *Angkar* instructed him to do or whether he did it on his own initiative” (emphasis added).¹⁴¹

97. Similarly, reference was also made to paragraph 3696 of the Written Judgement, which in turn refers to paragraphs 3656-3658 in section 14.3.8.3 *Forced sexual intercourse between spouses*, concluding *inter alia* that both men and women felt compelled to have sex with their new spouse, and when they did not, they were re-educated, threatened with death or punishment. In reaching

¹³⁶ See *supra*, paras 60-62.

¹³⁷ Prosecution Appeal Brief, para. 26 (emphasis in original) and footnote 74 which refers to paras 3683 and 3684 of the Written Judgement.

¹³⁸ This part of the Judgement is based on the evidence of PREAP Sokhoeun, NAKAGAWA and SAY Naroeun.

¹³⁹ NAKAGAWA: T. 13 September 2016, E1/472.1, after [15.45.55], she expresses her opinion following an unidentified woman’s account, which is mentioned by the Prosecution at paras. 26 and 30 of its Prosecution Appeal Brief: “And I’m sure that it impacted over the marriage life, that the husband might have been guilty to the wife or he worried or scared that his wife would never love him and that might have remained as a scar or a trauma for a long period of time until he could recover his masculinity and to ensure that – he could ensure his wife actually accepted him.” (emphasis added).

¹⁴⁰ Prosecution Appeal Brief, para. 26, and footnote 75 which refers to paras 3653 and 3696 of the Written Judgement.

¹⁴¹ Para. 3653 of the Written Judgement where the case of PREAP Sokhoeun is mentioned: T. 20 October 2016, E1/487.1, before [15.15.38]. See the arguments developed *supra*, in particular, at para. 76 concerning his testimony.

this conclusion, the Chamber relies, on the one hand, on the testimony of YOU Vann, PRAK Yut, SUN Vuth, SOU Sotheavy, NOP Ngim, OM Yoeurn and MOM Vun. However, as demonstrated above, these testimonies are inconsistent with the Prosecution's argument.¹⁴² On the other hand, at paragraph 3658, the Chamber relies on the rape of women falling outside the scope of the trial in finding that there was violence and coercion in the context of marriage and its consummation.¹⁴³

98. Based on these shaky foundations, the Chamber could obviously not go any further concerning the situation of men.

Finding that men “accordingly feared for their lives if they did not have sexual intercourse”¹⁴⁴

99. This finding is based on the same shaky foundations as the previous one. It therefore makes sense that it did not also enable the Chamber to find that there had been a serious attack on human dignity sufficient to characterise the crime as a crime against humanity of other inhumane acts.

100. As discussed above in reference to the state of international law at the time,¹⁴⁵ the Appellant's claim that forcing men to have sexual intercourse in the context of forced marriage was in itself a serious attack on human dignity is false. Moreover, in the Cambodia of 1975-1979, in the traditional conception of Khmer culture, men dominated women, particularly in domestic matters and in society in general. Generally, the impact of sexual intercourse was in fact different for men and women.

101. A review of section 14.3.12.2 *Impact of forced sexual intercourse on victims* alone is sufficient to show that men suffered no impact at the requisite level of gravity to establish the crime of other inhumane acts. On that evidence and despite its other otherwise questionable findings, the Chamber, in fact, should not even have found that men had “been subjected to sexual violence that was contrary to human dignity”. In any event, the Chamber had no option but to find that there was insufficient evidence of the requisite level of gravity to establish the crime of other inhumane acts.

¹⁴² See *supra*, paras 78, 65, 79, 46, 67, 71, and 80.

¹⁴³ Rapes of OM Yoeurn and MOM Vun which fall outside the scope of the case: OM Yoeurn was allegedly raped by her husband's chief after he complained to him about her refusal to consummate the marriage: T. 23 August 2016, E1/462.1. MOM Vun claims to have been raped by a group of comrades before her marriage: T. 16 September 2016, E1/475.1.

¹⁴⁴ Prosecution Appeal Brief, para. 26 and footnote 76 which refers to para. 3696 of the Written Judgement: accordingly, see *supra*, para. 97.

¹⁴⁵ See *supra*, paras 11-39.

102. It is worth recalling here the Supreme Court’s jurisprudence that circumstantial evidence – which is moreover irrelevant – is of extremely low probative value, and cannot corroborate non-existent direct evidence. Indeed, it is not enough to add up a multiplicity of this type of evidentiary items to meet the burden of proof by virtue of their number, irrespective of their probative value.¹⁴⁶ This is what the Prosecution attempted to do in its Appeal Brief and what the Trial Chamber did not dare do in its judgement.

III. CONCLUSION

103. **It is impossible to conclude, as a matter either of law or fact**, that the suffering endured by male victims of domestic sexual violence was serious enough to establish the crime of other inhumane acts.

104. Although it had a good number of grounds of appeal to raise about marriage, the Defence notes that on this point, the Appellant’s complaint against the Written Judgement in Case 002/02 is unfounded. Despite taking 5 months, the Prosecution was therefore logically unable to meaningfully argue its sole ground of appeal.

105. **FOR THESE REASONS**, the Defence requests the Supreme Court to REJECT the Prosecution’s appeal.

KONG Sam Onn	Phnom Penh	[signed]
Anta GUISSÉ	Paris	[signed]

¹⁴⁶ Case 002/01 Appeal Judgement, 23 November 2016, **F36**, paras 418-419.