BEFORE THE TRIAL CHAMBER

EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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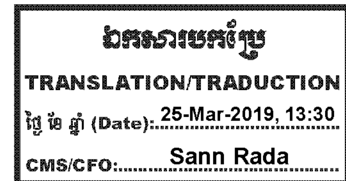

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Before:

The Trial Chamber
Judge NIL Nonn
Judge Jean-Marc LAVERGNE
Judge YOU Ottara
Judge Claudia FENZ
Judge YA Sokhan

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1196. As regards the evidence concerning S-21, including statements by Duch, who was chairman of the security centre, and by guards who were part of its staff, the Defence does not dispute that some facts of the facts which occurred there can be characterised as murder, extermination, enslavement, torture, persecution on political, racial, or religious grounds and other inhumane acts (attacks against human dignity) as crimes against humanity, or that facts can be characterised as wilfully causing great suffering or serious injury to body or health, or as wilfully depriving a prisoner of war or a civilian the rights of a fair and regular trial, and unlawful confinement of a civilian, which constitute grave breaches of the Geneva Convention. However, as regards persecution on racial grounds, the evidence does not support the conclusion that the crime of persecution was committed there. 93
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LIST OF ABBREVIATIONS

DK	Democratic Kampuchea
ECCC	Extraordinary Chambers in the Courts of Cambodia
ECHR	European Court of Human Rights
ICC	International Criminal Court
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IMT	Nuremberg International Military Tribunal
JCE	Joint Criminal Enterprise
MICT	Mechanism for International Criminal Tribunals
OCIJ	Office of the Co-Investigating Judges
SCSL	Special Court for Sierra Leone
STL	Special Tribunal for Lebanon
T.	Transcript of Hearing
WRI	Written Record of Interview

MAY IT PLEASE THE TRIAL CHAMBER

INTRODUCTION

1. On 15 September 2010, at the conclusion of the investigation which was opened by the Prosecution on 18 July 2007,[1] the -Co-Investigating Judges referred KHIEU Samphan and others for trial.[2] Seised of the case, the Trial Chamber decided to hear the charges in separate trials on account of the advanced age of the Accused.[3]

2. On 7 August 2014, at the close of a first trial (002/01),[4] the Trial Chamber sentenced KHIEU Samphan to life imprisonment and commenced substantive hearings in a second trial (002/02) in January 2015.

3. On 23 November 2016, towards the end of substantive hearings in Case 002/02, the Supreme Court Chamber upheld the sentence handed down in Case 002/01, but reversed some of the convictions.[5]

4. That day, the Democratic Kampuchea regime received condemnation and the ECCC's donors were satisfied; the ECCC had thus accomplished its historical and political mission.

5. The Trial Chamber can now discharge its judicial duties, as expected of any court of law.

6. It would be would be naive of the Khieu Samphan Defence (the "Defence") to expect that to happen considering the way the same judges conducted Cases 002/02 and 002/02. That said, the Defence's role is to emphasise that in trying KHIEU Samphan, the Trial Chamber must follow the judicial and procedural norms applicable to any criminal case.

7. Since the ECCC is disinclined to believe what KHIEU Samphan has consistently maintained, namely that he was not privy to the decisions of the CPK leadership and that he had no criminal

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[1] Co-Prosecutors' Introductory Submission, 18.07.2007, **D3**.
[2] Closing Order, 15.09.2010, **D427.**
[3] Severance Order of 22.09.2011, **E124**; Severance Decision, 26.04.2013, **E284**; Decision on Additional Severance, 04.04.2014, **E301/9/1**. Full details about references to written decisions, filings and other documents are found in the Annex to the present Closing Brief. Also, references to trial transcripts may be incorrect in some instances due to the ongoing review process, but they still invariably include at least a time indication in all the languages of transcripts, whether they are revised or not.
[4] Case 002/01 Trial Judgement in, 07.08.2014, **E313** ("Case 002/01 Trial Judgment").
[5] **Case 002/01 Appeal Judgement, 23.11.2016, F36.**

intent, the submissions contained in the present Case 002/02 Closing Brief are solely aimed at highlighting the rule of law (General Part I), the context of the armed conflict (General Part II) and the alleged crimes (General Part III), as well as the rules relating to individual criminal responsibility (General Part IV). If the law is properly and fairly applied, KHIEU Samphan should be acquitted.

General Part I. THE RULE OF LAW

8. Even though the Trial Chamber is not bound by the doctrine of precedent (Part I), it is still required to follow the rules governing its jurisdiction (Part II), the principle of legality (Part III), the rules governing assessment of evidence (Part IV) and equity (Part V).

Part I. NON-APPLICABILITY OF THE DOCTRINE OF PRECEDENT (*STARE DECISIS*)

Chapter I. NATIONAL LAW

9. A precedent is a decision of the court on a point of law which becomes authoritative when the court renders it or when a lower court pronounces on the same point of law. The weight of the "authority" varies depending on the judicial system.

10. In common law systems, where a significant portion of the law derives from customary law, as opposed to written law, judges are bound to follow their previous decisions according to the doctrine of precedent, otherwise known as *stare decisis*.[6]

11. The doctrine of precedent does not apply in civil law systems, where the law is codified, because judges are bound by the law. Precedent therefore carries less weight. It does not "require" them to follow it, but "recommends" that they do so.

12. In some instances, the highest courts in common law jurisdictions are allowed to depart from the doctrine in order to avoid automatic and arbitrary application of *stare decisis* because it inhibits correction of misinterpretations or precedents that have become manifestly ill-adapted or unjust,

13. For example, the United States Supreme Court has held that:

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[6] *Black's Law Dictionary*, 7th Edition, *"stare decisi"*, **D381.1.1**.

"The obligation to follow the precedent begins with necessity, and a contrary necessity marks its outer limit […]. [W]e recognize that no judicial system could do society's work if it eyed each issue afresh in every case that raised it. Indeed the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable. At the other extreme, a different necessity would make itself felt if a prior judicial ruling should come to be seen so clearly as error that its enforcement was for that very reason doomed."[7]

14. In England, the House of Lords held in 1966 that:

> "Their Lordships nevertheless recognise that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law. They propose therefore to modify their present practice and, while treating former decisions of this House as normally binding, to depart from a previous decision when it appears right to do so."[8]

Chapter II. INTERNATIONAL LAW

15. As Michael WOOD observed at the 2015 6- 67th session of the International Law Commission, there is no *stare decisis* in international law; he observed further that:

> "[It cannot be said that the decisions of international courts and tribunals are unquestionable for the purposes of identification of the rules of customary international law. Their weight varies depending on the quality of the reasoning of such decisions, the composition of the court or tribunal and the size of the majority by which they were taken. It is also proper to bear in mind that customary international law may have developed since the date of the decision in question.]"[9]

16. International courts such as the ICJ, the ECHR and the ICC, have clearly departed from *stare decisis* while the appeals courts of the *ad hoc* tribunals have maintained it to a certain extent.

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[7] *Planned Parenthood of Southeastern Pennsylvania v. Robert P. Casey*, 505 U.S. 833, 29 June 1992; *Aleksovski* Appeal Judgement (ICTY), 24.03.2000, para. 92.
[8] Statement read by the Lord Chancellor before the delivery of the Appeal Judgements on 26 July 1966. See: *Stare Decisis in the House of Lords: the Orthodox Position*, Gerald DWORKIN, *International Review of Comparative Law*, 1967, Volume 19, No. 1, p. 190 (available at: http://www.persee.fr/doc/ridc_0035-3337_1967_num_19_1_14761).
[9] Third report on the determination of customary international law, presented by Michael WOOD (Special Rapporteur) at the 67th session of the International Law Commission, A/CN.4/682, 27.03.2015, **F30/12.1.54**, para. 60.

Section I. THE ICJ

17. Article 38(1)(d) of the ICJ Statute provides that the court must apply "subject to the provisions of Article 59, judicial decisions and the teachings [...] as subsidiary means for the determination of rules of law." (*emphasis added*) According to Article 59 of the ICJ Statute, "[t]he decision of the Court has no binding force except between the parties and in respect of that particular case."

18. Pursuant to these provisions read together, the ICJ rejects the *stare decisis* doctrine. Even so, its judges do not hesitate to refer to their precedents in order to maintain continuity of their jurisprudence. As Judge Tanaka pointed out in 1964, a fair balance should be struck between legal certainty and justice:

> "I am well aware that some consideration should be given to the existence of precedents in regard to a case which the Court is called upon to decide. Respect for precedents and maintenance of the continuity of jurisprudence are without the slightest doubt highly desirable from the viewpoint of the certainty of law which is equally required in international law and in municipal law. The same kind of cases must be decided in the same way and possibly by the same reasoning. This limitation is inherent in the judicial activities as distinct from purely academic activities.
>
> On the other hand, the requirement of the consistency of jurisprudence is never absolute. It cannot be maintained at the sacrifice of the requirements of justice and reason. The Court should not hesitate to overrule the precedents and should not be too preoccupied with the authority of its past decisions. The formal authority of the Court's decision must not be maintained to the detriment of its substantive authority. Therefore, it is quite inevitable that, from the point of view of the conclusion or reasoning, the minority in one case should become the majority in another case of the same kind within a comparatively short space of time."[10]

[10] *Barcelona Traction, Light and Power Company, Limited* (*Belgium v. Spain*) – Preliminary objections, Appeal Judgment of 24.07.1964, Separate Opinion of Judge TANAKA, p. 63.

Section II. THE ECHR

19. While the ECHR usually follows its precedents "in the interests of legal certainty and the orderly development of the Convention case-law", it "is not bound by its previous judgments" and can depart from them "if it was persuaded that there were cogent reasons for doing so".[11]

20. Furthermore, it considers "the requirements of judicial security and protection of the legitimate expectations of the litigants does not guarantee the right to consistent jurisprudence".[12]

Section III. THE ICTR AND THE ICTY

21. While no provision of the Statute of these ad hoc Tribunals stipulates that the ICTR and ICTY judges are bound by the doctrine of precedent, their Appeals Chamber has held the view since the *Aleksovski* Appeal Judgement that:

> "In the interests of certainty and predictability, the Appeals Chamber should follow its previous decisions, but should be free to depart from them for cogent reasons in the interests of justice.
>
> Instances of situations where cogent reasons in the interests of justice require a departure from a previous decision include cases where the previous decision has been decided on the basis of a wrong legal principle or cases where a previous decision has been given *per incuriam*, that is a judicial decision that has been "wrongly decided, usually because the judge or judges were ill-informed about the applicable law."
>
> "It is necessary to stress that the normal rule is that previous decisions are to be followed, and departure from them is the exception. The Appeals Chamber will only depart from a previous decision after the most careful consideration has been given to it, both as to the law, including the authorities cited, and the facts. What is followed in previous decisions is the legal principle (*ratio decidendi*)."[13]

22. The Appeals Chamber also held that the *ratio decidendi* of its decisions "is binding" on the Trial Chambers of the *ad hoc* Tribunals.[14]

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[11] *Cossey v. the United Kingdom* (ECHR), 27.09.1990, para. 35.
[12] *Unedic v. France* (ECHR), 18.12.2008, para.74.
[13] *Aleksovski* (ICTY), 24.03.2000, paras. 107-110.
[14] *Aleksovski* (ICTY), 24.03.2000, para.113.

23. Accordingly, the Appeals Chamber does not hesitate to follow its previous decisions whenever it deems it necessary. For example, in *Semanza* (31 May 2000), it reconsidered its interpretation of Rule 40 *bis* of the Rules in *Barayagwiza* (3 November 1999) in light of the legislative history of that Rule (1996 [sic]).[15] The most recent and best-known rejection of the definition of aiding and abetting which was adopted in the *Perišić* Appeal Judgement and applied one year thereafter in the *Šainović* Appeal Judgement,[16] far from being accepted unanimously by the Appeal Chamber judges,[17] further illustrates the "relativity" of decided cases..

Section IV. <u>THE ICC</u>

24. Article 21(2) of the ICC's Rome Statute, entitled "Applicable Law", provides that "[t]he Court <u>may</u> apply principles and rules of law as <u>interpreted</u> in its previous decisions." (*emphasis added*) The ICC is therefore under no obligation to follow its previous decisions and is entirely free to rely on them as it deems fit.

Chapter III. <u>THE ECCC LAW</u>

25. At the ECCC, there is no statutory provision requiring judges to follow the rule of precedent. In fact, *stare decisis* does not apply at the ECCC, an internationalised court which operates according to the civil law tradition.

26. In Case 003, Co-Investigating Judge BOHLANDER noted that:

> "The PTC is the appellate body during the investigative stage of proceedings at the ECCC. In civil law systems, judges are bound only by the law; the common law principle of *stare decisis* does not apply. While the PTC can issue decisions and orders which are binding on the CJIs, legal principles formulated by the PTC do not, as a rule, bind the CIJs in their interpretation of the law.".[18]

27. After having observed that following the Pre-Trial Chamber's decisions allowed for a uniform application of the law in similar cases and was in the interests of legal certainty,[19] the Co-

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[15] *Semanza v. the Prosecutor*, ICTR-97-20-A, Decision, 31.05.2000, paras. 91-97.
[16] *Šainović* (ICTY), 23.01.2014, paras. 1650.
[17] *Stanišić and Simatović* (ICTY), 09.12.2015, paras. 104-106; Separate and Partially Dissenting Opinion of Judge Carmel AGIUS, para. 6; Dissenting Opinion of Judge Koffi Kumelio A. AFANDE, paras. 22-31.
[18] Decision of the International Co-Investigating Judge, 05.04.2016, **003-D87/2/1.7/1**, para. 13 (and para. 17).
[19] Decision of the International Co-Investigating Judge, 05.04.2016, **003-D87/2/1.7/1**, para.14.

Investigating Judge then went on to give an interpretation which was at variance with that of the Pre-Trial Chamber on the same point of law.[20]

28. In Case 002/01, the Trial Chamber departed from some decisions of the Supreme Court Chamber. For example, it found the concept "reasonable representativeness" as identified by the Supreme Court Chamber in the Closing Order, to be "meaningless", and declined to apply it.[21] Furthermore, after the Supreme Court Chamber considered that the convening of a second bench of trial judges had [by then] become "imperative" that and there was no obstacle against convening such a bench "where it [was] necessitated by the interest of justice ", it then went on to rule that his was the responsibility of the President of the Chamber,[22] who expressed serious doubts as to whether he was competent to do so. He remarked that, in any case, such course of action was "not in the interest of the proper administration of justice".[23]

29. It is plain that consistent jurisprudence is conducive to legal certainty. That said, judges are not obliged to follow a precedent and, more importantly, they must refrain from doing so if the precedent in question is flawed.

30. In fact, while he was at the ICJ, Judge GUILLAUME observed that "it is not the role of the judge to take the place of the legislator" and that "the Court must limit itself to recording the state of the law."[24] It is therefore plainly in the interest of justice to depart from a precedent where the interpretation of the law is flawed.

31. It therefore follows that, in Case 002/02, the Trial Chamber must not systematically and blindly follow the reasoning of the Supreme Court Chamber in Case 002/01. Not only is it not bound to do so, but it also it has the overriding duty to depart from it if its reasoning is erroneous.

32. Given that jurisprudential stability and consistency are vital to the credibility and viability of the legal legacy of any court,[25] as the Defence has previously pointed out, repeated reliance on flawed decisions is highly detrimental.

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[20] Decision of the International Co-Investigating Judge, 05.04.2016, **003-D87/2/1.7/1**, para. 78.
[21] Decision, 26.04.2013, **E284**, paras. 96-99. As this decision was appealed and the Supreme Court Chamber exercised its amendment power, the Chamber was subsequently obliged to implement it.
[22] Decision, 25.11.2013, **E284/4/8**, para. 74.
[23] Memorandum, 20.12.2013, **E301/4**, para. 10.
[24] Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, 08.07.1996, Separate Opinion of Judge Guillaume, p.71.
[25] Khieu Samphan's Defence Response, 28.01.2015, **F11/1**, para. 44.

33. As Gandhi once wrote, "[a]n error does not become truth by reason of multiplied propagation […]".[26]

Part II. JURISDICTION

Chapter I. TEMPORAL JURISDICTION

Section I. SCOPE

34. The ECCC law provides that the temporal jurisdiction of the Tribunal is from 17 April 1975 to 6 January 1979.[27]

Section II. "PRECEDENT" IN CASE 002/01

35. In Case 002/01, the Trial Chamber found KHIEU Samphan guilty both of committing some crimes through Joint Criminal Enterprise (JCE) and planning, instigating and aiding and abetting the commission of others.[28]

36. The Defence appealed some of the guilty findings for planning and incitement, on the grounds that the Trial Chamber had entered them in reliance on facts and conduct that occurred before 17 April 1975.[29]

37. The Supreme Court Chamber responded that it is permissible for the Trial Chamber to record guilty findings for …JCE (*sic*).[30] Not only did the Supreme Court Chamber reject an argument the Defence had not raised,[31] but it also vindicated the Defence while at the same time stating the contrary.

[26] *Young India,* Mohandas Karamchand Ghandi, 1924.
[27] ECCC Law, Article 2 new. This temporal limitation is also set forth in both the Agreement between the United Nations and the Government of Cambodia, and the Preamble to the Internal Rules.
[28] Case 002/01 Trial Judgement, paras. 1053-1054.
[29] Case 002/01 Appeal Brief, para. 9.
[30] Case 002/01 Appeal Judgement, paras. 211-221.
[31] The Defence raised the issue of temporal jurisdiction only in paragraph 9 of the Case 002/01 Appeal Brief. In footnote 512 of the Case 002/01 Appeal Judgement, the Supreme Court Chamber cites paragraph 9, adding: "see also paragraph 231". However, at paragraph 231, the Defence simply sets forth all the facts that the Chamber examined for the 1959-1979 period, and does not clearly state when or how it linked KHIEU Samphan to a common criminal purpose or a criminal aspect of the common purpose. This is unrelated to the charges against him at paragraph 9. Moreover, the NUON Chea Defence did not raise the issue of JCE, but only the other modes of participation: Case 002/01 Appeal Judgement, 23.11.2016, footnote 512 referring to paragraphs 627-635 and 663 of the NUON Chea Appeal Brief.

I. SUPREME COURT CHAMBER'S FINDINGS

38. After a detailed discussion on JCE, the Supreme Court Chamber found as follows:

> "In sum, the Supreme Court Chamber considers that in accordance with Article 2 new of the ECCC Law the *actus rei* of the crimes that form the subject of the charges must fall within the period from 17 April 1975 to 6 January 1977 [sic], while the conduct giving rise to individual criminal liability based on participation in a joint criminal enterprise may have occurred before, provided it formed part of extended contributions to the implementation of a common purpose which continued after 16 April 1975. Turning to the case at hand, it must be noted that this is not a case where there was a single act (such as planning or incitement), completed outside the temporal scope of the ECCC's jurisdiction, which eventually led to a criminal result within the temporal jurisdiction. Rather, the conduct in question was part of extended contributions to the implementation of a common purpose, which continued in the period after 16 April 1975. Specifically, the Accused took part in inspection of Phnom Penh after the expulsion of the inhabitants and continued to contribute to the implementation of the common purpose. As such, there is no indication that the Accused had distanced themselves from the common purpose prior to 17 April 1975, or, for that matter, any later time. Accordingly, the Supreme Court Chamber rejects KHIEU Samphan's arguments as regards the ECCC's temporal jurisdiction."[32]

39. Even leaving aside the fact that the source of the unsubstantiated claim that KHIEU Samphan participated in the inspection of Phnom Penh after the evacuation (especially given that this is neither an allegation nor a finding in the Case 002/01 Judgement is uncertain, and that there is no evidence in the - voluminous - case file to support that allegation), the Supreme Court Chamber completely disregarded the fact that the case before it involved other modes of participation besides JCE, such as planning and incitement.

40. Be that as it may, in a bid to validate its reasoning concerning JCE, the Supreme Court Chamber felt compelled to state that "it must be noted" that it was important to distinguish JCE from other modes of participation in respect of which a single act committed outside the scope of the ECCC's temporal distinction could eventually lead to a criminal result within the ECCC's [temporal] jurisdiction.

41. That was precisely the Defence's complaint, namely that the Trial Chamber recorded guilty findings for planning and incitement solely in reliance on acts that were committed outside the scope of the ECCC's jurisdiction.

---

[32] Case 002/01 Appeal Judgement, para.221.

42. While the Defence did not challenge the Trial Chamber's discretion to rely on evidence outside its temporal jurisdiction as regards JCE, it must point out that the Supreme Court Chamber's reasoning on the matter is highly flawed and does not constitute a proper precedent..

II. SUPREME COURT CHAMBER'S FLAWED REASONING

43. The Supreme Court Chamber began by enunciating its views on JCE before noting that the question has apparently never arisen on the international level.[33] It then went on to note that its position accorded with the jurisprudence of England and the United States, particularly with regard to the continuing crime of conspiracy.[34] Finally, it noted that the *Nahimana* jurisprudence, as invoked by the Defence, was of little relevance.[35]

44. In the *Nahimana* case, the ICTR Appeals Chamber considered whether, in a situation where the accused did not personally commit the crime, his acts or omissions establishing his liability for such a crime pursuant to one or more modes of responsibility provided for in the Tribunal's Statute also must have occurred within the Tribunal's temporal jurisdiction, i.e., between 1 January and 31 December 1994. The Tribunal then went on to note that the jurisprudence has not provided a clear answer to that question.[36] The Appeals Chamber had then considered the intention of the framers of the Statute and noted that the temporal jurisdiction was moved from April 1994, the initial proposed date, to January 1994, in order to include the acts of planning of the genocide that followed.[37] It then held as follows:

> "In the opinion of the Appeals Chamber, this clearly indicates that it was the intention of the framers of the Statute that the Tribunal should have jurisdiction to convict an accused only where all of the elements required to be shown in order to establish his guilt were present in 1994. Further, such a view accords with the principle that provisions conferring jurisdiction on an international tribunal or imposing criminal sanctions should be strictly interpreted. Accordingly, the Appeals Chamber finds that it must be shown that:
>
> 1) The crime with which the accused is charged was committed in 199;
>
> 2) The acts or omissions of the accused establishing his responsibility under any of the modes of responsibility referred to in Article 6(1) and (3) of the Statute occurred in 1994, and at the time

[33] Case 002/01 Appeal Judgement, paras. 215-216.
[34] Case 002/01 Appeal Judgement, para. 216.
[35] Case 002/01 Appeal Judgement, paras. 218-220.
[36] *Nahimana* Appeal Judgement (ICTR), 28.11.2007, para. 310.
[37] *Nahimana* Appeal Judgement (ICTR), 28.11.2007, paras. 311-312.

of such acts or omissions the accused had the requisite intent (*mens rea*) in order to be convicted pursuant to the mode of responsibility in question.”.[38]

45. According to the Supreme Court Chamber, the ICTR's interpretation of its Statute "is the result of its consideration of the particular drafting history of that provision and the ICTR Appeals Chamber's resulting assumption of the Statute's drafters' intention. None of this can be transposed to the interpretation of Article 2 new of the ECCC Law."[39]

46. It is plain that the drafting history of the ICTR Statute differs from that of the ECCC law. However, while history is not transposable, its interpretation clearly is. Further, the Supreme Court Chamber itself subsequently highlighted in the Case 002/01 Appeal Judgement (in regard to a provision of the IMT Charter) a highly significant piece of legislation on this subject, namely the Vienna Convention on the Law of Treaties.[40]

47. It is worth noting that the Supreme Court Chamber was disinclined to embark on an interpretation of Article 2 (new) of the ECCC Law and to discuss the intention of its framers.

48. Had it interpreted that article and the intention of its framers, it would have had to take account of the 1999 report of the group of experts mandated by the UN Secretary General to study the various options for prosecuting senior Khmer Rouge leaders "strongly" recommended the establishment of an ad hoc international tribunal similar to the ICTY and ICTR,[41] with jurisdiction limited to the period from 17 April 1975 to 7 January 1979:

> "The temporal jurisdiction of the United Nations tribunal would be a matter for the organ creating it. The Group is of the strong opinion that, as with its own mandate, the temporal jurisdiction of such a tribunal should be limited to the period of the rule of Democratic Kampuchea, i.e. 17 April 1975 to 7 January 1979. […] consideration of human rights abuses <u>by any parties before and after that period</u> would detract from the unique and extraordinary nature of the crimes committed by the leaders of Democratic Kampuchea."[42] (*emphasis added*)

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[38] Nahimana Appeal Judgement (ICTR), 28.11.2007, para. 313.
[39] Case 002/01 Appeal Judgement, para. 219.
[40] Case 002/01 Appeal Judgement, para.393 and footnote 973, where the Supreme Court refers to Article 33(4) of the Vienna Convention on the Law of Treaties found in Section 3 on "Interpretation of treaties". The two preceding articles included in this section provide that a treaty "shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose" (Article 31) and that "[r]ecourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion." (Article 32)
[41] Report of the Group of Experts for Cambodia established pursuant to UN General Assembly resolution 52/135,18.2.1999 (A/53/580; S/1999/231), **D366/7.1.556** (Report of the Group of Experts, **D366/7.1.556**), paras. 139-140.
[42] Report of the Group of Experts, **D366/7.1.556**, para. 149. (French version available online).

49. The drafters of the ECCC Law were mindful of that report and of the conditions for establishing the ICTR. Had they wished to extend the temporal jurisdiction to a period prior to 17 April 1975 so as to include the acts of planning, they would have done so. Instead, they even refrained from extending the court's jurisdiction beyond 6 January 1979 and not from 7 January 1979, as recommended, thereby excluding the date on which the Vietnam ousted the Democratic Kampuchea regime. In so doing, the drafters of the ECCC Law strictly defined the temporal jurisdiction in such a way as to exclude from the court's jurisdiction any crimes that were committed by other parties to the conflict and former members of the CPK who are currently in power, thereby excluding any acts committed before 17 April 1975 and after 6 January 1979.

50. Whereas this interpretation is crystal clear and accords with the criminal law principle of strict interpretation , as recalled in the *Nahimana* jurisprudence., it clearly appears that the Supreme Court Chamber totally ignored it (not only here but also in the entire Appeal Judgement).[43]

51. Rather than undertake an interpretation of the ECCC Law, the Supreme Court Chamber elected to contribute to the endemic disingenuousness of the Court. It continued to affirm that the *Nahimana* jurisprudence is of little relevance, noting that the trial concerned continuing crimes of direct and public incitement to commit genocide and conspiracy to commit genocide (which were not under litigation in Case 002/01).[44] However, those continuing crimes are neither less nor more relevant than the continuing crime of conspiracy (which was also not under litigation in Case 002/01) in light of the jurisprudence of England and the United States, which the Supreme Court had deemed "instructive" shortly before.[45] The fact of the matter is that no crime, whether continuing or not, is pertinent in regard to JCE given that JCE is a mode of liability.

52. The Supreme Court Chamber omitted to acknowledge that this is a general principle deriving from the *Nahimana* jurisprudence. In the he *Nahimana* jurisprudence, that principle is associated with another well-known principle, which is widely applied, including at the ECCC:

> "[…] the provisions of the Statute on the temporal jurisdiction of the Tribunal do not preclude the admission of evidence on events prior to 1994 […].For example, a Trial Chamber may validly admit evidence relating to pre-1994 acts and rely on it where such evidence is aimed at:
>
> - clarifying a given context;

[43] See *infra*, paras. 300-516.
[44] Case 002/01 Appeal Judgement, para. 220.
[45] Case 002/01 Appeal Judgement, para. 216.

- establishing by inference the elements (in particular, criminal intent) of criminal conduct occurring in 1994;
- demonstrating a deliberate pattern of conduct."[46]

53. The Trial Chamber had no qualms about transposing this exception to the ECCC, and proceeded to apply it in the Case 002/01 Judgement.[47] Now, if the exception is applicable, the principle also ought to be applicable.

54. Lastly, the Supreme Court Chamber noted that the *Nahimana* jurisprudence was of limited relevance and that the Appeals Chamber "did not discuss a constellation comparable to the one in the present case, namely where accused are held responsible based on their contributions – stretching over a long period of time – to the implementation of a common purpose, without, however, themselves fulfilling the *actus rei* of the crimes charged."[48]

55. While JCE was not at issue in the *Nahimana* case, the Appeals Chamber of the ad hoc Tribunals considered other cases involving JCE and evidence that was extrinsic to the temporal scope of the indictment. The Appeals Chamber was thus of the view that evidence dating from a period prior to that of the indictment can be admitted in order to establish the common purpose pursued during that period, as well as the role of the accused during that same period.[49] Since an accused cannot be held responsible for crimes committed outside the temporal jurisdiction of the court or the temporal scope of the indictment, this jurisprudence was a lot more applicable to the matter at hand than the English and American jurisprudence invoked by the Supreme Court Chamber in support of its reasoning in reply to a question that had not even been raised.

Section III. FINDINGS IN CASE 002/02

56. Both in the instant case and in Case 002/01, Khieu Samphan is not prosecuted solely for committing crimes through a JCE.

57. The Trial Chamber must therefore be mindful that it cannot enter any finding of guilty based on modes of liability other than JCE, in reliance on facts and conduct that are extrinsic to its temporal jurisdiction.

[46] *Nahimana* Appeal Judgement (ICTR), 28.11.2007, para. 313.
[47] Case 002/01 Trial Judgement, footnote 195.
[48] Case 002/01 Appeal Judgement, para. 220.
[49] *Đorđević* Appeal Judgement (ICTY), 27.01.2014, para. 295.

58. As regards JCE, it can consider evidence predating the temporal jurisdiction only for purposes of establishing the common purpose pursued during the period covered by the Closing Order (which is same as the ECCC's temporal jurisdiction) and Khieu Samphan's role during that period.

CHAPTER II. MATERIAL JURISDICTION (SAISINE *IN REM*)

59. The jurisdiction of the Trial Chamber, which was seised by means of the Closing Order when it became final (section I), is limited to certain facts within the Closing Order (Section II), which, in turn, are limited owing to the severance of charges (Section III). Despite those limitations, a large amount of out-of-scope evidence was tendered at trial and therefore should to be excluded from the deliberations (IV).

Section I. THE TRIAL CHAMBER'S *SAISINE* THROUGH THE CLOSING ORDER HAVING BECOME FINAL

I. PROCEDURE LEADING UP TO THE CLOSING ORDER

60. Before the ECCC, prosecution of crimes within the jurisdiction of the ECCC may be initiated only by the Co-Prosecutors, whether at their own discretion or on the basis of a complaint (Internal Rule 49(1), by conducting preliminary investigations to determine whether evidence indicates that crimes within the jurisdiction of the ECCC have been committed and identifying suspects and potential witnesses (Internal Rule 50(1).

61. If the Co-Prosecutors have reason to believe that crimes within the jurisdiction of the ECCC have been committed, they open a judicial investigation by sending an Introductory Submission to the Co-Investigating Judges, either against one or more named persons or against unknown persons (Internal Rule 53(1)). The submission must contain the following information: a) a summary of the facts; b) the type of offence(s) alleged; c) the relevant provisions of the law that defines and punishes the crimes; d) the name of any person to be investigated, if applicable; and e) the date and signature of both Co-Prosecutors (Internal Rule 53 (1).[50]

[50] These provisions of the Internal Rules are modelled on Cambodian criminal procedure, which, in turn, is modelled on French criminal procedure. See: Code of Criminal Procedure of the Kingdom of Cambodia, Article 44 (opening of a judicial investigation):"In case of a felony, the Prosecutor shall open a judicial investigation. The judicial investigation shall be based upon the initial submission provided to the investigating judge. The judicial investigation may be opened against identified or unidentified individuals. The initial submission (prepared by the Prosecutor) includes: a summary of the facts; a legal qualification of the facts; the indication of relevant provisions of the criminal

62. The investigative phase then begins.[51] The investigative phase is mandatory for crimes within the jurisdiction of the ECCC (Internal Rule 55(1)),[52] and the Co-Investigating Judges may investigate only the facts set out in an Introductory Submission or a Supplementary Submission (Internal Rule 55(2)).[53]

63. If, during an investigation, new facts come to the knowledge of the Co-Investigating Judges, the latter must inform the Co-Prosecutors, unless the new facts are limited to aggravating circumstances relating to an existing submission. Where the Co-Prosecutors have been informed of such new facts, the Co-Investigating Judges are not permitted to investigate them unless they receive a Supplementary Submission. (Internal Rule 55 (3).[54]

64. In the conduct of judicial investigations, the Co-Investigating Judges may take any investigative action conducive to ascertaining the truth. In all cases, they must conduct their investigation impartially, whether the evidence is inculpatory or exculpatory. (Internal Rule 55(5).[55]

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law and sanction for offense the name(s) of the suspect, if known. The introductory submission shall be dated and signed. These formalities shall be strictly complied with or the initial submission shall be void.")

[51] See also: Code of Criminal Procedure of the Kingdom of Cambodia, Article 124 (Introductory Submission, paragraph 1: "In compliance with Article 44 of this Code (Commencement of Judicial Investigation), a judicial investigation is opened by the introductory submission of the Royal Prosecutor."

[52] See also: Cambodian Code of Criminal Procedure, Article 122 (Commencement of Investigation): "Investigation is mandatory for a felony; however it is optional for a misdemeanour"... French Code of Criminal Procedure, Article 79: "A preliminary judicial investigation is compulsory where a felony has been committed. In the absence of special provisions, it is optional for misdemeanours. It may also be initiated for petty offences if it is requested by the district prosecutor [...]".

[53] See also: Cambodian Code of Criminal Procedure, Article 125 (Scope of Complaint), and paragraph 1: "The investigating judge is seized with the facts specified in the introductory submission. The investigating judge shall investigate only those facts."; French Code of Criminal Procedure, Article 80 I. paragraph 1: "The investigating judge may only investigate in accordance with a submission made by the district prosecutor"

[54] See also: Cambodian Code of Criminal Procedure, Article 125 (Scope of Complaint) paragraphs 2 and 3 "If during a judicial investigation, new facts susceptible to be qualified as a criminal offense arise, the investigating judge shall inform the Prosecutor. The Prosecutor can ask the investigating judge to investigate the new facts by making a supplementary submission. If there is no such supplementary submission, the investigating judge has no power to investigate the new facts. However, if the new facts only constitute aggravating circumstances of the facts already under judicial investigation, no supplementary submission is required". French Code of Criminal Procedure, Article 80 I. paragraph3: "Where an offence not covered by the prosecution submissions is brought to the knowledge of the investigating judge, he must communicate forthwith to the district prosecutor the complaints or the official records which establish its existence. The district prosecutor may then require the investigating judge, by an additional submission, to investigate the additional facts, or require him to open a separate investigation [...]".

[55] See also: Cambodian Code of Criminal Procedure, Article 127 (Investigating of Inculpatory and Exculpatory Evidence): "An investigating judge, in accordance with the law, performs all investigations that he deems useful to ascertaining the truth. An investigating judge has the obligation to collect inculpatory as well as exculpatory evidence". French Code of Criminal Procedure, Art*icl*e 81, paragraph 1: "The investigating judge undertakes in accordance with the law any investigative step he deems useful for the discovery of the truth. He seeks out evidence of innocence as well as guilt".

65. The Co-Investigating Judges must conclude the investigation by issuing a Closing Order, either indicting a Charged Person and sending him or her to trial, or dismissing the case. (Internal Rule 67(1)).[56]

II. THE CLOSING ORDER AND CONFIRMATION OF CHARGES

66. The Indictment is deemed void for procedural defect unless it sets out the identity of the Accused, a description of the material facts and their legal characterisation by the Co-Investigating Judges, including the relevant criminal provisions and the nature of the criminal responsibility. (Internal Rule 67(2)).[57]

67. The Co-Investigating Judges may issue a Dismissal Order in the following circumstances: a) The acts in question do not amount to crimes within the jurisdiction of the ECCC; b) The perpetrators of the acts have not been identified; c) There is not sufficient evidence against the Charged Person or persons of the charges. (Internal Rule 67(3)).[58]

68. The Closing Order must state the reasons for the decision. A Closing Order may both confirm the charges in relation to certain acts or against certain persons and dismiss the case for others. (Internal Rule 67(4)).[59]

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[56] See also: Cambodian Code of Criminal Procedure, Article 247 (Closing Order),and paragraph 1: "An investigating judge terminates the judicial investigation by a closing order. This order may be an indictment or a non-suit order".

[57] See also: Cambodian Code of Criminal Procedure, Article 247 (Closing Order) para. 2: "If the judge considers that the facts constitute a felony, a misdemeanour or a petty offense, he shall decide to indict the charged person before the trial court. The order shall state the facts being charged and their legal qualifications". French Code of Criminal Procedure, Article 181. paragraph 3: "The indictment order contains, under pain of nullity, a presentation and the legal qualification of the matters to which the accusation relates, and specifies the accused's identity".

[58] See also: Cambodian Code of Criminal Procedure, Article 247 (Closing Order) paragraph 3: "The investigating judge shall issue a non-suit order in the following circumstances: 1) The facts do not constitute a felony, misdemeanour or petty offense; 2) The perpetrators of the committed acts remain unidentified; 3) There is insufficient evidence for a conviction of the charged person "; French Code of Criminal Procedure, Article 177, paragraph 1: "If the investigating judge considers that the facts do not constitute a felony, a misdemeanour, or a petty offence, or if the perpetrator has remained unidentified, or if there are no sufficient charges against the person under judicial examination, he makes an order ruling that there is no cause to prosecute".

[59] See also Cambodian Code of Criminal Procedure, Article 247 (Closing Order) paragraph 4: "A closing order shall always be supported by a statement of reasons. The investigating judge is not obliged to conform to the final submission of the Prosecutor. The order may combine an indictment for certain facts and a non-suit order for other facts. " French Code of Criminal Procedure, Article 184: "The orders made by the investigating judge in accordance with the present section include the surname, first names, date and place of birth, domicile and profession of the person under judicial examination. They state the legal qualification of the actions he is charged with and state precisely the grounds for which there is or is not sufficient evidence against him".

69. The Co-Prosecutors, the Accused and Civil Parties must be immediately notified upon issue of a Closing Order,[60] and is subject to appeal under certain conditions (Internal Rule 67(5)). Where an appeal is filed against a Closing Order, the Greffier of the Co-Investigating Judges forwards the case file to the Greffier of the Pre-Trial Chamber. (Internal Rule 69 (1)).[61]

70. Where the Co-Prosecutors may appeal the Closing Order without any restrictions, the suspect may only dispute the provisions of the Closing Order "confirming the jurisdiction of the ECCC" and/or relating to provisional detention or bail (Internal Rule 74(1) and 74(3)).[62]

71. The Closing Order shall cure any procedural defects in the judicial investigation. (Internal Rule 76(7)).[63]

72. The Trial Chamber is seised by an Indictment from the Co-Investigating Judges or the Pre-Trial Chamber (Internal Rule 79(1)).[64]

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[60] See also: Cambodian Code of Criminal Procedure, Article 247 (Closing Order), paragraph 5: "The Royal Prosecutor, the charged person and the civil parties shall be informed of a closing order without delay". French Code of Criminal Procedure, Article 183 paragraph 1: "The person under judicial examination and the assisted witness are notified of the closing order, and the civil party is informed of the referral order or indictment order. The notification is made within the shortest time possible, either verbally with a signature entered into the case file or by recorded delivery letter."

[61] See also: Cambodian Code of Criminal Procedure, Article 271 (Competence of Investigation Chamber): "Appeals shall be heard by the Investigation Chamber of the Court of Appeal."; Article 273 (Referral of the Dossier to the Investigating Chamber).

[62] **There is a substantial difference here with the Cambodian Code of Criminal Procedure and the French Code of Criminal Procedure**: Cambodian Code of Criminal Procedure, Article 253 (Complaint to Investigating Chamber), paragraphs 3 and 4: "If the Royal Prosecutor considers that any part of the proceedings is null and void, he seizes the Investigation Chamber with a request for annulment, including a statement of the relevant reasons and informs the investigating judge"; Article 252 (Mandatory Rules): "The rules and procedures stated in the following Articles regarding general provisions are mandatory and shall be complied with, otherwise the activities shall be null and void - 122 (Commencement of Judicial Investigation), - 123 (Territorial Jurisdiction), - 124 (Introductory Submission) (paragraph 3), - 125 (Scope of the Complaint) (paragraphs 1 and 2) and - 128 (Assistance of Court Clerks) of this Code. Proceedings shall also be null and void if the violation of any substantial rule or procedure stated in this Code or any provisions concerning criminal procedure affects the interests of the concerned party. Especially, rules and procedures which intend to guarantee the rights of the defense have a substantial nature". French Code of Criminal Procedure, Article 186: "The right to appeal against the orders and decisions set out by article [] [… 181 (indictment); Article 211: "[The investigating chamber] examines whether sufficient charges exist against the person under judicial examination".

[63] See also: Cambodian Code of Criminal Procedure, Article 256 (Clearing Nullities by Closing Order): "A closing order which has become final and definitive shall legalize all nullities in the proceedings, if any". French Code of Criminal Procedure, Article 179, paragraph 6: "When it becomes final, this order [i.e., the one referring to the correctional court] wipes out all procedural defects, if there were any"; Article 181 paragraph 4: "Where it has become final, the indictment order wipes out procedural errors, if there were any".

[64] See also: Cambodian Code of Criminal Procedure, Article 291 (seizing the court of first instance: "In a criminal case the Court of First Instance can be seized through: […] the investigating judge's order or the Investigation Chamber's decision to forward the case for trial (indictment)".

73. The judgement must be limited to the facts set out in the Indictment (Internal Rule 98(2)).[65]

74. However, the Trial Chamber may change the legal characterisation of the crime as set out in the Indictment, as long as no new constitutive elements are introduced. (Internal Rule 98(2)).

75. The Trial Chamber must examine whether the acts amount to a crime falling within the jurisdiction of the ECCC, and whether the Accused committed those acts. (Internal Rule 98(3)).[66]

76. Accordingly, just as the Investigative Judges was before it, the Trial Chamber is seised of the facts of the case, and those facts only (*in rem*). Its *saisine* is limited to the facts set out in the Closing Order once it became final.

Section II. *SAISINE* LIMITED TO CERTAIN FACTS WITHIN THE CLOSING ORDER

77. It is to be noted that the purpose of the Closing Order is to provide information on the charges (I) so as to show why the Trial Chamber's jurisdiction is limited solely to the facts upon which the accused persons are committed for trial (II), and why it is impermissible for the Trial Chamber to extend its *saisine* (III).

I. PURPOSE OF THE CLOSING ORDER: TO PROVIDE INFORMATION ON THE CHARGES

78. While the Closing Order, once final, forms the basis of the prosecution case against the Accused, its main purpose -- as is the case with any indictment -- is to inform all suspects and charged persons of their right to a fair trial.

79. Indeed, Internal Rule 21(1)(d) provides that every person suspected or charged person has the right to be informed of any charges brought against him/her.

80. Article 14(3)(a) "of the International Covenant on Civil and Political Rights, which is referenced in Article 33 (new) of the ECCC Law, provides that:

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[65] See also: Cambodian Code of Criminal Procedure, Article 348 (Scope of Seizure of Court (facts)) paragraph 1: "The court may only decide on acts stated in the indictment, the citation, or on the written record of immediate appearance". French Code of Criminal Procedure, Article 231: "The assize court has full jurisdiction to try [...] those persons committed for trial before it by the indictment. It may not try any other accusation." Article 388: "The correctional court is seised of offences within its jurisdiction [...] where the case is sent to it by the investigation jurisdiction".
[66] See also: Cambodian Code of Criminal Procedure, Article 350 (Declaration of Guilt) paragraph 1: "The court shall examine whether: - the facts constitute a felony, a misdemeanour, or a petty offence; - the accused committed the crime of which he has been accused or not".

"In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him".

81. Framed in virtually identical terms, Article 6(3)(a) of the Convention on the Protection of Human Rights and Fundamental Freedoms provides that:

"Everyone charged with a criminal offence has the [...] right[]s [...] to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him".

82. The ECHR has observed that these provisions:

"point to the need for special attention to be paid to the notification of the "accusation" to the defendant. Particulars of the offence play a crucial role in the criminal process, in that it is from the moment of their service that the suspect is formally put on notice of the factual and legal basis of the charges against him. Article 6 § 3 (a) of the Convention affords the defendant the right to be informed not only of the cause of the accusation, that is to say the acts he is alleged to have committed and on which the accusation is based, but also the legal characterisation given to those acts. That information should, as the Commission rightly stated, be detailed.

[...] The Court considers that in criminal matters the provision of full, detailed information concerning the charges against a defendant, and consequently the legal characterisation that the court might adopt in the matter, is an essential prerequisite for ensuring that the proceedings are fair..

[...] the right to be informed of the nature and the cause of the accusation must be considered in the light of the accused's right to prepare his defence.".[67]

83. Prior to that, the European Commission of Human Rights recalled that the accused has the right to be informed:

"of the **cause** de the accusation, that is to say the acts he is alleged to have committed and on which the accusation is based, but also the legal characterization given to those facts. The information in[article 6 § 3 a] must contain details allowing the accused to prepare his defense, without necessarily mentioning all the evidence on which the accusation is based."[68] (*emphasis supplied*)

84. It therefore follows from Human Rights case law that it is through both the material facts and their legal characterisation, and not through the evidence in support thereof, that the accused is informed of the charges against him. Such important information must be detailed, accurate and complete so as to enable the accused to prepare hi defence.

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[67] *Pélissier and Sassi v. France* (ECHR, Grand Chamber), 25.03.1999, paras. 51-54 (references omitted).
[68] *X. v. Belgium* (European Commission of Human Rights), *Décision sur la recevabilité de la requête* (No.7628/76), 09.05.1977, para. 1 (references omitted). See also: *Colozza and Rubinat v. Italy* (Commission ECHR), report of the Commission (Applications No. 9024/80 and 9317/81), 05.05.1983, para. 114.

85. These fundamental principles are upheld by the International Criminal Tribunals where, depending on the applicable texts, the prosecutor prepares an indictment "containing a concise statement of the facts and the crime or crimes with which the accused is charged" [69] The indictment must set forth "a concise statement of the facts of the case and of the crime with which the suspect is charged".[70] The Appeals Chamber, before which it is possible to raise, be it for the first time, a defect in the indictment,[71] has highlighted the Prosecution's obligation to:

> "state the material facts underpinning the charges in the indictment, but not the evidence by which such material facts are to be proven. Hence, the question whether an indictment is pleaded with sufficient particularity is dependent upon whether it sets out the material facts of the Prosecution case with enough detail to inform a defendant clearly of the charges against him so that he may prepare his defence".[72]

86. It is those same principles which underpin Internal Rules 67(2) and 67(4), as cited *supra* (Section I, II), according to which:

> "- lest it be declared null and void, the Closing Order sets out the charges and legal characterization made by the Co-Investigating Judges, as well as the form of criminal liability;
>
> - the Closing Order is reasoned."

II. SCOPE OF THE FACTS UPON WHICH THE ACCUSED WERE SENT TO TRIAL

87. In light of the foregoing, it is plain that the scope of the charges includes material facts whose legal characterisation renders the Accused liable.

88. The Trial Chamber's *saisine* is based upon the facts for which the accused are sent to trial and of which the Trial Chamber is seised.

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[69] ICTY Statute, Article 18(4); ICTR Statute, Article 17(4); MICT Statute, Article16(4).
[70] ICTY/ICTR Rules of Procedure and Evidence, Rule 47(C); MICT Statute, Article 48(C). See also Regulation 52 o the ICC Regulations of the Court, pursuant to which document containing the charges must include: (b) A statement of the facts, including the time and place of the alleged crimes, which provides a sufficient legal and factual basis to bring the person or persons to trial, including relevant facts for the exercise of jurisdiction by the Court, (c) A legal characterisation of the facts to accord both with the crimes[…] and the precise form of participation […]".
[71] See for example: *Nahimana* Appeal Judgement (ICTR), 28.11.2007, para. 327; *Ntagerura* Appeal Judgement (ICTR), 07.07.2006, para. 31; *Kvočka* Appeal Judgement (ICTY), 28.02.2005, para. 35.
[72] *Kupreškić* Appeal Judgement (ICTY), 23.10.2001, para. 88.

89. Accordingly, while the Trial Chamber is seised of the case (*in rem*), it is not seised of the entirety of the facts contained in the Closing Order, but only of the material facts whose legal characterisation engages the responsibility of the persons charged.

90. As a consequence, in order to determine the exact scope of the charges and, by implication, the Trial Chamber's *saisine*, it is necessary to refer to the section of the Closing Order containing the legal characterisation of the facts (third part) and identify the facts that the Co-Investigating Judges considered as engaging the criminal responsibility of the accused persons.

91. For these reasons, the Trial Chamber is neither seised of:

- the other facts mentioned in the Closing Order, nor of
- the legal characterisations that are unrelated to the factual underpinnings them.

92. In other words, there is no *saisine* where the facts are unrelated to legal characterisation of the facts charged against the accused.

93. The Trial Chamber observed this when despite the clearing of the procedural defects in the Closing Order, once final, it held it was improperly seised of offences in the 1956 Penal Code.[73] It noted absent reference to the essential elements underpinning the charges, and for that reason, the portions of the Closing Order do not meet the preconditions for validity contained in Internal Rule 67(2), and therefore infringe the accused's right to mount an effective defence.[74]

94. By contrast, for example, in regard to facts in the Closing Order which are not legally characterised against the Accused, the Trial Chamber again noted that it was improperly seised of such facts (factual allegations of rape outside the context of marriage, see i*nfra.* (Section IV).[75] In fact, the Co-Investigating Judges issued an Internal Rule 67(4) order in which they confirm some charges while dismissing others.

95. It is quite easy to lose one's way in the meanders of the 790-page Closing Order (of which 339 are devoted to facts while 335 are devoted to endnotes concerning a large amount of evidence),

[73] Trial Chamber Decision, 22.09.2011, **E122**.
[74] Trial Chamber Decision, 22.09.2011, **E122**, paras. 16, 21-22.
[75] Memorandum, 25.04.2014, **E306**, para. 3; Trial Chamber Decision, 12.06.2015, **E348/4**, para. 15; Trial Chamber Decision, 30.08.2016, **E306/7/3**.

especially as, in the words of one of the Co-Investigating Judges, the Closing Order is rife with issues:

> "while they were perhaps not absolutely essential, they deemed them important should [the Closing Order] be the only court record of what happened in Cambodia in the period between 17 April 1975 and 6 January 1979".[76]

96. Yet, the only facts to be considered in the Closing Order which underpin a criminal case – as opposed to a case for the history books – –are the material facts whose legal characterisation points to the criminal responsibility of the accused persons. Since the portion of the **Closing Order** concerning legal characterisation is in some instances quite lapidary and in many instances separate from the factual portion, it is necessary, where applicable, to refer to the relevant factual portions of Closing Order. Also in some instances, it is necessary to refer to the Co-Prosecutors' Introductory and Supplementary Submissions. In fact, because the -Co-Investigating Judges were keen to make history and to create a judicial precedent, they investigated facts of which they were not seised, and of which the Trial Chamber was, by implication, improperly seised, and cannot adjudicate.

97. In any event, according to long-standing French jurisprudence, courts "[may only adjudicate the facts set out in the referral order, since the accused have an inalienable right to be tried solely on the basis of such facts.]"[77]

III. *SAISINE* IS NOT EXTENSIBLE

98. In both the civil law and international criminal law traditions, it is impermissible for a trial court to extend the charges so as to include facts of which it was not properly seised at the outset.

A. Civil law

99. While the Trial Chamber may amend the legal characterisations in the Closing Order according Internal Rule 98(2), it may only adjudicate the facts in the Closing Order. In the *Duch* Trial Judgement, the Trial Chamber recognised that:

[76] Extract of book by Marcel LEMONDE, *Un juge face aux Khmers Rouges*, January 2013, p. 202, **E280.12**.
[77] *Cour d'appel de Nîmes*, 18.05.1962, JCP 1963. II. 13069.

"the proviso [...] that no new constitutive elements be introduced is a reiteration of this well-established limitation, namely that any re-characterisation must not go beyond the facts set out in the charging document."[78]

100. It noted further that it follows from Internal Rule 98(2) that:

"any legal re-characterisation made by the Trial Chamber be limited to the facts set out in the Amended Closing Order. This approach accords with the powers conferred upon Trial Chambers in the Cambodian legal system, as well as in French legal system upon which it was originally modeled"[79]

101. It has indeed been long established in French law that a court (investigative, first instance, appellate) may not adjudicate facts of which it is not been properly seised, not even for purposes of legal characterisation.

1. Investigation

102. For many years, the criminal chamber of the court of cassation has recalled that the *saisine* of the investigative judge is strictly limited to the facts of which he is properly seised:

"The powers accorded to an investigating judge under article 81, paragraph 1, of the Code of Criminal Procedure, and which allow him to undertake, in accordance with the law, any investigative action that is conducive to ascertaining the truth, are only limited to those facts of which he is properly seised pursuant to articles 80 and 86 of this Code".[80]

103. Investigative courts, which are seised of facts and not of charges, are not bound by the characterisation proposed in the charging document:

"The investigative judge is seised of the facts set out in the introductory submission, independently of the legal characterisation proposed by the public prosecutor".[81]

"The investigating judge and the trial chamber itself are seised of the facts set out in the introductory submission, independently of the legal characterization proposed by the public prosecutor".[82]

104. Accordingly, while the investigative judge "are not bound by the characterisation of the facts proposed by the public prosecutor",[83] their discretion to characterise ceases to be lawful where it

[78] *Duch* Trial Judgement, 26.07.2010, para. 494.
[79] *Duch* Trial Judgement, 26.07.2010, para. 494.
[80] *Cass. Crim.*, 06.02.1996, No. 95-84041.
[81] *Cass. Crim.*, 20.03.1972, No. 71-93622.
[82] *Cass. Crim.*, 29.01.1985, No. 84-95197.
[83] *Cass. Crim.*, 11.02.1992, No. 91-86066.

affects their *saisine*. This is the case when, for purposes of recharacterisation, the investigative judges consider themselves seised of facts which are not set out in the charging document.[84]

105. In any event, it is impermissible for investigative judges to extend the scope of the investigation on their own motion so as to include facts that are not part of their *saisine*.[85] Likewise, a second-tier investigative court may pass judgement on facts that lie outside of the investigating judge's *saisine*.[86]

2. <u>First instance trial</u>

106. When an investigating judge is satisfied that there are sufficient charges against an accused person and that the facts constitute an offence, he issues an order referring the charged person to a criminal court for trial.[87] When he is satisfied that there are sufficient charges against the accused person and that the facts constitute a misdemeanour, he issues an order for the person to be charged before a criminal court (with or without a jury, depending on the nature of the offence).[88]

[84] *Cass. Crim.*, 10.05.1973, No. 73-90372: "Whereas through the introductory submission the investigative judge was seised against X… and his wife, and not of facts of involuntary manslaughter on the person of Béatrice X…, but rather of facts of failure to render assistance to a person in danger; […] Whereas therefore the trial chamber rightly declared itself incompetent to hear the facts alleged by the applicants in their submission, facts upon which the public prosecutor had not seised the trial court".

[85] *Cass, Crim.*, 25.06.1984, No. 83-94199: "Under Article 80 of the Code of Criminal Procedure, the investigative judge is not permitted to investigate facts of which he is not seised in the public prosecutor's submission. *Cass. Crim.* 01.04.1998, No. 97-84372: "The powers accorded to the investigative judge under Article 80 of the Code of Criminal Procedure are limited solely to facts of which he is seised pursuant to Articles 80 and 86 of the Code" (annulment of a trial chamber decision considered justified by the execution of letters rogatory for the arrest and placement in police custody by judicial police officials upon discovery of new facts not set out in the introductory submission).

[86] *Cass. Crim.*, 12.02.1969, No. 67-93533(annulment of the trial court's referral order on the grounds that facts predating the launch of the prosecution case not having been the subject of supplementary submissions for purposes of investigation, thereby exceeding falling outside the saisine, despite the continuing nature of the offence). See also: *Cass. Crim.*, 03.01.1970, No. 68-93382; *Cass, Crim*, 15.05.1979, No. 78-92189.

[87] French Code of Criminal Procedure, Article 177, paragraph 1, and Article 179, paragraph 1.

[88] <u>French Code of Criminal Procedure</u>, Article 177, paragraph 1, and Article 181, paragraph 1. The Special Criminal Court composed solely of professional judges has jurisdiction to determine certain crimes in cases of a military nature (Articles 697 and 698(6), terrorism (Article 706-25) or drug trafficking (Article 706-27).

107. Unlike the referral order, the order referring a charged person for trial is subject to appeal by the accused,[89] whereas the public prosecutor has the right to appeal any order of an investigative judge.[90]

108. When it becomes final, a referral order, like the charging document, cures all procedural defects, if there were any.[91]

109. In both misdemeanour and criminal proceedings, the trial chamber seised of the final referral order cannot pass judgement on facts of which it is not properly seised; this includes facts that are extrinsic to its *saisine* or those that are not included in the referral order or the indictment.

a. Facts extrinsic to the investigative judge's *saisine*

110. Quite logically, the trial chamber's *saisine* cannot be extended to include facts of which the investigating chamber was not seised at the outset.

111. There is little likelihood of extending the *saisine* of the assize court to include facts of which the investigative judge may be improperly seised, since the accused has the right to appeal the referral order.

112. As this judicial remedy is not afforded to the accused in the referral order issued to a misdemeanour court, the *Chambre criminelle de la Cour de Cassation* already in 1967 set aside and annulled a decision of a court of appeal by ruling that:

> "the referral order did not seise the misdemeanour court of facts that occurred before the the investigating judge were seised of the facts; in fact, absent new accusations from the public prosecutor, the investigating judges could not be seised of those facts".[92]

[89] According to Article 186, paragraph 1, of the French Code of Criminal Procedure, the right of appeal is exercised by the accused against orders and decisions provided for in Articles 80(1)(1) (decisions relating to the change of status from an accused to an assisted witness), 87 (admissibility of civil parties), 139 and 140 (decisions relating to judicial supervision), 142(6) and 142(7) (decisions relating to house arrest under electronic monitoring), 137 (3), 145 (1) and 145 (2), 148 (decisions of the liberty and custody judge relating to pre-trial detention and applications for release), 167, para. 4 (decisions rejecting a second or an additional expert opinion or additional expert opinion), 179, paragraph 3 (order by an investigative judge for remand in pre-trial detention in the settlement order), and 181 (order referring the accused for trial). Furthermore, Article 186(3) paragraph 1 of the Code of Criminal Procedure, provides that the accused and civil party have the a right to appeal the order referring the accused for trial before a correctional court (Article 179, paragraph 1 of the Code of Criminal Procedure) "if they consider that the offence sent to the correctional court constitutes a felony which should have been the subject of an indictment order sent to the assize court".
[90] French Code of Criminal Procedure, Article 185.
[91] French Code of Criminal Procedure, Article 179, paragraph 6 (referral order) and Article 181, paragraph 4 (referral for trial).
[92] *Cass. Crim.* 23.11.1967, No. 66-93733.

113. More recently, in 2012, it more generally and very explicitly held that:

> "on the one hand, while, according to article 179, paragraph 6 of the Code of Criminal Procedure, the referral order wipes out all defects when it becomes final, it cannot wipe out its own defects and/or imperfections, [...] on the other hand, an investigating judge may decides to commit a person under investigation only in relation to those facts of which he is seised, and, [...] as consequence, the person under investigation who is committed before the correctional court in respect of facts that are extrinsic to the jurisdiction of the trial court, if the allegations, so as to uphold his right of redress". (*emphasis added*).[93]

b. Facts not included in the *saisine*

114. A trial chamber cannot be seised of facts that are not part of its *saisine*, even for purposes of recharacterisation. There is the only one exception to this rule, and it concerns misdemeanours, not criminal charges.

i. *Proprio motu* extension of *saisine* is impermissible

115. The *Chambre criminelle de la Cour de Cassation* [Criminal Division of the Court of Cassation] has consistently recalled that it is prohibited for a chamber to extend its *saisine* of its own motion so as to include facts that are extrinsic to the investigation or the charges.

116. In regard to misdemeanour proceedings, the *Chambre criminelle de la Cour de Cassation* [Criminal Division of the Court of Cassation has noted that:

> "criminal courts may lawfully adjudicate only facts contained in the order or writ of summons by which they are seised".[94]

117. For that reason, it reversed an appellate court's decision by which the accused had been found guilty of charges including criminal association "[which was not in the referral order], because the accused has been cleared thereof.[95]

118. In another case, it declined to quash the decision of an appellate court which had admitted facts that were not included in the referral order only "by way of character evidence".[96]

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[93] *Cass. Crim.*, 11.12.2012, No. 12-86306.

[94] *Cass. Crim.* 15.03.1978, No. 77-92490; *Cass. Crim.*, 23.04.1980, No. 79-92527; *Cass. Crim.*, 05.06.1996, No. 95-83265.

[95] *Cass. Crim.* 25.11.2015, No. 14-85307.

[96] *Cass. Crim.*, 19.12.1979, No. 79-90931: "as such, irrespective of all the erroneous reasons, the court of appeal which did not exceed its saisine by referring to facts that may not be set out in the charging document, but are raised for

119. In regard to criminal proceedings, the *Cour de cassation* only recalls that:

> "[the assize court may not hear charges other than the ones contained in the indictment which, once, establishes the court's saisine]''.[97]

120. This is why it overturned the conviction of the accused for acts committed on a date other than that which was stated in the indictment.[98] It also overruled a decision in which the accused was convicted of several instances of rapes whereas the referral order stated only one, since the court "had modified the substance of the indictment.]''[99]

ii. <u>… even for purposes of recharacterisation</u>

121. The rule prohibiting a chamber from extending its *saisine* also applies to legal recharacterisation of the facts. In fact, the trial court only has discretion to recharacterise facts on two conditions.

122. First, while criminal courts are permitted to change the recharacterise the facts:

> "they may do so only on the condition that nothing is changed or added to the facts of the case and that they remain as they were characterised in the referral document".[100]

123. In other words, in criminal proceedings:

> "the court and the jury may not, without exceeding their power, deal with a matter which substitutes or adds a new fact to the facts contained in the charging document."[101]

124. It was on that basis that the *Cour de cassation* set aside decisions of assize courts which added a new charge to the one of which they were seised, after they had, for instance, convicted the accused of arbitrary arrest and detention whereas those accused were charged only with detention.[102]

125. Second, characterisation is conditional on respect for the fundamental freedoms of the accused. As to its execution, it must be commensurate with the right of the suspect or accused person to be

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purposes of character evidence, characterised all the constitutive elements of the crime of fraud".

[97] *Cass. Crim.*, 21.02.1996, No. 95-82085. *Cass. Crim.*, 08.03.2000, No. 99-82597.

[98] *Cass. Crim.*, 21.02.1996, No. 95-82085.

[99] *Cass. Crim.*, 08.03.2000, No. 99-82597.

[100] See *Cass. Crim.*, 22.04.1986, No. 84-95759 (cited in the *Duch* Judgement, 26.07.2010, para. 494, footnote 869). *Cass. Crim.*, 02.11.1978, No. 77-91635: "it is on the condition that the trial court does not substitute a new fact for the one of which it was seised".

[101] *Cass. Crim.*, 09.11.1983, No. 83-91982.

[102] *Cass. Crim.*, 09.11.1983, No. 83-91982: "Whereas in this instance the referral order only concerned the fact of having held Ms. Y… captive; whereas, therefore, the court exceeded its powers and overstepped the limits of its saisine when it rules on the factual allegation of unlawful confinement, whereas it was not included among the charges". See also *Cass. Crim.*, 24.01.1966, No. 95-81210.

adequately informed of the charges against him in accordance with his right to be afforded adequate time and means for the preparation of his defence, as the ECHR has noted in several cases against France:

> "While lower courts are allowed, where district law so allows, to recharacterise facts of which they are properly seised, they must ensure that the accused have been afforded the opportunity to exercise their right to answer and defence on this point in a concrete and effective manner, by being informed in a timely manner of the prosecution case, i.e. the material facts alleged against them and on which the prosecution case is based, together with a detailed legal characterisation of those facts."[103]

126. In a case where the court of assize had found the accused guilty of rape, whereas he was charged with attempted rape and sexual assault, the ECHR found that the accused's rights were infringed, insofar as the question of recharacterisation had only arisen at the end of the proceedings. For example, the ECHR ruled that:

> "For example, referring the case for retrial or seeking the applicant's views. It is for the municipal court, by virtue of its inalienable right to recharacterise facts, to afford the applicant the opportunity to exercise his due process rights in a concrete and effective manner, notably in a timely fashion, for example, by referring the case for retrial or by seeking the applicant's views." [104]

iii. <u>The charges and nothing but the charges</u>

127. While the trial court may under exceptional circumstances be properly seised of facts that are not referred to in the charges in misdemeanour proceedings, such is not the case in criminal proceedings.

128. An accused may be tried for factual allegations of which the misdemeanour court has not been seised, provided he "expressly'' consents to be tried based upon such allegations. Failing that, the criminal chamber of the *Chambre criminelle de la cour de cassation* [criminal division of the court of cassation] finds that the jurisdiction has exceeded the scope of its *saisine*,[105] including for purposes of recharacterisation.[106]

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[103] *Mattei v. France* (ECHR), 19.12.2006, para. 36. See also: *Pélisser and Sassi v. France* (ECHR, Grand Chamber), 25.03.1999,paras. 51-54, 62-63; *Miraux v. France* (ECHR), 26.09.2006, paras. 31-32, 34, 37.
[104] *Miraux v. France* (ECHR), 26.09.2006, para. 34.
[105] *Cass. Crim.*, 19.04.2005, No. 04-83879.
[106] *Cass. Crim.*, 22.11.1994, No. 94-80387: "While it is for criminal courts to restore the true characterisation of the facts, they may only do so on the condition that nothing is added, except with the express consent of the accused to be tried for facts or aggravating circumstances that are not included in the charges". *Cass. Crim.*, 23.01.2001, No. 00-80600.

129. However, the court of assize may not, under any circumstances, amend the terms of the prosecution case, not even with the consent of the accused.[107]

3. Appeal

130. Like investigating and trial chambers, appellate courts may not extend the scope of their *saisine*.

131. The criminal *Chambre criminelle de la cour de cassation* has noted that "the court of appeal is not competent to determine facts that were extrinsic to the *saisine* of the trial court.'' In the case in question, it ruled that the court of appeal had:

> "misconstrued the mandatory rules of law governing its jurisdiction to the extent that it could neither evoke nor substitute itself for the trial judges given that they were improperly seised.''.[108]

132. While the court of appeal is permitted to recharacterise the facts, it may only do so on the condition that it "does not substitute the facts of which it is seised for a new ones.''.[109]

133. Again, this is on the condition that the appellant "[has been afforded the opportunity to make his case on the basis of the new characterisation.]''.[110] The ECHR noted further that this condition was not met by one French court of appeal, which:

> "[in exercising its inalienable power to recharacterise the facts of which it was properly seised, had to afford the appellants the opportunity to exercise their rights to make their case on this point, and in a timely manner.]'' [111]

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[107] *Cass. Crim.*, 21.02.1996, No. 95-82085: "the court of assize may not hear any charges other than the ones contained in the indictment, which, once final, determines its jurisdiction; [...] But whereas it is not stated anywhere in the trial chamber's order that Benjamin X... committed any acts amounting to rape prior to 1 January 1992 and that it is immaterial whether, as stated in the trial record, the accused accepted the rectification; It therefore follows that the annulment stands".

[108] *Cass. Crim.*, 21 March 1979, No. 78-92998.

[109] *Cass. Crim.*, 02.11.1978, No. 02.11.1978.

[110] *Cass. Crim.*, 16.05.2001, No. 00-85066 (annulment on the grounds that "the second-tier judges recharacterised the facts on their own motion [...] without seeking the views of the accused on the medication.". Also: *Cass. Crim.* 03.03.2004, No. 03-84388. See also: *Cass. Crim.*, 17 October 2001, No. 01-81988 ("annulment on the ground that "there was no reference in the impugned order or in the trial records that Hakim X... was afforded the opportunity to make his case based on the new characterisation, whereas the constitutive elements of the offence of concealment of stolen items, which differs from complicity in robbery, was not included in the charges").

[111] *Pélisser and Sassi v. France* (ECHR, Grand Chamber), 25.03.1999, paras. 62-63. See also *Mattei v. France* (ECHR), 19.12.2006, paras. 39, 41, 43.

B. International criminal law

134. While international criminal law procedure differs, the underlying principles remain the same, in that it is the prosecution which determines the scope of the charges once is properly seised; the trial court is not permitted to extend the scope of its own motion. This is, for example, the case at the ICC and the ad hoc tribunals.

1. THE ICC

135. At the ICC, if the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he/she submits to the Pre-Trial Chamber a request for authorisation of an investigation, along with reference to the crimes which he/she has concluded were committed and a statement of the facts alleged to constitute a reasonable basis for finding that the said crimes were committed.[112]

136. Prior to opening the investigation and commencing a trial, the Pre-Trial Chamber holds a hearing to confirm the charges on which Prosecutor intends to seek trial of the accused. Before the hearing, the Prosecutor must provide to the Pre-Trial Chamber and the individual concerned with "a detailed description of the charges'' together with a list of evidence which the Prosecutor intends to present at the hearing. At the hearing, the Prosecutor must support each charge with sufficient evidence to establish the existence of substantial grounds to believe that the person committed the crime charged. The person concerned may deny the charges or challenge the evidence presented by the Prosecutor, and may present evidence to that effect. At the conclusion of the hearing, the Pre-Trial Chamber confirms the charges in all or in part if it satisfied that sufficient evidence has been presented, and commits the person to a Trial Chamber "for trial on the charges as confirmed''. After the charges are confirmed and before commencement of trial, the Prosecutor may amend the charges with the permission of the Pre-Trial Chamber and after notice to the accused. If the Prosecutor seeks to add any additional charges or to substitute more serious charges, Pre-Trial Chamber must hold a new hearing to confirm those charges.[113]

[112] Rome Statute, Article 15(3); Regulations of the Court, Regulation 49.
[113] Rome Statute, Article 61;, Regulations of the Court, Regulations 52-53; ICC Rules of Procedure and Evidence, Rules 121-130.

137. After being seised and at the end of the trial, the Pre-Trial Chamber issues a decision based on its evaluation of the evidence and the entire proceedings. Moreover:

> "[the decision [must] not exceed the facts and circumstances described in the charges and any amendments to the charges]''.[114]

138. If, at any time during the trial, it appears to the Trial Chamber that the legal characterisation of the facts may be subject to change, it must give notice to the participants of such a possibility, and at an appropriate stage of the proceedings will allow the participants to make oral or written submissions. It may suspend the hearing to ensure that the participants have adequate time and means for effective preparation. In its judgement, it may modify the legal characterisation of the facts:

> "without exceeding the facts and circumstances described in the charges and any amendments to the charges (ICTY) [115]

139. The convicted person may appeal the judgement on grounds of procedural error, error of fact, error of law and/or any other ground that affects the fairness and reliability of the proceedings or decision.[116] The Appeals Chamber has all the powers of the Trial Chamber, and rules on procedural issues, any decision and sentence "may be appealed''.[117]

2. <u>THE ICTR AND THE ICTY</u>

140. At the *ad hoc* Tribunals, the Prosecutor is responsible for the investigation and prosecuting cases.[118] If he or she decides that there is a prima facie case, in view of the presumption of innocence of the accused, he or she prepares an indictment containing a concise statement of the facts and the crime or crimes with which the accused is charged for transmission to a judge of the Trial Chamber.[119]

141. The Judge reviewing the indictment may request the Prosecutor to present additional evidence, confirm or reject each charge or suspend the review in order to give the Prosecutor an opportunity to amend the indictment.[120]

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[114] Rome Statute, Article 74(2).
[115] ICC Regulations of the Court, Regulation 55.
[116] Rome Statute, Article 81(1)(b).
[117] Rome Statute, Article 83(1) and 83(2).
[118] ICTY Statute, Article 16(1); ICTR Statute, Article 15(1); MICT Statute, Article 14(1).
[119] ICTY Statute, Article18(4); ICTR Statute, Article 17 (4); MICT Statute, Article 16(4).
[120] ICTY Statute, Art. 19(1); ICTR Statute, Article 18(1); MICT Statute, Article17(1); ICTY Rules of Procedure and

142. The Prosecutor may, without leave, amend the indictment and at any time before its confirmation. Subsequently, and until the initial appearance of the accused before the Trial Chamber, the Prosecutor may only amend the indictment with the leave of the Judge who confirmed it. During the initial appearance or thereafter, the indictment may only be amended with the leave of a Trial Chamber after full argument by all the parties.[121]

143. After the initial appearance of the accused, the Prosecutor must make available to the defence, *inter alia*, copies of the supporting materials which accompanied the indictment at the time when confirmation was sought.[122] Thereafter, the defence may raise preliminary motions, for example, to challenge jurisdiction or to allege procedural defects in the form of the indictment.[123]

144. The trial opens with the presentation of evidence for the prosecution.[124] At the close of the prosecution's case, the Trial Chamber by oral decision and after hearing the oral submissions of the parties, enter a judgement of acquittal on any count if there is no evidence capable of supporting a conviction.[125]

145. When both parties have completed their presentation of the case, the Trial Chamber deliberates in private and "vote[s] separately on each charge contained in the indictment''.[126] In the event of an appeal of all or part of the judgement, the Appeals Chamber "pronounce[s] judgement on the basis of the record on appeal''.[127]

146. In the *Duch* Judgement, the Trial Chamber noted that before the international *ad hoc* tribunals, Trial Chambers have generally required a formal amendment to the charges against the accused where the facts establish that the accused has committed a different or more serious offence than that indicated in the indictment.[128] Also, in another decision, the Trial Chamber noted that the

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Evidence, Rule 17(1); MICT Rules of Procedure and Evidence, Rule 48(F).
[121] ICTY/ICTR Rules of Procedure and Evidence, Rule 50; MICT Rules of Procedure and Evidence, Rule 50.
[122] ICTY Rules of Procedure and Evidence, Rule 66(A)(i); MICT Statute, Article 71(A)(i).
[123] ICTY Rules of Procedure and Evidence, Article 72(A); MICT Rules of Procedure and Evidence, Rule 79(A).
[124] ICTY Rules of Procedure and Evidence, Rule 85(A); MICT Rules of Procedure and Evidence, Rule 102(A).
[125] ICTY and ICTR Rules of Procedure and Evidence, Rule 98 *bis*; MICT Rules of Procedure and Evidence, Rule 121.
[126] ICTY/ICTR Rules of Procedure and Evidence, Rule 87; MICT Rules of Procedure and Evidence, Rule 104.
[127] ICTY Statute, Article 117; ICTY Rules of Procedure and Evidence, Rule 118; MICT Rules of Procedure and Evidence, Rule 144.
[128] *Duch* Trial Judgement, 26.07.2010, para. 495, citing footnote 781 of the *Kupreškić* Judgement (ICTY), 14.01.2000, para. 748 ("if the Trial Chamber finds in the course of trial that only a different offence can be held to have been proved, it should ask the Prosecutor to amend the indictment. If the Prosecutor does not comply with this request, the Trial Chamber shall have no choice but to dismiss the charge.")

international *ad hoc* tribunals have taken a strict approach to the degree of specification of material facts which should be included in the indictment, adding that:

> "[w]here an indictment is considered not to clearly inform the Accused of the nature and cause of the specific allegations against him, ICTY and ICTR Chambers have typically ordered the amendment of the indictment."[129]

147. As a matter of fact, the ICTR Appeals Chamber has recalled the law applicable to indictments as follows:

> "The charges against an accused and the material facts supporting those charges must be pleaded with sufficient precision in an indictment so as to provide notice to the accused. The prosecution is expected to know its case before proceeding to trial and cannot mould the case against the accused in the course of the trial depending on how the evidence unfolds. Defects in an indictment may come to light during the proceedings because the evidence turns out differently than expected; this calls for the Trial Chamber to consider whether a fair trial requires an amendment of the indictment, an adjournment of proceedings, or the exclusion of evidence outside the scope of the indictment. In reaching its judgement, a Trial Chamber can only convict the accused of crimes that are charged in the indictment."[130]

148. It is moreover well established that a convicted person may raise a defect in the indictment for the first time on appeal:

> "When the Appellant raises a defect in the indictment for the first time on appeal, then he bears the burden of showing that his ability to prepare his defence was materially impaired. When, however, an accused has previously raised the issue of lack of notice before the Trial Chamber, the burden rests on the Prosecutor to prove on appeal that the ability of the accused to prepare a defence was not materially impaired. All of this is subject to the inherent jurisdiction of the Appeals Chamber to do justice in the case."[131]

Section III. ***SAISINE* FURTHER CURTAILED BY THE SEVERANCE DECISION**

149. On 4 April 2014, before the trial opened and despite the Defence's objection,[132] the Trial Chamber again elected to sever the charges in Case 002.[133] In the Annex to its decision, it identified the

[129] Decision, 22.09.2001, **E122**, para. 20 and footnote. 44.
[130] *Muvunyi* Appeal Judgement (ICTR), 29.08.2008, para. 18. See also: *Ntagerura* Appeal Judgement (ICTR), 07.07.2006, paras. 22, 27-28; *Kupreškić* Appeal Judgement (ICTY), 23.10.2001, paras. 88 and 92; *Kvočka* Appeal Judgement (ICTY), 28.02.2005, paras. 28, 31-33.
[131] *Nahimana* Appeal Judgement (ICTR), 28.11.2007, para. 327; *Ntagerura* Appeal Judgement (ICTR), 07.07.2006, para. 31. See also: *Kvočka* Appeal Judgement (ICTY), 28.02.2005, para. 35.
[132] KHIEU Samphan's Submissions of 31.01.2014, **E301/5/2**.
[133] Decision on Additional Severance, 04.04.2014, **E301/9/1**.

paragraphs and sections of the Closing Order relevant to Case 002/02 ("Annex on the scope of Case 002/02").[134]

150. On 27 February 2017, more than one month after the conclusion of the substantive hearings in Case 002/02, and at the request of the Prosecution,[135] the Trial Chamber issued the Decision curtailing the scope of Case 002.[136] It thereby excluded from its *saisine* charges that are not included in Cases 002/01 and 002/02

151. In its Decision, the Trial Chamber noted for example that:

> "In the Annex to the Additional Severance Decision, the Trial Chamber noted that it may, upon reasoned application, expand the scope of Case 002/02 to include further facts additional to those already included with respect to purges in the North and East Zones. No such applications were made."[137]

152. Consequently, all the charges that the Trial Chamber excluded from the scope of Case 002/02 were omitted and were not adjudicated. For that reason, any attempts by the Prosecution and the Trial Chamber to address them indirectly in the Case 002/02 for the sake of making history rather than that of upholding justice, must not be allowed to prosper

153. In the case at hand, KHIEU Samphan ought to only answer to charges of which the Trial Chamber is properly seised, and only as set out in its Severance Decision. The remainder of the charges that are extrinsic to the Trial Chamber's *saisine* ought to be omitted from its deliberations.

Section IV. FACTS THAT OUGHT TO BE OMITTED FROM THE DELIBERATIONS IN CASE 002/02

154. In the course of the Case 002/02 trial, the Trial Chamber admitted and heard a great deal evidence regarding facts which are extrinsic to the case at hand. Such evidence relates to facts: (I) of which the Trial Chamber was never seised, (II) over which it had relinquished jurisdiction and (III). of which it was improperly seised

155. That evidence – which the Trial Chamber ought to omit from its deliberations and which unwarrantedly prolonged the proceeding – is set out in the relevant parts of the present Closing

[134] Annex: List of paragraphs and portions of the Closing Order relelvant to Case 002/02, 04.04.2014, **E301/9/1.1**.
[135] Co-Prosecutors' Response,19.09.2016, **E439/3**.
[136] Decision, 27.02.2017, **E439/5**.
[137] Decision, 27.02.2017, **E439/5**, para. 12.

Brief. It is, nonetheless, important in this instance to take account of any cross-cutting and/or recurrent evidence.

I. EVIDENCE RELATING TO FACTS OF WHICH THE TRIAL CHAMBER WAS NEVER SEISED

156. Since the opening of Case 002/02, both the Prosecution and the Civil Parties have sought to persuade the Trial Chamber to adjudicate facts of which it was never seised. The Prosecution has sought to add more charges so as to include facts relating to the Khmer Krom, while the Civil Parties have sought to add more charges so as to include facts relating to rape outside the context of marriage.

A. The Khmer Krom

157. Neither the Co-Investigating Judges nor the Trial Chamber have previously been seised of facts relating to the Khmer Krom as a group.

1. Investigations

158. The Prosecution has never seised the Co-Investigating Judges of facts relating to the treatment of the Khmer Krom. The latter stated so in response to requests for investigative actions by the Co-Prosecutors and the Civil Parties.

159. As a matter of fact, on 13 January 2010, the Co-Investigating Judges noted, for example, that they were "seised of the treatment of the Vietnamese in Prey Veng Province, Svay Rieng Province, and during incursions into the territory of Vietnamese, not of alleged crimes targeting the Khmer Krom in Pursat Province." They denied all those requests on the ground that they did not "fall within the scope of the Introductory nor the Supplementary Submissions".[138]

160. On 27 April 2010, the Pre-Trial Chamber confirmed the Co-Investigating Judges' lack of jurisdiction. It very clearly recalled that the scope of the investigation as defined in the relevant parts of the Introductory Submission includes persons considered as Vietnamese or as associates in one way or another in Vietnam not falling within the said scope.[139] It also pointed out that:

[138] Combined Order on Co-Prosecutors' Request for Investigative Action Regarding Khmer Krom and Mass Executions in Bakan District (Pursat) and the Civil Parties Request for supplementary Investigations Regarding Genocide of the Khmer Krom and the Vietnamese, 13.01.2010, **D250/3/3**, paras. 7-9.
[139] Pre-Trial Chamber Decision, 27.04.2010, **D250/3/2/1/5**, para. 41.

"The Pre-Trial Chamber is cognizant of the fact that the current scope of the investigation, as defined by the Introductory and Supplementary Submissions, may not reflect the full dimension of crimes committed by the Khmer Rouge against victims of Vietnamese origin during the relevant period. As indicated earlier, under the law applicable before the ECCC, the Co-Prosecutors have sole responsibility for determining the scope of the judicial investigation, and it is not for the Pre-Trial Chamber to comment on whether their decision in this respect may have an impact on their capacity to prove their case in relation to the allegation against the charged person of genocide targeting the Vietnamese group."[140]

161. On 15 September 2010, the Co-Investigating Judges issued their Closing Order and referred the Accused for trial only in respect of the facts relating to the Vietnamese group.[141]

2. Judgement

162. On 17 October 2014, during the opening statements in Case 002/02, Co-Prosecutor CHEA Leang asserted that the Prosecution was going show that the Khmer Krom were targeted:

> "As you will see […] the persecution of targeted groups, such as the Lon Nol solders, Khmer Krom, New People, continued throughout the DK period."[142]
>
> "These groups were closely monitored, and targeted for arrest and execution at the slightest misstep.[143]
>
> "The Khmer Krom sent to Tram Kak were enslaved and put to work in the district's cooperatives and worksites. Later on, the Vietnamese who had remained behind were rounded up and killed, until there were no more Vietnamese left in Tram Kak district. Khmer Krom were similarly targeted and accused of having 'Khmer bodies with Yuon heads'".[144]

163. On 12 February 2015, at the opening of the substantive hearings, the Defence teams objected to a Civil Party Lawyer's questioning of a Civil Party regarding the persecution of Khmer Krom at Tram Kok.[145] It was Judge LAVERGNE who pronounced the Trial Chamber's decision on the objection, in these terms:

"The Chamber decides to overrule the objection raised by the Defence for several reasons. First of all, the facts to which the civil party is testifying today concern living conditions at Tram Kak cooperative. As such, in our opinion, they are already relevant. Secondly, the

[140] Pre-Trial Chamber Decision, 27.04.2010, **D250/3/2/1/5**, para. 60.
[141] Closing Order, paras. 1335-1520 (the KK minority is only mentioned in paragraph 1468 regarding facts characterised as forced transfers during Movement of the Population 2 which was the subject of Case 002/01, but are not part of the scope of Case 002/02 except with regard to the Cham).
[142] T. 17.10.2014, **E1/242.1**, pp. 15-16 L. 24-25 and 1-2, between 09.37.32 and 09.39.47.
[143] T. 17.10.2014, **E1/242.1**, p. 16 L. 8-9, between 09.37.32 and 09.39.47.
[144] T. 17.10.2014, **E1/242.1**, p. 18 L. 19-25, after 09.43.54.
[145] T. 12.02.2015, **E1/262.1**, p. 21, L.9-22, between 09.57.02 and 09.58.43.

indictment makes reference to certain facts regarding the Khmer Krom. Therefore it also seems to us that in this capacity, the questions asked are within the scope of trial And finally, the Chamber would like to recall that there is no doubt that it will have to rule on the issue of who should be considered to belong to the Vietnamese group, whether it is Vietnamese by nationality or those who were perceived as Vietnamese. So, questions regarding that difficulty fall entirely within the scope of the trial and should therefore be discussed..".[146]

164. On 5 March 2015, the NUON Chea Defence pointed out that the Prosecution did not mention the Khmer Krom as a group in both their Introductory and Supplementary Submissions and in any subsequent supplementary submission, and also that the group is not mentioned in the Closing Order as a. It requested the Trial Chamber to assure the parties that the Khmer Krom would not be considered as a quasi group that was specifically targeted as such.[147]

165. On 25 May 2015, after having spent close to three months reflecting on the question and allowing it to be discussed during proceedings,[148] the Trial Chamber departed from Judge LAVERGNE's hasty ruling on the objection raised on 12 February 2015. With that in view, in response to NUON Chea's request for clarification, the President stated as follows:

> "[Case 002] does not include charges relating to the targeting of the Khmer Krom as a specific group -- that is, persecution as a crime against humanity or genocide of the Khmer Krom".[149]
>
> "As a general guideline where evidence is proposed or discussed in Court, which appears to relate solely to the targeting of the Khmer Krom, and to be exclusively relevant to the establishment of the elements of persecution as a crime against humanity or genocide against the Khmer Krom, it will be deemed not relevant and will not be allowed. 3) Evidence pertaining to the Khmer Krom may, nonetheless, be relevant to other issues in Case 002/02, such as the historical and political context of the case or to other crimes which are charged, and certain of the victims happen to be Khmer Krom, and as such may be admissible. However, the Chamber requests that the Parties focus on leading evidence which most strongly pertains to the charges at issue in Case 002/02. While the Chamber will not exclude witness or civil party testimony which touches upon the fact that an individual is Khmer Krom insofar as it is relevant to other issues within the scope of Case 002/02, this should not be the focus of Counsels' questioning as the targeting of Khmer Krom is not charged in this case - ".[150]

[146] T. 12.02.2015, **E1/262.1**, p. 21, between 09.57.02 and 09.58.49.
[147] NUON Chea's Motion, 05.03.2015, **E319/16**, paras. 9-10 and 19.
[148] T. 27.04.2015, **E1/293.1**, before 09.44.13, p. 13 in EN (Judge FENZ: "As to the issue when the decision will be issued, as soon as possible. It's on top of our priority list. And for the time being and first of all, the Khmer Krom issue, and I think we have said that before, can be dealt with as – in the absence of a decision to the contrary.").
[149] T. 25.05.2015, **E1/304.1**, p. 63 L. 2-4.
[150] T. 25.05.2015, **E1/304.1**, pp. 63-64, between 13.36.39 and 13.38. 52.

166. The Trial Chamber has consistently recalled that decision when ruling on the International Co-Prosecutor's requests for admission of documents from the investigations in Cases 003 and 004,[151] which requests the Defence has opposed on the grounds that some of them concern the Khmer Krom.[152]

167. Even so, the Prosecution's determination to add charges relating to the Khmer Krom as a group, as clearly manifested right from the opening statements, was unabated. For example, on 25 October 2016, towards the end of the substantive hearings, Prosecution Counsel DE WILDE questioned a Civil Party (called to testify regarding the suffering she endured on account of her forced marriage) as to whether the Khmer Krom in Bakan District viewed themselves as Cambodians or as Vietnamese.[153] Continuing in the same vein, despite an objection from the Defence, Prosecution Counsel contended that his questioning was about:

> "the perception of the Khmer Rouge regarding this Khmer Krom group. [whether] they considered as being close to the Vietnamese or ". [whether] they were people considered as being closes to the Vietnamese or as Vietnamese - I believe that this question is therefore pertinent and relevant".[154]

168. Yet, while Prosecution Counsel's line of questioning would no doubt have been pertinent in Case 004,[155] it was not the case in Case 002/02. In the end, time did not allow him to press on with his line of questioning,[156] but, even so, it is still important to observe that the treatment of the Khmer Krom in Bakan District was precisely the subject of a requests by the Prosecution for further investigative actions; the Co-Investigating Judges rejected those requests in 2010, because they fell outside their *saisine*, as noted *supra*.[157]

169. In Case 002/02, neither the Co-Investigating Judges nor, for that matter, the Trial Chamber was seised of the charges relating to the Khmer Krom as a group, be they as Vietnamese or otherwise.

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[151] Decision, 25.05.2016, **E319/36/2**, para. 22; Decision, 26.06.2016, **E319/47/3**, para. 25; Decision, 23.11.2016, **E319/52/4**, paras. 17-18.

[152] KHIEU Samphan's response, 11.12.2015, **E1/319/36/1**, para. 20; KHIEU Samphan's oral response, 23.05.2016, T. 23.05.2016, **E1/429.1**, pp. 40-41 between 10.28.48 and 10.31.03; KHIEU Samphan's response, 29.08.2016, **E319/52/3**, paras. 34-36; KHIEU Samphan's response, 03.10.2016, **E319/56/2**, paras. 37-39.

[153] T. 25.10.2015, **E1/489.1**, p. 15 around 09.32.56 (during Civil Party NGET Chat's testimony about the impact of the crimes).

[154] T. 25.10.2015, **E1/489.1**, p. 16, around 09.34.32.

[155] See list of crimes investigated in Case 004 on the ECCC website: https://www.eccc.gov.kh/fr/case/topic/655.

[156] T. 25.10.2015, **E1/489.1**, p. 21 around 09.42.25 and p. 22 around 09.44.33.

[157] Combined Order on Co-Prosecutors' Request for Investigative Action Regarding Khmer Krom and Mass Executions in Bakan District (Pursat) and the Civil Parties Request for supplementary Investigations Regarding Genocide of the Khmer Krom and the Vietnamese, 13.01.2010, **D250/3/3**.

170. For that reason, the Chamber must not yield to the Prosecution's persistent attempts (which will most certainly be re-echoed in the final submissions) to make it exceed its *saisine* by entertaining those facts. It is not for the Trial Chamber to remedy the Prosecution's shortcomings in regard to the investigations in Case 002, or to help it strengthen its position in regard to Cases 003 and 004.

B. Rape outside the context of marriage

171. Since the Co-Investigating Judges did not send the Accused upon factual allegations of rape outside the context of marriage, the Trial Chamber was never been seised of those facts.

1. Investigations

172. In their 15 September 2010 Closing Order, the Co-Investigating Judges found that rape was committed in diverse circumstances (at Kraing Ta Chan, S-21 and the Tram Kok cooperatives, among other places) before holding that in their view:

> "[…] the official CPK policy regarding rape was to prevent its occurrence and to punish the perpetrators. Despite the fact that this policy did not manage to prevent rape, it cannot be considered that rape was one of the crimes used by the CPK leaders to implement the common purpose. That is not the case, however, in the context of forced marriage, which is described below".[158]

173. They therefore decided not to confirm the charges in regard to those facts, unlike factual allegations of rape in the context of marriage.[159]

174. As the Co-Prosecutors did not appeal the Closing Order concerning the decision of partial dismissal,[160] it became *res judicata* upon the lapse of the period of appeal. As a matter of fact, a reasoned dismissal decision has the authority of *res judicata*, unlike a referral order which does not have the authority of *res judicata* on the merits (given that it is simply a recognition that sufficient grounds exist to send the case to trial).[161]. As such a decision is *res judicata* estops the adding of

[158] Closing Order, paras. 1426-1429.
[159] Closing Order, paras. 1524, 1545, 1548, 1551, 1554, 1559 (See also paras. 926-927 and 1181).
[160] The Co-Co-Investigating Judges explicitly dismissed the charges in the Closing Order, stated the reasons therefor. Even though that decision was an implicit dismissal, it was still subject to appeal. See, for example: *Cass. Crim.*, 07.04.1994, No. 93-82613, **E306/7/3/1/2.1.1**; *Cass. Crim.*, 17.12.2002, No. 01-86956, **E306/7/2.1.2**.
[161] For example: *Cass. Crim.*, 13.11.1996, No. 96-82087 and 96-83708, **E306/7/3/1/2.1.2**.

new charges based on the same facts, regardless of the legal characterisation of such facts.[162] Reopening an investigation that terminated by a dismissal order is the only way to overturn the *res judicator* attaching to that decision, which therefore preludes reopening of the proceedings by seising the Trial Chamber directly.[163]

175. In the instant, the partial dismissal decision on the factual allegations of rape outside of marriage became final before the Pre-Trial Chamber referred its decisions on the appeals against the Closing Order to the Trial Chamber. Insofar as the Co-Prosecutors did not request the re-opening of investigations into new charges, the proceedings concerning factual allegations of rape outside of marriage were terminated several weeks before the Accused were sent for trial.

2. Judgement

176. On 21 July 2011, upon a motion by Co-Prosecutors, the Civil Parties requested the Trial Chamber to "recharacterise" those facts, as they considered "the reasoning of the CU not to indict the Accused for the rapes outside the context of Forced Marriages [...] flawed".[164] They nonetheless recognised that " the CIJ did not indict these cases".[165]

177. On 25 April 2014, three weeks after having defined the scope of Case 002/02,[166] the Trial Chamber rejected the request, characterising it as a request to add charges and holding that it had no legal basis.[167]

178. On 12 June 2015, the Trial Chamber not only recalled its 2014 decision, but it also reiterated that the Accused bore no criminal responsibility for rape committed in the Kraing Ta Chan Security

[162] Internal Rule 70 ("When new evidence becomes available after a Dismissal Order by the Co-Co-Investigating Judges comes into force, the judicial investigation may be re-opened by the Co-Co-Investigating Judges at the initiative of the Co-Prosecutors."; Article 251 of the Cambodian Code of Criminal Procedure ("When there is new evidence, even after a on-suit order or a dismissal order of the Investigating Chamber has become final, the investigating judge may re-open the investigation at the initiative of the Royal Prosecutor"; Article 188 of the French Code of Criminal Procedure ("The person under judicial examination in respect of whom the investigating judge has ruled there was no cause to proceed may not be investigated in relation to the same facts unless new charges are made") and Article 190 of the same Code ("It is for the public prosecutor alone to decide whether there is a case for the resumption of the investigation on new charges "). See also: *Cass. Crim.*, 11.02.2009, No. 08-84321, **E306/7/3/1/2.1.3**; *Cass. Crim.*, 24.01.2001, No. 00-84408, **E306/7/3/1/2.1.4**.
[163] Cass. Crim., 10.11.1980, No. 79-94326, **E306/7/3/1/2.1.5**; Cass. Crim., 18.06.1997, No. 96-81.375, **E306/7/3/1/2.1.6**.
[164] Civil Parties' Response, 21.07.2011, **E99/1**, para. 40 (*emphasis added*).
[165] Civil Parties' Response, 21.07.2011, **E99/1**, para. 32 (*emphasis added*).
[166] Decision on Additional Severance, 04.04.2014, **E301/9/1**, and Annex: List of paragraphs and portions of the Closing Order relevant to Case 002/02, 04.04.2014, **E301/9/1.1**.
[167] Memorandum, 25.04.2014, **E306**, para. 3.

Centre, among other places. It did nonetheless point out that "the occurrence of rape may be relevant among others to the conditions in Kraing Ta Chan Security Centre".[168]

179. On 18 March 2016, the Civil Parties filed a submission on "confirmation of the scope of [Case 002/02] concerning the charges of rape outside the context of marriage". They argued that the Trial Chamber was seised of the factual allegations of rape outside of marriage and ought to determine the matter without being bound by the legal characterisation proposed by the Co-Investigating Judges.[169]

180. On 28 March 2016, the Defence filed a response moving that the Trial Chamber reject the request in that it was a disguised attempt to seek review of the Decision of 25 April 2014 given that the Trial Chamber was never seised of those facts and was therefore not in a position to adjudicate them.[170]

181. On 30 August 2016, the Trial Chamber confirmed that it was not seised of the factual allegations of rape outside the context of marriage and that it was not authorised to add to the charges against the Accused.[171] It went on to note, for example, that "[n]o other charged crime relies upon the factual basis of rape outside of forced marriage. This interpretation is further corroborated by the modes of responsibility retained in the Closing Order, which only consider rape within the context of forced marriage".[172]

182. On 28 September 2016, the Civil Parties appealed the Trial Chamber's decision on the grounds that it had the effect of terminating proceeding regarding the factual allegations of rape outside of marriage.[173] They claimed, *inter alia*, that the Trial Chamber was inconsistent in accepting evidence relating to facts of which it did not consider itself seised.[174] They highlighted the prejudice they suffered in centering most of their lines of questioning during hearings on rape and moral misconduct at the S-21 security centre,[175] and in the annex to their appeal, they attached details about the questions they asked and the time they spent on that exercise..[176]

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[168] Decision, 12.06.2015, **E348/4**, para. 11.
[169] Civil Parties' Submission. 18.03.2016, **E306/7**.
[170] KHIEU Samphan's response, 28 March 2016, **E306/7/1**.
[171] Decision, 30.08.2016, **E306/7/3**.
[172] Decision, 30.08.2016, **E306/7/3**, para. 15.
[173] Civil Parties' Immediate Appeal, 28.09.2016, **E306/7/3/1/1**, notified on 12.10.2016.
[174] Civil Parties' Immediate Appeal, 28.09.2016, **E306/7/3/1/1**, paras. 66 and 77.
[175] Civil Parties' Immediate Appeal, 28.09.2016, **E306/7/3/1/1**, para. 93.
[176] Annex B, Time Spent by the Civil Party Lead Co-Lawyers and Civil Party Lawyers on Examination Relevant to

183. On 24 October 2016, the Defence's filed a response, in which it submitted that the immediate appeal was inadmissible since the impugned decision was not aimed at terminating the proceedings in regard to the factual allegations of rape outside of marriage given that the Trial Chamber had only reiterated – yet again – that the proceedings had ended at the time of the investigation and that it had not previously been seised of those facts.[177] Even so, the Trial Chamber agreed with the Civil Parties that a problem arose from its finding that facts of which it was not seised relevant, before declaring that, unfortunately, this issue cannot be raised within the framework of an immediate appeal. However, the Defence nonetheless pointed out that this was recurrent problem with the Trial Chamber even though it was not always so for the Civil Parties in regard to other facts.[178]

184. Also on that date, the Prosecution filed a response, in which it submitted that the Civil Parties' appeal was inadmissible, for two reasons: first, since the Trial Chamber was never seised of the facts at issue, there remained no live proceedings to terminate; and second, the appeal was untimely under Internal Rule 107(1) since the Trial Chamber had already ruled twice on the same question before the impugned decision was issued.[179]

185. On 12 January 2017, the Supreme Court Chamber ruled the appeal inadmissible under Internal Rule 107(1), because it was untimely.[180] It held that the Civil Parties should have appealed the Trial Chamber's first decision on the matter, the one of 24 April 2014, and that it needed not address the remaining issues.[181]

186. That the Supreme Court did not address the issues raised by the Civil Parties is immaterial in that it remains clear to the Defence, the Prosecution and the Trial Chamber that the Trial Chamber was never seised of the facts of rape outside of marriage. Nonetheless, it is important to delve a little deeper into the Co-Prosecutors' arguments against the Civil Parties' Appeal, as (a), they reveal disingenuousness on the part of the Prosecution and (b) the Trial Chamber's lack of consistency in finding facts relevant after acknowledging that it did not consider itself seised of them.

a. <u>Disingenuousness on the part of the Co-Prosecutors</u>

Rape at S-21 Security Centre, 28.09.2016, **E306/7/3/1/1.1.2**.
[177] KHIEU Samphan's response, 24.10.2016, **E306/7/3/1/2**.
[178] KHIEU Samphan's response, 24.10.2016, **E306/7/3/1/2**, para. 39.
[179] Co-Prosecutors' Response, 24.10.2016, **E306/7/3/1/3**.
[180] Supreme Court Chamber Decision, 12.01.2017, **E306/7/3/1/4**.
[181] Supreme Court Chamber Decision, 12.01.2017, **E306/7/3/1/4**, paras. 29-30.

187. In responding to the Civil Parties' appeal, the Co-Prosecutors gave what can only be described as a lesson in law, one that they would have been better advised to learn and practice.. In fact, by adopting a line of argument akin to that the Defence in its responses to the Civil Parties[182] and in earlier segments of the present Closing Brief,[183] the Co-Prosecutors raised legal arguments in line with their attempts to introduce new charges.

188. The Co-Prosecutors demonstrated that under the applicable law, the Trial Chamber "was never seised"[184] of the factual allegations pertaining to rape outside of marriage. They explained that the Co-Investigating Judges dismissed those allegations, because they were of the view that the Accused could not be held responsible therefor under any mode of responsibility.[185] The Co-Prosecutors asserted that this has "always been [their] understanding of the Closing Order".[186]

189. Their claim is not entirely accurate. The reason for that is because, while their understanding may not have changed since the opening of the substantive hearings in Case 002/02, they did argue in 2011 and 2014 that the factual allegations pertaining to rape outside of the context of marriage were "a foreseeable consequence of the JCE".[187]

190. In any event, the Co-Prosecutors have since realised that the Trial Chamber could not adjudicate the factual allegations pertaining to rape, as it was not seised of them. In light of their line of argument in the rest of the response to the Civil Parties, they should realise that despite their attempts to that the contrary, the Trial Chamber cannot adjudicate all the factual allegations of which it is not seised.

[182] KHIEU Samphan's response, 28.03.2016, **E306/7/1**, and 24.10.2016, **E306/7/3/1/2**.
[183] See *supra*, paras. 60-148.
[184] Co-Prosecutors' response, 24.10.2016, **E306/7/3/1/3**, para. 17.
[185] Co-Prosecutors' response, 24.10.2016, **E306/7/3/1/3**, paras. 22 (and 23-24).
[186] Prosecution's response, 24.10.2016, **E306/7/3/1/3**, para. 25.
[187] Co-Prosecutors' Request, 16.06.2011, **E99**, para. 32: "The facts in the Closing Order provide enough basis for the Chamber to find that crimes against humanity of rape took place under the Democratic Kampuchea regime in various other circumstances outside the context of forced marriages notably in some security centres and cooperatives" (. Unlike rape in the context of forced marriage those particular crimes were committed without the explicit sanction of the CPK Nevertheless the Co Prosecutors submit that such crimes were foreseeable consequence of the JCE insofar as it involved the dehumanization torture and deliberate mistreatment of so called "bad elements"; T. 30.07.2014, **E1/240.1**, pp. 32-33 in the English version (because the French version is inaccurate), after 10.13.39 (Initial hearing at which the Prosecution that asserted JCE-3 is very important and would have an impact on Case 002/02, citing rape as an example: "On the charges of rape in the Case 002/02, our view is, that clearly is a natural and foreseeable consequence of the other parts of the criminal plan to persecute, to murder, to torture, and to force couples into marriage").

191. As a matter of fact, the Co-Prosecutors explained, for example, that the Civil Parties' interpretation that the Trial Chamber was seised *in rem* of all the facts set out in the Closing Order was based on "a misreading [...] and a misapplication of the law",[188] because, pursuant to the Internal Rules, the Trial Chamber was "only seised with those facts with which the Accused have been charged in the Closing Order" (*emphasis supplied*)[189]

192. They explained further, *inter alia*, that the Closing Order must describe the material facts and their legal characterisation by the Co-Investigating Judges in order to ensure the right of the Accused to be adequately informed of the nature and cause of the charges, in light of their right to prepare their defence.[190]

193. The Co-Prosecutors recalled further that the Trial Chamber has no power to characterise facts that the Co-Investigating Judges never characterised in the Closing Order,[191] and agreed with the Civil Parties that it "does not have the liberty to recharacterise factual allegation of which it is not first properly seised".[192]

194. Finally, the Co-Prosecutors concluded that the Trial Chamber "has no power to add new facts to the scope of [Case 002/02]."[193]

195. The Co-Prosecutors' assertions are correct, and also aptly apply to the factual allegations pertaining to the Khmer Krom as a group, as well as all to the other factual allegations that the Co-Prosecutors would like to see the Trial Chamber adjudicate by acting *ultra vires*.

b. Inconsistency on the part of the Trial Chamber

196. The civil parties' confusion about the charges of rape outside the context of marriage was no doubt exacerbated by the inconsistency of the Trial Chamber, which considers that facts outside the scope of the case may be relevant, and has allowed the civil parties to pointlessly devote an inordinate amount of trial time to that and other subject matters

188 Co-Prosecutors' Response, 24.10.2016, **E306/7/3/1/3**, para. 26.
189 Co-Prosecutors' Response, 10.2016, **E306/7/3/1/3**, para. 27.
190 Co-Prosecutors' Response, 24.10.2016, **E306/7/3/1/3**, paras. 27-28.
191 Co-Prosecutors' Response, 10.2016, **E306/7/3/1/3**, para. 30.
192 Co-Prosecutors' Response, 10.2016, **E306/7/3/1/3**, para. 31 (referring to paragraph 76 of the Civil Parties' appeal).
193 Co-Prosecutors' Response, 24.10.2016, **E306/7/3/1/3**, para. 34.

197. The Trial Chamber's recurrent inconsistency is particularly manifest in regard to the factual allegations pertaining to raps outside the context of marriage, in that it has clearly recognised several times that is not seised thereof.

198. Indeed, it makes no sense whatsoever to assert, on the one hand, that "the occurrence of rape may be relevant, among others, to the conditions in Kraing Ta Chan Security Centre,"[194] and, on the other, that "[n]o other charged crime relies upon the factual basis of rape outside of forced marriage."[195]

199. Insofar as none of the crimes charged against the Accused is supported by factual allegations pertaining to rape outside of the context of marriage, no such facts go to proof of any of the crimes charged. They are therefore clearly extraneous to the case.

200. Relying on such facts to establish any of the crimes charged against the Accused amounts to recharacterising facts of which the Trial Chamber is not seised, and hence to amending the indictment by adding new facts, whereas such course of action is strictly prohibited.

201. It is not the role of judges in a criminal case to pronounce on such facts "incidentally" for the sake of creating a historical record, and, moreover, doing so is a pointless exercise since a historical record already exists, in the form of the Closing Order.

202. The same is also true regarding all the other facts of which the Trial Chamber is not seised, but which it has time and again accepted to hear "a little bit" or "quickly" in the course the proceedings, or "generally, without going into details". In fact, the Trial Chamber cannot pronounce "incidentally", "a little bit", "quickly", or "generally, without delving into the details. Such course of action is entirely impermissible.

203. Accordingly, in its deliberations, the Trial Chamber should omit any and all evidence it has admitted and heard (at length or a little bit) concerning facts that are extraneous to its *saisine*.

[194] Decision, 12.06.2015, **E348/4**, para. 11.
[195] Decision, 30.08.2016, **E306/7/3**, para. 15.

II. EVIDENCE CONCERNING FACTS OF OVER WHICH THE TRIAL CHAMBER HAS DECLINED JURISDICTION

204. By deciding to sever the charges and to define the scope of Case 002/02, the Trial Chamber declined jurisdiction over all the charges that it excluded and which, moreover, it definitively ceased to consider by deciding to "reduce" the scope of Case trial Case 002.

205. Some of those charges relate to facts that the Co-Investigating Judges characterised as crimes committed by the Revolutionary Army of Kampuchea on Vietnamese territory.

206. Those facts were excluded from Case 002/02 at the Co-Prosecutors' request. Following the rationale of "representativeness" of the Closing Order's in making their proposals regarding the scope of the trial which was scheduled to follow Case 002/01, the Co-Prosecutors for instance:

> "propose[d] that the allegations in the Closing Order relating to "Crimes Committed by the Revolutionary Army of Kampuchea on Vietnamese territory" (paras. 832-840) be severed and excluded from Case 002/02, as such allegations concern separate or discrete events that are not intrinsically related to the Genocide of the Vietnamese who lived in Democratic Kampuchea".[196]

207. In its Severance Decision, the Trial Chamber accepted all of the Co-Prosecutors' proposals.[197] It therefore specified in the Annex concerning the scope of Case 002/02 that consideration of the factual allegations pertaining to the Vietnamese "[would exclude] the crimes committed by the Revolutionary Army of Kampuchea on Vietnamese territory".[198]

208. Whereas it was the Co-Prosecutors who requested definition of the scope of the case, they still proceeded to question witnesses about facts which allegedly occurred on Vietnamese territory. The Trial Chamber simply allowed them to proceed despite the Defence's objections.[199]

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[196] C-Prosecutors' Submission, 05.12.2013, **E301/2**, para. 11. See also: Co-Prosecutors' Submission, 31.01.2014, **E301/5/1**, para. 2: "As detailed in that 5 December filing, the specific crime sites or events that are proposed for inclusion in Case 002/02 by the Prosecution are: [...] (2) Treatment of the Vietnamese (excluding Crimes Committedby the Revolutionary Army of Kampuchea on Vietnamese territory; [...]"
[197] Decision on Additional Severance, 04.04.2014, **E301/9/1**, para. 32 and the disposition.
[198] Annex: List of paragraphs and portions of the Closing Order relevant to 002/02, 04.04.2014, **E301/9/1.1**, p. 2 (2(iv)(b) and p. 3 (3)(xii).
[199] See for example: T. 19.10.2016, **E1/486.1**, pp. 82-84, between 13.52.52 and 13.56.54, pp. 103-104, between 14.37.24 and 14.40.15 (during Stephen MORRIS' testimony); T. 26.10.2016, E1/490.1, pp. 53-56, between 11.14.36 and 11.20.53 (during CHUON Thy's testimony). See also: T. 21.09.2016, **E1/478.1**, pp. 27-29, between 09.53.43 and 09.58.51 (following a response by SEM Om).

209. For example,[200] the Trial Chamber allowed the Co-Prosecutors to dwell on such facts during its examination of Stephen MORRIS,[201] and Co-Prosecutor KOUMJIAN used that as an opportunity to engage in a bit of irony:

> "I appreciate that there are so many attacks by the Khmer Rouge into Vietnam that one could be confused."[202]

210. Then, in response to further objections from the Defence, Co-Prosecutor KOUMJIAN said:

> "The crimes are not part of the charges in this case, but clearly, it is relevant to issues in this case and the testimony of this expert [...]."[203]

211. The rule of thumb is: whatever is not part of the case file is irrelevant. It is unfortunate that this basic precept of criminal procedure was not respected by the Co-Prosecutors...or even by Judge LAVERGNE, who dwelt on the subject for a sizeable amount of time.[204]

212. It is not for the Trial Chamber to remedy the inadequacies of the Prosecution, which perhaps did not think through its proposals concerning the scope of Case 002/02.[205] The Trial Chamber cannot on any account determine facts which allegedly occurred on Vietnamese territory, facts of which it is not seised and with which the Accused are not charged. Therefore, in its deliberations, the Trial Chamber should omit any and all evidence that it impermissibly heard concerning such facts.

III. EVIDENCE CONCERNING FACTS OF WHICH THE TRIAL CHAMBER WAS IMPROPERLY SEISED

213. The Trial Chamber should also not consider any and all evidence relating to facts of which it was improperly seised, and should declare void the defective charges in the Closing Order, charges that the Accused were not afforded the opportunity to appeal before the Pre-Trial Chamber.

214. Indeed, to quote the criminal chamber of the *court of cassation*, where when it becomes final, as the indictment has the effect of curing any defects of the previous trial, "[the indictment] cannot cure its own defects and shortcomings."[206] Accordingly, it is for the Trial Chamber to examine and

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[200] For other examples, examination of IENG Phan by the Prosecution (T. 31.10.2016, **E1/492.1**, p. 37, after 10.47.39) and its presentation of key documents on the armed conflict (T. 03.11.2016, draft, pp. 21-23, between 09.49.16 and 09.52.57, pp. 27-39, between 10.05.36 and 10.50.57 and pp. 47-53, between 11.06.24 and 11.21.43).
[201] T. 19.10.2016, **E1/486.1**, p. 84 *et seq.*, from 13.56.54.
[202] T. 19.10.2016, **E1/486.1**, p. 87 L. 22-23, before 14.03.21.
[203] T. 19.10.2016, **E1/486.1**, p. 104 L. 19-21, after 14.38.42.
[204] Examination of LONG Sat by Judge LAVERGNE: T. 01.11.2016, **E1/493.1**, p. 13 *et seq*, after 09.30.45. See *infra*, paras. 793-800.
[205] See also *infra*, regarding the Prosecution's proposal concerning Buddhists, paras. 1487-1521.
[206] *Cass. Crim.*, 11.12.2012, No. 12-86306.

cure those defects in the Closing Order which were raised before it by the charged person-cum-accused "so as to ensure his right to an effective remedy".[207]

215. The Trial Chamber should therefore take the same course of action as it did when it declared itself improperly seised of the violations of the 1956 Penal Code and struck the defective segments of the Closing Order pertaining to the charges which did not conform to Internal Rule 67(2), even though the defects of the previous proceedings had been cured.[208]

216. In the instant case, the Trial Chamber should strike the charges of which it was improperly seised, either because the factual allegations were outside the *saisine* of the Co-Investigating Judges (A), or because the charges were insufficient for a referral to trial (B). Failure to do so would deny the Accused their appeal and fair trial right. Moreover, the Trial Chamber would thereby validate fundamentally unfair proceedings and also de-legitimise and discredit the ECCC.

A. Facts outside the Co-Investigating Judges' *saisine*

217. One area in which the Co-Investigating Judges have excelled is exceeding their *saisine* as defined in the Co-Prosecutors' Introductory and Supplementary Submissions; the Co-Prosecutors purposefully refrained from appealing whereas only they are permitted to do so.

218. The manifestations of the Co-Investigating Judges' historical/judicial role and their commitment to investigate inculpatory evidence more than exculpatory evidence are addressed in the relevant segment of the present Closing Brief. It is, however, important at this juncture to take a closer look at the defective charges that have been the subject of written submissions before the Trial Chamber, which seems oblivious to the import of the issue of deportation and "purges".

1. Deportation

219. On 18 July 2007, the Co-Prosecutors issued their Introductory Submission which includes no factual allegations pertaining to deportation of Vietnamese in Cambodia.[209] Subsequent to that, they issued their Supplementary Submission, which too does not include any such facts.[210]

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[207] *Cass. Crim.*, 11.12.2012, No. 12-86306.
[208] Decision, 22.09.2011, **E122**. See *supra*, para. 93.
[209] Introductory Submission, 18.07.2007, **D3.**
[210] Supplementary Submission, 26.03.2008 (concerning the North Zone Security Centre), **D83**; Co-Prosecutors' Response, 30.04.2009 (equivalent to *saisine* regarding allegations of forced marriage), **D146/3**; OCP Further Authorization, 05.11.2009 (equivalent to extension of *saisine*, 30.04.2009 regarding allegations of forced marriage), **D146/4**; OCP's Further Statement, 26.11.2009 (regarding marriage), **D146/5**; Supplementary Submission, 31.07.2009

220. On 15 September 2010, the Co-Investigating Judges issued the Case 002 Closing Order. They found for example that "the legal elements of the crime against humanity of deportation [had] been established in Prey Veng and Svay Rieng as well as at the Tram Kok Cooperatives."[211] According to them, such crimes were likely to have been committed during attacks targeting "a large number of Vietnamese living in Cambodia [...] forced to leave the places where they had been residing legally and to cross the Vietnamese border".[212]

221. On 18 October 2010, IENG Thirith and NUON Chea appealed the Closing Order.[213] They did not appeal the factual allegations characterised as deportation.

222. On 25 October 2010, IENG Sary also appealed the Closing Order. He contended, *inter alia*, that in both the Co-Prosecutors Introductory and Supplementary Submissions, the Co-Investigating Judges were not seised of the facts which were subsequently characterised as deportation in the Closing Order. Since the Co-Investigating Judges were not competent to investigate such facts, IENG Sary also requested that the relevant paragraphs of the Closing Order (i.e., 1397-1401) be stricken.[214]

223. On 13 January 2011, the Pre-Trial Chamber issued its decisions on all the appeals against the Closing Order.[215] The Closing Order became final as of that date.

224. On 15 February 2011, the Pre-Trial Chamber issued its decision on IENG Thirith' and NUON Chea's appeals. It noted, for example, that:

> "...with respect of challenges alleging defects in the form of the indictment, the Pre-Trial Chamber finds that they are clearly non-jurisdictional in nature and are therefore inadmissible at the pre-trial stage of the proceedings in light of the plain meaning of Internal Rule 74(3)(a) and Chapter II of the ECCC Law, which outlines the personal, temporal and subject matter jurisdiction of the ECCC. Nothing in the ECCC Law or Internal Rules suggests that alleged defects in the form of the indictment raise matters of jurisdiction. As such, these arguments

(regarding allegation of genocide of the Cham), **D196**; Co-Prosecutors' Clarification, 11.09.2009 (equivalent to *saisine* for allegations relating to security centres and execution sites), **D202**.

[211] Closing Order, para. 1397.

[212] Closing Order, para. 1398.

[213] IENG Thirith's Appeal, 18.10.2010, **D427/2/1**; NUON Chea's Appeal, 18.10.2010, **D427/3/1**.

[214] IENG Sary's appeal, 25.10.2010, **D427/1/6**, para. 204.

[215] Decision on IENG Thirith's and NUON Chea's Appeals, 13.01.2011, **D427/2/12**, **D427/1/26** (Decision on IENG Sary's Appeal) and **D427/4/14** (Decision on KHIEU Samphan's Appeal).

may be brought before the Trial Chamber to be considered on the merits at trial; however, they do not demonstrate the ECCC's lack of jurisdiction."[216]

225. On 24 January 2011, IENG Sary was expecting a similar Pre-Trial Chamber decision on his appeal against the Closing Order in respect to the facts characterised as deportation. In light of the above citation, he requested the Trial Chamber to strike the following impugned paragraphs of the Closing Order (1397-1401) before the opening of the trial. He reiterated that "the OCIJ had no jurisdiction to investigate the alleged deportation of the Vietnamese in Prey Veng, Svay Rieng and in Tram Kok Cooperatives."[217]

226. On 11 April 2011, the Pre-Trial Chamber issued a reasoned decision on the IENG Sary's Appeal.[218] It noted that IENG Sary's challenge regarding the Co-Investigating Judges' lack of *saisine* over the facts characterised as deportation meant that Co-Investigating Judges "indicted on the basis of the application of an allegedly erroneous definition of several elements of the crimes". It was therefore of the view that "these arguments are related to issues of fact and law and to the pleading practice and do not represent jurisdictional challenges."[219]

227. IENG Sary died on 14 March 2013.[220] The proceedings against him were terminated.[221]

228. On 4 April 2014, the Trial Chamber issued the second severance decision in Case 002. It also defined the scope of Case 002/02.[222] As such, it issued the list of paragraphs and portions of the Closing Order relevant to Case 002/02. As regards the crime against humanity of deportation, it pointed out that "[the review] [would] be limited to [...] treatment of Vietnamese in Prey Veng and Svay Rieng."[223] The Trial Chamber therefore held that the facts characterised by the Co-Investigating Judges as crime against humanity of deportation in the Tram Kok cooperatives was not within the scope of Case 002/02.[224]

229. On 25 April 2014, the Trial Chamber noted that there were remaining "preliminary objections that the Trial Chamber consider[ed] should be addressed at th[at] time", including those raised by IENG

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216 Pre-Trial Chamber Decision, 15.02.2011, **D427/3/15**, para. 63.
217 IENG Sary's Motion, 24.01.2011, **E58**, paras. 1 and 11.
218 Decision on IENG Sary's Appeal, 11.04.2011, **D427/1/30**.
219 Decision on IENG Sary's Appeal, 11.04.2011, **D427/1/30**, para. 83(9), footnote 199 and para. 85.
220 Death Certificate, 14.03.2013, **E270**.
221 Decision, 14.03.2013, **E270/1**.
222 Decision on Additional Severance, 04.04.2014, **E301/9/1**.
223 Annex: List of paragraphs and portions of the Closing Order relevant to Case 002/02, 04.04.2014, **E301/9/1.1**, p. 4.
224 Closing Order, para. 1397.

Sary regarding "jurisdiction over the crime against humanity of deportation". It then invited the parties to "indicate whether they adhere[d] to the objections raised by the IENG Sary and, if so, clarify their respective positions on these topics".[225]

230. On 20 May 2014, KHIEU Samphan agreed with the objection raised by IENG Sary. Accordingly, he requested the Trial Chamber "to adjudge and declare that it lacked jurisdiction over the crime against humanity of deportation".[226]

231. On 29 September 2014, the Trial Chamber rejected KHIEU Samphan's Request, on the ground that:

> "Had the scope of the judicial investigation been matter of controversy this should have been raised before the opening of the trial The Chamber is seized of the Closing Order which according to Internal Rule 76 shall cure any procedural defects in the judicial investigation with the provisions of Internal Rule 76(7)."[227]

232. This procedural background shows that the objection to the Co-Investigating Judges' jurisdiction over the facts characterised in the Closing Order as deportation, which objection was raised by IENG Sary and subsequently by KHIEU Samphan, is yet to be disposed of on the merits.

233. Yet it had been amply demonstrated that the Co-Investigating Judges violated the rules of procedure (a). By finding IENG Sary's and KHIEU Samphan's requests inadmissible at the stage at which they were raised, the Pre-Trial Chamber (b) and subsequently the Trial Chamber (c) denied the Accused the opportunity to appeal the illegal decision and thereby impaired their right to be adequately informed of the charges against them.[228] At this stage of the proceedings, the Trial Chamber has no choice but to decline jurisdiction over the factual allegations pertaining to deportation as crime against humanity (d).

a. Co-Investigating Judges' *proprio motu saisine*

234. Internal Rule 55(2) provides that:

> "The Co-Investigating Judges shall only investigate the facts set out in an Introductory Submission or a Supplementary Submission."

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[225] Memorandum, 25.04.2014, **E306**, para. 5.
[226] KHIEU Samphan's Submissions, 20.05.2014, **E306/2**.
[227] Memorandum, 29.09.2014, **E306**, para. 9.
[228] Internal Rule 21(1)(d); ECCC Law, Article 33; ICCPR, Article 14; ECHR, Articles 6 and 13.

235. However, none of the portions of the Co-Prosecutors' Introductory Submission relating to the events in Prey Veng, Svay Rieng and the Tram Kok cooperatives,[229] or the portions of the Co-Prosecutors' Supplementary Submission relating to other facts[230] contain facts pertaining to "a large number of Vietnamese living in Cambodia [who were forced to leave the places where they had been residing legally and to cross the Vietnamese border".[231]

236. Therefore, Internal Rule 55(2) was not respected, in that the Co-Investigating Judges were never seised of the facts characterised in the Closing Order deportation as a crime against humanity.

237. When they were challenged on 24 January 2011 concerning IENG Sary's arguments,[232] the Co-Prosecutors were made a vain attempt to explain the situation by claiming that there is "an adequate basis" in their Introductory Submission to allow the Co-Investigating Judges to investigate the impugned facts.[233] Their line of argument was:

> "The Introductory Submission specifically authorises the Co-Investigating Judges to open a judicial investigation into deportation. It also sets out that "…tens of thousands of people living in the Eastern Zone…" were "forcibly relocated" and that included people from Prey Veng and Svay Rieng. Furthermore, the Co-Prosecutors specifically alleged a policy of targeting the Vietnamese."[234]

238. That shows that they relied on three premises, none of which holds up.

239. First, they claimed that the Co-Investigating Judges were "specifically" authorised to open a judicial investigation into deportation. For that argument, they relied on paragraph 122 of the Introductory Submission. Theirs was a desperate attempt to gloss over their unsound reasoning. On the one hand, paragraph 122 states that the investigation only concerns the facts specified in paragraphs 37 to 72 of the Co-Prosecutors' Introductory Submission, which makes no reference to deportation. Accordingly, paragraph 122 cannot form a basis for defining the scope of the Co-Investigating Judges' *saisine*. On the other hand, as the Co-Prosecutors ought to be aware, the Co-Investigating Judges are only seised of facts and not of their legal characterisations as proposed by the Co-Prosecutors.[235] By ignoring that, the Co-Prosecutors overlook the basic precept of a judicial

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[229] Introductory Submission, paras. 42, 43 and 69-70.
[230] See *supra*, footnote 210.
[231] Closing Order, para. 1398.
[232] See *supra*, para. 225.
[233] Co-Prosecutors' Response, 16.03.2011, **E58/1**, para. 29.
[234] Co-Prosecutors' Response, 16.03.2011, **E58/1**, para. 29 referring to paras. 122, 42 and 69 of the Introductory Submission
[235] *Cass. Crim.*, 20.03.1972, No. 71-93622 ("The Investigating Judge is seised of facts set out in the introductory submission independently of the provisional characterisation of the facts by the Public Prosecutor.]"); *Cass. Crim.*,

investigation, which is to investigate facts, since investigators are under the obligation to "conduct their investigation impartially, whether the evidence is inculpatory or exculpatory",[236] so as to ensure respect for the rights of the defendant.

240. The Co-Prosecutors then referenced the Movement of the Population Phase 3, i.e., the one involving people from the East Zone. However, paragraph 42 of their Introductory Submission, which they cite, clearly sets out the facts concerning the Movement of the Population, Phase 3. These are facts which affected the population as a whole and not specifically Vietnamese people; as a matter of fact, they do not concern the movement of Vietnamese to Vietnam.

241. Lastly, the Co-Prosecutors went on to cite paragraph 69 of their Introductory Submission, which concerns a policy specifically targeting Vietnamese people. However, the factual elements concern a policy aimed at exterminating Vietnamese people, for example, by executing them. There is no reference to deportations.

242. Furthermore, the Co-Prosecutors did not respond to IENG Sary's arguments concerning the Tram Kok District cooperatives, thereby implicitly recognising the merits of his.

243. KHIEU Samphan already raised those matters in the motion he filed before the Trial Chamber on 20 May 2014.[237] It was important to highlight those facts, because they show that the Co-Investigating Judges were never seised of the facts which were subsequently characterised as deportation in the Closing Order. Despite that, the Co-Investigating Judges illegally seised themselves of those facts of their own motion, thereby at the very least, committing a flagrant procedural error, but more likely a breach that is reflective of their full commitment to further the Co-Prosecutors' case and their penchant to investigation only for inculpatory evidence.

b. <u>The Pre-Trial Chamber's refusal to pronounce on the merits</u>

244. The Pre-Trial Chamber considered that IENG Sary's ground of appeal against the Closing Order in regard to violation of the Co-Investigating Judges' *saisine* failed to satisfy the requirements of Internal Rule 74(3), which states that "[t]he charged person or the Accused may appeal against "orders [...] of the Co-Investigating Judges [...] confirming the jurisdiction of the ECCC" (the

11.02.1992, No. 91-86066 (The Investigating Judge "is not bound by the Public Prosecutor's provisional characterisation of the facts". See *supra*, paras. 103-104.

[236] Internal Rule 55(5).

[237] See *supra*, para. 230.

only way for the accused to appeal against the Closing Order, besides Rule 74(3)(f) as concerns orders "relating to provisional detention or bail").

245. The Pre-Trial Chamber noted that in "interpreting" Rule 74(3)(a), it had:

> "previously held that only jurisdictional challenges may be raised under that rule. In determining what constitutes a proper jurisdictional challenge, the Pre-Trial Chamber considered that the ECCC "is in a situation comparable to that of the *ad hoc* tribunals".[238]

246. It therefore noted that it considered such appeals admissible only where the appellant demonstrated that the application of a specific crime or mode of responsibility would infringe upon the principle of legality.[239] It noted further that challenges of procedural defects in the Closing Order were inadmissible before it:

> "Nothing in the ECCC law or Internal Rules suggests that alleged defects in the form of the indictment raise matters of jurisdiction. As such, these arguments may be brought before the Trial Chamber to be considered on the merits at trial and such do not demonstrate the ECCC's lack of jurisdiction."[240]

247. The Pre-Trial Chamber therefore found that IENG Sary's ground of appeal concerning of deportation "relat[ed] to the pleading practice and do not represent jurisdictional challenges".[241] In other words, the Pre-Trial Chamber considered that this challenge should be raised before the Trial Chamber.

248. The Pre-Trial Chamber's analysis is based on its view that the ECCC is in a situation akin to that of the *ad hoc* tribunals, as opposed to domestic civil law systems.

249. The Pre-Trial Chamber could have interpreted Internal Rule 74(3) in light of Articles 252 and 253 of the Cambodian Code of Criminal Procedure according to which the investigating chamber has the power to decide challenges by the accused in the event of violation of the conditions set out in Articles 124 of the (Introductory Submissions) paragraph 3; and 125 (Scope of Complaint), paragraphs 1 and 2, with Article 252 specifying that:

> "Proceedings shall also be null and void if the violation of any substantial rule or procedure stated in the Code or any provisions concerning criminal procedure affects the interests of

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[238] Pre-Trial Chamber Decision, 11.04.2011, **D427/1/30**, para. 45 (referring to the earlier Decision of 20.05.2010, **D97/14/15**, paras. 21 and 23-24).
[239] Pre-Trial Chamber Decision, 11.04.2011, **D427/1/30**, paras. 45-46.
[240] Pre-Trial Chamber Decision, 11.04.2011, **D427/1/30**, para. 47.
[241] Pre-Trial Chamber Decision, 11.04.2011, **D427/1/30**, para. 85.

the concerned party. Especially, rules and procedures which intend to guarantee the lights of the defense have a substantial nature."

250. The Pre-Trial Chamber could also have viewed the Closing Order in the same light as a committal for trial under French law, which the accused is permitted to appeal before the investigating chamber.[242]

251. Instead, it elected to equate the Closing Order to an indictment before the *ad hoc* Tribunals, which can be further amended at the trial stage and whose defects the accused can raise up until the stage of the appeal against conviction.[243]

252. The Pre-Trial Chamber explained that it "broadened" the scope of Internal Rule 74 only on a case by case basis:

> "Where appeals filed against an Indictment under Internal Rule 74 raise matters which cannot be rectified by the Trial Chamber, and not allowing the possibility to appeal at this stage would irreparably harm the fair trial rights of the accused."[244]

253. The Pre-Trial Chamber found that after "extensive investigations carried out over the course of three years", "the interests in acceleration of legal and procedural processes" are greater and outweigh the interests to be gained by considering these grounds of appeal at this stage, as allegations of defects in the indictment may be raised".[245]

254. While the Pre-Trial Chamber's course of action does not really serve the purpose of "accelerating" the procedural process, since it simply defers determination of these issues until the judgement stage, it at least has the merit of being in line with the possibilities offered to accused persons before International Criminal Tribunals to challenge indictments, and since French jurisprudence allows a defendant alleging a defect in the indictment that he has been unable to appeal "to request the trial court, if his allegations are well founded, to void the indictment so as to uphold his right of redress".[246]

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[242] See *supra*, footnote 62 and paras. 106-107.
[243] See *supra*, paras. 140-148.
[244] Pre-Trial Chamber Decision, 11.04.2011, **D427/1/30**, para. 48.
[245] Pre-Trial Chamber Decision, 11.04.2011, **D427/1/30**, para. 51.
[246] *Cass. Crim.*, 11.12.2012, No. 12-86306 (decision in a case where the investigating judge exceeded his *saisine*). See *supra*, para. 113.

255. However, such course of action is not practicable where the trial chamber to which the matter is referred for determination refuses to do so, thereby irreparably harming the fair trial rights of the accused.

c. <u>The Trial Chamber's refusal to pronounce on the merits</u>

256. As discussed *supra*, on 24 February 2011, IENG Sary requested the Trial Chamber to strike the impugned paragraphs of the Closing Order prior to the commencement of trial. Following his death, the Trial Chamber invited KHIEU Samphan on 25 April 2014 to indicate whether he adhered to the objection raised by IENG Sary, which he did, on 20 May 2014. On 29 September 2014, the Trial Chamber denied his Submissions in Decision E306/5.

257. In its dismissal decision, the Trial Chamber first recalled Internal Rule 76(7), which provides that once final, the Closing Order cures any procedural defects, declaring that the challenge in question "should have been brought during the investigation phase" (E306/5, paragraph 5). It recalled further that it has in very limited circumstances considered challenges related to alleged irregularities occurring during the pre-trial phase "if it appears necessary to safeguard the fairness of trial proceedings" (E306/5, paragraph 6). The Trial Chamber then went on to state some other reasons why considered that the Accused had been "duly informed of the scope of the investigation" (E306/5, paragraphs. 7-8). Lastly, it ruled in (E306/5, paragraphs 9-10) that:

> "9. Therefore KHIEU Samphan had the opportunity to detect the alleged irregularity here at tissue. Had the scope of the judicial investigation been a matter of controversy, this should have been raised before the opening of the trial. The Chamber is seized of the Closing Order which, according to Internal Rule 76(7), shall cure any procedural defects in the judicial investigation."
>
> 10. The KHIEU Samphan Defence has not demonstrated any additional fair trial issue <u>warranting the intervention of the Chamber at this stage</u>. (*emphasis added*)

258. The Trial Chamber's refusal to intervene and pronounce on the on the merits of the challenges amounts to denial of justice (i) and to a demonstration of its partiality (ii).

i. <u>Denial of justice</u>

259. In inviting the defence teams on 24 February 2011 to indicate before the opening of the Case 002 proceedings whether they wished to adhere to the objection raised by IENG Sary despite his death and the termination of proceedings against him, the Trial Chamber was well aware that this entailed

issues of fairness. Yet, instead of adopting a course of action commensurate with the scope of the problem, it chose to do an about-face and turn a blind eye.

260. The Trial Chamber considered that the challenge "should have been brought during the investigation phase" (E306/5, paragraph 5) or "before the opening of the trial" (E306/5, para. 9). That holding is difficult to fathom, because it renders otiose the question as to whether the defence teams wished to continue adhering to IENG Sary's objection after his death. It also contradicts the statement it made at the time of the invitation, namely that these issues were raised "by the IENG Sary Defence prior to the deadline".[247]

261. Moreover, that holding is inaccurate since IENG Sary's challenge was brought before the opening of the trial on 24 January 2011, and also it had already been brought before the Pre-Trial Chamber during the investigation phase (in IENG Sary's Appeal against the Closing Order).

262. In fact, the challenge had been brought during the pre-trial phase, but had not been disposed of on the merits. The Pre-Trial Chamber did not cure the defects at paragraphs 1397 to 1401 of the Closing Order.

263. Seised thereafter, the Trial Chamber refused to intervene "at that stage of the proceedings".

264. In other words, the Pre-Trial Chamber deferred to the Trial Chamber to dispose of the challenge on the merits. Seised of the challenge, the Trial Chamber responded that it was not for it to decide, because it should have been brought before the Pre-Trial Chamber.

265. Be that as it may, the fact that the question had been raised previously by IENG Sary is of no relevance. Indeed, insofar as the defects in the Closing Order cannot be cured by the Pre-Trial Chamber, for the Trial Chamber to ignore the problem would amount to a denial of justice and a violation of the Accused's effective remedy and fair trial rights.

ii. <u>Demonstration of partiality</u>

• <u>Intervention in case of inadmissible Prosecution requests</u>

[247] Memorandum, 25.04.2014, **E306**, para. 5.

266. The Trial Chamber's refusal to intervene, as stated in Decision E306/5, is even more difficult to fathom, given that that the Trial Chamber is more demanding with respect to the Accused and less so with respect to the Prosecution.

267. For example, it admitted and disposed of the Prosecution's request to consider JCE-3 as the mode of liability applicable to the Accused, and the request to exclude the armed conflict nexus requirement from the definition of crimes against humanity.[248] Yet, in regard to those matters, the Closing Order had become final and the deadline for raising preliminary objections had lapsed, and therefore, having regard to Internal Rule 89, the Trial Chamber should have found those requests inadmissible.[249] Instead, based on its interpretation of Internal Rule 98(2), even though it only concerns the trial stage,[250] the Trial Chamber found both requests admissible, adding, that it may "at any time [...] change the legal characterisation of facts contained in the Amended Closing Order"[251] and "apply the correct law applicable at the time of the acts in question", even though that is precluded by the ECCC Law or Internal Rules.[252]

268. Moreover, in both those instances, the Trial Chamber also noted that the requests were made prior to the opening of the substantive proceedings and did not adversely affect the Accused's fair trial rights for that reason.[253]

269. There is no reason for such disparity in the handling of requests by KHIEU Samphan and the Prosecution, especially given that in KHIEU Samphan's case, there was a real risk that his fundamental rights could be violated. Such violations have since occurred.

• **Skewed view of criminal procedure**

270. To justify its refusal to pronounce on the challenge concerning deportation, the Trial Chamber asserted that the Accused had been "duly informed of the scope of the investigation" (E305/6, paragraph 8). To justify this holding, it made a timid attempt to address matters of territory.

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[248] Decision, 12.09.2011, **E100/6**; Decision, 26.10.2011, **E95/8**. Although it did not formally declare it admissible, the Chamber also examined the merits of a third Prosecution request of the same nature seeking to "recharacterise the conduct of rape as a specific crime against humanity" (Request of 16 June 2011, **E99**) in its Memorandum, 25.04.2014, **E306**, para. 4. The Chamber rejected that request by accepting to the Supreme Court's findings on the subject.
[249] Internal Rule 89.
[250] Internal Rule 98: "The Judgement"; KHIEU Samphan's Response, 22.07.2011, **E99/3**, paras. 6-20.
[251] Decision, , 12.09.2011, **E100/6**, para. 25.
[252] Decision , 26.10.2011, **E95/8**, para. 9.
[253] Decision, 12.09.2011, **E100/6**, para. 25; Decision, 26.10.2011, **E95/8**, para. 9.

271. According to the Trial Chamber, "[f]rom the very beginning of the case and in particular since the beginning of the judicial investigation, the Introductory Submission authorised the Co-Investigating Judges to investigate deportation as a crime against humanity." (E306/5, para. 7). The Trial Chamber thus committed the same grave error as the one committed earlier by the Co-Prosecutors..[254] Yet, it could not have been unaware that the Co-Investigating Judges are only seised of the facts, as opposed to their legal characterisations as chosen by the Prosecution. As a matter of fact, the Internal Rules are abundantly clear concerning the scope of the Co-Investigating Judges' *saisine*. "The Co-Investigating Judges shall only investigate the facts set out in an Introductory Submission or a Supplementary Submission."[255] Cambodian and French law provide to the same effect.[256] Moreover, strict application of this rule has been reaffirmed time and again in French jurisprudence.[257]

272. The Trial Chamber's erroneous holding reveals its particularly unsettling view of criminal procedure. In fact, its position seems to be that the crimes would already be established at the Introductory Submission stage and that the task of the Co-Investigating Judges would only consist in building supporting evidence around the charges rather than investigating for both inculpatory and exculpatory evidence. The Trial Chamber would then intervene at the end of that process only for purposes of sentencing.

273. Still in a bid to justify its refusal to intervene on the premise that the Accused had been duly informed of the scope of the investigation, the Trial Chamber reasserted that the Prosecution's Final Submission "clearly referred […] to the deportation of Vietnamese". (E306/5, paragraph 8) That assertion merits since it ignores the fact that the Final Submission is not aimed at seising the Co-Investigating Judges, or putting the Accused on notice as to the charges against them.[258]

274. Just as a final submission cannot cure defects in the Introductory and Supplementary Submissions, the Trial Chamber cannot make up for the Prosecution's inadequacies and justify the unlawful

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[254] See *supra*, para. 239.
[255] Internal Rule 55(2).
[256] Cambodian Code of Criminal Procedure, Article 125 (scope of referral) paragraph 1: "The investigating judge is seized with the facts specified in the Introductory Submission. The investigating judge shall investigate only those facts." (*emphasis added*); French Code of Criminal Procedure, Article 80(I) para. 1.
[257] See *supra*, paras. 102-105.
[258] Internal Rules 55(2), 66 and 67(1); Cambodian Code of Criminal Procedure, Articles 125 (Scope of Complaint) para. 1, 246 (Prosecution Final Submission) and 247 (Closing Order) para. 4 ("The Investigating Judge is not bound by the Prosecution Final Submission.")

impeaching excesses of the Co-Investigating Judges by refusing to pronounce on challenges to paragraphs 1397 to 1401 of the Closing Order.

d. Conclusion

275. At this stage of the proceedings, it is for the Chamber to strike the defective portions from the Closing Order. It cannot but find that it was improperly seised of the factual allegations of deportation, as set forth at paragraphs 1397 to 1401 of the Closing Order; it must therefore decline jurisdiction over those facts, as the Accused cannot be held accountable therefor.

276. The Trial Chamber's failure to do so would amount to endorsing a process whereby a charged person or an accused cannot challenge defects in the indictment, and would therefore dash any hope of a fair trial and impair the credibility of the ECCC.

2. Factual allegations of "purges"

277. On 22 June 2016, the Defence seised the Trial Chamber of an urgent request for clarification of the Trial Chamber's *saisine* in regard to "internal purges".[259] The Defence was concerned that the Trial Chamber might be tempted to expand its *saisine* owing to developments in previous weeks, including:

> - the fact that the Chamber had created a new sub-segment of hearings specially devoted to witness testimonies "on internal purges",[260] and
>
> - the Chamber's decision to call a new witness from Cases 003 and 004 at the request of the International Co-Prosecutor, on the ground that that the witness could provide relevant evidence with regard to the "purging cadres from the Kratie sector".[261]

278. In that request, which will only be summarised here with references the more detailed submissions on the matter, the Defence recalled that in themselves, "internal purges" were not a crime. In fact, "purges" were not included as an underlying crime in the legal characterisation of the Closing Order and therefore required a nexus to a site under investigation in the case, as defined by the Severance Decision.

[259] KHIEU Samphan Urgent Request, 22.06.2016, **E420**.
[260] KHIEU Samphan Urgent Request, 22.06.2016, **E420**, paras. 3-7.
[261] Decision, 25.05.2016, **E319/36/2**, para. 12; KHIEU Samphan Urgent Request, 22.06.2016, **E420**, paras. 8-9.

279. The Defence emphasised that according to the Co-Prosecutors' Introductory Submission, the Co-Investigating Judges were only seised of the factual allegations of "purges" in the former North Zone in 1976 and in the East Zone in 1978. It demonstrated that in light of some segments of the Closing Order, the Co-Investigating Judges had *proprio motu* extended their investigations to other facts of "purges" other than the ones set out in the charging document. The Defence recalled further that the Trial Chamber could determine the facts of "purges" of which the Co-Investigating Judges had been properly seised only to the extent that they were related to sites that are within the scope of Case 002/02.

280. On 1 July 2016, the Trial Chamber responded to the Defence's request by means of a terse Memorandum (E420/1).[262] It recognised that "it [did] not understand internal purges to be an underlying offence." (E420/1, para. 5), before declaring that it was:

> "however, seised of facts relating to five alleged policies said to have been designed and implemented by CPK leaders". One of these policies is defined in the Closing Order as consisting in: *"the re-education of "bad elements" and the killing of "enemies", both inside and outside the Party ranks".* (E420/1, para. 6) (*emphasis supplied*).

281. The Trial Chamber then found that the Defence's reading of the loci and temporal scope of the case was incorrect:

> "This limited reading of the Closing Order does not, however, reflect the scope of Case 002/02 set out in the severance decision. The Closing Order has expressly identified locations and bodies outside of the Old and New North Zones and/or the East Zone as falling within the scope of Case 002/02. It does not further impose the temporal limitations for which the KHIEU Samphan Defence team argues." (E420/1, para. 7).

282. The Trial Chamber did not address the fact that the Defence had cited some paragraphs of the Closing Order in order to show that the Co-Investigating Judges had extended their *saisine*, whereas it was limited to specific sites and time frames.

283. The Trial Chamber ignored that question and then went on to conclude that:

> "the relevant policy alleged in the Closing Order and the underlying offences with which the Accused are charged is a matter to be addressed in the Judgement stage. This is all the Trial Chamber will say on the matter for the time being, except to note that it is regrettable that the matter was raised at such a late stage." (E420/1, para. 10).

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[262] Memorandum, 01.07.2016, **E420/1**.

284. Therefore, the Trial Chamber is yet to answer the question raised by KHIEU Samphan, which was not about the relationship between alleged policies and underlying crimes, but rather about the Trial Chamber's *saisine* following that of the Co-Investigating Judges, the latter *saisine* being in large part illegitimate.

285. There is nothing surprising about Trial Chamber's silence regarding the Co-Investigating Judges' extension of their *saisine* over factual allegations of "purges" given that it refused to intervene when the Co-Investigating Judges extended their *saisine* to include factual allegations of deportation.

286. Even so, at this stage of the proceedings, as was the case for factual allegations of deportation, the Trial Chamber has no other choice but to clean up its act. It is obliged to declare itself improperly seised of all the factual allegations of "purges" set forth in the Closing Order and to exclude the portions the Closing Order of which the defects could not be cured during the investigation phase.

287. It is important to point out that the Trial Chamber can on no account consider itself properly seised of those facts, as that would imply that it is seised of facts in relation to the alleged policies, as though there were, on the one hand, facts relating to policies, and on the other, facts relating to crimes, regarding which the nexus is to be examined during the trial phase.

288. In fact, in instances where the Trial Chamber is seised of facts relating to policies, that only concerns the crimes that are alleged to have been part of a given policy.

289. In other words, in and of itself, a policy is not a crime. It is only the category in which the Co-Investigating Judges classified the crimes upon which they decided to send the Accused for trial, considering that the accused were responsible for such crimes owing to their alleged participation in a JCE.

290. Accordingly, the five alleged policies set out in the Closing Order cannot constitute "catch-all" categories that would allow the Trial Chamber to consider and determine facts outside its *saisine*.

291. In fact, after having noted that the Trial Chamber was "in any event, prohibited from attributing criminal responsibility for crimes that fell outside the scope of the charges", the Supreme Court

Chamber characterised the five policies identified in the Closing Order simply as "means to structure the analysis of the implementation of the socialist revolution in Cambodia".[263]

292. The only nexus that could be established at the trial stage is between, on the one hand, the facts of which the Trial Chamber is seised and in respect of which it must first establish that they constitute crimes, and, on the other, the Accused in order to determine their participation in such crimes once established.

293. Like the factual allegations of deportation and all the other factual allegations outside the *saisine* of the Co-Investigating Judges, the factual allegations of "purges" of which it was not properly seised are outside also out-of-scope.

B. <u>The facts underpinning the charges were insufficient to send the Accused for trial</u>

294. Still in order to safeguard the Accused's rights to seek remedy and be heard, the Trial Chamber must exclude the portions of the Closing Order upon which the Accused were sent to trial even though the charges were insufficient for that purpose.

295. As discussed *supra*, accused before the ECCC may seek remedy against portions of the Closing Order other than those relating to the Trial Chamber's *saisine* and to provisional detention. Yet, accused before other national or international tribunals are permitted to challenge defects in their indictment, including those relating to insufficiency of charges, at least one stage of the proceedings against them.

296. For example, accused before Cambodian courts may invoke those rights before the investigating chamber.[264] Also, accused before French criminal courts may invoke them before the investigating chamber.[265] Accused before French misdemeanour courts can invoke such rights before the trial courts.[266] Accused before the *ad hoc* Tribunals can invoke them at least at the trial stage.[267] Accused before the ICC may invoke them before the Pre-Trial Chamber and at the trial stage.[268]

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[263] Case 002/01 Appeal Judgement, para. 227.
[264] Cambodian Code of Criminal Procedure, Article 253 (referral of Investigative Judges) paras. 3 and 4; Article 252 (rules prescribed on pain of nullity).
[265] French Code of Criminal Procedure, Article 186: "The right to appeal against the orders and decisions set out by [...] 181] is open to the person under judicial investigation" (referral order); Article 211: "The Investigating Chamber] examines whether sufficient charges exist against the person under judicial examination."
[266] See *supra*, paras. 110-113.
[267] See *supra*, paras. 140-148.
[268] See *supra*, paras. 135-139.

297. In rationale akin to that of the *ad hoc* Tribunals and to French criminal law, the ECCC Pre-Trial Chamber interpreted the ECCC law as allowing the Accused to raise challenges, not before it but the Trial Chamber.[269]

298. Accordingly, the Trial Chamber has the duty to consider the challenges relating the sufficiency of charges highlighted *infra* and to therefore exclude the corresponding defective portions of the Closing Order which the Accused did not have the opportunity to appeal at the pre-trial stage and of which the Trial Chamber was not properly seised.[270]

299. The Trial Chamber's failure to do so would amount to endorsing a procedure where Accused before the ECCC cannot challenge defects in the indictment, and would therefore irremediably impair their fair trial rights and undermine the legitimacy of the ECCC.

Part III. PRINCIPLE OF LEGALITY (*NULLUM CRIMEN, NULLA POENA SINE LEGE*)

Chapter I. CORRELATION OF PRINCIPLES AGAINST ARBITRARY PUNISHMENT

300. The legality principle is a cardinal criminal law principle. *Nullum crimen, nulla poena sine lege*. Only the law can define a crime and prescribe a penalty. This principle protects individuals against arbitrariness and guarantees their fundamental freedoms in a democratic society.

301. Individuals must be able to regulate their conduct in accordance with the norms in force at the time of their actions. They must be able to decide, at any given moment, whether to obey or disobey the law, with the knowledge that disobeying the law entails penalties..

302. The principle of legality was developed during the Age of Enlightenment, by, among others, Cesare BECCARIA, in his renowned *Essay on Crimes and Punishments*, which was published in 1764. Today, it is among the authorities on the protection of human rights, including: the Declaration of the Rights of Man and the Citizen (Articles 5 and 8), the Universal Declaration of Human Rights (Article 11-2), the ICCPR (Article 15), ECHR (Article 7). It also features prominently in many a penal code, including that of Cambodia.

303. For example, Article 1 of the Cambodian Criminal Code provides that:

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[269] See *supra*, paras. 244-255.
[270] See for example *infra*, paras. 942-948, 1022-1028, 1254-1271.

"The penal code specifies the offences, points out the persons who could be declared as responsible for the offences and determine the penalties as well as the modalities of their application."

304. According to Article 3 of the Cambodian Criminal Code: titled "Principles of Legality",:

"Only the act constituting an offence that is provided in the criminal provisions in force gives rise to criminal punishment."

"No sentence can be executed if it has not been pronounced by a court."[271]

305. While, unlike the ICCPR,[272] the ECHR is not directly applicable before the ECCC, the provisions of the two Conventions regarding the principle of legality are virtually identical. The jurisprudence of the ECHR, which is more substantial than that of the Human Rights Committee, serves as a normative reference in regard to the principle of legality.

306. When the ECHR considers alleged violations of the principle of legality as enshrined in Article 7 of the ECHR, it starts out by reiterating that:

"the guarantee enshrined in Article 7, which is an essential element of the rule of law, occupies a prominent place in the Convention system of protection, as is underlined by the fact that no derogation from it is permissible under Article 15 in time of war or other public emergency. It should be construed and applied as follows from its object and purpose, in such a way as to provide effective safeguards against arbitrary prosecution, conviction and punishment."[273]

307. It also notes that Article 7 of the ECHR:

"is not confined to prohibiting the retrospective application of the criminal law to an accused's disadvantage: it also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*) and the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy. It follows from these principles that an offence must be clearly defined in the law."[274]

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[271] In 1956, Article 6 of the Cambodian Penal Code read as follows: "Art. 6. A penal law shall not have retroactive effect. No offence may be punished by a penalty that was not provided for by law prior to the commission of the offence." Article 111(3) of the French Penal Code in turn provides that"[n]o one may be punished for a felony or for a misdemeanour whose ingredients are not defined by statute, nor for a petty offence whose ingredients are not defined by a regulation. No one may be punished by a penalty which is not provided for by the statute, if the offence is a felony or a misdemeanour, or by a regulation, if the offence is a petty offence."
[272] ECCC Law, Article 33 (new).
[273] *Vasiliauskas v. Lithuania* (ECHR, Grand Chamber), 20.10.2015, para. 153.
[274] *Kokkinakis c. Greece* (ECHR), 25.05.1993, para. 52; *Vasiliauskas v. Lithuania* (ECHR, Grand

308. The principle of legality comprises three correlated principles according to which criminal law shall not be applied retrospectively, shall be clearly defined under the law (qualitative conditions of accessibility and foreseeability) and shall be strictly interpreted.

Section I. CRIMINAL LAW PRINCIPLE OF NON-RETROACTIVITY

309. The retroactive application of criminal law is prohibited when it works to the detriment of the party concerned. This principle also applies to the provisions that define offences and those concerning sentences.

310. As regards sentencing, the ECHR for example pointed to retroactive application of criminal law in regard to an applicant who, at the time of the facts of which he was found guilty, was facing a prison term not exceeding four months, whereas the Appeal Court had applied a new law in his case, which prescribed a two-sentence.[275]

311. As concerns provisions defining the offences, the ECHR, for example, in *Vasiliauskas v. Lithuania*, considered the case of a Lithuanian applicant convicted of genocide in 2004 for acts committed in 1953, pursuant to provisions of a new Lithuanian Penal Code which came into force in 2003. The ECHR held that:

> "The Court therefore considers it clear that the applicant's conviction was based upon legal provisions that were not in force in 1953 and that such provisions were therefore applied retroactively. Accordingly, this would constitute a violation of Article 7 of the Convention unless it can be established that his conviction was based upon international law as it stood at the relevant time."[276]

312. The ECHR then analysed the definition of the elements of the crime of genocide as it stood in 1953 and noted that it was narrower than the one that the Lithuanian authorities had applied to the applicant. It thus held that:

> "The Court accepts that the domestic authorities have discretion to interpret the definition of genocide more broadly than that contained in 1948 Genocide Convention. However, such discretion does not permit domestic tribunals to convict persons accused under that broader definition retrospectively."[277]

Chamber),20.10.2015, para. 154.

[275] *Jamil v. France* (ECHR), 08.06.1995, paras. 34-36.

[276] *Vasiliauskas v. Lithuania* (ECHR, Grand Chamber), 20.10.2015, para. 166.

[277] *Vasiliauskas v. Lithuania* (ECHR, Grand Chamber), 20.10.2015, para. 181.

313. The ECHR found based thereupon that the principle of legality had been breached.[278]

Section II. PRINCIPLES OF ACCESSIBILITY AND FORESEEABILITY

314. The principle of legality of offences and sentences implies that crimes and the sentences relating thereto must be clearly laid down in the law, and that entails qualitative requirements, including accessibility and foreseeability. In fact, the defendant must able to know beforehand the charge and sentence he faces by engaging in a given conduct.

315. The "quality of law" requirements regarding both the definition of the offence and the applicable sentence are set out in greater detail in ECHR jurisprudence.

I. ACCESSIBILITY

316. In dealing with a potential breach of the legality principle, the ECHR starts out by verifying whether the criminal "law" on which the impugned conviction is based was sufficiently accessible, that is, whether it was published.[279]

317. It proceeds likewise in dealing with international crimes. In *Korbely v. Hungary*, the applicant was convicted in 2001 of offences committed in October 1956, when he was a senior military officer, a captain in charge of a training course. The ECHR Grand Chamber noted that the Geneva Conventions had been incorporated in Hungarian law by a 1954 executive order and published in the form of a brochure. Moreover, an order of the General Chief of Staff on the teaching of the Conventions was published in the military gazette in September 1956 and was accompanied by a synopsis thereof. In those circumstances, the ECHR was satisfied that those instruments were sufficiently accessible to the applicant.[280]

318. In the *Vasiliauskas v. Lithuania* case, the Grand Chamber found that the instruments of international law prohibiting genocide were sufficiently accessible to the applicant in 1953. It noted for example that the Soviet Union was a party to the London Agreement of 1945 by which the

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[278] *Vasiliauskas v. Lithuania* (ECHR, Grand Chamber), 20.10.2015, paras. 185-186, 191.

[279] For example: *Kokkinakis v. Greece* (ECHR), 25.05.1993, para. 40.

[280] *Korbely v. Hungary* (ECHR, Grand Chamber), 19.09.2008, paras. 74-75. In another case, the Grand Chamber considered both the accessibility and foreseeability of a conviction for war crimes in light of international laws and customs which had not been officially published in the USSR or in the Soviet Socialist Republic of Latvia, in the particular case of the commander of a platoon, after noting that "those laws constituted detailed *lex specialis* regulations fixing the parameters of criminal conduct in a time of war, primarily addressed to armed forces and, especially commanders": *Kononov v. Lithuania*, 17.05.2010 (ECHR, Grand Chamber), 17.05.2010, paras. 235-239 and 244.

Charter of the Nuremberg IMT was enacted, and that it had signed the 1948 Genocide Convention in December 1949; the latter Convention entered into force in 1951 after twenty instruments of ratification or accession had been deposited.[281]

II. FORESEEABILITY

319. According to the ECHR Grand Chamber,

> "the term "law" implies qualitative requirements, including those of accessibility and foreseeability. These qualitative requirements must be satisfied as regards both the definition of an offence and the penalty the offence in question carries. An individual must know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him criminally liable and what penalty will be imposed for the act committed and/or omission. Furthermore, a law may still satisfy the requirement of "foreseeability" where the person concerned has to take appropriate legal advice to assess, to a degree that is reasonable in the circumstances, the consequences which a given action may entail."[282]

320. As it recently noted in *Vasiliauskas v. Lithuania*, these principles are also applicable in international law:

> "an offence must be clearly defined in the law, be it national or international. This requirement is satisfied where the individual can know from the wording of the relevant provision – and if need be, with the assistance of the courts' interpretation of it and with informed legal advice – what acts and omissions will make him criminally liable."[283]

321. In the above case, the Grand Chamber found that the Lithuanian courts had applied to the petition a definition of genocide that was broader than the one that applied at the relevant time, and concluded that even with the assistance a lawyer, the applicant could not have foreseen at that time that the killings of which he was convicted could be characterised as genocide. Given those circumstances, it found that the principle of legality had been breached.[284]

322. As regards the sentence, the ECHR for example analysed the case of a Cypriot applicant who was convicted of murder and sentenced to life imprisonment, which, at the time of the facts, was twenty years, according to the executive and administrative authorities.[285] It held that:

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[281] *Vasiliauskas v. Lithuania* (ECHR, Grand Chamber), 20.10.2015, paras. 167-168.
[282] *Kafkaris v. Cyprus* (ECHR, Grand Chamber), 12.02.2008, para. 140 (references to omitted prior decisions).
[283] *Vasiliauskas v. Lithuania* (ECHR, Grand Chamber), 20.10.2015, para. 154.
[284] *Vasiliauskas v. Lithuania* (ECHR, Grand Chamber), 20.10.2015, paras. 178, 181, 185, 186 and 191.
[285] *Kafkaris v. Cyprus* (ECHR, Grand Chamber), 12.02.2008, paras. 143-148.

> "at the time the applicant committed the offence, the relevant Cypriot law taken as a whole was not formulated with sufficient precision as to enable the applicant to discern, even with appropriate advice, to a degree that was reasonable in the circumstances, the scope of the penalty of life imprisonment and the manner of its execution. Accordingly, there has been a violation of Article 7 of the Convention in this respect."[286]

323. The foregoing principles and examples clearly reveal that foreseeability does not simply boil down to the foreseeability of criminal charges, but also, and more importantly, it includes their contents and the possibility of appreciating their extent and impact.

Section III. THE LAW SHALL BE STRICTLY INTERPRETED IN AND IN FAVOUR OF THE ACCUSED

324. The principle of legality of crimes and sentences implies that Judges must not interpret the law freely, so as to avoid imposing penalties without legal basis.

325. According to ECHR case law, "as a corollary to the principle of legality of convictions, the provisions of criminal law are subject to the principle of strict interpretation",[287] or again accordingly, "the principle that the criminal law must not be extensively construed to an accused's detriment for instance by analogy".[288]

326. Article 5 of the Cambodian Penal Code, "Interpretation of Criminal Legislation", provides that:

> "Criminal legislation is to be construed strictly. Judges may neither extend the scope of application nor proceed by analogy."[289]

327. Where there is doubt or ambiguity as to the purport of the criminal law despite its strict interpretation, the *in dubio pro reo* principle, a corollary to the presumption of innocence, must be applied, and where the law is ambiguous, it must be resolved in favour of the accused.

328. These criminal law-specific interpretation principles are expressly enshrined, for example, in Article 22 of the ICC Rome Statute titled "*Nullum crimen sine leg*", in Part III "General Principles of Criminal Law":

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[286] *Kafkaris v. Cyprus* (ECHR, Grand Chamber), 12.02.2008, para. 150.
[287] *Dragonotiu and Militaru-Pidhorni v. Romania* (ECHR), 24.05.2007, para. 40.
[288] *Kokkinakis v. Greece* (ECHR), 25.05.1993, para. 52; *Vasiliauskas v. Lithuania* (ECHR, Grand Chamber), 20.10.2015, para. 154.
[289] Article 111-4 of the French Penal Code in turn provides that: "Criminal legislation is to be construed strictly."

"2. The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted."

329. They are applied by other international criminal courts and the ECCC. For example, the Appeals Chamber of the *ad hoc* Tribunals noted in *Limaj* that it had previously recognised in *Naletilić and Martinović* that the *in dubio pro reo* principle applied to the requisite *mens rea*.[290] In *Renzaho*, it held that:

"The principle of *in dubio pro reo* provides that any doubt should be resolved in favour of the accused. The Appeals Chamber recalls that, as a corollary to the presumption of 100

innocence and the burden of proof beyond reasonable doubt, the principle of *in dubio pro reo* applies to findings required for conviction, such as those which make up the elements of the crime charged."[291] (*emphasis added*)

330. The ECCC Pre-Trial Chamber held that "[it] erred in failing to include the armed conflict nexus requirement as part of its definition of crimes against humanity under customary international law from 1975-1979".[292]

Chapter II. EVISCERATION OF THE PRINCIPLES BY THE SUPREME COURT CHAMBER

331. In Case 002/01, the Defence appealed some of Trial Chamber's violations of the principle of legality. It argued that, as regards certain crimes and modes of liability, the Trial Chamber had "[ill-defined the elements likely to engage the Accused's criminal liability as they existed at the time of the events]" and that it had "[relied on rules posterior to the facts while considering that they were foreseeable and accessible to the accused at the time of the events]".[293]

332. For instance, the Defence challenged the definition of the *mens rea:* the crime against humanity of murder, the crime against humanity of extermination, JCE, planning, incitement and aiding and abetting.[294] It highlighted the Trial Chamber's recurrent error consisting in systematically lowering

[290] *Limaj* Appeal Judgement, (ICTY), 27.09.2007, para. 21, referring to *Naletilić and Martinović* (ICTY), 03.05.2006, para. 120 ("Consequently, if the issue could not be clearly answered even in 1998 and lacking any indication to the contrary, the existence of an armed conflict or its character has to be regarded, in accordance with the principle of *in dubio pro reo*, as [...]".
[291] *Renzaho* Appeal Judgement, (ICTR), 01.04.2011, para. 474.
[292] Pre-Trial Chamber Decision, 15.02.2011, **D427/2/15**, para. 144.
[293] Case 002/01 Appeal Brief, para. 50.
[294] Case 002/01 Appeal Brief, paras. 59-62 (murder), paras. 63-67 (extermination), paras. 68-73 (JCE), paras. 74-79 (planning), paras. 80-86 (instigating), paras. 87-92 (aiding and abetting).

the *mens rea* threshold so as to make up for the lack of evidence of direct criminal intent, and challenged the false and legally unfounded claim that "[the extent of the knowledge required varies, depending on whether the acts with which the Accused is charged were committed before, during or after the commission of the crimes".]"[295]

333. The Defence also challenged the Trial Chamber's course of action in regard to accessibility and foreseeability, contending that the incorrect definitions of the *mens rea* of murder, extermination, JCE, planning, incitement and aiding and abetting were neither accessible nor foreseeable in 1975.[296]

334. Even after two years of deliberations, the Supreme Court Chamber still declined to address the errors highlighted by the Defence.[297] It recognised the Trial Chamber's error regarding the *mens rea* of extermination, but not that of murder and JCE.[298] It acquiesced to the Trial Chamber's course of action in regard to accessibility and foreseeability.[299]

335. In so doing, the Supreme Court Chamber in turn violated the principle of legality and eviscerated it of its substance.

336. Yet in the *Duch* case in 2012, it had held that:

> "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."[300]

337. In a footnote, the Supreme Court Chamber cited Kenneth GALLANT regarding "the value of the most restrictive interpretation as opposed to the judiciary usurping the legislature's position by applying unclear laws". It also cited Guénaël METTRAUX regarding the *ad hoc* Tribunals:

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[295] Case 002/01 Appeal Brief, para. 107.
[296] Case 002/01 Appeal Brief, paras. 99-102, 104-105.
[297] The Supreme Court Chamber did not bother to address the other modes of liability apart from JCE (despite what is stated in paragraph 766 of the Case 002/01 Appeal Judgement), or the Trial Chamber's erroneous holding that the level of knowledge required varies with time.
[298] Case 002/01 Appeal Judgement, paras. 387-410 (murder), paras. 516-522 (extermination), paras. 1051-1055 (JCE, or the Supreme Court acknowledges the error to a certain extent but makes up for it).
[299] Case 002/01 Appeal Judgement, paras. 761-766 and 1093-1095.
[300] *Duch* Appeal Judgement, 03.02.2012, para. 97 footnote 184.

> "[T]he enduring jurisprudential legacy of the Tribunals will largely depend on their ability to base their decisions upon a body of pre-existing rules, and not upon the theoretical eagerness of their drafters. The two Tribunals could become historically and legally anecdotal if they seemed to shelter intellectual complacency or judicial activism."[301]

338. The unfortunate truth is that, four years on, the Supreme Court Chamber is yet to live up to expectations with regard to ensuring the legitimacy of the ECCC. Instead, it has been a shining example of judicial militancy (Section I). Further, it has not consistently delivered on the "careful and reasoned" review it had always advocated, but instead, usurped the functions of a legislator by applying laws which lack clarity (Sections II to IV).

339. If the Trial Chamber is to confer a modicum of legitimacy to the ECCC and ensure compliance with the cardinal criminal law principle of legality, it must especially avoid following in Case 002/02 the lamentable and discreditable "precedent" which was set in Case 002/01.

Section I. <u>JUDICIAL MILITANCY</u>

340. The Supreme Court Chamber's patent militancy is manifested in its erroneous and biased reasoning (I), as well as its approach to criminal law, whereby the fight against impunity takes precedence over the fight against arbitrary punishment (II).

I. <u>ERRONEOUS AND BIASED REASONING</u>

341. In the Case 002/01 Appeal Judgement, the Supreme Court Chamber held that the legality requirement was met where the crimes or modes of liability existed under customary international law at the material time and the Accused bore command responsibility.[302] It added:

> "The Supreme Court Chamber further recalls that, as to the accessibility requirement, in addition to treaties, "laws based on custom [...] can be relied on as sufficiently available to the accused" and that, as to foreseeability, the accused "must be able to appreciate that the conduct is criminal in the sense generally understood, without reference to any specific provision". In this regard, the Supreme Court Chamber accepts the argument of the Co-Prosecutors that, given that the crimes for which KHIEU Samphan was convicted "are some of the gravest known; he cannot seriously contend that he did not understand that his conduct was criminal in the sense generally understood."[303]

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[301] *Duch* Appeal Judgement, 03.02.2012, footnote 184 (*references omitted*).
[302] Case 002/01 Appeal Judgement, paras. 761-762, 764.
[303] Case 002/01 Appeal Judgement, para. 762 (*references omitted*).

342. For that "recall", the Supreme Court Chamber cited paragraph 96 of the *Duch* Appeal Judgement. However, that paragraph is more detailed and, moreover, the Supreme Court Chamber makes no reference the paragraph, which follows it:

> "96. Finally, as an additional safeguard, fairness and due process concerns underlying the international principle of legality require that charged offences or modes of responsibility were "sufficiently foreseeable and that the law providing for such liability [was] sufficiently accessible [to the accused] at the relevant time."178 "[A]s to foreseeability [...][the accused] must be able to appreciate that the conduct is criminal in the sense generally understood, without reference to any specific provision." As for the accessibility requirement, in addition to treaty laws, laws based on custom or general principles can be relied on as sufficiently available to the accused. Furthermore, a Chamber may "have recourse to domestic law for the purpose of establishing that the accused could reasonably have known that the offence in question or the offence committed in the way charged in the indictment was prohibited and punishable." Finally, "[a]lthough the immorality or appalling character of an act is not a sufficient factor to warrant its criminalisation [...], it may, in fact play a role [...] insofar as it may refute any claim by the Defence that it did not know of the criminal nature of the acts."
>
> 97. [...] Chambers in this Tribunal are under an obligation to determine that the <u>holdings on elements of crimes</u> or modes of liability therein were applicable during the temporal jurisdiction of the ECCC. <u>Furthermore, they must</u> 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." (*emphasis added*)

343. Somewhere between the *Duch* Appeal Judgement and the Case 002/01 Appeal Judgement, the following holdings – among others –, somehow evaporated into thin air:

> - it is the definition of the elements of crimes or modes of participation that, at the time of the events, must not only have been foreseen by the law but also accessible and foreseeable,
>
> - the Judges may rely on the domestic law to establish that the accused could reasonably have known that the offence in question or the one committed in the way it is characterised in the indictment was prohibited and punishable.

344. Those omissions could not have been inadvertent, given that they concern the two core arguments that the Defence put forward.

345. In regard to the first argument, the Supreme Court Chamber simply responded that "the accused must be able to appreciate that the conduct is criminal in the sense generally understood, without reference to any specific provision." It simply cited an ICTY decision which stated unabashedly and without citing any provisions, that "<u>[A]s to foreseeability [...] [the accused] must be able to appreciate that the conduct is criminal</u> in the sense generally understood, without reference to any

specific provision."[304] (*emphasis added*) However, as regards foreseeability, the conduct in question is that which is described in the definition of the crime, and certainly not the conduct of the Accused (see *infra*, II).

346. In regard to the second argument, the Supreme Court Chamber carefully avoided addressing the real by the issue by distorting the argument:

> "As for the argument that, because Cambodia has a dualist legal system, international norms did not form part of Cambodian domestic law at the time of the facts, and that KHIEU Samphan could thus not expect their application, KHIEU Samphan misrepresents the findings of the Pre-Trial Chamber, to which he refers in his appeal brief. In the paragraph following the one cited by KHIEU Samphan, the Pre-Trial Chamber found that "the ECCC Law [...] requires the ECCC to exercise is jurisdiction in accordance [with] the international principle of legality, which allows for criminal liability over crimes that were either national <u>or</u> international in nature at the time they were committed", a finding clearly consistent with the Duch Appeal Judgement (001-F28)."[305] (*emphasis supplied*)

347. Yet, in its submission, the Defence made no reference to the Pre-Trial Chamber's finding, but rather to the examples of jurisprudence it had cited in the latter part of a lengthy footnote where it indicated that some judges do not apply international law because it is not transposed into national legislation.[306]

348. Furthermore, the said Pre-Trial Chamber finding is not incompatible with the fact that the judges took account of national law. Indeed, that is precisely what the Pre-Trial Chamber did in another decision where it stated that it was not persuaded that in the period from 1975 to 1979, the persons under investigation would have been able to foresee that they could be held responsible for JCE-3, since Pre-Trial Chamber did not cite any provision of period Cambodian law that would have

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[304] Case 002/01 Appeal Judgement, para. 762, footnote 1983 referring to: *Prosecutor v. Hažihasanović et al.*, IT-01-47-AR72, Decision on objection to jurisdiction (*command responsibility*), 16.07.2003, para. 34.
[305] Case 002/01 Appeal Judgement, para. 763.
[306] Case 002/01 Appeal Brief, para. 101 and footnote 218, which reads as follows: "Judgement, para. 18 footnote 40: *Kononov v. Latvia,* para. 208 (regarding the codification of laws and customs of war up to the Principles of Nuremburg: "[Both international law and domestic law (<u>the latter including the international norms transposed</u>) serving as a basis for prosecutions and the determination of liability at national level]" (*emphasis added*); *Cass., Crim.*, 17 June 2003, Criminal Law Bulletin, 2003 No. 122 (*Aussaresses*: "[international custom cannot cure the absence of incriminating texts, under the characterisation of crimes against humanity, of the facts reported by the plaintiff"]). For other examples, see: Pre-Trial Chamber Decision of 15 February 2011, **D427/2/15**, para. 97, footnote 215 p. 44; NUON Chea's Preliminary Objections, **E51/3**, para. 48; IENG Sary's Appeal against the Closing Order, **D427/1/6**, para. 123, footnote 250. (*emphasis supplied*). It was therefore abundantly clear that the Defence was referring to "other examples", i.e. additional examples, to supplement those mentioned by the Pre-Trial Chamber in footnote 215, and more specifically on page 44 (footnote 215, pp. 43 and 44).

enabled the accused to foresee that they could incur such liability. It therefore found that the principle of legality precludes application of JCE-3 at the ECCC.[307]

349. The Defence was only referring to that finding of the Pre-Trial Chamber finding.[308] That is precisely the issue the Supreme Court Chamber avoids to address, Moreover, it could not accuse the Defence of misrepresenting the finding, given that both the Trial Chamber and the ICTY Appeals Chamber interpreted it the same way.[309]

350. The Supreme Court Chamber's assertion that the Accused must be able to appreciate that the conduct is criminal in the sense generally understood without citing any specific provision is contrary to the principle of legality and its essence. The truth of the matter is that the Supreme Court Chamber is simply using it as a way to obfuscate the principle in its bid to impose punishment.

II. CRIMINAL POLICY: PRECEDENCE OF THE FIGHT AGAINST IMPUNITY OVER THE FIGHT AGAINST ARBITRARY PUNISHMENT

351. According to the Supreme Court Chamber, the accused must be able to appreciate that the conduct is criminal in the sense generally understood, without reference to any specific provision. It shares the view of the Co-Prosecutors that where the crimes are some of the gravest known, the accused cannot persuasively contend that he did not understand that his conduct was criminal in the sense generally understood.[310]

352. In other words, it is sufficient that the accused understands that he did something wrong. If what he did is very, very wrong, then he cannot persuasively contend that he did not appreciate that did something wrong.

353. Far from being a mere holier-than-thou *obiter dictum*, the Supreme Court Chamber applied this reasoning to JCE and to the crime against humanity of murder. This very conveniently enabled it to avoid addressing any issues relating the definition of *mens rea*.

354. For example, in regard to JCE, the Supreme Court Chamber held as follows:

[307] Pre-Trial Chamber Decision, 20.05.2010, **D97/15/9**, para. 87.
[308] Case 002/01 Appeal Brief, para. 105 and footnote 223, referring to Pre-Trial Chamber Decision of 20.05.2010, **D97/15/9**, para. 87.
[309] Trial Chamber Decision, 12.09.2011, **E100/6**, para. 28; *Đorđević* Appeal Judgement (ICTY), 27.01.2014, para. 50.
[310] Case 002/01 Appeal Judgement, para. 762.

"Regarding the arguments concerning the foreseeability and accessibility of the modes of liability pursuant to which KHIEU Samphan was convicted, the Supreme Court Chamber has already found above that the Trial Chamber did not err in finding that, at the time relevant to charges, an individual could incur criminal liability under customary international law by making a significant contribution to the implementation of a common criminal purpose. This finding was based, in particular, on a review of the post-World War II jurisprudence. The Supreme Court Chamber does not consider that this form of liability – which holds responsible those who enter into a common criminal purpose and contribute to its implementation for the crimes that this common purpose amounted to or involved – was inaccessible or unforeseeable to the Accused, notably because the crimes at issue were very grave. KHIEU Samphan cannot persuasively argue that he could not expect that he might be held criminally liable for engaging in activities that involved the commission of such crimes." [311]

355. It held based thereupon that:

"As a result, the Supreme Court Chamber considers that it was sufficiently foreseeable to KHIEU Samphan that he could incur criminal responsibility pursuant to JCE, as affirmed above."[312]

356. The gravity of the crimes therefore allowed the Supreme Court Chamber to dispense with: 1) considering whether the post-war case law was accessible to KHIEU Samphan; and 2) addressing the question raised regarding the foreseeability of the Trial Chamber's definition of the *mens rea* of JCE-1. In fact, contrary to what the Supreme Court Chamber seems to suggest, the Defence has never argued that KHIEU Samphan could not foresee JCE-1. It argued that he could not foresee a *mens rea* of JCE-1 encompassing an element that was less restrictive than specific intent, i.e., a JCE-1 with a *mens rea* of a JCE-3.[313] By its ploy, the Supreme Court Chamber avoided to address this argument, despite its merit.

357. Furthermore, since the *mens rea* requirement of JCE-1 is same as that of JCE-3, if one were to follow the Supreme Court Chamber' logic, the Accused could have foreseen JCE-3 owing to the gravity of the crimes involved. However, the fact that the Pre-Trial Chamber determined otherwise shows that such is not the case.

358. Regarding the crime against humanity of murder, the Supreme Court Chamber held that:

"As to the foreseeability and accessibility of the mens rea of murder and extermination, the Supreme Court Chamber has conducted an extensive review of the respective mental elements of these crimes. In respect of murder, this analysis led to the conclusion that a mental element less restrictive than direct intent formed part of customary international law in 1975. As noted above, as to foreseeability, it is sufficient that the accused was able to "appreciate that the conduct is criminal in the sense

[311] Case 002/01 Appeal Judgement, para. 1093.
[312] Case 002/01 Appeal Judgement, para. 1095.
[313] Case 002/01 Appeal Brief, paras. 105 and 107.

generally understood, without reference to any specific provision". Thus, what is required is not an analysis of the technical terms of the definition of the crimes, but whether it was generally foreseeable that the conduct in question could entail criminal responsibility. Accordingly, there is no need to show that it was foreseeable that criminal responsibility could arise in circumstances was acting with *dolus eventualis*, as opposed to *dolus directus*. The Supreme Court Chamber thus rejects the arguments raised in this regard."[314]

359. Here again, the criminal nature of the conduct very conveniently allows the Supreme Court Chamber to dispense with: 1) considering the accessibility of the sources it relied upon for its finding that a *mens rea* that is less restrictive than specific intent existed under customary international law with regard to murder; 2) considering the foreseeability of the definition of the *mens rea* of murder.

360. Moreover, based on the Supreme Court Chamber's reasoning, it is not immediately clear why it did not dispense with analysing the technical terms in the definition of extermination in order to establish its existence at the material time. After all, with such logic, if extermination was criminalised at the material time, it is immaterial whether the exterminator acted with specific intent or *dolus eventualis*. Regardless of whether he acted with specific intent or *dolus eventualis*, he could have known that what he was doing was wrong and could be held criminally responsible.

361. In the final analysis, the fact that Supreme Court Chamber equates foreseeability of the offence to foreseeability of its criminal character implies that a person can foresee a crime or a mode of responsibility that is not applicable to him at the time of the facts. That is a convenient way to expand the charges, augment criminal sentences and impose arbitrary penalties, but that is entirely contrary to the *nullum crimen sine lege* principle.

362. It is thus hardly surprising that the Supreme Court Chamber's claim is in stark contrast to the jurisprudence of the European Court of Human Rights:

ECCC Supreme Court Chamber	ECHR Grand Chamber
"[I]t is sufficient that the accused was able to "appreciate that the conduct is <u>criminal in the sense generally understood</u>, <u>**without reference to any specific provision**</u>". Thus, what is required is <u>not an analysis of the technical terms of the definition</u> of the crimes, but whether it was <u>generally</u>	"Article 7 is not confined to prohibiting the retrospective application of the criminal law to an accused's disadvantage. It also embodies more generally, the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*). While it prohibits in

[314] Case 002/01 Appeal Judgement, para. 765.

foreseeable that the conduct in question could entail criminal responsibility." (*emphasis added*).[315]	particular extending the scope of existing offences to acts which previously were not criminal offences, it also lays down the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy; it follows from this that an offence must be clearly defined in law. This condition is satisfied where the individual can know **from the wording of the relevant provision** and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him liable."[316] (*emphasis added*) "[T]he term "law" implies qualitative requirements, including those of accessibility and foreseeability. These qualitative requirements must be satisfied as regards both the definition of an offence and the penalty the offence in question carries."[317] (*emphasis added*)

366. It is therefore quite obvious that unlike the Supreme Court Chamber, the ECHR reasons in terms of the law and not in terms of the individual concerned.

367. For example, in the *Vasiliauskas v. Lithuania*, as cited *supra*, the applicant was well aware that the killings in respect of which he was convicted of genocide were punishable and that "[the conduct [was] criminal nature in the sense generally understood without reference to any specific provision.]" Indeed, committing murder is not only wrongful, but also serious. Accordingly, the ECHR Grand Chamber: 1) considered whether the relevant legal provisions were accessible to the applicant the relevant time,[318] and then went on to 2) consider foreseeability by analysing the technical terms in the definition of the constitutive elements of genocide as it stood at the relevant time, which was narrower than the one it applied.[319] It concluded that if the relevant law was accessible to the applicant at the material time, "[his] conviction for genocide could not have been foreseen at the time of the killings of the partisans"[320] It thus found that the principle of the rule of law had been breached.[321] As a consequence, although genocide was a crime at the material time and the relevant law was accessible to the applicant, he could not have foreseen that a broader

[315] Case 002/01 Appeal Judgement, para. 765.
[316] *Vasiliauskas v. Lithuania* (ECHR, Grand Chamber), 20.10.2015, para. 154
[317] *Kafkaris v. Cyprus* (ECHR, Grand Chamber), 12.02.2008, para. 140 (*references to prior decisions omitted*).
[318] *Vasiliauskas v. Lithuania* (ECHR, Grand Chamber), 20.10.2015, paras. 167-168.
[319] *Vasiliauskas v. Lithuania* (ECHR, Grand Chamber), 20.10.2015, para. 169-185.
[320] *Vasiliauskas v. Lithuania* (ECHR, Grand Chamber), 20.10.2015, para. 186.
[321] *Vasiliauskas v. Lithuania* (ECHR, Grand Chamber), 20.10.2015, para. 191.

definition of genocide would be applied. While he could have appreciated that his conduct was criminal, he was a victim of the breach of the rule of law principle.

368. Even so, it cannot be argued that the ECHR was unaware of the wrongfulness and gravity certain acts. Indeed, in a case involving corruption, below is what it stated before examining the alleged breach of the principle of legality of which it was seised:

> "[The Court is aware that corruption is a threat to the rule of law, democracy and human rights, undermines the principle of proper administration, equity and social justice, falsifies competition, hinders economic development and endangers the stability of democratic institutions and the moral foundations of society. However, the principles enshrined in Article 7 are applicable to the offences of corruption just as they do to any other criminal procedure.]"[322]

369. And as it has recalled many a time:

> "the guarantee enshrined in Article 7, which is an essential element of the rule of law, occupies a prominent place in the Convention system of protection, as is underlined by the fact that no derogation from it is permissible under Article 15 in time of war or other public emergency. It should be construed and applied, as follows from its object and purpose, in such a way as to provide effective safeguards against arbitrary prosecution, conviction and punishment."[323]

370. The ICCPR also prohibits such derogation, as the Human Rights Committee emphasised in its General Comment No. 29 "State of Emergency":

> "Article 4, paragraph 2, of the Covenant explicitly prescribes that no derogation from the following articles may be made: [...] article 15 (the principle of legality in the field of criminal law, i.e. the requirement of both criminal liability and punishment <u>being limited to clear and precise provisions</u> in the law that was in place and applicable at the time the act or omission took place, except in cases where a later law imposes a lighter penalty)".[324] (*emphasis added*)

371. Further, the Special Rapporteur on terrorism and human rights underscored that it is crucial to abide by the principle of legality at all times,[325] and recalled its meaning:

> "The meaning of the principle *nullum crimen sine lege* is that in order to be qualified as an offence, an act or omission should be criminalized under applicable law at the time of its commitment and, further, <u>that the definitions of criminal offences must be precise, unequivocal and unambiguous</u>. Thus, in its General Comment No. 29, the Human Rights Committee has specified that the principle of legality in the field of criminal law signifies that criminal responsibility, as well as punishment, must be defined within "clear and precise provisions in the law that was in place and applicable at the time the act or

[322] *Dragonotiu and Militaru-Pidhorni v. Romania* (ECHR), 24.07.2007, para. 41.
[323] *Vasiliauskas v. Lithuania* (ECHR, Grand Chamber), 20.10.2015, para. 153.
[324] General Comment No. 29, State of Emergency (Art. 4), Human Rights Committee, CCPR/C/21/Rev.1/Add.11, 31.08.2001, para. 7.
[325] *Specific Human Rights Issues: New Priorities, in Particular Terrorism and Counter-Terrorism*, Human Rights Committee, E/CN.4/Sub.2/2003/WP.1, 08.08.2003, paras. 63-64.

omission took place, except in cases where a later law imposes a lighter penalty." The European Court of Human Rights agrees, further pointing out that the principle nullum crimen sine lege implies that definitions of criminal offences, or criminal incriminations, must be precise and unambiguous. And the Inter-American Court of Human Rights concurs that crimes must be "classified and described in precise and unambiguous language that narrowly defines the punishable offence, thus giving full meaning to the principle of *nullum crimen nulla poena sine lege praevia* in criminal law", specifying further, that ambiguity in describing crimes creates doubts and the opportunity for abuse of power "particularly when it comes to ascertaining the criminal responsibility of individuals and punishing their criminal behavior with penalties that exact their toll on the things that are most precious, such as life and liberty."[326] (*emphasis added*)

372. The Special Rapporteur recalled further that the definition of a crime must be strictly construed and must not be extended by analogy. In case of ambiguity, the definition must be interpreted in favour of the person that is the subject of an investigation, prosecution or a conviction.[327]

373. Accordingly, the wrongful nature of the conduct and gravity of the crimes cannot palliate the lack of a clear and precise definition, contrary to the position of the Supreme Court Chamber and the message it is conveying.

374. Therefore, to ensure respect for the principle of legality, it is not sufficient that the incrimination was recognised under customary international law at the time of its commission, or that the defendant held a senior position and/or was able to appreciate that his conduct was criminal in the sense generally understood, without reference to any specific provision. The definition of the crime must, in particular, have been both accessible and foreseeable, that is, sufficiently clear and unambiguous.

375. That is, moreover, precisely what the ICTY very clearly recalled in *Vasiljević* (which concerns violence to life and person under customary international law):

> "Each Trial Chamber is thus obliged to ensure that the law which it applies to a given criminal offence is indeed customary. The Trial Chamber must further be satisfied that this offence was defined with sufficient clarity for it to have been foreseeable and accessible, taking into account the specificity of customary international law. "[328] (*emphasis added*)

376. In that case, on the basis of reasoning akin to that of the Supreme Court Chamber, the Prosecution had argued that:

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[326] *Specific Human Rights Issues: New Priorities, in particular Terrorism*, Human Rights Committee, E/CN.4/Sub.2/2003/WP.1, 08.08.2003, para. 65. (*references omitted*).
[327] *Specific Human Rights Issues: New Priorities, in particular Terrorism*, Human Rights Committee, E/CN.4/Sub.2/2003/WP.1, 08.08.2003, para. 67.
[328] *Vasiljević* Trial Judgement, (ICTY), 29.11.2002, para. 198.

"a distinction must be drawn between the existence of an offence, on the one hand, and the definition or elements of that offence, on the other hand. The former concerns the principle of legality or *nullum crimen sine lege*, whereas the latter involves the principle of specificity. Needless to say, the principle of legality requires that the crime exist under the law when and where the relevant act is committed. This does not mean however that the offence must have all its elements exhaustively spelled out in advance."[329] (*emphasis supplied*)

377. The Prosecution's contention that a distinction must be drawn between the existence of an offence, on the one hand, and the definition of elements of that offence, on the other, was explicitly rejected.[330]

378. In light of the foregoing, it is plain that the reasoning of the Supreme Court Chamber regarding the principle of legality runs counter to the object, purpose, and raison d'être of this fundamental principle, dating back more than 200 years, according to which no one shall be arbitrarily prosecuted, convicted or punished.

379. It is therefore a matter of grave concern that the Appeals Chamber of an international tribunal which is expected to uphold the values of a democratic society and the rule of law was still capable of such reasoning in 2016.

380. The Trial Chamber has the affirmative obligation to refrain from adopting the reasoning adopted by an activist Supreme Court Chamber which has chosen the fight against impunity over the fight against arbitrary punishment, and which, moreover, has demonstrated its penchant to act as a legislating by applying vis-à-vis the Accused laws that a questionable and ill-defined laws with respect to the crime against humanity of murder, and JCE.

Section II. <u>SPECIFICITY OF CUSTOMARY INTERNATIONAL LAW</u>

I. <u>DIFFICULTY IN CRYSTALISING A NORM OF CUSTOMARY INTERNATIONAL LAW</u>

381. Respecting the principle of legality is particularly difficult when the "law" at issue consists in a rule of customary international law. Indeed, unlike the international treaty law, customary

[329] *Prosecutor v. Vasiljević*, IT-98-32-T, Submission by the Prosecution on the Law with Respect to "Violence to Life and Person", 28.03.2002, para. 5.
[330] *Vasiljević* Trial Judgement, (ICTY), 29.11.2002, footnote 541 (para. 198): "The Trial Chamber rejects the submission by the Prosecution that a distinction must be drawn between the principle of legality on the one hand and a so-called principle of specificity on the other, whereby the former would only be concerned with the existence of a criminal offence, while the latter would be concerned with the definition or elements of that offence."

international law is, by nature, unwritten and changes constantly. It is therefore difficult to crystallise a norm of customary international law at any given point in time.

382. This difficulty is illustrated by the simple fact that since 2012, the question of crystallising customary international law has been the subject of study by the International Law Commission ("ILC") that is expected to lead to the publication of an analytical practical guide for judges, lawyers and practitioners called upon to identify customary international law.[331]

383. Michael WOOD, the designated Special Rapporteur , has so far written four reports on the subject. The second report concerns the core issues relating to the right approach to identifying rules of customary international law, in particular, the two requirements of custom and the method for assessing their existence.[332] In that report, he recalls that international custom is defined in the ICJ Statute, Article 38(1)(b) as a "general practice accepted as law".[333]

384. After having noted the need to satisfy the two requirements of a rule of customary international law ("a general practice" "accepted as law" or *opinio juris*) in order to ascertain its existence,[334] Michael WOOD states:

> "Ascertaining whether a rule of customary international law exists is a search "for a practice which [...] has gained so much acceptance among States that it may now be considered a requirement under general international law." Such an exercise may be an "arduous and complex process", not least because "any alleged rule of customary law must [of course] be proved to be a valid rule of international law, and not merely an unsupported proposition." As elaborated below, for this task, "caution and balance are indispensable, not only in determining the right mix of what States say and do, want and believe, but also in being aware of the ambiguities with which many elements of practice are fraught."[335]

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[331] Formation and identification of customary international law, Note by Michael WOOD, Special Rapporteur, 30.05.2012, A/CN.4/653, para. 3; A/66/10, 2011, Annex A, para. 4 (all the works are available on the ILC website at: http://legal.un.org/ilc/guide/1_13.shtml).

[332] Second Report on identification of customary international law, Michael WOOD, 22.05.2014, A/CN.4/672, para. 9.

[333] Second Report on identification of customary international law, Michael WOOD, 22.05.2014, A/CN.4/672, para. 17.

[334] Second Report on identification of customary international law, Michael WOOD, 22.05.2014, A/CN.4/672, paras. 21-29.

[335] Second Report on identification of customary international law, Michael WOOD, 22.05.2014, A/CN.4/672, para. 30.

385. The Special Rapporteur notes that "[a]s the International Court has consistently made clear, it is "State practice from which customary law is derived".[336] He adds that ascertaining the practice of States is an important practical issue. The dissemination and location of practice (and *opinio juris*) "remain an important practical issue in the circumstances of the modern world, notwithstanding the development of technology and information resources".[337] He proposes that ILC should consider once more (the last time it did so was in 1950) "ways and means of making evidence of customary international law more readily available".[338] Since then, a study to this effect is in progress.[339]

386. Under such circumstances, it is crucial to be particularly rigorous and cautious in ascertaining a rule of customary international law and considering its foreseeability and accessibility. In light of that, it is surprising, to say the least, that the Supreme Court Chamber has thus far made no effort to define the two elements of a rule of customary international law, even before finding that some existed at the time of the facts under review, that is, 40 years ago.

387. Without going into as much detail as Special Rapporteur Wood, it is important to briefly point to a number core elements of the definition of general practice and its acceptance as law (*opinio juris*), both of which are required to establish the existence of a rule of customary international law.

II. GENERAL PRACTICE

388. The practice of States may take a variety of forms. It is manifested in the conduct of States "on the ground" (physical and verbal actions), diplomatic acts and correspondence, legislative acts, judgements of national courts, official publications on international law, statements made on behalf of States concerning codification efforts, practice in connection with treaties, and acts in connection with resolutions of organs or international organisations and conferences.[340]

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[336] Second Report on identification of customary international law, Michael WOOD, 22.05.2014, A/CN.4/672, para. 33.

[337] Second Report on identification of customary international law, Michael WOOD, 22.05.2014, A/CN.4/672, paras. 35 and 83.

[338] Second Report on the identification of customary international law, Michael WOOD, 22.05.2014, A/CN.4/672, paras. 35 and 82-83; Fourth Report on identification of customary international law, Michael WOOD, 08.03.2016, E/CN.4/695, para. 48.

[339] ILC Report on the work of its 68th session, 2016, A/71/10, chapter V, para. 56.

[340] Second Report on identification of customary international law, Michael WOOD, 22.05.2014, A/CN.4/672, paras. 37-48.

389. For a rule of customary international law to be identified, the practice need not be unanimous (universal), but it must be extensive, in other words "it must receive 'general' or 'widespread' acceptance", "sufficiently widespread" and "sufficiently general and uniform", "sufficiently extensive and convincing" and "participation in the practice must also be broadly representative."[341]

390. Furthermore, the practice of States must be "consistent". "Thus, contradiction in the practice of States or inconsistent conduct [...] would prevent the emergence of a rule of customary law".[342]

III. RECOGNISED AS LAW (*OPINIO JURIS*)

391. The second requirement for ascertaining customary international law is the acceptance of general practice as law. In other words, States are to "believe themselves to be applying a mandatory rule of customary international law", or "[feel] legally compelled to ... [perform the relevant act] by reason of a rule of customary law obliging them to do so".[343]

392. For example, as the ECCC Pre-Trial Chamber has noted:

> "A wealth of state practice does not usually carry with it a presumption that *opinio juris* exists; "not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it."[344]

393. The foregoing notwithstanding, it is important to note that in the Case 002/01 Appeal Judgement, the Supreme Court Chamber somehow "identified" rules of customary international law that did not exist at the time of the facts under review.

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[341] Second Report on identification of customary international law, Michael WOOD, 22.05.2014, A/CN.4/672, para. 52 and footnote 152-155, where reference is made to ICJ case law.
[342] Second Report on identification of Customary International Law, Michael WOOD, 22.05.2014, A/CN.4/672, para. 55 and footnote 168 and 171, where reference is made to the jurisprudence of the ICJ.
[343] Second Report on identification of Customary International Law, Michael WOOD, 22.05.2014, A/CN.4/672, para. 60 and footnote 182-183, where ICJ jurisprudence is cited.
[344] Pre-Trial Chamber Decision, 20.05.2010, **D97/15/9**, para. 53, footnote 144, where reference is made to ICJ jurisprudence.

Section III. *MENS REA* OF THE CRIME AGAINST HUMANITY OF MURDER

394. The Supreme Court Chamber considered that "the *mens rea* of the a crime against humanity murder as it stood in 1975 must be defined *largo sensu* so as to encompass *dolus eventualis*."[345]

395. The Trial Chamber must not do likewise in Case 002/02, as that finding is contrary to the principle of legality. The Defence reaffirms its submission in the Case 002/02 Appeal Brief, namely that at the time of the facts charged, there was no different alternative or lesser standard in customary international law than the specific intent to kill.[346]

396. The Supreme Court Chamber relied on a highly questionable analysis of the 20 August 1947 judgement of the U.S. Military Tribunal in the Nuremberg *Doctors' Trial* where the accused were charged, *inter alia*, with involvement in medical experiments conducted in Third Reich concentration camps (I).[347] Moreover, the Supreme Court Chamber's extrapolations on the various domestic laws are not persuasive as to whether in the definition of the crime of murder as it stood in 1975 encompassed any *dolus eventualis* (II).

I. NO *DOLUS EVENTUALIS* IN THE *DOCTORS' TRIAL*

397. In the Case 002/01 Trial Judgement, the Trial Chamber defines the *mens rea* of murder as:

> "The intent of the accused or of the person or persons for whom he is criminally responsible either to kill or to cause serious bodily harm in the reasonable knowledge that the act or omission would likely lead to death."[348]

398. The Defence had previously challenged that definition on the ground that in that in entering its finding, the Trial Chamber relied "solely on subsequent case law of the *ad hoc* tribunals" which "did not identify any international cases predating theirs in which that standard was applied".[349]

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[345] Case 002/01 Appeal Judgement, para. 410.
[346] Case 002/01 Appeal Brief, para. 59.
[347] *United States of America v. Karl BRANDT et al., American Military Tribunal for the Trial of War Criminals,* Nuremberg, 20.08.1947, UNWCC, Volume II ("Doctors' Trial"), pp. 171-300.
[348] Case 002/01 Trial Judgement, para. 412 [=>387].
[349] Case 002/01 Appeal Brief, para. 60.

399. In rejecting the Defence's submission, the Supreme Court Chamber appeared to have construed the *Doctors' Trial* as a case which "provides strong indication that in the post-World War II period, the crime against humanity of murder included the notion of *dolus eventualis*".[350]

400. The Supreme Court Chamber noted that the experiments for which the accused were prosecuted "had inflicted serious bodily harm on the victims". It cited the charges against Accused Karl BRANDT, HANDLOSER, Rudolf BRANDT and SIEVERS.[351]

401. The Supreme Court Chamber noted further that:

> "Whereas inflicting serious bodily harm was what the accused directly intended, they had at the same time the reasonable knowledge that their victims were likely to die as a result of the experiments. Thus, whilst an explicit definition of the mens rea of murder is lacking in the judgement in the Medical Case, it is safe to assume that the U.S. Military Tribunal did not require a showing of direct intent to kill in order to enter a conviction for murder in these circumstances."[352]

402. The Supreme Court Chamber proposes "safe to assume" reasoning, which is not grounded in the U.S. Military Tribunal judgement or on any other such authority.

403. Moreover, such reasoning is totally erroneous and is reflective of a sad reality, in that the judges are driven solely by their quest for punishment, and are ready to sacrifice intellectual integrity and legal certainty for the purpose at hand. On the one hand, the lack of an "explicit definition of the *mens rea*" should have closed the debate on that issue and prompted the Supreme Court Chamber to adopt a restrictive interpretation in favour of the Accused, pursuant to the principle of criminal legality (A).[353] On the other hand, and more importantly, given the factual circumstances of the *Doctors' Trial*, it is a cause for graver concern that the appellate chamber would render a decision which suggests such a low threshold for the intent to kill in the minds of the Nazi criminals (B).

A. <u>Lack of a definition of *mens rea*</u>

404. In the Case 002/01 Trial Judgement, the Trial Chamber omitted to identify any jurisprudence predating the facts charged, to support the adoption of an alternative subsidiary or lower threshold

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[350] Case 002/01, para. 395. It is important to point out that neither the Trial Chamber in the Case 002/01 Trial Judgement nor the Defence in the Case 002/01 Appeal Brief defined *dolus eventualis* as the intent "to cause serious bodily harm [...] that [...] would likely lead to death". The Supreme Court chose to do so. It is only binding on the Supreme Court Chamber.
[351] Case 002/01 Appeal Judgement, para. 395 and footnote 980.
[352] Case 002/01 Appeal Judgement, para. 395.
[353] See *supra*, paras. 324-330.

than that of the specific intent to kill. The fact that the Supreme Court Chamber then went on to cite only one item of jurisprudence with no definition of the *mens rea* of the crime in support of the Trial Chamber's finding shows that it is uncertain whether *dolus eventualis* forms part of the definition of murder.

405. Further, even if *dolus eventualis* was indeed part of the definition of murder in the wake of the *Doctors' Trial*, there still would be no subsequent authority illustrating a uniform and systematic practice that could be a source of a customary rule before 1975. The lack of any reference to *the Doctors' Trial* in the jurisprudence referred to by both the Trial Chamber and the Supreme Court Chamber, which admitted intent (called *dolus eventualis* or otherwise)[354] that differs from the specific intent to kill in the definition of murder, shows no customary rule existed.[355]

406. Accordingly, in the absence of an *opinio juris* showing that a customary rule existed before 1975, the Trial Chamber has no choice but to depart from the Supreme Court Chamber's erroneous reasoning and follow legal course whereby the rights of the Accused are respected, and should therefore hold that in 1975 customary international law did not include *dolus eventualis* in the definition of the crime of murder.

B. No actual *dolus eventualis*

407. In the *Doctors' Trial*, the American Military Tribunal tried twenty-three accused on several counts. Only counts 1 and 2 are relevant to the case at hand. They contain details about the crimes committed against the subjects during each medical experiment and a list the accused charged with committing those crimes.[356]

408. Twelve experiments were presented to the judges for determination: High-Altitude Experiments (A), Freezing Experiments (B), Malaria Experiments (C), Lost (Mustard) Gas Experiments (D), Sulphanilamide Experiments (E), Bone, Muscle, and Nerve Regeneration and Bone Transplantation Experiments (F), Sea-Water Experiments (G), Epidemic Jaundice Experiments

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[354] See *supra*, para. 398.
[355] *Kordic* and *Cerkez* Trial Judgement, (ICTY), 26.02.2001, para. 236; *Stakić* Trial Judgement, (ICTY), 31.07.2003, para. 587; *Duch* Trial Judgement of 26.10.2010, paras. 331 and 333. See also the case law on which the precedents are based: *Akayesu* Trial Judgement, (ICTR), 02.09.1998, para. 589; *Kayishema* Trial Judgement, (ICTR), 21.05.1999, paras. 139-140; *Kupreskić* Trial Judgement, (ICTY), 14.01.2000, paras. 560-561; *Blaskić* Trial Judgement, (ICTY), 03.03.2000, para. 217; *Blagojević* Trial Judgement, (ICTY), 17.01.2005, para. 556.
[356] *Doctors' Trial*, pp. 174-178.. 179 and 180, describing other macabre programmes for which some of the accused were prosecuted. Murder being the requisite means of bringing them to fruition, the direct intent to kill is inherent.

(H), Sterilization Experiments (I), Spotted Fever Experiments (J), Experiments with Poison (K), Incendiary Bomb Experiments (L).[357]

409. The charges relating to experiments (F) (G) (I) and (L) do not include the death of the victims. In this instance, the accused are therefore not charged with murder.

410. Accordingly, there remain eight experiments in respect of which fourteen accused were convicted of murder.[358] A careful reading of the judgement reveals that none of the convictions is based on an alleged *dolus eventualis* and that the Supreme Court Chamber's finding to the contrary amounts to denial of the history of the concentration camps.

411. The eight experiments in question (like the four others) have one thing in common, namely that they were performed in the Nazi concentration camps: Ravensbruck for experiments (E) and (I), Saschsenhausen for experiments (D), (H), Natzweiler for experiments (D) (H),(J), Dachau for experiments (A) (B) and (C), and lastly, Buchenwald for experiments (J) and (K).[359]

412. Anyone who is at all conversant with Second World War history knows that those camps were used for detaining specific categories of people (namely Jews, Gypsies, prisoners of war and political opponents), people that the Hitler regime designated for certain death. The madness which drove the Nazis to exterminate their victims is revealed in the International Military Tribunal judgement:

> "One of the most notorious means of terrorizing the people in occupied territories was the use of concentration camps. They were first established in Germany at the moment of the seizure of power by the Nazi Government. Their original purpose was to imprison without trial all those persons who were opposed to the Government, or who were in any way obnoxious to German authority. With the aid of a secret police force, this practice was widely extended, and in course of time concentration camps became places of organized and systematic murder, where millions of people were killed.
> […]
> A certain number of the concentration camps were equipped with gas chambers for the wholesale destruction of the inmates, and with furnaces for the burning of the bodies. Some of them were in fact used for the extermination of Jews as part of the "final solution" of the Jewish problem. Most of the non-Jewish inmates were used for labour, although the conditions under which they worked made labour and death almost synonymous terms. Those inmates who became ill and were unable to work were either destroyed in the gas chambers or sent to special infirmaries, where they were given

[357] *Doctors' Trial*, pp. 174-178.
[358] *Doctors' Trial*, p. 198 (Karl BRANDT), p. 207 (HANDLOSER), p. 217 (SCHROEDER), p. 222 (GENZKEN), p. 228 (GEBHARDT), p. 241 (Rudolf BRANDT), p. 248 (MRUGOWSKY), p. 26 (SIEVERS), p. 271 (ROSE), p. 281 (BRACK), p. 285 (BECKER-FREYSENG), p. 290 (HOVEN), p. 295 (OBERHEUSER) and p. 297 (FISCHER).
[359] *Doctors' Trial*, pp. 174-178.

> entirely inadequate medical treatment, worse food if possible than the working inmates, and left to die."[360]

413. Once the inmates were inside the camp gates, the question was therefore not whether they would die but rather how they would die. The fact that all of them did not die from the detention conditions does not mean that in those places death was only a likelihood. Yet, that is precisely how the Supreme Court Chamber sees it.

414. Moreover, the Supreme Court Chamber's finding does not stand up to scrutiny considering the methods that were employed for the experiments on the inmates.

415. As regards experiments (A) and (B), the ill-treatment meted out inevitably led to death.[361] The language employed by the Nuremberg Tribunal judges is unequivocal as to the perpetrators' specific intent to kill. As for experiment (A), the Judges held for example that:

> "Concentration camp inmates were killed while being subjected to experiments conducted in the chamber."[362]

416. As regards experiment (B), in addition to the death of the subjects, it is also reported that the organs extracted were used on "5 experimental subjects killed" as part of other experiments.[363] While it is uncertain whether any convictions for murder were recorded in respect of these other experiments, reference to them reveals that no convictions were recorded in respect of criminal intent of the perpetrators. The intent to kill is direct. In fact, as regards experiment (B), the International Military Tribunal judges held further that:

> "The inmates were subjected to cruel experiments at Dachau in August 1942. Victims were immersed in cold water until their body temperature was reduced to 28 degrees Centigrade, when they died immediately."[364]

417. Four other experiments consisted in infecting inmates with deadly diseases: malaria for experiment (C), gas gangrene and tetanus for experiment (E), jaundice for experiment (H) and typhus for

[360] Trial of the Major War Criminals before the International Criminal Tribunal, 01.10.1946, IMIT, Vol. I, pp. 234-235.
[361] *Doctors' Trial*, pp. 175, 236-237 and 255-256.
[362] *Doctors' Trial*, p. 282.
[363] *Doctors' Trial*, pp. 200-201, p. 237 and 256.
[364] Trial of the Major War Criminals before the International Criminal Tribunal, 01.10.1946, TMI, Vol. I, p. 252.

experiment (J), and then testing random therapeutic protocols on them.[365] All those experiments inevitably led to the death of the subjects, with a 90% mortality rate for experiment (J).[366]

418. Finally, for the last two experiments, the accused used two equally deadly products: mustard gas for experiment (D) and poison for experiment (K).[367] For the latter experiment, some victims were even killed immediately for purposes of conducting an autopsy, after being secretly injected with poison.[368]

419. In those two sets of experiments, the deliberate decision to expose the victims to a deadly disease or substance shows the specific intent to kill. There is no need to expound further. Any other position as to intent would be unsustainable.

420. In conclusion, the Supreme Court Chamber's assertion that the accused in the *Doctor's Trial* had "the reasonable knowledge that their victims were likely to die as a result of the experiments" is to be seen as just a flair of rhetoric. It goes without saying that the subjects of the experiments had reasonable knowledge given that c were destined to die and that the experiments led to their death. Where the law requires rigour, the Supreme Court Chamber elected to use an euphemism of the kind that one would expect from Dr Ernst Robert GRAWITZ, the Schutzstaffeln Chief Medical Officer,[369] who used to write the words "deaths must be anticipated" on the bodies of inmates who were destined to die and had been selected solely for that purpose, before injecting them with jaundice.[370]

II. DOMESTIC LAWS AS THEY STOOD IN 1975 ARE NOT APPLICABLE

421. In support of its far-fetched holding concerning the *Doctors' Trial*, the Supreme Court Chamber asserts that it "is further reinforced when domestic practices regarding the crime of murder are taken into consideration",[371] which it subsequently struggles to demonstrate by citing laws from fourteen countries.[372]

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[365] *Doctors' Trial*, pp. 175-178.
[366] *Doctors' Trial*, pp. 177-178.
[367] *Doctors' Trial*, pp. 176 and 178.
[368] *Doctors' Trial*, p. 178.
[369] *Doctors' Trial*, p. 186.
[370] *Doctors' Trial*, p. 194.
[371] Case 002/01 Appeal Judgement, para. 395.
[372] Case 002/01 Appeal Judgement, paras. 397-408.

422. However, the findings that the Supreme Court Chamber recorded in reliance on those domestic laws breach the principle of legality for a variety of reasons. They are based on an incorrect interpretation of Cambodian law (A), post-1975 law (B) and earlier law which cannot constitute customary international law (C).

A. Erroneous citation of Cambodian law

423. The Supreme Court Chamber cites Articles 503, 504 and 505 of the 1956 Cambodian Penal Code which does not enshrine *dolus eventualis*.[373] Article 503 enshrines "involuntary homicide".[374] That is therefore extraneous to the notion of *dolus eventualis*, which requires characterisation of the intent to kill, however slight. Article 504 characterises as "murder or an attempt to murder" acts "caused or that can be caused by immediate intention with the aim to death of someone".[375] That is quite simply a manifestation of specific intent to kill.

424. Only Article 505 merits further commentary. It provides:

> "The judges can conclude that a murderer intentionally kills another one, if [the] murderer uses lethal weapons, or strongly hits, or there are many injur[i]es on the dea[d] [person's] bod[y], or a murderer certainly chose to hit on the vital parts of body [thereby causing the person's] death."[376]

425. The Supreme Court Chamber clearly demonstrated its bias by citing that article. In this instance, the specific intent to kill is the only presumed intent. It is deduced from the agent's conduct of which the extreme gravity manifests the intent to kill. It is therefore hard to fathom why the Supreme Court Chamber drew a parallel between Article 505 and the *dolus eventualis* "found" in the *Doctors' Trial*. Instead, the Supreme Court Chamber should have relied upon the presumption created by the article so as to avoid the pitfall. Also, it should have relied upon that presumption to deduce the perpetrators' specific intent to kill from his knowingly exposing subjects to disease and lethal substances.[377] Somehow, unfathomably, the Supreme Court Chamber elected to take a different course of action erroneously and for the wrong reasons

[373] Case 002/01 Appeal Judgement, para. 397.
[374] Cambodian Code of Criminal Procedure of 1956, Article 503.
[375] Cambodian Code of Criminal Procedure of 1956, Article 504.
[376] Cambodian Code of Criminal Procedure of 1956, Article 505.
[377] See *supra*, para. 419.

B. Citing post-facto laws

426. Many of other authorities cited by the Supreme Court Chamber are post-1975.[378] They are therefore not part of the law as it stood at the time relevant to the facts.[379]

C. Citing earlier laws that are not part of customary international law

427. Apart from the provisions of the Cambodian Penal Code that are to be precluded,[380] the only pre-1975 authorities cited by the Supreme Court Chamber are – in regard to civil law – one 1879 Belgian scholarly article and one provision of the 1969 Criminal Code of Poland.[381]

428. As for common law, the authorities cited include a 1974 decision of the House of Lords, an identical provision of the criminal codes of India and Singapore,[382] provisions of the criminal codes of four of Australia's six federal states and two of its three federal territories, three decisions of two Supreme Courts of Australia, one decision of the High Court of Australia and, lastly, one decision of a South African court.[383]

429. This miscellany of sources does not disclose any widespread or uniform state practice or *opinio juris* establishing the existence of any pre-1975 norm of customary international law.[384]

Section IV. FABRICATING A HYBRID JCE

430. After having violated the doctrine of precedent regarding murder as a crime against humanity, the Supreme Court eviscerated it by fabricating a hybrid JCE in order to convict the Accused before the ECCC.

431. After considering whether or not JCE I and JCE III existed in customary international law (I), the Supreme Court Chamber defined a hybrid JCE without any basis (II). Not only is the Supreme

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[378] Case 002/01 Appeal Judgement, footnote 993-994 (France), 995 (Belgium), 996 (Germany), 997 (Italy), 998 (Spain), 999 (Poland), 1001 (England and Wales) 1003 (United States, reference to the 1962 U.S. Criminal Code which came into force in 1985), 1004 (Canada), 1007 (Australia, only as a source of jurisprudence) and 1008 (Australia).
[379] See *supra*, paras. 309-313 and 403.
[380] See *supra*, paras. 423-425.
[381] Case 002/01, Appeal Judgement, footnotes 995 (Belgium) and 999 (Poland). 1969 Criminal Code of Poland replaced that of 1932, which is also cited by the Supreme Court Chamber.
[382] The provisions are identical because the two countries were under British rule for a long time.
[383] Case 002/01 Appeal Judgement, footnote 1000 (England and Wales), 1005 (India), 1006 (Singapore) 1007 (Australia, the sources of law, two decisions of two Supreme Courts and one decision of a High Court), 1009 (Australia, one Supreme Court decision) and 1011 (South Africa).
[384] See *supra*, paras. 388-392.

Court Chamber's definition at odds with the authorities it considered in determining whether categories of JCE existed in customary international law (III), but also the course of action it chose is unprecedented in modern international criminal law (IV). The Supreme Court Chamber ultimately retroactively applied a law that it created on 23 November 2016, one that, moreover, the Accused could not have foreseen, but which paved the way for their conviction (V).

I. WHETHER JCE-I AND JCE-III EXISTED IN CUSTOMARY INTERNATIONAL LAW AT THE TIME RELEVANT TO THE FACTS UNDER REVIEW

432. The Supreme Court Chamber started by observing that the Chambers of the ECCC, as well as the *ad hoc* Tribunals, the SCSL and STL have addressed at length the question of whether and under which conditions customary international law provides for individual criminal responsibility for international crimes in respect of individuals who made, with the requisite intent, a contribution to the implementation of a common criminal purpose.[385]

433. It recalled that the *Tadić* Appeal Judgement (1999) marked the first time that an international court undertook to set out the elements of liability for what it termed "JCE", based upon a review of post-World War II jurisprudence, national jurisprudence and international treaties. On the basis of that review, the ICTY Appeals Chamber identified three forms of JCE:

> 1) the "basic" form (JCE I) covering cases in which "all co-defendants, acting pursuant to a common design, possess the same criminal intention; for instance, the formulation of a plan among the co-perpetrators to kill, where, in effecting this common design (and even if each co-perpetrator carries out a different role within it), they nevertheless all possess the intent to kill." [386]
>
> 2) the "systemic" form (JCE II) covering cases of concentration camps in which "[t]he notion of common purpose was applied to instances where the offences charged were alleged to have been committed by members of military or administrative units such as those running concentration camps; i.e., by groups of persons acting pursuant to a concerted plan", while having "knowledge of the nature of the system" and "the intent to further the common concerted design to ill-treat inmates";[387]
>
> 3) the so-called "extended" form (JCE III) covering "cases involving a common design to purse one course of conduct where one of the perpetrators commits an act which, while outside the common design, was nevertheless a natural and foreseeable consequence of the effecting of that common purpose".[388]

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[385] Case 002/01 Appeal Judgement, para. 773
[386] Case 002/01 Appeal Judgement, para. 773; *Tadić* Appeal Judgement (ICTY), 15.07.1999, para.196.
[387] Case 002/01 Appeal Judgement, para. 773; *Tadić* Appeal Judgement (ICTY), 15.07.1999, paras. 202-203.
[388] Case 002/01 Appeal Judgement, para. 773; *Tadić* Appeal Judgement (ICTY), 15.07.1999, para. 204.

434. The Supreme Court Chamber also noted that the elements of the notion of JCE have been further confirmed and fine-tuned by subsequent case law, in particular by the Appeals Chamber of the international criminal tribunals in *Rwamakuba* and *Brđanin*, based on an analysis of post-war case law. It recalled that the ECCC Pre-Trial Chamber concluded that in light of the London Charter, Control Council Law No. 10, international cases and authoritative pronouncements, JCE I and JCE II were recognised forms of responsibility in customary international law at the time relevant to the proceedings before the ECCC, unlike JCE III which was not applicable to the proceedings before the ECCC for that reason.[389]

435. The Supreme Court Chamber held that the phrase "significant contribution to the implementation of the common purpose", which derives from ICTY jurisprudence, is intended to express the essence of post-World War II case law, namely that individual criminal responsibility may arise in circumstances where an individual makes a contribution to the implementation of a common criminal purpose, even if that contribution does not amount to the *actus reus* of the crime and is removed from the commission of the crime itself.[390] It gave examples of cases involving accused who were convicted of taking part in a common criminal purpose even though they did not have a major role in the crimes: *Almelo*, *Schonfeld*, *Einsatzgruppen*, *RuSHA* and *Justice*.[391] It also cited Article II(2) of Control Council Law No. 10, which provides that a person is deemed to have committed one of the crimes defined by that Law:

> "if he was (a) a principal or (b) was an accessory to the commission of any such crime or ordered or abetted the same or (c) took a consenting part therein or (d) was connected with plans or enterprises involving its commission (…)"[392]

436. It then analysed the elements of JCE liability and concluded that the common criminal purpose is at the core of this mode of liability, a conclusion that is confirmed by the jurisprudence of the ICC and the SCSL analysis of post-World War II jurisprudence. It then noted that:

> "*In the* Tadić *Case, the ICTY Appeals Chamber required "[t]he existence of a common plan, design or purpose which* amounts to or involves the commission of a crime *provided for in the Statute"*. (*emphasis supplied*)[393]

[389] Case 002/01 Appeal Judgement, para. 774, referring to a decision of the Pre-Trial Chamber dated 20.05.2010, **D97/15/9**.
[390] Case 002/01 Appeal Judgement, para. 779.
[391] Case 002/01 Appeal Judgement, paras. 780-787.[392] Case 002/01 Appeal Judgement, para. 788, citing Control Council Law No. 10 dated 20.12.1945.
[392] Case 002/01 Appeal Judgement, para. 788, citing Control Council Law No. 10 dated 20.12.1945.
[393] Case 002/01 Appeal Judgement, para. 789; *Tadić* Appeal Judgement (ICTY), 15.07.1999, para. 227-ii: "The

437. The Supreme Court Chamber noted that some ICTY cases, JCE flowed from common plans related to purposes that were definitely not criminal and whose implementation involved the commission of crimes: *Martić*, *Krajišnik* and *Prlić* Appeal Judgements.[394] It also emphasised that in line with the same jurisprudence, the SCSL Appeals Chamber stated in *Brima* that:

> "[i]t can be seen from a review of the jurisprudence of the international criminal tribunals that the criminal purpose underlying the JCE can derive not only from its ultimate objective, but also from the means contemplated to achieve that objective. The objective and the means to achieve the objective constitute the common design or plan."[395]

438. It then turned to the question of JCE III. First. it approved of the Pre-Trial Chamber's Decision, with which the Trial Chamber concurred, a decision in which the Pre-Trial Chamber concluded that the post-war decisions upon which the ICTY Appeals Chamber relied in *Tadić* to which the Trial Chamber referred did not constitute "a sufficiently firm basis" for finding that JCE III existed in customary international law.[396] It again analysed several post-World War II cases which were referred to by the Co-Prosecutors,[397] including Italian cases,[398] as well as 13 cases dating from the post-World War II period,[399] which, in its view, do not amount to proof that JCE III existed in customary international law.

439. In response to the Co-Prosecutors' argument that the existence of JCE liability may be established based on a review of domestic criminal law, the Supreme Court Chamber pointed out that the cases and domestic law are devoid of an international element and may not qualify as a state practice relevant to identifying a rule of customary international law. It noted further that the Co-Prosecutors' examples were also not sufficient to establish the existence of a general principle of law that crimes of others may be imputed to an accused who did not personally carry out the *actus reus*, when those crimes were not encompassed by a common purpose.[400]

440. The Supreme Court Chamber therefore found that JCE III liability did not exist in customary international law at the time relevant to the charges in the case at hand[401] before establishing the

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existence of a common plan, design or purpose which amounts to or involves the commission of a crime provided for in the Statute."

[394] Case 002/01 Appeal Judgement, para. 789 and footnotes 2066 and 2069.
[395] Case 002/01 Appeal Judgement, para. 789 and footnote 2067.
[396] Case 002/01 Appeal Judgement, para. 791.
[397] Case 002/01 Appeal Judgement, paras. 792-794.
[398] Case 002/01 Appeal Judgement, paras. 795-798.
[399] Case 002/01 Appeal Judgement, paras. 799-804 and footnote 2107.
[400] Case 002/01 Appeal Judgement, paras. 805-806.
[401] Case 002/01 Appeal Judgement, para. 807.

criteria for deciding which crimes are encompassed by a common purpose.

II. SUPREME COURT CHAMBER'S FABRICATION OF A HYBRID JCE: JCE IV

441. After the lengthy arguments summed up *supra*, the Supreme Court Chamber defined the common purpose. It recalled that the jurisprudence since the *Tadić* Appeal Judgement requires the common purpose to amount to or involve the commission of a crime.[402]

442. The Supreme Court Chamber deemed that the common purpose "amounts" to the commission of a crime if "the commission of the crime is the, or among the, primary objective(s) of the common purpose".[403]

443. The Supreme Court Chamber pointed out that this wouldbe the case, for example, in a scenario where the common purpose is to kill a group of political enemies. In such a scenario, there would be no doubt that the members of the joint criminal enterprise acted with the specific intent to kill.[404]

444. Further, the Supreme Court Chamber considered that the situation is different when the common purpose involves the commission of a crime. In fact:

> "In contrast, the common purpose "involves" the commission of a crime if the crime is a means to achieve an ulterior objective[405] (which itself may not be criminal). In such a scenario, it is not necessary that those who agree on the common purpose actually *desire* that the crime be committed, as long as they recognise that the crime is to be committed to achieve an ulterior objective. This may include crimes that are foreseen as means to achieve a given common purpose, even if their commission is not certain." (*emphasis supplied*).[406]

445. It cited the example of a gang which agrees to break into a house to rob it and to use, if necessary, deadly force to overcome any resistance that it may encounter. In the Supreme Chamber's view, it would be unconvincing to conclude that the eventual murder was not encompassed by the common purpose because it was not certain that murder would actually be committed in the course of the break-in. In such a scenario, the crime of murder was a constituent element of the plan as conceived, even if the members of the gang did not know whether it would actually be committed.[407]

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[402] Case 002/01 Appeal Judgement, para. 807.
[403] Case 002/01 Appeal Judgement, para. 807.
[404] Case 002/01 Appeal Judgement, para. 807.
[405] *Brima* Appeal Judgement (SCSL), para. 80 ("the Appeals Chamber concludes that the requirement that the common plan, design or purpose of a joint criminal enterprise is inherently criminal means that it must either have as its objective a crime within the Statute, or contemplate crimes within the Statute as the means of achieving its objective").
[406] Case 002/01 Appeal Judgement, para. 808 (reference included, footnote 2132 of the Appeal Judgement).
[407] Case 002/01 Appeal Judgement, para. 808.

446. The Supreme Court Chamber deemed that if attaining the objective of the common purpose may bring about the commission of crimes, but it is agreed to pursue this objective regardless, these crimes are encompassed by the common purpose in that, even though they not directly intended, they are contemplated by it:

> "Whether a crime was contemplated by the common purpose is primarily a question of fact that – absent an express agreement – has to be assessed taking into account all relevant circumstances, including the overall objective of the common purpose and the likelihood that it may be attained only at the cost of the commission of crimes. What is of note is that the common purpose may encompass crimes in which the commission is neither desired nor certain, just as it is sufficient for the commission of certain crimes that the perpetrator acted with *dolus eventualis* and therefore neither desired that the crime be committed nor was certain that it would happen."[408]

447. The Supreme Court Chamber noted further that in all the scenarios it described:

> "[t]here is a meeting of minds – express or implicit – in respect of this crime of those who agree on the common purpose. Thus, the members of the JCE must accept the commission of the crime either as a goal, as an inevitable consequence of the primary purpose or as an eventuality treated with indifference. To the extent that those agreeing on the common purpose are not expected to carry out the *actus reus* of the crime themselves, but rely on others to do so, this may be construed as a form of delegated authority for the direct perpetrator to make a decision as to the ultimate implementation of the *actus reus*; again this bears resemblance with the concept of *dolus eventualis*. Conversely, where the crime was not encompassed by the common purpose in the sense specified above, its commission was an autonomous decision of the direct perpetrator and there is no basis for its imputation to others."[409]

448. Further ahead in the Case 002/01 Appeal Judgement, the Supreme Court Chamber analyses the law applicable to the requisite standard of *mens rea*. Citing the *Kvočka* Appeal Judgement (ICTY), it recalls that the requirement is that the accused and other members of the JCE share "the intent to effect the common purpose". It deems that it is nevertheless a general statement that requires further elaboration bearing in mind both the crimes at issue and the circumstances of the case.[410] It considers that:

> "depending on the crimes at issue and the factual scenario, it may be appropriate to consider whether the accused knew of the substantial likelihood that crimes would be committed."[411]

449. The Supreme Court Chamber's reasoning, in its entirety, is flawed. To concur with it would be to consider that a form of JCE exists which combines the elements of JCE I and JCE III with an

[408] Case 002/01 Appeal Judgement, para. 808.
[409] Case 002/01 Appeal Judgement, para. 809.
[410] Case 002/01 Appeal Judgement, para. 1054 and footnote 2841.
[411] Case 002/01 Appeal Judgement, para. 1055.

additional *mens rea* which may vary depending on the facts and circumstances at issue. While such odd reasoning may be consistent with partisan and repressive logic, it is entirely without foundation.

450. To the extent that the Supreme Court Chamber failed to cite any provisions in support of its assertions, its definition of JCE cannot be deemed to have existed in customary international law at the time relevant to the charges in the case at hand. By itself, the definition cannot qualify as a state practice that is recognised as law.

451. Moreover, none of the authorities it analysed beforehand supports its definition.

III. NO HYBRID JCE EXISTS IN CUSTOMARY INTERNATIONAL LAW

452. In order to circumvent the non-applicability of JCE III liability at the ECCC, the Supreme Court Chamber, by a sleight of hand, included the foreseeable crimes under JCE III within the common purpose. However, the truth is that it is precisely because those crimes are foreseeable that are not encompassed by the common purpose. In light of the authorities considered by the Supreme Court Chamber, to argue the contrary would be inimical.

A. The *Tadić* Appeal Judgement and post-World War II jurisprudence

453. As recalled by the Supreme Court Chamber, i the ICTY Appeal Chamber identified three forms of JCE liability in the *Tadić* Appeal Judgement by analysing a variety of sources of post-World War II jurisprudence; that jurisprudence was subsequently confirmed.[412] According to it, the three forms of JCE liability have the same *actus reus* but a different *mens rea*.

454. The *actus reus* common to the three forms of JCE liability involves a plurality of persons, the existence of a common plan, design or purpose which amounts to or involves or implies the commission of crimes; participation of the accused may take the form of assistance in or contribution to the execution of the common plan or purpose.[413]

455. By contrast, the *mens rea* element differs according to the JCE category at issue:

> - JCE I: the intent to perpetrate a certain crime, this being the shared intent on the part of all co-perpetrators (*direct intent*),
>
> - JCE II: personal knowledge of the system of ill-treatment, as well as the intent to further

[412] Case 002/01 Appeal Judgement, paras. 773-774.
[413] *Tadić* Appeal Judgement (ICTY), 15.07.1999, para. 227.

to this common concerted system of ill-treatment (*direct intent*),

- JCE III: the intent to participate in and further the JCE or, in any case, to the commission of a crime by the group. In addition, "responsibility for a crime other than the one agreed upon in the common plan arises only if, under the circumstances of the case, (i) it was *foreseeable* that such a crime might be perpetrated by one or other members of the group and (ii) the accused *willingly took that risk*." (*dolus eventualis*)[414]

456. Accordingly, in all ECCC cases, the common purpose entails or implies the commission of crimes. However, it is only in regard to JCE III that liability is incurred for crimes other than those agreed upon as part of the common purpose, that is to say, foreseeable crimes which the accused wilfully took the risk to perpetrate in order to realise the common purpose.

457. The ICTY Appeal Chamber gave examples for each category of JCE liability. For JCE I, the example is the formulation of a plan to kill where each perpetrator carries out a different role. In such an instance, even if the accused did not personally carry out the killing, he or she must have had intent to obtain that result.[415]

458. The two examples of JCE III given for cases "involving a common design to pursue one course of conduct where one of the perpetrators commits an act which, while outside the common design, was nevertheless a natural and foreseeable consequence of the effecting of that common purpose" are as follows:

> "An example of this would be a common, shared intention on the part of a group to forcibly remove members of one ethnicity from their town, village or region (to effect "ethnic cleansing") with the consequence that, in the course of doing so, one or more of the victims is shot and killed. While murder may not have been explicitly acknowledged to be part of the common design, it was nevertheless foreseeable that the forcible removal of civilians at gunpoint might well result in the deaths of one or more of those civilians. Criminal responsibility may be imputed to all participants within the common enterprise where the risk of death occurring was both a predictable consequence of the execution of the common design and the accused was either reckless or indifferent to that risk. Another example is that of a common plan to forcibly evict civilians belonging to a particular ethnic group by burning their houses; if some of the participants in the plan, in carrying out this plan, kill civilians by setting their houses on fire, all the other participants in the plan are criminally responsible for the killing if these deaths were predictable."[416]

459. In the example concerning JCE I liability, killing is foreseen in the plan. In the first example of JCE III, it is the forcible removal at gunpoint which is intended plan, while the death of civilians is only a foreseeable consequence of the implementation of the plan. In the second example of JCE

[414] *Tadić* Appeal Judgement (ICTY), 15.07.1999, para. 228 (*emphasis supplied*)
[415] *Tadić* Appeal Judgement (ICTY), 15.07.1999, para. 196.
[416] *Tadić* Appeal Judgement (ICTY), 15.07.1999, para. 204.

III liability, it is the forceful evictions of civilians by burning down their houses, and not the deaths resulting therefrom which are the foreseeable consequence.

460. In both of these examples, the intent is therefore not to cause the deaths of civilians. Although they are foreseeable and the perpetrators are oblivious to that risk, they are only a foreaseeable consequence of the implementation of the eviction and are not a necessary means to realise that objective. In other words, the foreseeable deaths are not part of the plan.

461. The Supreme Court Chamber's example concerning "JCE through a break-in" entails breaking into a house through the use of deadly force to overcome any resistance. In such an instance, the objective is the break-in. The eventual murder, even though it is a risk taken deliberately, can only be a natural consequence of realising the criminal plan. It is not a necessary means of realising the plan. Since its realisation is not required for the objective to be achieved (unlike the break-in and the theft), it is not part of the common purpose.

462. In all the foregoing scenarios, the participants devise a common plan to commit crimes. It is those crimes which are encompassed in the common purpose. However, where participants agree to take the risk of committing a crime that is a consequence of effecting their plan, only the risk is part of the plan whereas the crime —if it is actually committed – is extraneous to the plan. The eventual crime exceeds the common purpose, which is the reason why it is an "extended" form of liability.

463. Antonio Cassese, a judge on the *Tadić* appeal bench, who is credited with distinguishing between the three categories of JCE, called JCE I "liability for a common intentional purpose" and JCE III "incidental criminal liability based on foresight and voluntary assumption of risk." [417]

464. Consequently, responsibility is incurred for intentional crimes under JCE I. Such responsibility can only be incurred for crimes that are foreseeable under JCE III.

465. The post-war authorities which the Supreme Court analysed of its own motion before offering its own definition of the common purpose are a case in point. Foreseeable crimes are not considered part of the common criminal purpose in <u>any</u> of those authorities cited.

466. The only instances where the question of foreseeability arises is in regard to the Supreme Court Chamber's determination as to whether at the time relevant the charges in the case at hand, an

[417] Cited in *Kai AMBOS Amicus Curiae* on JCE, 04.11.2008, **D99/3/27**, footnote 7.

accused was in a position to foresee his or her responsibility for crimes "which were not encompassed by the common purpose".[418]

467. By contrast, in all the authorities concerning the existence of JCE I (and JCE II) in customary international law, the questions of foreseeability, possibility and probability never arise. All crimes that are the part of a common plan are intentional.

468. In fact, when the Pre-Trial Chamber analysed all the sources cited in the *Tadić* Appeal Judgement in relation to JCE I, it noted that States Parties to the Statute of the IMT and the Control Council Law No. 10 acknowledged that responsibility was extended:

> "individuals will also be responsible when they intentionally participate in the formulation or execution of a common purpose or enterprise involving the commission of such crimes. This constitutes undeniable support of the basic and systemic forms (JCE I & II) of JCE liability."[419]

469. The Pre-Trial Chamber then analysed the eight cases cited in the *Tadić* Appeal Judgement (including *Almelo*, *Schonfeld*, and *Einsatzgruppen*, which were analysed by the Supreme Court Chamber) which demonstrate that the accused had to have "the intent" to commit the crimes.[420] It again considered the Control Council Law No. 10 cases: *Justice* and *RuSHA* (also analysed by the Supreme Court Chamber), in which the crimes encompassed by the plan for which the accused were convicted were indeed wilful and by no means foreseeable.[421]

470. Accordingly, in the post-World War II period, only intentional crimes are encompassed by a common criminal purpose, whereas foreseeable crimes are not.

471. The Supreme Court Chamber's distinction between a purpose which "amounts to" the commission of crimes and a purpose which "involves" perpetration is immaterial.

472. Furthermore, when the Supreme Court Chamber holds that "the jurisprudence since Tadić requires that the common purpose "amounts to" or ""involves" the commission of a crime,"[422] it overlooks the fact that in Control Council Law No. 10 (which it cites) already relates to a crime "connected with plans or enterprises involving its commission".[423]

473. The only difference between "pre-*Tadić*" and "post-*Tadić*" case law is that the ICTY and the SCSL

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[418] Case 002/01 Appeal Judgement, para. 790, and 791-804 (in particular, paras. 793, 795, 796, 798 and 800).
[419] Pre-Trial Chamber Decision, 20.05.2010, para. 58.
[420] Pre-Trial Chamber Decision, 20.05.2010, para. 62.
[421] Pre-Trial Chamber Decision, 20.05.2010, paras. 65-68.
[422] Case 002/01 Appeal Judgement, para. 807 (*emphasis added*).
[423] Case 002/01 Appeal Judgement, para. 788, citing Article II-2 of Control Council Law No. 10 (*emphasis added*).

have since heard cases in which criminal means had been used to implement non-criminal plans. However, none of the cases in this category cited by the Supreme Court Chamber have applied a hybrid JCE that includes crimes foreseeable in the common purpose.

B. Cases concerning a non-criminal purpose as such

474. Before conjuring up a *dolus eventualis* of JCE III in JCE I, the Supreme Court Chamber stated that "the common purpose *'involves' the commission of a crime if the crime is a* means *to achieve an ulterior objective*".[424] It then went on to cite *Brima* (SCSL), to which it had previously referred, as well as *Martić*, *Krajišnik* and *Prlić* (ICTY).[425] None of those cases supports the Supreme Court Chamber's fabrication.

1. *Brima*

475. In *Brima*, the Trial Chamber found that the Indictment was defective owing to the non-criminal nature of the common purpose of the alleged JCE: "to take any actions necessary to gain and exercise political power and control over the territory of Sierra Leone".[426] The Prosecution appealed this finding.

476. The Appeals Chamber stated that:

> "It can be seen from a review of the jurisprudence of the international criminal tribunals that the criminal purpose underlying the JCE can derive not only from its ultimate objective, but also from the means contemplated to achieve that objective. The objective and the means to achieve the objective constitute the common design or plans."[427]
>
> "[T]he requirement that the common plan, design or purpose of a joint criminal enterprise is inherently criminal means that it must either have as its objective a crime within the Statute, or contemplate crimes within the Statute as the means of achieving its objective."[428]

477. The Appeals Chamber reviewed the Indictment in question and found it not to be defective.[429] Yet, it decided not to amend the factual findings or to refer the case to another trial chamber, "having regard to the interest of justice."[430]

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[424] Case 002/01 Appeal Judgement, para. 808 (*emphasis supplied*).
[425] Case 002/01 Appeal Judgement, para. 808 and footnote 2132, and para. 789 and footnotes 2066, 2067 and 2069.
[426] *Brima* Appeal Judgement (SCSL), 03.03.2008, para. 67
[427] *Brima* Appeal Judgement (SCSL), 03.03.2008, para. 76
[428] *Brima* Appeal Judgement (SCSL), 03.03.2008, para. 80
[429] *Brima* Appeal Judgement (SCSL), 03.03.2008, paras. 81-86
[430] *Brima* Appeal Judgement (SCSL), 03.03.2008, para. 87

478. According to the Indictment:

> "The crimes alleged in this Indictment, including unlawful killings, abductions, forced labour, physical and sexual violence, use of child soldiers, looting and burning of civilian structure, were either actions within the joint criminal enterprise or were reasonably foreseeable consequence of the joint criminal enterprise. » (*emphasis added*)."[431]

479. It is clear in this instance that the foreseeable crimes are considered to be outside of the common purpose.

480. Moreover, the Appeals Chamber allowed the Prosecution to plead "the basic and extended forms of the JCE in the alternative."[432]

2. *Martić*

481. In *Martić*, it was held that although the political aims of the Serb leadership "to unite Serb areas in Croatia and in BiH with Serbia in order to establish a unified territory" did not "amount to a common purpose within the meaning of the law on JCE [...]", "where the creation of such territories is intended to be implemented through the commission of crimes within the Statute this may be sufficient to amount to a common criminal purpose."[433]

482. In that case, the Accused was charged with participation in a JCE I and a JCE III,[434] the Trial Chamber held that:

> "From at least August 1991, the political objective to unite Serb areas in Croatia and in BiH with Serbia in order to establish a unified territory was implemented through widespread and systematic armed attacks on predominantly Croat and other non-Serb areas and through the commission of acts of violence and intimidation. In the Trial Chamber's view, this campaign of violence and intimidation against the Croat and non-Serb population was a consequence of the position taken by the SAO Krajina and subsequently the RSK leadership that co-existence with the Croat and other non-Serb population, in Milan Martić's words, 'in our Serbian territories of the SAO Krajina', was impossible. Thus, the implementation of the political objective to establish a unified Serb territory in these circumstances necessitated the forcible removal of the non-Serb population from the SAO Krajina and RSK territory. The Trial Chamber therefore finds beyond reasonable doubt that the common purpose of the JCE was the establishment of an ethnically Serb territory through

[431] *Brima* Appeal Judgement (SCSL), 03.03.2008, para. 81, citing, *inter alia*, para. 34 of the Indictment.
[432] *Brima* Appeal Judgement (SCSL), 03.03.2008, para. 85
[433] *Martić* Appeal Judgement (ICTY), 08.10.2008, para. 112, referring to the *Martić* Judgement (ICTY), 12.06.2007, para. 442
[434] *Martić* Trial Judgement (ICTY), 12.06.2007, para. 435

the displacement of the Croat and other non-Serb population, as charged in Counts 10 and 11."[435]

483. Accordingly, the common purpose only included the crimes required for implementation of the objective.

484. After finding that the Accused "intended to forcibly displace the non-Serb population from the territory of the SAO Krajina, and subsequently the RSK" and that he had "actively participated in the furtherance of the common purpose of the JCE,[436]" the Trial Chamber held that the crimes charged "were found to be outside of the common purpose of the JCE" but that he "willingly took the risk that the crimes" might be perpetrated.[437]

485. Therefore, even in instances where the purpose in itself is not criminal, but is achieved by criminal means, the foreseeable crimes are not encompassed by the common purpose, unlike intentional crimes, which are required to fulfil the purpose.

3. ***Krajišnik***

486. In *Krajišnik*, the Indictment alleges that the common purpose of the JCE was "the permanent removal, by force or other means, of Bosnian Muslim, Bosnian Croat or other non-Serb inhabitants from large areas of Bosnia and Herzegovina through the commission of crimes which are punishable under […] the Statute." The Indictment also alleges that "[t]he crimes enumerated in all the Counts of this indictment were within the object of the joint criminal enterprise" and that the Accused held the state of mind necessary for the commission of each of these crimes."[438]The Accused was charged with persecution, murder, extermination, deportation and forced transfer.[439]

487. The Trial Chamber found that the deportations and forced transfers "were necessary means of implementing the common objective of removal by force of Bosnian Muslims and Bosnian Croats from large areas of Bosnia-Herzegovina."[440] It considered that the other crimes that were not

[435] *Martić* Trial Judgement (ICTY), 12.06.2007, para. 445.
[436] *Martić* Trial Judgement (ICTY), 12.06.2007, para. 453 (Count 10: deportation, crime against humanity; Count 11: forcible transfer, crime against humanity).
[437] *Martić* Trial Judgement (ICTY), 12.06.2007, para. 453 (crimes against humanity: persecution, murder, imprisonment, torture, inhumane acts; breaches of the Geneva Conventions: murder, torture, cruel treatment, wanton destruction of villages or devastation not justified by military necessity, destruction or wilful damage done to institutions dedicated to education or religion, plunder of public or private property).
[438] *Krajišnik* Trial Judgement (ICTY), 27.09.2006, para. 1089.
[439] *Krajišnik* Trial Judgement (ICTY), 27.09.2006, para. 1095.
[440] *Krajišnik* Trial Judgement (ICTY), 27.09.2006, para. 1097.

"original" had later on become part of the common purpose "since implementation of the common objective can no longer be understood to be limited to commission of the original crimes."[441] It added: "[w]ith acceptance of the actual commission of new types of crime and continued contribution to the objective, comes intent, meaning that subsequent commission of such crimes by the JCE will give rise to liability under JCE form 1."[442]

488. Whilst the Prosecution had pleaded the Accused's liability under JCE I and alternatively JCE III, the Chamber only held him responsible for JCE I.[443] Although the Appeals Chamber found that the criminal means of achieving the common objective of the JCE can evolve over time,[444] it dismissed the Trial Chamber's finding concerning the extended crimes on the ground that the Trial Chamber did not sufficiently specify in which manner and at which point in time those crimes became encompassed by the original common objective of the JCE.[445]

489. In any case, whether at the origin or later on, here again, only the crimes required for the accomplishing the objective and which are intentional are included in the common purpose.

4. *Prlić*

490. In *Prlić*, the Indictment alleges all the forms of JCE.[446] It alleges, for example, that any crime "which was not within the purpose of the JCE or an intended part of it is alleged to be the natural and foreseeable consequence of the JCE and the implementation or attempted implementation thereof (Form 3)." (*emphasis added*)[447]

491. It was found that the ultimate objective of the alleged JCE was "to set up a Croatian entity that reconstituted, at least in part, the borders of the Banovina of 1939, and facilitated the reunification of the Croatian people."[448] The Trial Chamber considered that the evidence demonstrated that there was "only one, single common criminal purpose – domination by the HR HB Croats through ethnic cleansing of the Muslim population. To accomplish this purpose, the members of the group, which included the various Accused, made use of the political and military apparatus of the HZ(R) H-

[441] *Krajišnik* Trial Judgement (ICTY), 27.09.2006, para. 1098.
[442] *Krajišnik* Trial Judgement (ICTY), 27.09.2006, para. 1098.
[443] *Krajišnik* Appeal Judgement (ICTY), 17.03.2009, paras. 167-169.
[444] *Krajišnik* Appeal Judgement (ICTY), 17.03.2009, para. 163
[445] *Krajišnik* Appeal Judgement (ICTY), 17.03.2009, paras. 177, 178 and 203.
[446] *Prlić* Trial Judgement (ICTY), 29.05.2013, Volume 1, para. 22.
[447] *Prlić* Trial Judgement (ICTY), 29.05.2013, Volume 1, para. 24.
[448] *Prlić* Trial Judgement (ICTY), 29.05.2013, Volume 4, para. 24.

B."[449]

492. The Trial Chamber deemed that the evidence supports the fact that "a JCE was established to accomplish the political purpose at least as early as mid-January 1993",[450] and that as of June 1993 the common criminal purpose was expanded and "encompassed new crimes."[451] It held that the Accused "intended that these crimes be committed in order to further the common plan".[452] It then listed the "crimes that fall within the framework of the common plan of the Form 1 JCE".[453]

493. The Trial Chamber also decided that other crimes "not be included in the common criminal purpose."[454] It considered that the Accused knew that these crimes, which were the natural and foreseeable consequences of the evictions, might be committed in order to carry out the evictions and took this risk knowingly, becoming hence liable under JCE III.[455]

494. Therefore, once again, the foreseeable crimes are not encompassed by the common criminal purpose.

C. Conclusion

495. In view of the foregoing, the Supreme Court Chamber's definition of a hybrid JCE finds no legal basis in international law, even in regard to cases concerning plans "involving" the commission of crimes.

496. In such cases, the common criminal purpose is as shown in the diagram below:

[449] *Prlić* Trial Judgement (ICTY), 29.05.2013, Volume 4, para. 41.
[450] *Prlić* Trial Judgement (ICTY), 29.05.2013, Volume 4, para. 44.
[451] *Prlić* Trial Judgement (ICTY), 29.05.2013, Volume 4, para. 59.
[452] *Prlić* Trial Judgement (ICTY), 29.05.2013, Volume 4, para. 67.
[453] *Prlić* Trial Judgement (ICTY), 29.05.2013, Volume 4, para. 68.
[454] *Prlić* Trial Judgement (ICTY), 29.05.2013, Volume 4, para. 70.
[455] *Prlić* Trial Judgement (ICTY), 29.05.2013, Volume 4, paras. 72-73.

497. Whereas for the Supreme Court, the schematic representation would be :

498. However the inclusion of foreseeability in a common criminal purpose does not have its place in international criminal law. Even in modern international criminal law, agreeing to take a risk is not considered as an agreement to commit a crime.

IV. UNCONVENTIONAL AND UNPRECEDENTED PATCHING TOGETHER OF JCE-1 WITH JCE-3

499. At the international tribunals which apply JCE, ancillary responsibility on foresight and voluntary assumption of risk (JCE III) is not part of responsibility for a common purpose or related to responsibility for a common intentional purpose (JCE I).

500. With regard to JCE I, the requisite *mens rea* does not include foreseeability or anything less than *dolus directus*. Indeed, according to settled case law, JCE I requires evidence that all of the participants shared the same criminal intent, and the Accused intentionally participated in the enterprise and intended its commission:

> "The basic form of joint criminal enterprise […] requires that the accused must both intend the commission of the crime and intend to participate in a common plan aimed at its commission." [456]

501. So the point is not whether the accused considers that crime could be committed:

> "As concerns JCE Form 1, the requisite element is the intent to commit a specific crime, an

[456] *Munyakazi* Appeal Judgement (ICTR), 28.09.2011, para. 160. See also: *Stanišić and Župljanin* Appeal Judgement (ICTY), 30.06.2016, para. 375; *Popović* Appeal Judgement (ICTY), 30.01.2015, para. 1369; *Brđanin* Appeal Judgement (ICTY), 03.04.2007, para. 365 ("the accused must both intend the commission of the crime and intend to participate in a common plan aimed at its commission").

intent that must be shared by all of the co-participants."[457]

502. Foreseeability only applies to JCE III:

> "[…] when all the elements of JCE are met in a particular case, the accused has done far more than merely associate with criminal persons. He has the intent to commit a crime, he has joined with others to achieve this goal, and he has made a significant contribution to the crime's commission. Thus, he is appropriately held liable also for those actions of other JCE members, or individuals used by them, that further the common criminal purpose (first category of JCE) or criminal system (second category of JCE), or that are a natural and foreseeable consequence of the carrying out of this crime (third category of JCE)."[458]

503. Responsibility for a crime under JCE III is incurred when:

> (1) it was foreseeable that such a crime might be committed by one or more members of the group; (2) the accused deliberately assumed the risk that the crime would be committed because he knew that a crime of this sort was the probable outcome of the furtherance of the common purpose; and (3) he accepted the crime being carried out while nevertheless deciding to take part in the JCE."[459]

504. Foreseeability under JCE III is to be distinguished *dolus directus* under JCE 1 :

> "Pursuant to JCE I, the accused must share the intent for the commission of the crimes alleged in the Indictment and not merely foresee their occurrence."[460]
>
> "The question of "foreseeability" relates to the extended form of joint criminal enterprise, not the basic form."[461]
>
> "The first form of the JCE requires intent in the sense of *dolus directus*, and […] recklessness of dolus eventualis does not suffice."[462]

505. Therefore, even the *ad hoc* tribunals which have been applying all the forms JCE for many years

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[457] *Prlić* Trial Judgement (ICTY), 29.05.2013, Volume 1, para. 214. See also: *Stanišić and Simatović* (ICTY), Appeal Judgement, 09.12.2015, para. 77 ("the intent to perpetrate a certain crime"); *Stakić* Appeal Judgement (ICTY), 22.03.2006, para. 65 ("intended that the crime at issue be committed"; *Vasiljević* Appeal Judgement (ICTY), 25.02.2004, para. 101 ("intent to perpetrate a certain crime"); *Tadić* Appeal Judgement (ICTY), 15.07.1999, para. 228 ("intent to perpetrate a certain crime").

[458] *Martić* Appeal Judgement (ICTY), 08.10.2008, para. 172.

[459] *Prlić* Judgement (ICTY), 29.05.2013, Volume 1, para. 216. See also for example: *Stanišić and Zupljanin*, ICTY, 30.06.2016, para. 958: "The Appeals Chamber recalls further that the subjective element of the first category of Joint criminal enterprise is that an accused had the intent to commit the crimes that form part of the common purpose of the joint criminal enterprise and the intent to participate in a common plan aimed at their commission. For liability pursuant to the third category or joint criminal enterprise, a trial chamber must be satisfied in addition that: (i) it was foreseeable to the accused that a crime outside the common purpose might be perpetrated by one or more of the persons used by him (or by any other member of the joint criminal enterprise) in order to carry out the *actus reus* of the crimes forming part of the common purpose; and (ii) the accused willingly took the risk that the crime might occur by joining or continuing to participate in the enterprise." (*emphasis added*)

[460] *Sainović* Appeal Judgement (ICTY), 23.01.2014, para. 1014.

[461] *Karemera and Ngirumpatse* Appeal Judgement (ICTR), 29.09.2014, para. 564.

[462] *Stanišić and Simatović* Trial Judgement (ICTY), 30.05.2013, Volume 2, para. 1258 and footnote 2193. See also in para 2332: "However, as above, the Trial Chamber understands such knowledge and acceptance of the risk that crimes would be committed to be insufficient for the first form of JCE liability".

have consistently drawn a distinction between the two modes and not treated them as one, as does the Supreme Court Chamber. Now, had the Supreme Court Chamber's hybrid definition of JCE existed in customary international law, international criminal tribunals would certainly have applied it, especially as such a definition would have enabled them to once and for all cease to rely on JCE III, which was created in 1999 by the *Tadić* Appeal Judgement, and to avoid all that it has encountered in the form strong challenges from the defence and the dissenting judges, challenges that only disingenuous invocation of *stare decisis* has enabled them to withstand.[463]

506. The Supreme Court Chamber's fabrication of a hybrid JCE is even more opportunistic than that of JCE III in 1999, and is only aimed at circumventing the inapplicability of JCE III at the ECCC whereas the proceedings before it hardly entail JCE I.

V. FABRICATED IN A BID TO CONVICT THE ACCUSED AT THE ECCC

507. The ECCC id mandated to hear facts that occurred 40 years ago within a historical and political context that was marked by the cold war, following the atrocities committed in Cambodia by the United States as part of its war against Vietnam, and the overthrow by the Khmer Rouge of the then dictatorship in order to usher in a socialist revolution.

508. By sending the Accused to trial in Case 002 based upon JCE I, the Co-Investigating Judges, who sought more inculpatory than exculpatory evidence, still could not but recognise that the purpose of the CPK leaders "was not entirely criminal in nature."[464]

509. At the conclusion of the Case 002/01 proceedings, the Trial Chamber also recognised that the purpose was "not in itself necessarily or entirely criminal."[465] It stated that "while this common purpose was not criminal in itself, the policies formulated by the Khmer Rouge involved the commission of a crime as a means of bringing the common plan to fruition,"[466] without however, distinguishing the crimes intended by the scheme from the resulting foreseeable crimes.

510. The Supreme Court Chamber recognised that this suggests that the Trial Chamber was of the view that the crimes that had resulted from the implementation of the common purpose could be imputed

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[463] See, for example, *Tolimir* Appeal Judgement (ICTY), 08.014.2015, para. 281 and 284; *Popović* Appeal Judgement (ICTY), 30.01.2015, paras. 1672 – 1674; *Đorđevic* Appeal Judgement (ICTY), 27.01.2014, paras. 48-53; *Prlić* Judgement (ICTY), 29.05.2013, Volume 1, para. 210.
[464] Closing Order, para. 1524.
[465] Case 002/01 Trial Judgement, para. 778.
[466] Case 002/01 Trial Judgement, para. 804.

on the Accused.[467] It stated that: "by referring to crimes that merely 'resulted' from the implementation of the common purpose, the Trial Chamber erred in law by importing a notion of criminal liability that did not exist either under customary international law at the time of the charges or as a general principle of law."[468]

511. Even so, in reliance on its own definition of JCE I,[469] the Supreme Court Chamber was able to uphold the convictions by encompassing in the common purpose crimes that would predictably ensue, including killings. In fact, it held that the deaths that occurred during the evacuation of Phnom Penh were "likely"[470] or could have been envisaged by anticipation should there be any resistance[471] and also that the occurrence of deaths during Population Movement Phase Two were "likely".[472]

512. However, in the same way as the deaths which occurred during the forced transfers in the ICTY cases,[473] the deaths which occurred during Population Movement (Phase 2) cannot be construed otherwise than as the natural and foreseeable consequence of the implementation of the plan to move the population. Therefore, given that JCE III is not applicable at the ECCC, the Accused could not have been convicted for deaths that occurred during the population movements had it not

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[467] Case 002/01, Appeal Judgement, para. 790.
[468] Case 002/01 Trial Judgement, para. 810.
[469] Case 002/01 Trial Judgement, para. 849: "Accordingly, the Supreme Court Chamber will now consider whether the crimes [...] were encompassed by the common purpose [...], applying the principles set out above", referring to fn 2265 in paras. 807 *et sec*, where the Supreme Court provides its own definition of JCE.
[470] Case 002/01 Appeal Judgement, para. 853: "it has been established that the common purpose of moving the population from Phnom Penh to the countryside, as reflected in the population movement policy, involved the death civilians resulting from the conditions of the evacuation. This is because it has been established that the members of the JCE - the Party leadership - were aware of the conditions the evacuees, including the most vulnerable, would have to endure and that it was likely that, in particular, the most vulnerable would die during the evacuation." (*emphasis added*).
[471] Case 002/01 Appeal Judgement, para. 857: "This is so because it was evident that the forces tasked with carrying out the evacuation of the city would likely resort to deadly force if they encountered resistance. This is irrespective of whether specific orders to kill were given, who gave such orders, and whether such orders were only given to troops under certain commanders." (*emphasis added* by us); para. 860: "Nevertheless, as regards killings of Khmer Republic soldiers in the context of the evacuation of Phnom Penh, the Supreme Court Chamber considers that the killings were encompassed by the common purpose. This is because, as with civilians who were killed for not fulfilling orders to leave, even in the absence of an order to kill Khmer Republic soldiers, in the circumstances in which the evacuation of Phnom Penh was carried out, it was likely that such killings would take place." (*emphasis added*).
[472] "Case 002/01 Appeal Judgement, para. 868: "The occurrence of deaths among the transferees was therefore likely; nevertheless, the members of the JCE engaged in the implementation o/the common purpose." (*emphasis added* by us)
[473] In addition to the example from the *Tadić* Appeal Judgement, and *Martić* as discussed *supra,* para. 458 and paras. 482-484, see *Sainović* case (ICTY, Judgement of 28.02.2009 and Appeal Judgement, 23.01.2014) in which it is considered that the common purpose that was be implemented by the forced population transfer and the other crimes listed by the Prosecution (murder, sexual assault, destruction of religious property) were examined in light of JCE 3.

been for Supreme Court Chamber's hybrid form of JCE.

513. The Supreme Court Chamber's fabrication is therefore a good return on investment for both the donors to the Tribunal and the Co-Prosecutors who, realising the difficulty of providing evidence of direct criminal intent, pleaded JCE III already in their Introductory Submission and struggled for years to secure its application at the ECCC (on two occasions it even indicated that it should be applied to rape, even though the Accused are not charged therewith).[474]

514. Unfortunately, the return on investment is illegal. As it the case for murder as a crime against humanity with *dolus eventualis*, the Supreme Court Chamber's hybrid form of JCE did not exist in customary international law at the time relevant to the case. This is especially important because the crime and its *sui generis* mode of liability, as defined by the Supreme Court Chamber, was not foreseeable to the Accused. Not even with good legal guidance.[475]

515. The Trial Chamber must refrain from adopting the same course of action as the Supreme Court Chamber in the interest of respect for the principle of legality. Once again, this goes to the legitimacy and credibility of the ECCC.

516. In that regard, it is worth noting that the decisions of the Pre-Trial Chamber and the Trial Chamber recognising that JCE III is not applicable were lauded in international criminal law circles, including by the ICTY justices, such as Judge Schonburg and Judge Antonetti.[476] According to the latter:

> "Admittedly, JCE does have some positive points; however, in my view it was broadly defined and awkwardly extended to every aspect of individual criminal responsibility, including its territorial scope, its temporal scope and a range of offences it gave rise to. This form of criminal responsibility in its broad application has been the source of confusion and divergent, even erroneous interpretations, so much so that criminal responsibility extended to participants of a lower rank loosely connected with each other in the alleged common criminal plan. It also caused a **presumption of guilt** to hang over higher ranking participants, even though the initial common plan may not have been criminal but turned

[474] Pre-Trial Chamber Decision, 20.02.2010, D97/15/9, para. 97 (the Chamber states that according to "a proper reading of the Introductory Submission, the fact that the OCP intended to allege all forms of JCE is not ambiguous". Co-Prosecutors' Request, 17.06.2011, **E100**; T. 30.07.2014, **E1/240.1**, p.32, around 10.12.15: "We think that's an important issue [JCE-3] which will affect Case 002/02." Regarding facts of rape see *supra*, para. 189.
[475] See *supra*, paras. 319-320.
[476] *Jurisprudence on JCE – revisiting a never ending story*, Wolfgang SHOMBURG, 01.06.2010 (at: http://www.cambodiatribunal.org/assets/pdf/court-filings/ctm_blog_6_1_2010.pdf); *Tolimir* Appeal Judgement (ICTY), 08.04.2015, Separate and Partly Dissenting Opinion of Judge Jean-Claude ANTONETTI, V.C.2. The practice of other international tribunals: the example of the courts of Cambodia, pp. 109-112; *Šešelj* Judgement (ICTY), 31.03.2016, Concurring Opinion of Presiding Judge Jean-Claude Antonetti attached to the Judgement, 5.4. The Cambodian Courts and the third form of JCE, pp. 169-177.

out to be such due to lower ranking agents acting out of control or on grounds other than those initially put forward by their superiors, or even by the leader acting against the will of other members of the group by personally taking decisions not submitted in advance to the members of the group in order to secure his position." (*emphasis in the original*)[477]

Lastly, it seems that this concept has been articulated to fly to the rescue of a faltering Prosecution. This, in my view, is not the role of the Judge, who must **strictly** apply the very specific forms of responsibility provided for in the Statute rather than craft theories or hypotheses to fill a void in the investigation." (*emphasis in the original*)[478]

Part IV. RULES OF EVIDENCE

517. The evidence in any criminal case is in assessed in accordance with a given set of rules with due regard for the adversarial and presumption of innocence principles.

518. In the present case, it is particularly important to conform to those rules given that the evidence is especially flimsy, as are the recollections of the events dating back more than 40 years.

519. Moreover, while the case file contains period documents, these are copies of material obtained by non-judicial bodies under often nebulous circumstances. As a matter of fact, the Court has only two originals of the documents that were submitted by Stephen HEDER in July 2013.[479] Although CD-Cam has documents it considers to be originals, its executive director, CHHANG Youk, was reluctant to reveal their whereabouts during the Case 002/01 proceedings, but the Chamber did not take issue with that. Indeed, the President of the Chamber stated:

> "Mr. Witness, you do not need to respond to the question by the defence counsel, then, as a principle of safety and security of those documents, that is in regards to the original documents and the photocopies documents used in this courtroom, is the core of the debate. It is not necessary to reveal the location of those original documents. And the issues raised by parties for a closed session, we have the view that it is not necessary. You may proceed, but please make sure that it is not necessary to specify the provenance -- secret provenance of the -- of the documents. But the most important thing is the copies of the documents which have been copied from the original.".[480]

520. Likewise, the Chamber continued to lean in favour of time-saving by permitting witnesses to review their previous statements before testifying, rather than allowing them to testify

[477] *Šešelj* Trial Judgement (ICTY), 31.03.2016, Concurring Opinion of Presiding Judge Jean-Claude Antonetti attached to the Judgement, p. 168.
[478] *Šešelj* Trial Judgement (ICTY), 31.03.2016, Concurring Opinion of Presiding Judge Jean-Claude Antonetti Attached to the Judgement, p. 181.

[479] Memorandum, 31.07.2013, **E297** (*Revolutionary Youth* and *Revolutionary Flag*).
[480] T. 02.02.2012, **E1/38.1**, p. 12, around 09.28.13.

spontaneously. Started in 2012 in Case 002/01, this practice received the blessing of the Supreme Court Chamber.[481] However, the Supreme Court Chamber has not acted accordingly when hearing witnesses.[482] In the Case 002/01 Appeal Judgement, it held that:

> "the practice of exposing witnesses to what they previously said could interfere with or distort their memory, and thus the truth, by reducing the spontaneity with which their evidence is offered in court".[483]

521. Even though the Supreme Court Chamber considered that "clearly, the Trial Chamber could have adopted a procedure more consistent with Cambodian practice and the legal tradition followed by the Cambodian system",[484] it did not disapprove of the Chamber's course of action. It could have done otherwise in rendering its judgement at the close of the substantive proceedings in Case 002/02, given the impact that could have had on the case.

522. Be that as it may, the Trial Chamber must take full account of the fallibility of the evidence produced and exercise due caution in evaluating it. The Trial Chamber has been castigated many times by the Supreme Court Chamber for the way it handled the evidence in Case 002/01. It did not always follow the Supreme Court Chamber's guidelines, preferring instead to meet its quota of politically acceptable convictions.

523. The point here is not to outline all the rules of evidence, but rather to highlight matters concerning which the Trial Chamber is most likely to deviate from the norm, namely: written records of interview, hearsay evidence, expert evidence, evidence obtained through torture and reasonable doubt.

Chapter I. WRITTEN RECORDS OF INTERVIEW

524. The law applicable to written records of interview merits to be examined (section I) before turning to the trial transcripts in Case 002/01 (Section II), civil party applications (Section III) and the testimony of Civil Party SAR Sarin (Section IV).

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[481] Case 002/01 Appeal Judgement, paras. 257-269.
[482] Supreme Court Chamber Order, 17.06.2015, **F26**, p. 4.
[483] Case 002/01 Appeal Judgement, para. 267.
[484] Case 002/01 Appeal Judgement, para. 269.

Section I. LAW APPLICABLE TO ASSESSMENT OF WITNESS' WRITTEN RECORDS OF INTERVIEW

525. Given the inalienable right of the accused to examine or have examined the witnesses against them,[485] the admission and assessment of written records of interview in lieu of live testimony are subject to very stringent rules. Absent confrontation, such statements are of inherently low probative value (I), and some cannot be relied upon in lieu of live testimony (II).

I. INHERENTLY LOW PROBATIVE VALUE

526. In the course of the Case 002/01 proceedings, the Chamber pointed out many times that "[a]bsent the opportunity to examine the source or author of evidence, less weight may be assigned to that evidence".[486]

527. Regarding written records of interview, the Supreme Court Chamber held as follows in the Case 002/01 Appeal Judgement:

> "This evidence is of an inherently low probative value, a fact that the Trial Chamber had only acknowledged in general terms, but not applied in practice".[487]

528. The Supreme Court Chamber thus recalled that:

> "the written evidence of a witness who has not appeared before the Trial Chamber and who was not examined by the Chamber and the Parties must generally be afforded lower probative value than the evidence of a witness testifying before the Chamber. Even lower probative value must, in principle, be assigned to evidence that – unlike the interview records produced by the Office of the Co-Investigating Judges – was not collected specifically for the purpose of a criminal trial [...] This results, first, from the fact that the Trial Chamber would not have had an opportunity to assess the demeanour of the individual while testifying and ask questions to clarify issues. Second, in accordance with persuasive jurisprudence of the European Court of Human Rights, a conviction may not be based solely or to a decisive degree on evidence by a witness whom the defence has not had an opportunity to examine, unless there are sufficient counterbalancing factors in place, so that an accused is given an effective opportunity to challenge the evidence against him. Third, the trustworthiness, accuracy and authenticity of out-of-court statements collected outside the framework of a judicial process are affected by the lack of judicial formalities and guarantees".[488]

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[485] Article 13(1) of the ECCC Law, Internal Rule 84(1), Article 297 of Cambodian Code of Criminal Procedure, Article 14(3)(e) of ICCPR, Article 6(3)(d) of ECHR.
[486] Case 002/01 Trial Judgement, para. 34, and footnote 94; Decision, 20.06.2012, **E96/7**, paras. 21-22, 24-25, 27, 29, 34; Decision, 15.08.2013, **E299**, para. 19.
[487] 002/01 Appeal Judgment, para. 430.
[488] Case 002/01 Appeal Judgement, para. 296 (references omitted).

529. Accordingly, the Chamber must strictly adhere to those principles in Case 002/02 and not simply enunciate them.

II. RELIANCE ON CERTAIN WRITTEN RECORDS OF INTERVIEW IS PRECLUDED

530. During the Case 002/01 proceedings, in reliance mainly on the ICC Rules of Procedure and jurisprudence, the Trial Chamber considered that where statements about the acts and conduct of the Accused as charged or about "pivotal issues" or "live matters in dispute" are challenged by the Accused, such statements can be admitted, but that "they shall be taken into consideration at the conclusion of the trial in assigning weight to all statements and transcripts put before the Chamber."[489]

531. The Trial Chamber ruled that in so far as any statement or transcript of available witness contained evidence going to proof of the acts and conduct of the Accused as charged, it would "not rely" on such information in order to prove the Accused's personal acts or conduct as charged.[490] It then held that such evidence relating to the acts and conduct of the Accused is "not allowed under the law" within the meaning of Internal Rule 87(3)(d)unless the Defence has been accorded the opportunity of in-court examination of the witnesses or civil parties concerned.[491] It pointed to exceptions to this principle in respect of evidence of persons who are not available for the reasons enumerated in Rules 92 *quater* and *quinquies* of the ICTY Rules of Procedure and Evidence, i.e., where the person:

- has since died after his statement was obtained,
- can no longer with reasonable diligence be traced,
- is unable testify orally by reason of bodily or mental condition,
- is unable to attend as a witness due to threats, intimidation or improper interference.[492]

532. The Chamber noted that according to the relevant rules and practice, a chamber can admit this type of evidence where it is satisfied that the person:

[489] Decision, 15.08.2013, **E299**, paras, 19, 23.
[490] Decision, 15.08.2013, **E299**, para. 28.
[491] Case 002/01Trial Judgement, para. 31; Decision, 20.06.2012, **E96/7**, paras. 21-22; Decision, 15.08.2013, **E299**, paras. 17 and 25. See also more recently: Memorandum, 03.11.2016, **E434/2**, para. 15; Memorandum, 06.12.2016, **E319/52/5**, para. 2.
[492] Decision, 20.06.2012, **E96/7**, paras. 32-33; Decision, 15.08.2013, **E299**, para. 17.

"is genuinely unavailable and that the proposed evidence is reliable, and where it considers that the probative value of this evidence is not substantially outweighed by the need to ensure a fair trial".[493]

533. In the Case 002/01 Trial Judgement, the Chamber stated that it made an exception to this principle in respect of persons who were deceased, adding that, in such a circumstance, "it would not base any conviction decisively thereupon".[494] In the Case 002/01 Appeal Judgement, the Supreme Court Chamber endorsed the Chamber's course of action.[495]

534. It should also be noted that according to the ICTY, refusal to appear as a witness is not among the exceptions to the preclusion of evidence relating to the acts and conduct of the Accused as narrowly defined in the Rules of Procedure and Evidence and echoed by the Chamber. In fact, the ICTY Appeals Chamber stated that these rules allow for the admission of the evidence of a person who is "objectively unable to attend a court hearing", and not for a person who is theoretically able to attend, because he can choose to testify, but is not required to do so.[496]

535. Furthermore, some ICTY Trial Chambers considered "unavailable" to mean "unable to attend for testimony" "for reasons beyond control". They ruled, for example, that inability to prevail over witnesses is not sufficient reason to find that those witnesses are unavailable within the meaning of the stringent requirements set out in the Rules of Procedure and Evidence.[497]

536. It is important to recall all these principles, as both the Trial Chamber and the Supreme Court Chamber misapprehended them in the Case 002/01 Trial Judgement (A), and because there is a risk of that happening in the Case 002/02 Judgement (B).

A. Misapprehension by the Trial Chamber and the Supreme Court Chamber in Case 002/01

537. In order to salvage the Chamber's finding that KHIEU Samphan justified the evacuation of Phnom Penh during indoctrination sessions, the Supreme Court Chamber unabashedly justified reliance on a book authored by Ben KIERNAN which constitutes hearsay about KHIEU Samphan's acts and conduct, even though Ben KIERNAN refused to attend for testimony:

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[493] Decision, 20.06.2012, **E96/7**, para. 32.
[494] Case 002/01 Trial Judgement, para. 31.
[495] Case 002/01 Appeal Judgment, paras. 284-294.
[496] *Lukić* Appeal Judgment (ICTY), 04.12.2012, para. 565; *Prosecutor v. Prlić et al.*, IT-04-74-AR73.6, Decision on Appeals against admitting Transcript of Jadranko Prlić's Questioning into Evidence, 23.11.2007, para 48.
[497] *Prosecutor v. Tolimir*, IT-05-88/2-T, Partial Decision on Prosecution's Rule 92*bis* and 92*ter* Motion for Five Witnesses, 27.08.2010, paras. 32-33; *Prosecutor v. Popović et al.*, IT-05-88-T, Decision on the Admissibility of the Borovčanin Interview and the Amendment of the Rule 65 *ter* Exhibit List, 25.10.2007, para. 74.

"KHIEU Samphan avers that the Trial Chamber's "isolated claim" that he justified the urban evacuations during indoctrination sessions is based on hearsay evidence. The Supreme Court Chamber notes that, of the four items of evidence upon which the Trial Chamber relied in support of this finding, one – a book authored by Ben KIERNAN – referred specifically to the evacuation of cities as a subject of indoctrination sessions, while the other sources relate more generally to KHIEU Samphan's involvement in such sessions. Ben KIERNAN cites as a source an interview that he conducted in 1980 with a Cambodian physicist who had returned to Cambodia from France in late 1975. However, as noted above, given that Ben KIERNAN had not testified before the Trial Chamber, the Trial Chamber should not have given much weight to his book, in particular when making a finding that related to KHIEU Samphan's conduct and that was directly relevant to his individual criminal liability. Nevertheless, it must be noted that that (sic), elsewhere in the Trial Judgement, the Trial Chamber found that KHIEU Samphan had attended a ten-day meeting in May 1975 at the Silver Pagoda during which Party leaders had justified the evacuation of the cities. Thus, there was evidence before the Trial Chamber that indoctrination sessions covered the justification of the evacuation of cities, that KHIEU Samphan led some indoctrination sessions. Considered in light of the totality of the evidence on this point, including the limited weight it could attach to Ben KIERNAN's account, the Trial Chamber's finding that KHIEU Samphan had justified the evacuation at least of one of the indoctrination sessions was not unreasonable." (*emphasis added*).[498]

538. However, neither the Trial Chamber nor the Supreme Court Chamber could permissibly accord any weight, however little, to Ben KIERNAN's book without him attending for testimony, because: 1) this book relates to the acts and conduct of KHIEU Samphan2) Ben KIERNAN was neither deceased nor objectively unable to appear in court for any reasons beyond control.[499]

539. Moreover, this was uncorroborated hearsay evidence. In fact, it is not stated anywhere in the entire body of evidence relating to this issue that KHIEU Samphan led indoctrination sessions and thereby justified evacuations (including at the Silver Pagoda, where indoctrination sessions – and hence justifications – were led by POL Pot and NUON Chea, as stated in the Trial Judgement).[500]

540. Therefore the finding that KHIEU Samphan justified evacuations at least one of the indoctrination sessions should have been deemed as pure speculation. However, it is should not be deemed as speculation to point out that it is not unacceptable for the Supreme Court Chamber to

[498] Case 002/01 Appeal Judgement, para 1015.
[499] Memorandum, 13.06.2012, **E166/1/4**, in which the Chamber indicates that it decided not to hear Ben KIERNAN after having exhausted all reasonable means to obtain his testimony, stating:(p. 2): "concerted efforts were made by both the Chamber and the United States institutions supportive of the ECCC to obtain the expert's testimony but, in reality, the ECCC has few practical means at its disposal to compel the attendance of an uncooperative expert"] (*emphasis added*).
[500] Case 002/01 Appeal Judgment, footnote 2698, where the Supreme Court cites paragraph 743 of the Trial Judgment of which footnote 2341 refers to statements by KHIEU Samphan according to which he attended a meeting at the Silver Pagoda, and to testimony by PHY Phuon that POL Pot and NUON Chea led study sessions at that location.

opportunistically flout the basic precepts of a criminal trial in order to meet its quota of acceptable convictions.

B. Concerns about possible misapprehension in Case 002/02

541. At the conclusion of the substantive hearings in Case 002/02, the Chamber made a number of remarks which raised the concern that it could illegally rely on written records of interview about the acts and conduct of the Accused.

542. On 23 November 2016, at the request of the International Co-Prosecutor, the Trial Chamber admitted written records of interview from Case File 004, stating as follows:

> "The Chamber finds that the five documents provide unique information and evidence relating to the trial topic of Internal Purges, with one document being particularly relevant to S-21 Security Center, two documents being additionally relevant to the acts or conduct of the Accused, and two documents being additionally relevant to the administrative and communication structures." (*emphasis added*)[501]

543. On 29 November 2016, the Defence requested the Trial Chamber to specify whether this was a departure from the jurisprudence or a mistake, given that it had again found this type of evidence inadmissible three weeks earlier.[502]

544. On 6 December 2016, after having recalled its jurisprudence, the Trial Chamber ruled that those documents could be used as evidence of the acts and conduct of the Accused "only if their authors testified before the court, thereby giving the Accused the opportunity to cross-examine them". It stated further:

> "[The Chamber therefore draws the parties' attention on the possibility of this additional relevance should the parties wish to file requests for the appearance of witnesses. […] Whatever the case, the Chamber will assess, at the opportune moment, the probative value and the weigh to attach to written records of interview and the absence of in-court testimony is of paramount importance in this respect, especially if the evidence provided is isolated and uncorroborated by other evidence]".[503]

545. However, the Chamber had previously set a firm date, i.e., 1 September 2016, for filing requests for the testimony of additional witnesses,[504] making the above justification sound rather surprising.

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[501] Decision, 23.11.2016, **E319/52/4**, para. 15-D.
[502] KHIEU Samphan's request for clarification [no English version is available – so no caps], 29.11.2016, **E319/52/4/1**., referring in footnote 5 of the Memorandum of 03.11.2016, **E434/2**, para. 15, itself referring to the Decision of 15.08.2013, **E299**, paras. 17 and 25.
[503] Memorandum, 06.12.2016, **E319/52/5**, para. 3.
[504] Memorandum, 28.06.2016, E421; Memorandum, 26.08.2016, **E421/3**(reasons given in the Decision of 21.09.2016, **E421/4**).

546. Not surprisingly, it wasn't long before the Co-Prosecutors took advantage of the loophole thus created. On 13 December 2016, they requested the testimony of two additional witnesses concerning the role of the Accused; one of those witnesses is the author of a written record of interview which had been admitted on 23 November 2016 because of its "additional relevance" to the acts and conduct of the Accused.[505]

547. In the morning of 15 December 2016, the Chamber held a hearing concerning the Co-Prosecutors' Request, to which the Defence opposed for a number of reasons, not the least of which was that it was well out of time.[506] That afternoon, the Trial Chamber dismissed the Request, ruling it "untimely".[507] On 9 January 2017, it explained that it denied the Request because it had not been filed by 1 September 2016 and that it was not satisfied that the proposed testimony was of such importance as to offset its late filing.[508]

548. Although in the end the Chamber very quickly closed the loophole it had inadvertently created, Judge LAVERGNE's remarks during the 15 December 2016 proceedings heightened concerns that the Chamber could be tempted to use written records of interview relating to about the acts and conduct of the Accused. Indeed, following the Defence opposition to the Co-Prosecutors' request, Judge LAVERGNE wanted to hear the Defence "react", stating:

> "I note, unless I'm wrong, that the witnesses the Prosecution is seeking to call have both been interviewed by the OCIJ and their WRIs that have been declared admissible, so they are already on the case file, therefore. The question arises whether there are, indeed, parts of the WRI that concern the role of the Accused. Those statements should be subject to cross-examination and, for purposes of clarity, the Khieu Samphan Defence doesn't wish to cross-examine witnesses on statements they have made and which are on record.".[509]

549. Perplexed, the Defence replied that under the law, matters relating to the acts and conduct of the Accused in written statements are not open to consideration by the Trial Chamber and therefore that the Trial Chamber needed not cross-examine the witnesses despite having admitted their written records of interview.[510]

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[505] Co-Prosecutors' Request, 13.12.2016, **E452**.
[506] T. 15.12.2016, **E1/514.1**, pp. 3-26, from 09.16.07 to 09.59.21.
[507] T. 15.12.2016, **E1/514.1**, p. 110, around 15.47.27.
[508] Memorandum, 09.01.2017, **E452/1**, paras. 3-4.
[509] T. 15.12.2016, **E1/514.1**, pp. 17-18, between 09.41.26 and 09.42.30.
[510] T. 15.12.2016, **E1/514.1**, pp. 18-19, between 09.42.30 and 09.43.27.

550. It is plain that such issues would not have arisen had the Chamber simply not admitted the written records of interview relating to the acts and conduct of the Accused or had not acquiesced to the Prosecution's proposal in Case 002/01 to redact from the proposed statements any information relating to those matters.[511]

551. Instead, the Chamber elected to admit huge numbers of written records of interview into evidence throughout the proceedings despite their inherently low probative value. It is now faced with the task of vetting them while bearing in mind the basic cardinal rule, – one that it has recalled many a time – that it cannot use those written records of interview any way of evidence of the acts and conduct of the Accused.

Section II. CASE 002/01 TRIAL TRANSCRIPTS

552. Cases 002/01 and 002/02 are separate cases, owing to the severance.[512] Therefore, the Case 002/01 trial transcripts of are written records of interview in Case 002/02, with two exceptions:

- where witnesses in Case 002/01 returned as witnesses in Case 002/02,
- where witnesses in Case 002/01 also testified in relation to facts under review in Case 002/02 and were cross-examined on facts.

553. The reason for those exceptions is because, even though 002/01 and 002/02 are separate cases, the parties and the judges in both cases are the same. Moreover, some of the facts under review are common to both cases.

554. Therefore, for witnesses who testified in both Cases 002/01 and 002/02, the trial transcripts of their testimony in Case 002/01 cannot be used as written statements in lieu of live testimony. They are prior statements.

555. Where witnesses testified in Case 002/01 and not in Case 002/02, but testified in part in relation to facts common to both cases and were therefore cross-examined thereupon by the Accused, parts of their trial transcripts relating to those issues can be used in lieu of live testimony.

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[511] Decision, 15.08.2013, **E299**, para. 24.
[512] Supreme Court Chamber Decision, 29.07.2014, **E301/9/1/1/3**, para. 42.

556. The facts common to both cases are those relating to the historical context, the administrative structure, the communication structure, the military structure, as well as the role and character of the Accused persons.[513]

Section III. CIVIL PARTY APPLICATIONS

557. On 20 June 2012, the Chamber stated during in the Case 002/01 proceedings that "Statements or other evidence collected not under judicial supervision but instead by diverse intermediary organizations or other entities external to the ECCC" could enjoy no presumption of reliability, as opposed to written records of interview prepared within a judicial framework. It added:

> "Civil Party applications (which were often prepared by various intermediary organizations on behalf of Civil Party applicants), in the absence of information regarding the circumstances in which they were recorded, may also be proposed to be put before the Chamber but may ultimately be able to be afforded little, if any, probative weight." (*emphasis added*).[514]

558. As noted *supra*,[515] this principle has not been applied even though the Supreme Court Chamber was endorsed it.

559. More civil parties testified in Case 002.02 than in Case 002/01, and this brought to light the fact the documents relating to civil party applications are totally unreliable.

560. On 3 April 2015, just weeks into the substantive hearings, International Civil Party Lead Co-Lawyer GUIRAUD was forced to admit that:

> Again, I freely admit to those on the Defence side, that we, the Co-Lead Lawyers, will have to clarify the situation since the errors seem quite obvious and repetitive in the VIF as well as in the supplementary inform that was filed. We are just as all Parties, ultimately, we too are discovering these discrepancies and the extent of this problem[516]

561. Having realised that the International Co-Prosecutor's intended to place oodles of civil party applications from Case Files 003 and 004 on the case file during the proceedings, allegedly by way of exculpatory material, the Trial Chamber pointed out that civil party applications have "much lesser" probative value than written records of interview.[517]

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[513] Annex: List of paragraphs and portions of the Closing Order relevant to Case 002/02, **E301/9/1.1**, in which the Chamber identifies in a footnote the paragraphs of the Closing Order which were previously included in 002/01.
[514] Decision, 20.06.2012, **E96/7**, para. 29.
[515] See *supra*, paras. 526-529.
[516] T. 03.04.2015, **E1/288.1**, p. 16, before 09.42.47.
[517] Memorandum, 27.08.2015, **E319/14/2**, para. 4.

562. Towards the end of the substantive proceedings, Mr GUIRAUD recalled further that the application were prepared by NGOs (and not by ECCC investigators), hence why "from one NGO to another, the various questions and the content of the civil party statements can vary".[518] He added that it was "impossible to compare a civil party application, that was taken by an NGO in very special conditions", to an interview with the OCIJ.[519]

563. In view of all the disparities that were highlighted during the proceedings between civil parties' live testimonies and statements they made in "special conditions" while recording their civil party applications, the Chamber cannot properly use such documents in lieu of live testimony, not even for the purposes of corroboration.

Section IV. SAR SARIN'S TESTIMONY

564. In November 2016, Civil Party SAR Sarin started to give testimony – as he had done in Case 002/01 – but then decided to discontinue his testimony under false pretexts before the KHIEU Samphan Defence had had the opportunity to question him. In December 2016, the Trial Chamber heard the parties' oral submissions and invited them to file written submissions on the use of Civil Party SAR Sarin's testimony.

565. On 20 December 2016, the Defence again laid out the historical background and submitted written submissions as to why SAR Sarin's testimony should be considered as written records of interview to which no probative value may be afforded, given their lack of reliability and credibility of that particular civil party.[520]

566. Those submissions are still pending before the Trial Chamber, and the Defence expressly refers thereto and also emphasising that, absent confrontation, the Chamber can in no case accept SAR Sarin's statements by way of evidence of the acts and conduct of the Accused.

Chapter II. HEARSAY EVIDENCE

567. Many statements, whether from live testimony or otherwise, relate to facts that the person who made them did not personally witness, and therefore amount to hearsay.

[518] T. 31.08.2016, **E1/467.1**, pp. 66-67, from 11.33.02 to 11.34.01.
[519] T. 24.10.2016, **E1/488.1**, pp. 68, before 11.39.51.
[520] KHIEU Samphan's submissions, 20.12.2016, **E453/1**.

568. Such being the case, as the Supreme Court Chamber has recalled, hearsay evidence will usually be afforded less weight than sworn evidence that has been subjected to cross examination. Although the Chamber has the discretion to hear and use evidence of that nature, it must do so with due caution. A factual finding cannot be recorded solely on the basis of inconclusive and unverifiable hearsay evidence. [521]

569. However, in Case 002/02, and even though the onus is on the prosecution to prove the guilt of the accused,[522] the Co-Prosecutors showed little interest in the sources of the hearsay evidence produced in court. The Trial Chamber, which too has shown little interest in the matter despite its onus as finder of fact, must therefore take due account of that in evaluating the evidence.

Chapter III. EXPERTS

570. In the course of the Case 002/02 proceedings, the Chamber heard the testimony of eight persons (Elizabeth BECKER, YSA Osman, Alexander HINTON, Henri LOCARD, Kasumi NAKAGAWA, Peg LEVINE, Stephen MORRIS and VOEUN Vuthy) that it deemed to be experts on a range of subjects. Having regard to the law applicable to expert testimony (Section I), the Trial Chamber must note the lack of reliability and probative value of part of the evidence of those experts (Section II).

Section I. LAW APPLICABLE TO THE ASSESSMENT OF EXPERT TESTIMONY

571. Pursuant to Internal Rule 31:

> "1. Expert opinion may be sought by the Co-Investigating Judges or the Chambers, on any subject deemed necessary to their investigations or proceedings before the ECCC.
>
> 2. An expert who agrees to be appointed shall take an oath or affirmation in accordance with his or her religion or beliefs to assist the Co-Investigating Judge or the Chambers honestly, confidentially and to the best of his or her ability".[523]

572. In reliance on the jurisprudence of the International Criminal Tribunals, the Chamber stated that an expert is "obliged to testify with the utmost neutrality and objectivity".[524]

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[521] Case 002/01 Appeal Judgement, para. 302 (referring to many ICC Appeals Chamber precedents).
[522] Internal Rule 87-1.
[523] See also Articles 162 to 171 of the Code of Criminal Procedure of the Kingdom of Cambodia, in particular Articles 163 and 164, which provide that an expert witness must take an oath "to assist the court honestly and sincerely".
[524] Decision on Assignment of Experts, 05.07.2012, **E215**, para. 15 and footnote 22.

573. The Appeals Chamber of the International Criminal Tribunals has noted that in a limited number of instances, Trial Chambers of International Criminal Tribunals have ruled inadmissible the evidence of a proposed expert witness on the ground that this evidence is so lacking in terms of the indicia of reliability because of lack of impartiality and independence or appearance of bias. It held that such a determination has to be made on a case-by-case basis. It pointed out, nonetheless, that where the proposed evidence was *prima facie* admissible, those matters were to be asserted by the Trial Chamber at a later stage in the course of determining the weight to be attached to the evidence in question.[525]

574. Since Case 002/01, the Chamber has considered that challenges regarding bias of a witness called as expert are a matter related to "the evaluation of the evidence given by him and not its admissibility".[526]

575. Moreover, citing the jurisprudence of the International Criminal Tribunals, the Supreme Court Chamber too has noted as follows:

> "international jurisprudence and practice recognises that an expert witness is meant to provide specialised knowledge that may assist the fact finder to understand the evidence presented. Jurisprudence from the ad hoc tribunals indicates that the role of an expert witness in proceedings before those tribunals is to testify to issues within his specific expertise, but not to testify on disputed facts or about the acts, conduct, or criminal responsibility of an accused as would a fact witness. For that reason, a trial chamber's finding concerning an alleged murder attributed to the accused, which was based exclusively on the testimony of an expert witness amounting to double hearsay, was overturned on appeal. The jurisprudence of the ICTY and ICTR further shows that, before these tribunals: (i) expert witnesses are afforded latitude as to what falls within their expertise; (ii) when testifying to issues outside their expertise, their testimony "will be treated as personal opinions of the witness and will be weighed accordingly" (suggesting that it may still be considered by the trier of fact); and (iii) that it is possible for an individual to assume both the role of an expert and that of a fact witness.
>
> […]as noted above, the Trial Chamber's reliance on expert testimony to reach factual conclusions is not per se prohibited, as long as the role of experts remains limited to assisting the trier of fact in "understanding evidence presented during trial", without becoming the vehicle for the introduction of otherwise unreliable evidence. Therefore, a key factor in the assessment of the reliability and probative value of expert evidence is the careful scrutiny of the sources from which experts infer their conclusions. This is typically done in the course of cross-examination. <u>Where the sources are not fully accessible and verifiable, a diminished weight must be attributed to expert evidence derived from</u>

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[525] *Prosecutor v. Popović et al.*, IT-05-88-AR73.2, Decision on Joint Defence Interlocutory Appeal Concerning the Status of Richard Butler as an Expert Witness, 30.01.2008, paras. 21-22 and footnotes 87 and 88, **F30/11/1.38**.
[526] Decision on Assignment of Experts, 05.07.2012, **E215**, para. 15 and footnote 22.

them, given the restricted possibility for the Parties and the court to test the experts' conclusions" (*emphasis added*).[527]

576. It noted further that:

> "a careful assessment of the experts' sources is especially appropriate where [...] the fact finder is considering evidence provided by historical experts [...], since their specialist knowledge and analytical skills are indeed [...] close to those expected of the judges involved in the present case".[528]

Section II. SOME EXPERT TESTIMONY LACKS RELIABILITY AND PROBATIVE VALUE

577. In view of the foregoing, the Chamber must approach the testimony of the eight experts it heard in 002/02 with utmost caution by scrutinising their sources and ascertaining their impartiality, which it took for granted when deciding to call them for testimony.

578. Apart from Peg LEVINE – who is beyond reproach on both counts –[529] it will be recognised that three "experts" in particular, whose sources are sketchy, fell short of demonstrating "utmost neutrality and objectivity".

I. YSA OSMAN

579. On 30 May 2014, the Defence opposed the Co-Prosecutors' request for YSA Osman's expert testimony. It noted that his degrees or any university which might have awarded those degrees were not specified, and, moreover, that he worked for DC-Cam for many years and was working for the Office of the OCIJ at the ECCC at the time of the proceedings. It highlighted the fact that he is Cham and that he experienced the Khmer Rouge regime during which he lost family members, and therefore could not possibly be an objective expert , given his dual status as a witness and a victim.[530]

580. On 18 September 2015, the Chamber articulated the reasons for its decision to call YSA Osman as an expert witness concerning the treatment of the Cham. It stated that it would take account both of the allegations of bias and of his dual status as a victim and a witness in assessing his evidence.

[527] Case 002/01 Appeal Judgement, paras. 328-329 (references omitted).
[528] Case 002/01 Appeal Judgement, footnote 799.
[529] T. 10.10.2016, **E1/480.1**, T. 11.10.2016, **E1/481.1**, T. 12.10.2016, **E1/482.1**. It is worth noting that the President never before spoken so approvingly of an expert's testimony as he did concerning that of Peg LEVINE: T. 12.10.2016, **E1/482.1**, p. 59, after 11.30.56 ("Your testimony as an expert during the last three days with patience, professionalism and virtue is greatly appreciated, and your testimony may contribute to the truth in this case.")
[530] KHIEU Samphan's Objections, 30.05.2014, **E305/9**, paras. 41-42.

The Chamber did point out that "it is not bound by the evidence or conclusions given by an expert, and that these will be subject to the same rules and open to the same scrutiny as other pieces of evidence put before [it]".[531]

581. In February and March 2016, YSA Osman gave four days of expert testimony on the treatment of the Cham.[532]

582. As demonstrated *infra*,[533] his testimony proved that the Defence's concerns were founded and also that in many instances his sources were sketchy.

II. ALEXANDER HINTON

583. On 30 May 2014, the Defence did not oppose the Co-Prosecutors' and Civil Parties' request to call Alexander HINTON for expert testimony. It nonetheless pointed out that he had worked for DC-Cam, which impaired his impartiality and also that the Trial Chamber should take account of that in assessing his testimony, the Chamber should it wish to hear him.[534]

584. On 4 March 2016, the Trial Chamber stated the reasons for its decision to hear Alexander HINTON's expert testimony "primarily on matters concerning the Treatment of the Vietnamese and Buddhists." It noted that:

> "[while] 2-TCE-88 [Alexander HINTON] uses the term 'genocide' in most of his writings when referring to mass killings, [...] it is only for the Chamber to determine whether the legal elements of genocide, or any other crimes charged, as defined in the Law of the ECCC exist and/or have been proven. The Chamber also recalls that it is not bound by the evidence or conclusions given by an expert, and that these will be subject to the same rules and open to the same scrutiny as any other piece of evidence put before the Chamber."[535]

585. Alexander HINTON gave expert testimony for four days of, from 14 to 17 March 2016, concerning the treatment of the Vietnamese and Buddhists.[536]

586. As demonstrated *infra*,[537] his testimony has proved that the Defence's concerns were understated in a way that did not reflect reality. He not only demonstrated outright bias, but he also stated that

[531] Decision, 18.09.2015, **E367**, paras. 11-12.
[532] T. 09.02.2016, **E1/388.1**, T. 10.02.2016, **E1/389.1**, T. 23.03.2016, **E1/407.1**, T. 24.03.2016, **E1/408.1**.
[533] See *infra*, paras. 1588-1605
[534] KHIEU Samphan's objection, 30.05.2014, **E305/9**, paras. 39-40.
[535] Decision, 04.03.2016, **E388**, para.17.
[536] T. 14.03.2016, **E1/401.1**, T. 15.03.2016, **E1/402.1**, T. 16.03.2016, **E1/403.1**, T. 17.03.2016, **E1/404.1**.
[537] See *infra*, paras. 1935-1936 and 2226-2233.

he cannot reveal some of his sources due to rules governing his research on anthropology; moreover he was also unable to reveal them in instances where his findings derived from his own work and not from that of others.

III. HENRI LOCARD

587. On 30 May 2014, the Defence did not mention Henri LOCARD – whose expert testimony had been requested by the Prosecution – among those whose appearance as expert witnesses it opposed or about whom it had reservations.[538]

588. On 16 June 2016, the Chamber stated the reasons for its decision to call Henri LOCARD as an expert witness regarding security centres and political slogans during the Democratic Kampuchea regime. It noted – of its own motion – that he was commissioned by the Co-Prosecutors to compile a series of reports on the network of security centres during the Democratic Kampuchea period, but this is not mentioned in the curriculum vitae he provided to the court. The Chamber then stated:

> "[…] the Chamber recalls that challenges, if any, on an expert's independence and impartiality are matters related to the evaluation of his evidence. The Chamber also recalls that it is not bound by the evidence or conclusions given by an expert, and that these will be subject to the same rules and open to the same scrutiny as any other piece of evidence put before the Chamber."[539]

589. Henri LOCARD gave expert testimony for four days of, from 28 July to 2 August 2016, concerning security centres and political slogans during the Democratic Kampuchea period.

590. In the course of his testimony, he sometimes overstepped the bounds of his expertise by discussing the acts and conduct of the Accused. His testimony on the subject should be deemed as personal opinion and therefore assessed as such, in light of the jurisprudence cited by the Supreme Court Chamber; moreover, it reveals his deep-seated bias against the Accused.

591. As the Defence demonstrated in submissions following his testimony,[540] his statements and writings concerning KHIEU Samphan are not consistent with his sources, where any sources are available (B), and that, in any case, they reflect a patent lack of impartiality and objectivity (A). It is important to highlight the reasons why his statements and publications concerning KHIEU

538 KHIEU Samphan's Objections, 30.05.2014, **E305/9**, paras. 39-40.
539 Decision, 16.06.2016, **E415**.
540 KHIEU Samphan's Request. 23.08.2016, **E415/4**; KHIEU Samphan's Request, 21.11.2016, **E447/1**.

Samphan must not be afforded any probative value, and therefore, why his personal and biased opinions about KHIEU Samphan should be stricken from the record.

A. Deep-seated bias

592. A few days after Henri LOCARD's testimony, the Defence requested the admission of two *Cambodia Daily* articles (dated 3 and 6 August 2006) concerning statements he made following his in-court testimony.[541] The Chamber granted the Request.[542]

593. At the opening of the proceedings on 2 August 2016, Henri LOCARD accused KHIEU Samphan's international Co-Lawyer of "practis[ing] cold torture on me" when cross-examining him.[543] Counsel Anta GUISSÉ thus requested the Chamber to remind the expert that she was simply doing her job and that his statements were inappropriate before a court of law.[544]

594. Despite this call to order by the Defence – and in the lack of any from the Chamber, which remained unconcerned, – Henri LOCARD was unrepentant and continued to make disparaging remarks about the defence lawyers in the press. The article dated 3 August 2016 is a case in point:

> "Contacted later, Mr Locard went further in his criticism of both Ms. Guisse and Victor Koppe, a lawyer for Nuon Chea – calling them 'criminal' and 'perverse'.
> 'These people are criminal because they are making the tribunal waste hours and weeks, days and months,' he said.
> 'It [the tribunal] should have been no more than three years, because of these completely perverse people who are what we call deniers, negationists – they deny reality.'
> The historian also accused the lawyers of 'ridiculing' Cambodian witnesses and civil parties.
> 'I was expecting it and I know how to defend myself. But I think of the poor Khmers who have not got as high education and my ability to debate and who are completely upset and thrown off balance,' he said.[545]

595. Following the 5 August 2016 press release from the ECCC Defence Support Section objecting to the aforementioned statements and recalling the importance of the defence lawyers' work in ensuring a fair trial, Henri LOCARD went even further. He not only stood by his earlier statements,

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[541] KHIEU Samphan's Request, 23.08.2016, E415/4.
[542] Memorandum, 14.09.2016, **E415/4/1**.
[543] T. 02.08.2016, **E1/453.1**, p. 4, after 09.05.10.
[544] T. 02.08.2016, **E1/453.1**, pp. 5-6, from 09.06.28 to 09.09.50.
[545] *French Historian accuses Khmer Rouge Trial Lawyers of Having Subjected Him to "Cold Torture"*, George WRIGHT, *The Cambodia Daily*, 03.08.2016, **E3/10649**, ERN 013253112297.

but he also hurled further insults at the defence lawyers and the Accused. The article dated 6 August 2016 affords a good illustration of that:

> "Mr. Locard said he stood by his previous claims, and accused the lawyers of attempting to hide the truth about the Pol Pot regime.
> 'Particularly Nuon Chea, it seems like the defense lawyers are so horrified by what [the defendants] say that they seem to encourage them to remain in their silence,' Mr. Locard said.
> 'They do everything to obfuscate the truth rather than for the truth to come out.'
> Offering up some suggestions for alternate ways for the lawyers to defend their clients, Mr. Locard suggested that they should have agreed to psychiatric assessments for the former Khmer Rouge leaders.
> 'They could have accepted a psychiatric examination of their client,' he said. 'Even you hear some of the declarations of Nuon Chea—so far removed from reality, seeing plots of enemies absolutely everywhere. We can have doubts with their sanity'".[546]

596. Those statements show that, commensurate with his in-court demeanour, Henri LOCARD was incapable of testifying with utmost neutrality and in accordance with his pledge to assist the Chamber honestly and to the best of his ability.[547]..

597. Henri LOCARD not only made it a point upon entering the courtroom to greet everyone except for the Defence,[548] but he also a consistently showed reluctance to answer the Defence lawyers' questions, whereas he exhibited an entirely different attitude when answering questions from the judges and the other parties. As a matter of fact, it was only the Defence lawyers' questions that he was reluctant to answer or refused to answer altogether, whereas they asked him straightforward and legitimate questions about his background, his working methods and his sources.

598. Below is an example of his exchange with NUON Chea's international Co-Lawyer:

> "I'm sorry, Mr. Lawyer. I think you make this Court for the people who are listening to me behind me waste their time by useless totally – asking me totally useless questions. You said earlier that your time is limited, so if your time is limited, please ask me relevant questions."[549]

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[546] *"ECCC Defense Support Section Rejects Claim That Lawyers Are 'Criminals"*, George WRIGHT, *The Cambodia Daily*, 06.08.2016, **E3/10653**, ERN 01321131 (the Defence requested translation of this short article into Khmer and French on 23.08.2016. To date, only the KH translation into Khmer has been completed).
[547] T. 28.07.2016, **E1/450.1**, p. 41, after 10.52.42.
[548] T. 28.07.2016, **E1/453.1**, p. 5, before 10.52.34.
[549] T. 01.08.2016, **E1/452.1**, p. 22, before 09.51.52.

"The question is irrelevant; therefore I will not answer it."[550]

"I'm not here to make the trial of DC-Cam. I'm here to be part of the trial of Democratic Kampuchea regime and its leaders."[551] (Whereas he spontaneously criticised DC-Cam while responding to the Chamber.)[552]

"This question is repetitive. I already answered that question."[553]

"Post-'79 is not the object of this trial."[554]

599. And an example of an exchange with KHIEU Samphan's international Co-Lawyer:

"First, I've already been asked about this and I've already answered so it is repetitive, and you say you only have this short period of time, first."[555]

"Counsel, I think I already answered this question. It appears to me that this question is a repetitive question."[556]

"Well, that is what I was going to explain to you. I'm looking at the clock. We have gone beyond the time allotted."[557]

600. It may be that Henri LOCARD's defensive demeanour was simply because he felt uneasy – and understandably so – about answering questions concerning his work methods and his exact sources. As it turned out, the defence lawyers' questions highlighted the fact that many of his an "expert" findings concerning the Accused are unfounded.

601. In some instances, Henri LOCARD was forced to acknowledge so in regard to KHIEU Samphan. For example, he said that there was "an error" in what he had characterised as a "pre-emptive and general description",[558] and that perhaps he should not have said that,[559] or that "[i]ndeed, this is extrapolation [...]."[560]

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[550] T. 01.08.2016, **E1/452.1**, p. 22, after 09.51.52.
[551] T. 01.08.2016, **E1/452.1**, p. 43, before 11.01.06.
[552] T. 28.07.2016, **E1/450.1**, pp. 51-52, from 11.25.59 to 11.27.21; pp. 87-88, from 14.39.13 to 14.40.44.
[553] T. 01.08.2016, **E1/452.1**, p. 47, after 11.08.55.
[554] T. 01.08.2016, **E1/452.1**, p. 54, after 11.22.37.
[555] T. 01.08.2016, **E1/452.1**, p. 101, around 15.24.53.
[556] T. 02.08.2016, **E1/453.1**, p. 12 after 09.20.10.
[557] T. 02.08.2016, **E1/453.1**, p. 20, before 09.32.03.
[558] T. 01.08.2016, **E1/452.1**, p. 96, around 15.16.08. pp. 95-96, after 15.13.57: relating to a claim that KHIEU Samphan was the head of the government's prisons division.
[559] T. 01.08.2016, **E1/452.1**, p. 101, after 15.24.53 (p. 99, before 15.22.47: the statement was: "during his economics classes at the Phnom Penh University [KHIEU Samphan] was often very aggressive towards his European and foreign students, recalling that he was only there for the Khmer students. Society needed to be cleansed or wiped of all foreign and corrupt elements".
[560] T. 02.08.2016, **E1/453.1**, p. 11, around 09.19.009 (pp. 7-13, from 09.10.45: this was his interpretation of SUONG

602. In some other instances, his answers revealed that his assertions are without a sound basis. For example, the assertion that "the main obsession of Khieu Samphan, the head of state of the regime was to cleanse Cambodian society" (*emphasis added*) is based on two "sources" concerning the 1960s: 1) the statements of a former female student of KHIEU Samphan that during his economics classes the latter would criticise the SIHANOUK regime, calling it as corrupt,[561] and 2) the claim that it was "well-known to everyone" that at that time KHIEU Samphan was known as "Mr. Clean" because he "refused to engage in or be dragged into any type of corruption."[562]

603. Similarly, the naming in the new (2016) edition of his book of KHIEU Samphan among the three people who "in the shadows [...] had all the powers and took all the key decisions" is based solely on what SALOTH Ban or PHY Phuon him, namely that before the capture of Phnom Penh, "KHIEU Samphan was already in charge of economic affairs because that was his field. He was in charge of the distribution of everything. He was the one who supervised the distribution of ammunition."[563] Henri LOCARD's far-fetched extrapolation was further accentuated by SALOTH Ban's sworn testimony, according to which he saw KHIEU Samphan adding to a list, which he assumed was an munitions list, and therefore offered his assistance because he knew how to write.[564]

604. In the same vein, as concerns the addition to the new (2016) edition of his book that "[a]s Secretary of the Standing Committee of the Party, also referred to as Office 870, he was at the very heart of power", Henri LOCARD indicated that he read what SHORT and CHANDLER have written, namely that KHIEU Samphan replaced Doeun, adding but that he was basing himself "simply on the fact that he was present at K-3 throughout the regime."[565] This new assertion on the part of the "expert", who read none of the minutes of the Standing Committee meeting or any other internal Party document,[566] is far-fetched, especially considering that he had stated earlier: "of course [...] I read in detail the Judgment in Case 002/01", which was issued in 2014.[567] Yet, the Trial Chamber

Sikoeun's statements to the effect that individual roles were not clearly and rigidly defined, in support of his conclusion that it is very difficult to determine KHIEU Samphan's exact role within the Party's Central Committee, given that he played different roles depending on the circumstances).

561 T. 29.07.2016, **E1/451.1**, p. 99, before 15.22.47.
562 T. 01.08.2016, **E1/452.1**, p. 98, after 15.19.43.
563 T. 01.08.2016, **E1/452.1**, p. 109, before 15.42.26.
564 T. 25.04.2012, **E1/68.1**, pp. 45-46, from 11.23.53.
565 T. 01.08.2016, **E1/452.1**, pp. 113-114, between 15.51.18 and 15.53.08.
566 T. 01.08.2016, **E1/452.1**, pp. 113-114, around 15.53.08; T. 02.08.2016, **E1/453.1**, p. 15, before 09.23.20.
567 T. 01.08.2016, **E1/452.1**, p. 107, after 15.38.53; see also: T. 28.07.2016, **E1/450.1**, p. 45, after 11.10.26 ("r coming

states the said Judgement that neither SHORT nor CHANDLER "came across a document confirming that KHIEU Samphan replaced Doeun as the head of Office 870."[568] Despite their speculation, and in light of other evidence, the Trial Chamber concluded that it "[was] not satisfied that KHIEU Samphan ever served as the chairman of Office 870."[569]

605. Those are just a few examples to show that Henri LOCARD felt uneasy when faced with Counsel GUISSE's questions., It is understandably not always pleasant for anyone to realise that the quality of their work is being called into question. Even so, there is no justification for Henri LOCARD's accusation that Counsel GUISSE "tortured" him in court.[570] There is no justification for his attacks on the defence counsel in the media, calling them "criminals", "completely perverse" and "negationists".[571] There is no justification for what he did just days thereafter – cool headedly – when, adding to his disparaging remarks, he alleged that defence counsel were doing everything to obfuscate the truth by refusing to allow psychiatric their clients to undergo assessment examination given their uncertain mental health, adding that defence counsel were encouraging them to remain silent because they are "so horrified" to hear what they say.[572]

606. The overriding and only reason for the tenor and gravity of Henri LOCARD's statements – besides his obvious lack of awareness of the Accused's rights in criminal proceedings – is his long-standing deep-seated bias against NUON Chea and KHIEU Samphan. That is the reason for his hasty and specious conclusions about the Accused, and (to use his own words) his "pre-emptive and general description", "errors" and "extrapolations".[573]

607. Henri LOCARD may not be objective, but he at least has the merit of being consistent. In the statements he made to the press, he was only speaking his mind and exposing his prejudices, but that was already perceptible in his in-court demeanour.

out this month a second edition [...] in which I made many corrections to take into account what has been said in this because I do not believe this court find (sic) [sheds] new light on democratic Kampuchea"); T. 28.07.2016, **E1/450.1**, p. 49, after 11.20.23 (still regarding the 2016 edition: "I tried to put in new information that I got mainly through readings, and through the court and through my interviews (...)".

[568] Case 002/01 Trial Judgement, 07.08.2014, para. 398.

[569] Case 002/01 Trial Judgement, 07.08.2014, para. 399.

[570] T. 02.08.2016, **E1/453.1**, p. 4, after 09.05.11.

[571] "*French Historian Accuses Khmer Rouge Trial Lawyers of Having Subjected Him to 'Cold Torture'*", George WRIGHT, *The Cambodia Daily*, 03.08.2016, **E3/10649**, ERN 01325397.

[572] "*ECCC Defense Support Section Rejects Claim That Lawyers Are 'Criminals'*", George WRIGHT, *The Cambodia Daily*, 06.08.2016, **E3/10653**, ERN 01321131.

[573] See *supra*, para. 601

608. When answering the Prosecution's questions after a passage in which he states that the Khmer Rouge leaders were removed from reality was read to him, he couldn't help but digress even though he has no qualifications in psychiatry or psychology:

> "Had they become crazy? Had they gone mad? I think the Defence could have pleaded this, but I think they haven't done so for the time being. They refused to be examined by psychiatrists, quite to the contrary of Duch; that's too bad. [...] Yes it's true that they were completely disconnected from reality. They were cut in two pieces, if you will. They were schizophrenic. In their daily lives with their families, their wives, their children, they were model fathers and husbands. In the case of – this is true for Khieu Samphan, this is true for Duch, this – Khieu Samphan had four children, a wife. He was a model family man."[574]

609. Along the same lines, he simply could not resist "diagnosing" NUON Chea and KHIEU Samphan as having obsessions. According to him, "the absolute obsession" of NUON Chea was secrecy,[575] "the main obsession" of KHIEU Samphan was to cleanse Cambodian society (the basis of this assertion is mentioned *supra*).[576]

610. Henri LOCARD was speaking as a non-professional using disparaging language. Indeed, if he really believed that the Accused are mentally unstable, clinical speaking, he should not have criticised them for remaining silent since anything they said would be meaningless. Instead, he considers their silence culpable and as aimed at "obfuscating" the horrific truth.[577]

611. The Defence will not go as far as characterising his demeanour as obsessive, but it notes that in the course of his testimony, he could hardly resist digressing, saying that KHIEU Samphan was present and/or that he would or could answer. NUON Chea, who was not in the courtroom, was also the subject of another type of digression.

612. For example, when Counsel KOPPE asked him why he did not seek to corroborate some of his information with official publications, he answered:

> "Let me return the question to you. You're lucky enough to defend a character who was an extremely important personality under Democratic Kampuchea, Nuon Chea. And as some of these words I mentioned used in the slogans are quite learned words in Pali and Sanskrit, only

[574] T. 29.07.2016, **E1/451.1**, pp. 123-124, after 15.48.38.
[575] T. 29.07.2016, **E1/451.1**, p. 26, at 10.01.10.
[576] See *supra*, para. 602.
[577] "*ECCC Defense Support Section Rejects Claim That Lawyers Are 'Criminals'*", George WRIGHT, *The Cambodia Daily*, 06.08.2016, **E3/10653**, ERN 01321131.

quite highly-educated people could have conceived them. So, why don't you ask your own – your client if he or people around him, like Tiv Ol or whoever, Khieu Samphan, perhaps, have authored these slogans and – or not at all? I don't know. I think that the two people who are standing trial here, Khieu Samphan and Nuon Chea, know much better. But you will advise them to stick to their right to keeping silence, so in that respect, we cannot move on and, as historians, we still are in the dark and depend on hypothesis. Some of them might be right; some of them might be wrong. They know."[578]

613. Below is just an example concerning KHIEU Samphan:

"[…] and he was an adolescent [Saloth Ban] who was bringing messages on a bicycle between Nuon Chea and Pol Pot, in any case. Did he also bring messages to Khieu Samphan? Those are questions to be asked of Khieu Samphan himself. Maybe he'd say no."[579]

614. Henri LOCARD is entitled to his opinions. However, his patent lack of objectivity inevitably impairs the reliability of his findings.

615. Henri LOCARD had already lost credibility by insulting the accused and their lawyers in the press, but he had already undermines his reputation when he accused Counsel GUISSE in court of having subjected him to "cold torture". Indeed, to dare compare the ECCC courtroom to an S-21 interrogation room is not only outrageous and untoward, but it is also unfathomable coming from someone who was called to testify as an expert on security centres under the Democratic Kampuchea regime.

616. This umpteenth extrapolation by Henri LOCARD already proved that his bias was against the accused and not in favour of the victims, even though he claims to speak on the victims' behalf.[580]

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[578] T. 01.08.2016, **E1/452.1**, pp. 26-27 from 10.01.10.12 to 10.02.32.
[579] T. 29.07.2016, **E1/451.1**, p. 101, after 14.43.07. Other examples: T. 28.07.2016, **E1/450.1**, pp. 46-47, after 11..13.51 ("Philip Short […] But one of my models has been Philip Short and Philip Short interviewed many, many Khmer Rouge leaders, intellectuals including, at length, Khieu Samphan, present here, and I think that's the source -- a very important source to understand the regime. He is, of course, the Khmer Rouge themselves, when they are willing to speak (…)"; pp. 112-113, after 15.27.04 ("It is possible that in Phnom Penh-- and it's unfortunate that Mr. Khieu Samphan doesn't want to furnish any explanations to the Chamber because he should know (…)"); T. 29.07.2016, **E1/451.1**, p. 37, before 10.14.28 ("So I would invite Khieu Samphan to contradict me […]"); p. 75, before 13.48.25 ("What happened to all of it? You'll need to ask that question to Khieu Samphan, who is present here, who can answer you much better than I can"); T. 01.08.2016, **E1/452.1**, p. 54, after 11.21.23 ("You can get information from not your specific client, but from Khieu Samphan. I think he was in prison at least one month at some stage, so he might answer better. No, I did not make any specific research on the […]").
[580] T. 28.07.2016, **E1/450.1**, p. 41, before 11.02.46 (where H. LOCARD explains why he chose the subject of his doctoral thesis, saying that he wanted to understand why some of the close friends he knew under Sangkum had disappeared), pp. 60-61, before 11.31.14 ("So I consider myself as somewhat the voice of ordinary Cambodians who suffered a horrendous death and for (*sic*) to speak in the name of their families."); T. 02.08.2016, **E1/453.1**, p. 13, before 09.23.21 ("I worked on the base of the victims' testimonies and not the voices of the perpetrators.").

Indeed, his highly inappropriate self-victimisation during cross-examination by Counsel GUISSE reflects particularly offensive lack of consideration for the real victims of torture during the Democratic Kampuchea period.

B. An "expert" contradicted by his sources

617. When he was questioned about the sources of some of his claims concerning KHIEU Samphan, he answered that he relied on statements he recorded in the course of his interviews with SALOTH Ban or PHY Phuon. The Defence then requested the Trial Chamber to order him to disclose the notes and recordings of those interviews.[581]

618. On 25 October 2016, the Trial Chamber granted the Defence's oral request and provided the parties with documents from Henri LOCARD.[582] It also provided information allowing to retrace the following timeline:

a. On 11 August 2016, the Chamber received a letter from Henri LOCARD in which he stated that he had in his possession typewritten notes of his interviews with SALOTH Ban and PHY Phuon, as well as some 25 audio cassettes from his interviews with the latter.[583] Henri LOCARD added that SUONG Sikoeun may have other cassettes of interviews with PHY Phuon and that it is SUONG Sikoeun who has all of the cassettes of the interviews with SALOTH Ban.[584]

b. On 22 August 2016, Henri LOCARD sent to the Chamber two typed documents related to SALOTH Ban and PHY Phuon, but no cassettes.[585]

c. On 24 August 2016, upon instructions of the Chamber, the Witness and Expert Support Unit reach out to SUONG Sikoeun. SUONG Sikoeun stated that he had only done Khmer into

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[581] T. 01.08.2016, **E1/452.1**, pp. 103, between 15.29.19 and 15.30.40, and p. 111 around 15.46.35; T. 02.08.2016, **E1/453.1**, pp. 20-21, between 09.36.15 and 09.38.34.
[582] Memorandum, 25.10.2016, **E447.**
[583] Memorandum, 25.10.2016, **E447**, para. 2. Regarding the typed notes, Henri LOCARD stated: "I carried those interviews over the years with SUONG Sikoeun who was both my interpreter from French to Khmer and vice-versa was, and the translator who would type their answers on a laptop provided by myself. I later somewhat reorganized the text" (Letter by Henri LOCARD, 05.08.2016, **E447.1**, p. 1, para.2). See also details provided at the hearing: T. 02.08.2016, **E1/453.1**, p. 24, before 09.38.30.
[584] Letter by Henri LOCARD, 05.08.2016, **E447.1**, p. 1, paras. 3,4.
[585] Memorandum, 25.10.2016, **E447**, para. 2.

French translations and that he had no cassettes, since he was not allowed to keep them. He added that he was uncertain why Henri LOCARD told the Court otherwise.[586]

d. On 12 September 2016, in answer to a another request, the Chamber received two additional documents from Henri LOCARD which, according to the Chamber, seem to be the same as the two documents it had received previously, the only difference being the title and the format. Once again, no audio cassette was provided.[587]

e. On 25 October 2016, the Chamber disclosed to the parties the four documents provided by Henri LOCARD.[588]

619. On 21 November 2016, despite the lack of the audio recordings of the interviews that Henri LOCARD was obviously reluctant to release, even he had manifested a willingness to do so in court,[589] the Defence requested the admission of short excerpts from some of the estimated 720 pages provided.[590] On 16 December 2016, the Chamber granted the request.[591]

620. The excerpts in question contradict Henri LOCARD's peremptory assertions and reinforces the Defence's position in many respects.

1. No contact between POL Pot and KHIEU Samphan in the 1960s

621. In his testimony, Henri LOCARD stated that he was "convinced" that KHIEU Samphan was in contact with the CPK leaders in the 1960s, that is to say well before he went underground. When he was questioned by the Defence about his sources, he answered that he had made an addition in the second edition of his book following his discussions with SALOTH Ban who allegedly had indicated to him that when he was living with his uncle (POL Pot) in Phnom Penh (between 1959 and 1963):"[…] they asked him to carry out in secret these messages on his bicycle, obviously he was an adolescent, so no one paid much attention to him – especially to Khieu Samphan and Nuon Chea."[592]

[586] Email to the Chamber from the Witnesses/Experts Support Unit, 24.08.2016, **E447.3.**
[587] Memorandum, 25.10.2016, **E447**, para. 2.
[588] Memorandum, 25.10.2016, **E447**, para. 2; Annexed table listing titles and reference numbers of documents, **E447.2**.
[589] T. 02.08.2016, **E1/453.1**, p. 29, around 09.47.24], p. 31, before 09.51.44.
[590] KHIEU Samphan's Request, 21.11.2016, **E447/1**.
[591] Memorandum, 16.12.2016, **E447/2.**
[592] T. 01.08.2016, **E1/452.1**, pp. 47-48, from 11.08.55 to 11.10.00.

622. That statement was the reason why the Defence requested disclosure of the notes and recordings of his interviews with SALOTH Ban.[593]

623. However, nothing in the notes supplied by Henri LOCARD relates to any messages conveyed Ban to KHIEU Samphan by SALOTH. On the contrary, the messages that SALOTH Ban's uncle asked him to deliver at that time were for other recipients:

> "I was tasked with delivering, on my bicycle, messages which were rolled up and inserted in a ball-pen, either to Nuon Chea or to Ieng Sary, Son Senm Hou Yuon, Ney Sarann, who was then headmaster of Chamreun Vichea secondary school. These individuals would give me messages of their own, similarly disguised, for delivery to Saloth Sar."[594]

624. That proves that there is no truth to Henri LOCARD's claims in court and in the second edition of his book, which was published in 2016.[595].

625. Moreover, SALOTH Ban's statements confirm what KHIEU Samphan has consistently maintained, namely that he was not in touch with the CPK and that he had no ties with it before he went underground.

2. <u>Extrapolation regarding KHIEU Samphan's role and powers</u>

626. In his testimony, Henri LOCARD explained that the reason why he added KHIEU Samphan in the second edition of his book to the three people who "in the shadow [...] had all the powers and took all the key decisions" was because of the statements he recorded during the interviews with SALOTH Ban or PHY Phuon, according to which before the capture of Phnom Penh "KHIEU Samphan was already in charge of economic affairs because that was his field. He was in charge of the distribution of everything. He was the one who supervised the distribution of ammunition."[596] According to Henri LOCARD, this information was mainly obtained from PHY Phuon.[597]

627. Those statements are the reason why the Defence requested disclosure of the notes and recordings of his interviews with PHY Phuon.[598]

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[593] T. 01.08.2016, **E1/452.1**, p. 117, between 15.29.19 and 15.30.40.
[594] Excerpt of Henri LOCARD's notes, **E3/10772**, ERN 01356678.
[595] *Pourquoi les Khmers Rouges*, Henri LOCARD, 2016, **E3/10640**, p. 98, ERN FR 01321063.
[596] T. 01.08.2016, **E1/452.1**, pp. 107-108, from 15.38.55 to 15.40.38.
[597] T. 01.08.2016, **E1/452.1**, p. 111, before 15.46.35.
[598] T. 01.08.2016, **E1/452.1**, pp. 107-108, around 15.38.55.

628. However, in the notes supplied by Henri LOCARD, it is not PHY Phuon but rather SALOTH Ban who discusses the matter, but in very different terms:

> "At that time [before the capture of Phnom Penh], I was in charge of one keeping records of weapons and ammunition received and distributed. That is what I stated before the Khmer Rouge Tribunal: whenever I was absent, it was Bang (elder brother) Khieu Samphan who replaced me. That is how we functioned. Our Head of State! He and I were interchangeable."[599] (*emphasis added*)

629. SALOTH Ban's statement is reflective of his testimony to the effect that that KHIEU Samphan would sometimes provide his assistance by preparing an ammunition list because he knew how to write.[600] This is therefore a far cry from the "distribution or supervision of the distribution of the ammunition" based upon which Henri LOCARD concluded in the new edition of his book that KHIEU Samphan was part of the people who "in the shadow [...] had all the powers and took all the key decisions."

630. Here again, there is no truth to Henri LOCARD's claims both in court and in the second edition of his book (2016).[601].

C. Conclusion

631. In view of the foregoing, the Chamber should consider Henri LOCARD's statements and writings, which exceed the scope of his expertise (limited to security centres and Democratic Kampuchea period slogans), as the personal opinions of an "expert" with a deep-seated bias against the Accused. The Chamber should in no way rely on his statements, extrapolations and "findings" concerning KHIEU Samphan, in that they are far-fetched, to say the least, devoid of substance and purely and simply untruthful. Accordingly, the Chamber ought to omit them in its evaluation of the evidence.

Chapter IV. EVIDENCE OBTAINED THROUGH TORTURE

632. Throughout the Case 002/02 proceedings, the NUON Chea Defence and the Co-Prosecutors – as well as the Chamber –, tried to use evidence obtained through torture.

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[599] Excerpt from Henri LOCARD's notes, **E3/10773**, ERN 01577226.
[600] T. 25.04.2012, **E1/68.1**, p. 52 L. 7-19, after 11.25.22.
[601] *Pourquoi les Khmers Rouges*, Henri LOCARD, 2016, **E3/10640**, p. 92, ERN FR 01321060.

633. On 21 May 2015, the [KHIEU Samphan] Defence recalled that, pursuant to the applicable law, evidence obtained through torture or physical or psychological coercion may only be used to prove the truth of the matter asserted in a statement.[602]

634. On 5 February 2016, the Trial Chamber ruled, with Judge FENZ dissenting, that such evidence can be used for other purposes in certain instances.[603]

635. Even though that decision is questionable because it is legally erroneous,[604] Judge LAVERGNE and President NIL Nonn still attempted to use such evidence beyond the limits prescribed in the Trial Chamber's decision.[605]

636. While it is quite unlikely that the Trial Chamber will reconsider its erroneous decision in its deliberations, it should at least refrain from relying on such evidence beyond the limits it prescribed.

Chapter V. <u>REASONABLE DOUBT</u>

637. Internal Rule 21 establishes the fundamental principle that "[e]very person suspected or prosecuted shall be presumed innocent as long as his/her guilt has not been established." Pursuant to Internal Rule 87(1), "[t]he onus is on the Co-Prosecutors to prove the guilt of the accused. In order to convict the accused, the Chamber must be convinced of the guilt of the accused beyond reasonable doubt." Pursuant to the English and Khmer versions of the Internal Rules, the Chamber must be convinced "beyond reasonable doubt / ដោយគ្មានវិមតិសង្ស័យ".

638. At paragraph 22 of its in Case 002/01 Judgement, the Trial Chamber states that:

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[602] KHIEU Samphan's Request, 21.05.2015, **E350/4**.

[603] Trial Chamber Decision, 05.02.2016, **E350/8**; Reasons for Partially Dissenting Opinion of Judge FENZ, 11.03.2016, **E350/8.1**.

[604] The Defence maintains its position as stated on 26 February 2016: T. 26.02.2016, **E1/392.1**, p. 38, from 10.36.36 to 10.37.47 (Counsel Guissé: "Let me point out that the Khieu Samphan defence is of the view that in spite of your decision on the statements obtained by torture, we maintain that there has been, on your part, an inaccurate analysis of the Convention, and its exceptions. [...] However, considering that you have already made this decision and that such a decision is not subject to appeal during the trial, Let me point out that, in general terms that we believe that the convention was incorrectly interpreted by the Chamber.").

[605] For example, during their examination of Witness KAING Guek Eav *alias* Duch: T. 14.06.2016, **E1/437.1**, pp. 86-96, between 15.15.57 and 15.19.34 (after Defence objection, President NIL Nonn stated that he used the document only because he could not find another period document); T. 16.06.2016, **E1/439.1**, pp. 16-19, between 09.35.21 and 09.44.07, and pp. 23-32, between 09.54.32 and 10.15.21 (Judge LAVERGNE).

[605] Case 002/01 Trial Judgement, para. 22.

> "In order to resolve any discrepancy between the different language versions of Internal Rule 87(1) that reflect the common law "beyond reasonable doubt" standard and the civil law concept of "*intime conviction*", the Chamber has adopted a common approach that evaluates the sufficiency of the evidence. Upon a reasoned assessment of the evidence, the Chamber interprets any doubt as to guilt in the Accused's favour."[606] (*emphasis added*)

639. In its Appeal Brief, the Defence submits that the Trial Chamber erred in considering that there could be a "discrepancy" between the different language versions of this rule because, in the context of the ECCC, *intime conviction* can only be interpreted to mean "conviction beyond any reasonable doubt". It also pointed out that the Trial Chamber wrongly relied on its understanding of the civil law concept of *intime conviction* repeatedly, the civil law concept being more subjective and less restrictive than the common law standard.[607]

640. The Supreme Court Chamber swept that argument aside by quoting paragraph 22 of the Trial Judgement, while noting that:

> "The Trial Chamber therefore clearly stated that it would adopt the standard of proof beyond reasonable doubt. Moreover, a review of the French version of the Trial Judgement reflects that the Trial Chamber never used the term 'intime conviction', but rather such terms as *"il ne fait aucun doute"*, when reaching its conclusions.".[608]

641. While the Trial Chamber did not use the term *"intime conviction"* in the French version of the Trial Judgement, it seldom used terms such as "beyond doubt". In fact, the Supreme Court Chamber found only ten such instances in the French version of the 777-page Judgement, including one instance where the Chamber states that "it was not convinced beyond any reasonable doubt."[609] That is the <u>only</u> instance in its Judgement where the Trial Chamber refers to the concept of conviction beyond any reasonable doubt.

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[606] Case 002/01 Trial Judgement, para. 22.

[607] Case 002/01 Appeal Brief, para. 109. The reproach was similar to that of Trial Chamber Judge VAN DEN WYNGAERT in her Dissenting Opinion in the *Katanga* Trial Judgment: "One of my fundamental concerns about this judgment is that the entire decision is very short on hard and precise facts and very long on vague and ambiguous 'findings', innuendo and suggestions. Whatever my colleagues may believe in their *intime conviction*, I fear it cannot stand up against the required standard of proof and the dispassionate rigour it demands. More specifically, the case record has so many weaknesses and presents such an incomplete picture that it is impossible, in my view, to come to conclusions beyond reasonable doubt on many points. In addition, most of the evidence falls far short of the standards of reliability that I was accustomed to at the ICTY. It is not possible, in my view, to base a conviction on such weak evidence. The standard of proof, which must be the same for everyone no matter how challenging the circumstances are for the Prosecutor, simply does not allow it." (Minority Opinion of Judge Christine Van den Wyngaert, ICC-01/04-01/07-3436-AnxI, 07.03.2014, para. 172, cited in footnote 229 of the Case 002/01 Appeal Brief).

[608] Case 002/01 Appeal Judgement, para. 380.

[609] Case 002/01 Appeal Judgement, footnote 937.

642. Such exceptions are largely outnumbered by the 215 instances where the Trial Chamber only states that it is "satisfied".[610] They are also outnumbered by the instances where the Supreme Court Chamber overturned findings on the ground that the evidence relied upon by the Trial Chamber was insufficient to sustain a beyond any reasonable doubt finding,[611] or that a finding was unreasonable,[612] or ,in many instances, unexplained.[613]

643. Under those circumstances, any person of good faith would be hard pressed to fail to recognise that the Trial Chamber did not apply a burden of proof that was often lower than the beyond-a-reasonable-doubt threshold.

644. Moreover, the Supreme Court Chamber specifically explained the procedure to follow in this instance:

> "According to the relevant jurisprudence of the ad hoc tribunals, which the Supreme Court Chamber finds to be persuasive, not each and every fact in the Trial Judgement must be proved beyond reasonable doubt, but all facts underlying the elements of the crime or the form of responsibility alleged as well as all those which are indispensable for entering a conviction, especially facts forming the elements of the crime or the form of responsibility alleged against the accused. In practical terms, there might be other facts that need to be established beyond reasonable doubt due to the way in which the case was pleaded. However, where only indirect evidence is available, 'if one of the links is not proved beyond a reasonable doubt, the chain will not support a conviction'. As to how to prove the necessary elements, this jurisprudence disapproves of piecemeal approach – that is, to apply the beyond reasonable doubt standard to individual items of evidence in isolation from one another. Rather, the finder of fact must be satisfied beyond reasonable doubt, on the basis of the totality of the evidence, that all facts forming the elements of the crime and mode of liability are established, as well as the facts indispensable for entering a conviction. Similarly, the ICC Appeals Chamber has found

[610] Case 002/01 Trial Judgement, paras. 80, 110, 111, 112, 116, 124, 127 (twice), 132, 134, 142, 144, 151, 152, 179, 182, 193, 195, 197 (twice), 228, 264, 266, 273, 323, 362, 372, 373, 378, 393, 419, 452, 453, 496, 515, 520, 521, 534, 547, 548, 553, 556, 558, 561, 562, 565, 571 (twice), 580, 581, 621, 643, 656 (twice), 667, 677, 681, 683, 684, 686, 742, 746, 747, 749, 750, 753, 771 (twice), 777, 804, 806, 807, 810, 826, 829, 835, 836 (twice), 844, 845, 846, 847, 848, 849, 851, 852, 854, 856, 859, 861, 862 (twice), 867 (twice), 869, 875, 878, 879, 880, 882, 884, 885, 886 (twice), 887 (three times), 888 (twice), 889, 891, 894, 896, 897, 898, 899, 904 (three times), 906, 908 (thrice), 909 (twice), 910, 911, 912 (twice), 913, 914, 915, 917, 918, 920, 921, 923, 924, 925 (twice), 926 (five times), 927 (twice), 928, 929, 930, 933, 934, 936, 937, 939, 949, 950, 952, 953 (three times), 955, 957, 958, 963, 965, 972 (twice), 979, 995, 997 (twice), 999, 1000, 1002, 1005, 1006 (twice), 1008, 1009, 1010, 1011 (twice), 1012, 1015, 1021, 1022, 1023, 1030, 1032, 1033, 1034, 1035, 1038, 1039, 1041, 1042, 4016, 1047, 1048, 1049, 1050 (twice), footnotes 2096 and 2586.

[611] For example, Case 002/01 Trial Judgement, paras. 430, 435, 436, 440, 441, 446, 447, 454, 456, 457, 469, 470, 471, 484, 537, 540, 550, 600, 972, 1117, footnote 1182.

[612] For example: Case 002/01 Appeal Judgement, paras. 443, 448, 455, 536, 637, 640, 655, 658, 702, 865, 884, 932, 1009, 1073, 1080, 1083, footnote 2653.

[613] For example: Case 002/01 Appeal Judgement, paras. 430, 436, 446, 470, 550, 600, 640.

that, when determining whether this standard has been met, the finder of fact is required to carry out a holistic evaluation and weighing of all the evidence taken together in relation to the fact at issue.

The Supreme Court Chamber emphasises, however, that a cumulative, or holistic, approach is contemplated mainly in respect of the reliability of individual pieces of evidence in light of available corroboration and, at times, the term is used as regards sufficiency of indirect evidence for establishing the main fact beyond a reasonable doubt from predicate facts. This jurisprudence lends no support to the claim that a multiplicity of evidentiary items may add up to meet the burden of proof beyond reasonable doubt by virtue of their sheer number, irrespective of their probative value. Indeed, such an approach would mean that an accused could be convicted merely on the basis of widespread rumours."[614]

645. In the *Ntagerura* Appeal Judgement, to which the Supreme Court Chamber refers, the ICTR Appeals Chamber very clearly laid out the three "different stages of the fact-finding process which a Trial Chamber undertakes before it can enter a conviction":

1) At the first stage, the Trial Chamber has to assess the credibility of the relevant evidence presented [...] Individual items of the evidence, such as the testimony of different witnesses, or documents admitted into evidence, have to be analysed in the light of the entire body of evidence adduced;

2) Only after the analysis of all the relevant evidence, can the Trial Chamber determine whether the evidence upon which the Prosecution relies should be accepted as establishing the existence of the facts alleged, notwithstanding the evidence upon which the Defence relies. At this fact-finding stage, the standard of proof beyond a reasonable doubt is applied to establish the facts forming the elements of the crime or the form of responsibility alleged against the accused, as well as with respect to the facts which are indispensable for entering a conviction;

3) At the final stage, the Trial Chamber has to decide whether all of the constitutive elements of the crime and the form of responsibility alleged against the accused have been proven".[615]

646. The Appeals Chamber of the International Criminal Tribunals found that:

"[...] the presumption of innocence requires that each fact on which an accused's conviction is based must be proved beyond a reasonable doubt [...] if facts which are essential to a finding of guilt are still doubtful, notwithstanding the support of other facts, this will produce a doubt in the mind of the Trial Chamber that guilt has been proven beyond a reasonable doubt".[616]

647. In the *Limaj* Appeal Judgement, it again held that:

"the principle of *in dubio pro reo*, as a corollary to the presumption of innocence, and the burden of proof beyond a reasonable doubt, applies to findings required for conviction, such as those which

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[614] Case 002/01Appeal Judgement, paras. 418-419 (references omitted).
[615] *Ntagerura* Appeal Judgement (ICTR), 07.07.2006, para. 174.
[616] *Ntagerura* Appeal Judgement (ICTR), 07.07.2006, para. 175.

make up the elements of the crime charged. This approach is consistent with the case-law of the International Tribunal and is a logical approach, given that, in the context of issues of fact, the principle is essentially just one aspect of the requirement that guilt must be found beyond a reasonable doubt."[617]

648. Therefore, the Trial Chamber cannot hide behind a "holistic approach" expecting it to resolve a non-existent "discrepancy" between *intime conviction* and conviction beyond any reasonable doubt, the only standard that should be applied at the ECCC. The Chamber must stringently apply both the rules on proving guilt beyond any reasonable doubt and the *in dubio pro reo* principle, a corollary to the presumption of innocence.

649. It is important to be mindful of that, especially given that the Trial Chamber already convicted the Accused in Case 002/01 by recording findings in anticipation of Case 002/02, thereby demonstrating its bias.

Part V. FAIRNESS

650. Even Accused before the ECCC are entitled to the presumption of innocence and to an impartial tribunal.[618] Unfortunately, the ECCC judges have not led by example in terms of respect for those principles. Indeed, in Case 002/01, the Trial Chamber did not hesitate to enter findings in anticipation of 002/01 (Chapter I), in the course of a trial where it again demonstrated its bias (Chapter II).

Chapter I. FINDINGS ENTERED IN ANTICIPATION OF CASE 002/01

651. In rendering its judgement in Case 002/01, the Trial Chamber did not hesitate to enter findings concerning facts under review in Case 002/02, whether such facts were common to both cases or exclusive to Case 002/02.

652. A Special Panel rejected the Applications for Disqualification of the Chamber, which were filed by the Defence teams following the issuance of the Trial Judgement.[619] However, Judge DOWNING, a member of the Special Panel, issued a robustly reasoned partially dissenting

[617] *Limaj* Appeal Judgement (ICTY), 27.09.2007, para. 21.
[618] Agreement between the United Nations and the Government of Cambodia, Articles 12 and 13; Law on the Establishment of the ECCC, Article 33 (new); ICCPR, Article 14; Internal Rules 21 and 34(2).
[619] Decision of the Special Panel of 14.11.2014, **E314/12**; Reasons for the Decision of the Special Panel, 30.01.2015, **E314/12/1.**

opinion. According to him, the findings entered would lead a reasonable observer, well informed, to apprehend reasonable bias on the part of the challenged judges. Judge DOWNING indeed appended a detailed annex concerning each accused person along with of excerpts of the Closing Order and the relevant findings in the Case 002/01 Trial Judgement; it is entitled " Predetermination of factual issues relevant to the criminal responsibility for the crimes prosecuted Case in Case 002/02."[620]

653. In the Case 002/01 Appeal Judgement, the Supreme Court Chamber points out that it has "repeatedly flagged the issue", and recalls its findings on the appeal against the severance decisions (where it recommended setting up a new panel for Case 002/02) and stated that its findings have no impact on Case 002/01.[621] Furthermore, the Supreme Court Chamber held that as the findings of the Trial Chamber had no influence on the convictions, they could only have the value of *dicta* which, as such, are not subject to appellate review.[622]

654. An *obiter dictum* is:

> ": a Latin term [...] used to refer to, in a judgement, an opinion of a judge in passing, for guidance only and as an occasional indication which, unlike reasons, even in overabundance, is not aimed at justifying the decision containing it, but only to make known in advance, and for all intents and purposes, the opinion of a judge on a matter other that on which the outcome of the litigation at hand requires to settle."[623] (*emphasis added*)

655. For instance the findings relating to Case 002/02, which the Chamber recorded in anticipation of Case 002/01, are not only in violation of the presumption of innocence of the Accused but also a pre-judgement of 002/02.

656. Even the Supreme Court Chamber engaged in such a course of action by holding that:

> "Indeed, it would appear that the enslavement of population was one of the principal objectives of the Khmer Rouge regime, of which the population transfer was but a first step."[624]

657. It is wishful thinking to expect the Trial Chamber not to be influenced by the *obiter dictum* of the Supreme Court Chamber or by the fact that it has previously expressed its own views on the case before it.

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620 Reasons for Partially Dissenting Opinion of Judge DOWNING, 23.01.2015, **E319/12/1**; Annex **E319/12/1**.
621 Case 002/01 Appeal Judgement, para. 228 and footnote 560.
622 Case 002/01 Appeal Judgement, para. 229.
623 *Vocabulaire juridique*, G. CORNU, PUF, 8th edition 2007, *Obiter dictum*.
624 Case 002/01 Appeal Judgement, para. 828.

658. The reality is that KHIEU Samphan is being tried by judges who, while they have not manifested disregard for him, have, at any rate, manifested utter disregard for the presumption of innocence principle.

Chapter II. MANIFESTATIONS OF BIAS IN CASE 002/02

659. It is not possible to list all of the instances in Case 002/02 where the Trial Chamber has manifested bias in favour of the Prosecution and against KHIEU Samphan, but a few a few examples will suffice to drive that point home.

Section I. A QUEST FOR INCULPATORY EVIDENCE

660. Despite the lengthy judicial investigations and pre-trial phases, Case 002/02 became a quest for inculpatory evidence. As a matter of fact, the Trial Chamber allowed the Co-Prosecutors to introduce new testimonial and documentary evidence in the course of the proceedings (much of it deriving from the ongoing investigations in Cases 003 and 004). In instances where the Chamber introduced evidence of its own motion in the course of the trial, such evidence was also inculpatory.[625]

661. By releasing the list of witnesses it proposed to hear (without the reasons) in drips and drabs as the trial progressed, the Chamber left the door open for further inculpatory evidence to be introduced, which it then readily admitted whenever it considered that such evidence capable of helping fill gaps in the testimonies it had heard hitherto.[626]

662. The Defence was swamped throughout the proceedings, as it had to reply to requests of the other parties (often filed at the last minute) and a to deal with all the new evidence as it was being introduced. It was thus given no choice but to prepare for the trial while it was already underway, with a constantly changing schedule.

663. The introduction of all that new evidence caused considerable delay to the proceedings. The Chamber elected to hear new prosecution witnesses, some of whom gave out-of-scope evidence,[627] and to admit huge amounts of written records of interview, all of which were also out of scope, and

[625] For example: KEO Chandara, MUY Vanny, SAY Doeun, PREAP Sokhoeurn and copies of translations of Vietnamese documents of no probative value (Decision, 25.11.2016, **E327/4/7**).
[626] For example, testimony about the treatment of the Cham and the Vietnamese which the Prosecution requested in its filings of 15.05.2015 (**E366)**, 15.09.2015 (**E381)** and 24.12.2015(**E382),**
[627] For example, Civil Party SUN Vuth (see *infra*, paras. 1417-1438).

of intrinsically low probative value,[628] instead of hearing the few individuals whose testimony the Defence had requested before the trial opened.[629] For instance, only two of the 186 witnesses who testified were proposed by the Defence (i.e., 1.07%).[630]

664. Despite the Defence's insistent requests to recall Stephen HEDER and François PONCHAUD, both of whom were deemed credible in Case 002/01 and had a great deal to say regarding the subject matter of Case 002/02 upon which they were not cross-examined in Case 002/01,[631] the Chamber preferred to, for example, recall another witness even though the witness in question had been heard in Case 002/01 by way of exception concerning the entirety of the facts in Case 002.[632] The Chamber also preferred to hear the testimony of 16 witnesses during the trial segment on marriages instead of that of the eight witnesses who were scheduled to testify when it granted the Civil Parties' request to extend the scope of Case 002/02 so as to include factual allegations on marriages countrywide.[633] The Chamber even decided to hear one of those civil parties during a key documents hearing, after the Prosecution submitted his written record of interview in Case 004,[634] even while many witnesses who testified in other trial segments had also testified about marriages.

665. It was therefore at the detriment of two key testimonies for the Defence and the expeditiousness of the trial proceedings that the Trial Chamber largely favoured the Prosecution and facilitated its work of seeking new evidence despite a lengthy judicial investigation.

Section II. THE PROSECUTION IS PRESUMED TO BE OF GOOD FAITH, WHILE THE DEFENCE IS PRESUMED TO BE OF BAD FAITH

666. The main reason Case 002/02 has turned into a quest for inculpatory case is because the Chamber turned a blind eye to the Prosecution's failure to meet its obligation of disclosing exculpatory

[628] For example, Decisions **E319/7** (24.12.2014), **E319/17/1** (08.04.2015,), **E319/22/1** (17.07.2015) and **E319/32/1** (18.02.2016).
[629] Expert witnesses proposed by KHIEU Samphan, 09.05.2014, **E305/5** and Annex **E305/5.2** (summaries).
[630] Expert Witness Peg LEVINE and Witness CHUON Thy.
[631] For example, KHIEU Samphan Requests of 09.08.2016 (**E408/6**), and **E408/6/1** (of 13.10.2016). The Chamber disingenuously considered that recalling them in Case 002/02 would be repetitious and would "cause an undue delay to the proceedings" (Memorandum, 03.11.2016, **E408/6/2**, para. 6), which is ironic considering all the time unnecessarily spent on admitting and/or hearing evidence that was irrelevant and/or of virtually no probative value, and recalling SAO Sarun.
[632] SAO Sarun. See Memorandum, 10.05.2012, **E194**.
[633] Decision on Additional Severance, 04.04.2014, **E301/9/1**, para. 33
[634] T. 08.09.2016, draft, p. 1, before 09.04.02 (notification of Decision to hear PREAP Sokhoeurn).

evidence. Indeed, whereas in Case 002/01 the Prosecution only disclosed, as required, potentially exculpatory evidence deriving from the ongoing investigations in Cases 003 and 004 only, in Case 002/02, it disclosed all of the evidence it deemed relevant.[635] Rather than reprimand the Prosecution for its disingenuously unethical conduct, as it amply demonstrated, the Chamber simply remarked that the new interpretation adopted by the Prosecution was overly broad.[636]

667. On the other hand, after having left the Defence with no choice but to prepare its Case 002/01 appeal brief instead of preparing for the opening of the Case 002/02 proceedings, the Chamber then proceeded to file complaints with the respective bar associations of KHIEU Samphan's lawyers.[637] Only recently, when it decided to terminate the services the standby lawyers it had then appointed to act as replacements if necessary, it recalled that it had proceeded with these appointments when "finding that the conduct of KHIEU Samphan and his Counsel had obstructed proceedings".[638] It was, nonetheless, forced to recognise that "[s]ince this time, the circumstances have not necessitated the replacement of current Counsel for KHIEU Samphan"[639] without ever saying a word about the fact that KHIEU Samphan's lawyers were cleared by their respective bar associations of the accusations of misconduct.[640]

668. The Chamber has a biased view of the work of the Defence, and often seems irritated by it. For example, when the Defence questioned the credibility of some inculpatory testimony, the Trial Chamber felt obliged to intervene rather heavy-handedly to defend the individuals concerned.[641] However, it did not react when the Defence was insulted by individuals whose credibility was

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[635] KHIEU Samphan Request, 24.08.2015, **E363**; KHIEU Samphan Reply, 17.09.2015, **E363/2**.
[636] Decision, 22.10.2015, **E363/3**.
[637] Order, 19.12.2014, **E330.**
[638] Memorandum, 28.03.2017, **E321/3**, para. 1 (at paragraph 4, the Chamber considers that the grounds warranting retention of Standby Counsel were no longer present "after the filing of the Accused's Closing Brief". No such grounds existed, and also there is no reason for Standby Counsel to remain in place, since they are certainly not drafting "alternate closing briefs").
[639] Memorandum, 28.03.2017, **E321/3**, para.1.
[640] Letter from the Bar Association of Cambodia, 13.07.2015, **E330/1/1**; Decision of Paris Bar Council Disciplinary Board, 17.11.2015, **E330/3.2**.
[641] For example: President NIL Nonn's interventions during the examination of Duch (T. 23.06.2016, **E1/443.1**, pp. 14-16, from 09.26.35 to 09.31.40, pp.36-37, from 10.36.28 to 10.38.20; Judge FENZ's interventions during the examination of Civil Party HENG Lai Heang, T. 19.09.2016, **E1/476.1**, pp. 83-85, between 15.28.42 and 15.33.11, p. 87 around 15.36.50.

called into question.[642] There were even instances when the Trial Chamber itself insulted the Defence, but the Defence remained courteous in the face of it all.[643]

669. Yet, the Trial Chamber has been very accommodating, even lenient vis-à-vis the Prosecution's lack of diligence and its lapses. For example, the Trial Chamber allowed the Prosecution to tender into evidence an entire book very shortly before the testimony of an expert it had proposed before the proceedings.[644] It allowed the Prosecution to call an expert witness whereas the individual in question had had since recanted his testimony.[645] It also allowed the Prosecution to submit documents (including some that were not on the list) in relation to a key documents hearing even though it had decided against submitting such material.[646] Moreover, the Trial Chamber has in many instances tried to make up for deficiencies in the Prosecution's examination of witnesses.[647]

670. Theoretically speaking, the Chamber could very well manifest less bias in its evaluation of the evidence. Needless to say, that is the Defence's wish even though it may all turn out to be hoping against hope. Be that as it may, and whatever opinion the Chamber may hold, the Defence will have done its job to the bitter end and in accordance with its professional obligations.

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[642] For example: Duch insulting Counsel GUISSÉ, T. 23.06.2016, **E1/443.1**, p. 10, before 09.21.05, p. 50, before 11.10.32; Henri LOCARD insulting Counsel GUISSÉ, See *supra*, paras. 593-594.

[643] While examining KHIEU Samphan, Judge LAVERGNE insinuated that his lawyers may have hidden things from him, implying that they were interested in money, whereas he had manifested bias in his interpretation of the Defence's administrative filings: T. 28.10.2014, **E1/244.1**, pp. 3-11, between 09..08.47.43 and 09.22.45.

[644] T. 26.07.2016, **E1/448.1**, pp. 84-87, between 15.13.37 and 15.21.38.

[645] T. 20.10.2016, **E1/487.1**, pp. 17-21, between 09.36.39 and 09.41.42 (testimony of Stephen MORRIS).

[646] T. 05.01.2017, draft, pp. 5-11, between 13.40.25 and 13.53.40 (Judge FENZ even reprimanded the Defence foraddressing policy matters in its presentation of documents on the role of the Accused, because the Chamber had earlier instructed the Defence not to submit documents on policies until such a time as documents on the role of the Accused were to be submitted; see T. 10.01.2017, draft, between 10.46.47 and 10.48.12)

[647] See for example the examination of NEANG Ouch by Judge LAVERGNE, T. 10.03.2015, **E1/274.1**, pp. 45-86, between 11.05.06 and 16.01.44, or that of CHOU Koemlan, again by Judge LAVERGNE, T. 27.01.2015, **E1/253.1**, pp. 8-16, between 09.25.21 and 09.46.37

Title II. THE ARMED CONFLICT AS A KEY COMPONENT OF THE CONTEXT

671. The Defence teams requested that the Case 002/02 proceedings open with the presentation of evidence regarding the armed conflict, because this a key issue which has an impact on the rest the case,[648] but the Trial Chamber decided to hear the matter only at the end of the proceedings.[649] Moreover, it is noteworthy that the Co-Investigating Judges devoted merely five paragraphs of the Closing Order to the armed conflict.[650]

672. Yet, the armed conflict ought to be at the heart of any discussion of the events in Cambodia in the period between 1975 and 1979, because it took place against that background. With that in view, any analysis of the CPK policy during that period which does include the armed conflict only yields an incomplete and unilateral view of the events and therefore fails to explain the conduct of the various actors at that time.

673. The Trial Chamber did address the armed conflict in the *Duch* case, but only very briefly without touching on its impact on Democratic Kampuchea's domestic policies.[651] It is therefore necessary to take a closer look at the conflict, including its root causes (Part I), its main stages in the period within the scope of the ECCC's temporal jurisdiction (Part II) and its consequences in fact and in law (Part III).

Part I. THE CONFLICT AND ITS ROOT CAUSES

674. In a small paragraph of the *Duch* Trial Judgement, the Trial Chamber sets out the historical background to the conflict between Cambodia and Vietnam, indicating that it "stemmed from various factors, some of which date back centuries"[652] of the history of Cambodia and Vietnam, like that of many of their neighbours, has indeed been punctuated by wars, attempts at annexation and power struggles marked by a degree of condescendence of the Vietnamese vis-à-vis their neighbours. POL Pot characterised that as "arrogance" in one of his speeches.[653] Outside observers,

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[648] At first hearing (T. 30.07.2014, **E1/240.1**, pp. 42-44, from 10.54.10 to 10.576.25, p. 46, around 11.01.18, p. 47, after 11.04.20).
[649] Decision, 12.09.2014, **E315**, para. 14.
[650] Closing Order, paras. 150-155. While a large number of period documents are referenced in the endnotes, the rest of the Closing Order contains no reference to the impact of the armed conflict on the alleged facts.
[651] *Duch* Trial Judgement, 26.07.2010, paras. 59-81.
[652] *Duch* Trial Judgement, 26.07.2010, para. 60.
[653] In an April 1978 speech, POL Pot displays this arrogance following the Vietnamese invasion in late 1977: *Revolutionary Flag*, "The Presentation of the Comrade Secretary of Communist Party of Kampuchea on the Occasion of the 3rd Anniversary of the Great Victory of 17 April (…)", April 1978, **E3/4604**, ERN 00519838.

such as Stephen MORRIS, have pointed to Vietnam's arrogance. Stephen MORRIS wrote:

> "[…] regarding the Cambodians as being somehow inferior culturally and there is a history during the Vietnamese occupation of Cambodia in the 19th century where humiliation of the Cambodians was an important part of political life […] the Vietnamese regard themselves as superior […]"[654]

675. Witnesses have testified that well before the advent of the Democratic Kampuchea regime, they used to hear Vietnamese being referred to as "hereditary enemies" of Cambodia.[655] It is important to bear this in mind, because the Prosecution has tended to portray the animosity felt by part of the population towards Vietnam as a political construct of the Khmer Rouge, whereas it dates back to an earlier period.

676. Such a reaction by a people towards a State that it perceives as a potential invader or which considers itself superior owing to a turbulent past, particularly in border areas, can be observed in many other parts of the world. Relations between France and Germany are a case in point. Two world wars and prior to that, frequent wars in earlier centuries have bred a sense of mistrust among French people, as evidenced by the many unflattering names they call to Germans, because they view them as invaders.[656]

677. Similarly, relations between Vietnam and Cambodia have been strongly tainted by their long-standing close yet tense links (Chapter I). The root cause of the Vietnam-Cambodia conflict lies in the delicate balance to be struck between dialogue the two States engaging in dialogue and the fact that the Democratic Kampuchea leadership the asserted national sovereignty after 17 April 1975 (Chapter II).

Chapter I. ENEMY BROTHERS

678. While the two countries are brothers because of their geographical proximity, and because of the ideologies developed by their revolutionary movements in the common fight against the United

[654] Stephen MORRIS: T. 18.10.2016, **E1/485.1**, p. 89, around 15.18.18. See also: Douglas PIKE Report entitled "The Vietnam Cambodian Conflict, Report prepared at the Request of the Sub-Committee on Asian and Pacific Affairs, Committee on International Relations, Congressional Research Service", 95th Congress, 4 October 1978, **E3/2370**, ERN 00187396.

[655] See for example: MEAS Voeun: T. 03.02.2016, **E1/387.1**, p. 29, around 10.07.02; PRUM Sarat: T. 27.01.2016, **E1/383.1**, p. 13, before 09.31.50.

[656] One example is the term "*boche*", which was used already in 19th century France, but was more widely used during the First World War; it was also used in Belgium. See https://fr.wikipedia.org/wiki/Boche andhttps://www.rtbf.be/14-18/thematiques/detail_l-ennemi-comme-on-le-nomme-la-re-invention-du-boche-et-du-mof?id=8976002.

States, they are also enemies because of their past conflicts.[657] Their often competing national interests created friction before 1975 (Section I), which degenerated into a border conflict (Section II).

Section I. FRICTION BEFORE 1975

679. The historical context, and in particular, the Vietnam war, is essential to understanding the friction which developed between the two revolutionary movements. The weakening of the Cambodian revolutionary movement following the 1954 Geneva Accords (I) was the root cause of the mistrust towards the Vietnamese, despite their common fight against the Americans and the LON Nol regime, even though the 1973 Paris Peace Agreement marked the end of Vietnam's tutelage (III).

I. THE GENEVA ACCORDS AND THE SIDELINING OF THE CAMBODIAN COMMUNISTS

680. Prior to the Vietnam War, the Indochina war epitomised the region's struggle for independence from French colonial power. It is therefore important to bear in mind the relations that the Vietnamese communists developed with the Cambodian resistance against colonialism in order to gain an understanding of the events which followed.[658]

681. For instance, the first alliance whereby the Cambodian communists were under Vietnamese control, set the tone for relations between the two communist parties a Vietnam's sense of "revolutionary superiority" always in the background. As Stephen MORRIS pointed out in his testimony, "[i]t was the ambition of the Vietnamese to use the people whom they regarded as being loyal to them to create communist parties in other countries."[659]

682. The Geneva Accords, which brought an end to the Indochina War, also dealt a blow to the Khmer communist movement, as it was excluded from the negotiations. That created mistrust among Cambodians, because they realised that the Vietnamese held their own interests paramount with regard to their plan to create an Indochinese party.[660]

683. For the Vietnamese communists, it was important to be in the good books of SIHANOUK, co-

[657] Nayan CHANDA also entitled his book on relations between the two countries: *Brother Enemy,* 1986, **E3/2376**.
[658] See Dmitry MOSYAKOV's analysis in the article "The Khmer and the Vietnamese Communists: A history of their relations as told in the Soviet archives", 2004, **E3/9644**, ERN 01125297.
[659] Stephen MORRIS: T. 18.10.2016, **E1/485.1**, pp. 93-94, around 15.39.00.
[660] Article by Dmitry MOSYAKOV entitled "The Khmer and the Vietnamese Communists: A history of their relations as told in the Soviet archives", 2004 **E3/9644**, ERN 01125297.

founder of the non-aligned movement. This is why they withdrew their forces from the parts of Cambodia which were under their control, thereby obliging the Khmer communists to go underground. Moreover, the directives of the Vietnamese communists to support SIHANOUK and to end the armed conflict exacerbated the sense of betrayal spawned by the Accords.[661]

684. The repression that many a Khmer communist subsequently suffered at the hands of the SIHANOUK regime seriously impeded the movement. The new leaders, in particular POL Pot, who restored the Party to form what was became the CPK, were always mindful of that experience.

II. MISTRUST DESPITE THE COMMON STRUGGLE

685. The overthrow of SIHANOUK in 1970 marked a turning point, because the new revolutionary movement enjoyed his support in the fight against the LON Nol regime. Military cooperation with Vietnam was once again required, as the Vietnamese had again taken charge of the operations and did not hesitate to give orders as the "big brother".[662]

686. However, because the situation was critical, it was crucial to unite on the battlefield and fight together. Needless to say, this was not only a matter of having a common Marxist vision, but also, and more importantly, it was a tactical necessity given that the Americans were supported the LON Nol regime. For the Vietnamese, it was crucial to have rear bases on Cambodian territory.[663] The Vietnam-Cambodia liaison committees also played a crucial role in the fight against the LON Nol regime.[664] Moreover, this was a way for the Cambodian communists to regroup. David CHANDLER underscored the significance of this alliance.[665]

687. Such cooperation does not mean that the Khmer communists had not learned the lessons of the past. Tensions remained, in particular with regard to China's military aid.[666] Since that aid transited

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[661] Article by Dmitry MOSYAKOV entitled "The Khmer and the Vietnamese Communists: A history of their relations as told in the Soviet archives", 2004, **E3/9644**, ERN 0112529; Book by Philip SHORT, *Anatomy of a Nightmare,* 2004, **E3/9**, ERN 00396297.

[662] Article by Dmitry MOSYAKOV entitled "The Khmer and the Vietnamese Communists: A history of their relations as told in the Soviet archives", 2004, **E3/9644**, ERN 01085976-77.

[663] Prior to the LON Nol's coup d'état, the two revolutionary groups had different interests, with Vietnam defending its own. See Stephen MORRIS: T. 19.10.2016, **E1/486.**1, pp. 111-112, around 15.24.28.

[664] Stephen MORRIS: T. 19.10.2016, **E1/486.1**, pp. 22-23, after 09.48.43

[665] Book by David CHANDLER, *Brother Number One, A Political Biography of Pol Pot,* 1992, **E3/17**, p. 84, ERN 00392999: The communists could gain recruits by claiming loyalty to the prince while obtaining arms, training and experience from Vietnam. Soon after the coup, several hundred well trained Khmers set off from North Vietnam to take part in their country's struggle."

[666] Regarding the tensions he allegedly observed in 1973 in the Southeast Zone: LONG Sat: T. 01.11.2016, **E1/493.1**, pp. 70-71, around 14.07.30.

through Vietnam, part of it never reached Cambodia. Wary, POL Pot very quickly became opposed to the idea of an Indochinese party under Vietnamese control and made that clear, given the new context.[667]

688. Relations with Vietnam also spawned tensions within the CPK even before 1975, as Ta Mok was particularly hostile to the Vietnamese.[668] Moreover, Vietnam's thinly veiled sense of superiority as the "big brother", as manifested by successive leaders of the Khmer communist movement, was felt even among the lowest levels of the population.[669] Indeed, the local population was particularly resentful of the occupation of Cambodian territory by Vietnamese troops. Therefore, the necessary alliance in the face of the United States and its allies as the common enemy was not without its problems.[670] The mistrust was exacerbated by the fact that the Vietnamese single-handedly oversaw the end of the Vietnam War.

III. THE PARIS PEACE AGREEMENT OR THE END OF "BIG BROTHER" CONTROL

689. The Khmer communists who were actively engaged in the armed struggle viewed Vietnam's signing of the 1973 Paris Peace Agreement as yet another form of betrayal.[671] For them, negotiating with LON Nol or the Americans was out of the question. They therefore firmly resisted Vietnam's attempts to force their hand.[672] Philip SHORT has described a period of arm wrestling during which the Vietnamese drastically reduced the amount of supplies transiting along the Ho Chi Minh Trail, a move that did not deter the Khmer Rouge from pursuing the war.[673]

690. The military advances of their forces and the victories they won against the LON Nol troops, despite the massive US bombings changed the dynamic. For instance, the Vietnamese had to

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[667] KE Pich Vannak, son of KE Pauk, witnessed a pre-1975 meeting in the former North Zone between POL Pot and Vietnamese representatives: "I saw LÉ Yun, and THAM Vann Dong. LÉ Yun came once. At that time, I served him tea and gave him a massage. THAM Vann Dong came twice. When those two persons came, I saw POL Pot had a meeting with LÉ Yun and an interpreter (I did not know who that interpreter was). During the meeting, I heard those two persons talked (*sic*) about joining the Indo-China Party, but POL Pot refused to join it. The two persons spoke to each other seriously. At that time, I was near that place." (WRI of Witness KE Pich Vannak (deceased), 04.06.2009, **E3/35**, ERN 00346148-49.

[668] WRI of CHHOUK Rin, 29.07.2008, **E3/361**, ERN 00766449-50. Soldier under Ta Mok.

[669] DC-Cam Interview of SÂN Lăn *alias* Lăn, 21.02.2005, **E3/7822**, ERN 00667336; Stephen MORRIS: T. 19.10.2016, **E1/486.1**, p. 131, around 15.53.36.

[670] PRUM Sarat: T. 27.01.2016, **E1/383.1**, p. 50, before 11.21.34.

[671] WRI of MÂM Nai, 07.11.2007, **E3/351,** ERN 00162930-31.

[672] Article by François PONCHAUD entitled "Vietnam and Cambodia: A Fragile Militant Solidarity", March 1979, **E3/7258** ERN 01200264-65.

[673] Book by P. SHORT, *POL Pot, Anatomy of a Nightmare,* 2004, **E3/9**, ERN 00396448-49.

rethink their strategy when they realised that POL Pot's troops controlled two thirds of Cambodian territory. The supplies resumed.[674]

691. Despite the difficulties arising from the continuing war against LON Nol and the US bombings, the fact that Vietnam once again broke ranks with the Cambodian liberation movement changed their relations once and for all. The Paris Peace Agreement indirectly enabled the Khmer Rouge movement to liberate itself and to assume a position of strength. Vietnam was forced to recognise that and to suspend its designs about control over Cambodia.[675] This turn of events also made Democratic Kampuchea realise the significance of sovereignty and national independence, as manifested in the border conflict.

Section II. THE BORDER CONFLICT STARTING AS FROM 1975

692. It is important at this juncture to highlight the sticking point which was the catalyst for the armed conflict, namely the running border dispute in the period between 1975 and 1979, as Steve HEDER explained in court.[676] It is therefore worth taking a closer look at the reasons behind the border disputes between the two countries (I) and the root causes of the conflict which broke out in May 1975 (II).

I. BOUNDARIES INHERITED AS SUCH FROM THE COLONIAL ADMINISTRATION

693. An very detailed 1976 study by the US State Department provides a historical overview of the Vietnam-Cambodia border disputes. It describes the decisions of the French administration on the management of French interests in colonial Indochina, as well as the discussions concerning the maritime boundaries. As regards the latter question, it would appear that the Brévié Line remained in place.[677]

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[674] Book by P. SHORT, *POL Pot, Anatomy of a Nightmare,* 2004, **E3/9**, ERN 00396450.
[675] Stephen MORRIS: T. 19.10.2016, **E1/486.1**, p. 24, before 09.53.41.
[676] Steve HEDER: T. 17.07.2013, **E1/225.1**, p. 83 around 14.35.25: "Well, setting aside the difficulty of disentangling the question of presence of Vietnamese military forces inside Cambodia in a context where it's not described as territorial encroachment on the one hand and instances in which it's described as territorial encroachment on the other - because sometimes people made that distinction - there are accounts right from the - before 1975 - before April 1975 through '75, '76 and '77 and of course in the latter part of '77 and continuously thereafter, there is fighting back and forth across what I think both sides would recognize as some place that's the border. So, in interviews and in official documents - internal documents - particularly post '75 for the internal documents, I don't recall any internal documents from before '75, but - yes, this is - this is happening on an increasingly large-scale right from pre-April 1975 through to 7 January '79."
[677] *International Boundary Study: Cambodia – Vietnam Boundary*, No. 155, 05.03.1976, **E3/2373**, p. 12, ERN 00157777.

694. Nonetheless, in its negotiations with Democratic Kampuchea, Vietnam subsequently questioned the boundaries established through practice and transposed on maps of the region, characterising them as "imperialistic".[678] Yet, as the Trial Chamber itself pointed out in the *Duch* Trial Judgement, "[…] border demarcations drawn by the French, often favouring the Vietnamese side, and in particular over the Brévié line (drawn in 1939 as a maritime boundary for administrative and policing purposes) further increased tension."[679]

II. ROOT CAUSES OF THE CONFLICT

695. In the talks that took place after 17 April 1975, the Vietnamese always came across as greedy and demanding in regard to their claims. Indeed, one witness from the East Zone testified that some Khmer villages which used to appeared on the map subsequently ceased to exist, implying that those villages were absorbed by Vietnam.[680] In an article about the history of the border talks, François PONCHAUD points out that "[t]he Vietnamese were effectively staking a claim over territorial waters that extended much farther than those delineated by Brévié, bringing the port of Kompong Som, which was paramount to Cambodian independence, virtually under Vietnamese control. Similarly, they took the view that most of the oil fields around the Puolo Wai Islands belonged to Vietnam."[681] Therefore, these were not just routine talks, because economic survival was at stake.

696. Among its claims, the Vietnam also argued that SIHANOUK had ceded Ou Reang and Ou Le territory along its border.[682] It is little wonder therefore that the talks concerning boundaries were contentious throughout the conflict for obvious economic and strategic reasons relating to Cambodia's independence and sovereignty. Boundaries were therefore a key issue, hence why they were the root cause of the conflict.

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[678] Record of Meeting of the Standing Committee, 11.03.1976, **E3/217**, ERN 00182635 concerning the year 1975: "Throughout history, the problem of the eastern border has not yet been solved. In June 1975, during negotiations, our Party brought up this problem, but the Vietnamese did not respond. Later, they told Comrade Nuon that this border was made by imperialists."
[679] *Duch* Trial Judgement, 26.07.2010, para. 60.
[680] LONG Sat: T. 01.11.2016, **E1/493.1**, p. 73, before 14.15.43; T. 02.11.2016, **E1/494.1**, p. 6, after 09.15.38, and p. 8, around 09.15.42.
[681] Article by François PONCHAUD entitled "Vietnam and Cambodia: A Fragile Militant Solidarity", March 1979, **E3/7258** ERN 0012265-66.
[682] Report by Chhin, 19.02.1976, **E3/8377**.

Chapter II. 1975-1976: A DELICATE BALANCE BETWEEN ALLIANCE AND NATIONAL SOVEREIGNTY

697. In the wake of the 17 April 1975 victory, it was clear to all observers that the long-standing antagonisms between the two countries were still alive.[683] It was especially clear that the new Democratic Kampuchea regime considered the idea of an Indochinese federation unacceptable.[684] For the new leaders, the priority was to gain autonomy and a real presence on the world stage, and also to preserve the hard-earned independence while at the same time maintaining the alliance with their big neighbour, which meant favouring dialogue (Section I). However, the procrastination in the early stages led to a deadlock, and Democratic Kampuchea rejected Vietnam's regional ambitions as it perceived them as a breach of its sovereignty (Section II).

Section I. ATTEMPTS AT DIALOGUE IN THE EARLY DAYS OF THE CONFLICT

698. It is hardly surprising that the open conflict was triggered by decades-long border disputes given that the integrity of a country's borders is the most emblematic sign of its sovereignty. As the Chamber correctly pointed out in the *Duch* case, "disputes" began as early as April 1975 and the conflict began in earnest in May of that year with incidents in Phu Quoc (Koh Tral) and Tho Chu (Koh Krachak).[685] Though the conflict continued to escalate with the fighting confined to a few strategic areas in its initial stages, there was a willingness to defuse the situation; the Cambodian side advocated negotiations (I) in dealing with a military situation, which required continued monitoring in order to maintain both the integrity of the boundaries and national sovereignty (II).

I. NEGOTIATIONS AIMED AT DEFUSING THE SITUATION

699. For Democratic Kampuchea, breaking free from Vietnamese control did not mean engaging in a head-on confrontation with a vital ally. POL Pot therefore deemed it necessary to cooperate and maintain ties while at the same time remaining vigilant. That is why the Standing Committee decided already in April 1975 to make a gesture in the form of a visit to Vietnam despite the existing military tensions. The visit in May 1975 in the immediate aftermath of the clashes around the border

[683] Diplomatic cable sent by the Australian Embassy in Hanoi to the Australian Department of Foreign Affairs, Canberra, 08.05.1975, **E3/9722**, ERN 01186941-42.
[684] Diplomatic cable sent by the Australian Embassy in Hanoi to the Australian Department of Foreign Affairs, Canberra, 08.05.1975, **E3/9722**, ERN 01186945.
[685] *Duch* Trial Judgement, 26.07.2010, para. 66.

islands is recounted by Philip SHORT, who characterises POL Pot's strategy as "an astute move".[686]

700. According to François PONCHAUD, the attack on Phu Quoc, which prompted Vietnam to retaliate in Poulo Wai, was described by POL Pot as a mistake on the part of the Democratic Kampuchea forces due to their "lack of topographical knowledge", for which he apologised to the Vietnamese authorities.[687] The idea was therefore to defuse the tension and ensure that relations remained peaceful.[688] Moreover, the Vietnamese took the border issue and its handling very seriously. The Socialist Republic of Vietnam was keen not to allow tensions and national considerations erode its "influence" over Cambodia. Both sides manifested a willingness to overcome difficulties, hence why Le Duan visited Cambodia in August 1975, a visit that the Australian embassy in Hanoi described as an unusual move.[689]

701. On the Democratic Kampuchea side, the calls for peaceful solution were heeded, as evidenced by Standing Committee meeting records. One such example is a November 1975 report about the situation at the border, which reads as follows:

> "Diplomatically, when we meet the Vietnamese, we will say that : We wish to have no clashes with one another. If there are excesses against one another, we will solve them. We will be the model of friendship. In Ratanakiri, some Vietnamese brothers and sisters have come to Au Ta Bauk. We told those friends to withdraw, but they have not. If they do not withdraw, this will lead to confusion. Therefore, we will tell them to withdraw. We wish to have no clashes with one another. If there are excesses against one another, we will solve them. We will be the model of friendship."[690]

702. That same message is echoed in a November 1975 telegram from Angkar to Ya regarding the eastern frontier. After setting out the various tactics and strategies to adopt in the event of a clash, the telegram sums up the prescribed policy, namely to reach out to the leaders concerning a negotiated settlement.[691]

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[686] Book by Philip SHORT, *POL Pot, Anatomy of a Nightmare*, 2004, **E3/9**, p. 384, ERN 003963999.
[687] Article by François PONCHAUD entitled "Vietnam and Cambodia: A Fragile Militant Solidarity", March 1979, **E3/7258**, ERN 01200264-65.
[688] *Revolutionary Youth*, August 1975, **E3/749**, ERN 00593942.
[689] Diplomatic cable sent by the Australian Embassy in Hanoi to the Australian Department of Foreign Affairs, Canberra, 20.08.1975, **E3/9723**, ERN 00532686-87.
[690] Standing Committee Meeting, 02.11.1975, **E3/227**, ERN 00183413-14.
[691] Telegram to Ya, 11.11.1975, **E3/1150**, ERN 00539054.

II. Resisting all attempts to violate Democratic Kampuchea's sovereignty

703. However, advocating dialogue did not mean being reckless or showing weakness. The alliance needed to be closely monitored. After having demonstrated strength by mobilising the Cambodian population, being under anyone's control was out of the question. In his testimony, Stephen MORRIS described the Soviet Union's idea of a federation which Vietnam was eager to adopt:

> "Well, the history of Vietnam is the history of a long march south from what is now northern Vietnam to conquer territories which were once occupied by other ethnic groups, including the Cham and the Cambodians. Large parts of what is now southern Vietnam used to be part of Cambodia, and the French assisted in the official dismemberment of that part of southern Vietnam from Cambodia during their colonial rule. And I also think that the whole concept of the Indochinese Federation which was initiated in the Communist International in the 1930s was a guiding impulse and motivating factor in the behavior of the Vietnamese communists towards Cambodia in the subsequent decades. I think that the idea of the Indochinese Federation was modelled on the Soviet Union itself, that is, that there would be one major political ethnic entity which provided the "leadership" for the other ethnic groups which were federated with it. So as in the case of the Soviet Union, the Russian ethnic group was dominant over the other non-Russian peoples of the Soviet Union. So the Vietnamese conceived Indochina as a place where the Vietnamese would be dominant over the Lao and Cambodians in terms of leadership, and they were --- considered themselves more advanced than the people of Laos and Cambodia."[692]

704. This "expansionist" model which was in line with "Vietnamese nationalism"[693] entailed totally annilation of Cambodia's independence, hence why the Khmer Rouge rejected it outright. This is why the situation in Cambodia continued to be a preoccupation while they sought to achieve more egalitarian relations with the Soviet Republic of Vietnam. For instance, Vietnamese forces were still occupying part of north-eastern Cambodia. As David CHANDLER pointed out, the Lao precedent was on everyone's mind.[694]

705. While negotiations were ongoing, the troops continued going head-to-head at each on a regular basis with increasing intensify over time. As historian MOSYAKOV noted, the Socialist Republic

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[692] Stephen MORRIS: T. 18.10.2016, **E1/485.1**, pp. 87-88, after 15.11.54 (*emphasis added*)

[693] Stephen MORRIS: T. 18.10.2016, **E1/485.1**, p. 98, before 15.21.58: "I think that that is part of culture. Nationalism is part of the Vietnamese culture and I think that, yes, I think that Vietnamese nationalism has been expansionist until recent times."; T. 18.10.2016, **E1/485.1**, p. 89, after 15.17.08. "So the idea of there being a federation was consistent with Marxist-Leninist ideology but, in fact, it was really a Vietnamese project which was dressed up to be something consistent with Marxism/Leninism" (*emphasis added*).

[694] Book by David CHANDLER, *POL Pot, Brother Number One,* 1992, **E3/17**, p. 110, ERN 00393024.

of Vietnam never gave up on the idea of keeping Cambodia as its private turf, and freely discussed it with its Russian interlocutors.[695]

706. For its part, Democratic Kampuchea continued to seek ways to free itself from Vietnamese influence. In this context, the border issues, which was closely linked to national sovereignty, came to symbolise that endeavour. As Stephen MORRIS indicated, "the border issues were the symptom of what happened or of deeper causes."[696] Indeed, for Democratic Kampuchea, standing on its own feet on the world stage was among the top priorities. This is why gaining an understanding of and using the geopolitical context to its advantage was high on its agenda.

Section II. A COMPLEX GEOPOLITICAL CONTEXT

707. The unfolding of the Khmero-Vietnamese conflict must also be viewed in light of the geopolitical context at that time. Each one of the two countries cared about its image in the eyes of the other countries which were keen on maintaining a balance in the midst of the Cold War. After its military victory against the United States, the embodiment of imperialism, Democratic Kampuchea needed to have its voice heard among the non-aligned countries and to embark on a diplomatic offensive with a view to making its case concerning the conflict with Vietnam (I). Meanwhile, China and the USSR were jockeying for influence over the two countries (II).

I. THE NON-ALIGNED MOVEMENT AND DIPLOMATIC STAKES

708. Democratic Kampuchea was well aware of the significance of gaining recognition on the world stage. This was not simply a matter of having ideologically compatible economic partners, but it also entailed linking up with countries which were fighting for self-determination, national independence and progressive development. For Cambodia, making its case to the non-aligned countries was clearly part of its strategy of thwarting the ambitions of the Socialist Republic of Vietnam in the region, a position is clearly reflected in the minutes of the Standing Committee meetings.[697]

709. For its part, the Socialist Republic of Vietnam was also well aware that it had to handle the tensions with tact so as to avoid being seen as yet another imperialist power, especially because it was

[695] Article by Dmitry MOSYAKOV entitled: "The Khmer Rouge and the Vietnamese Communists: A history of their relations as told in the Soviet archives", 2004, **E3/9644**, ERN 01085964.
[696] Stephen MORRIS: T. 20.10.2016, **E1/487.1**, pp. 55-56, after 11.18.25.
[697] Record of Meeting of the Standing Committee, 11.03.1976, **E3/217**, ERN 00182637.

seeking to join the non-aligned movement.[698] Moreover, it was keen not to offend China given that China disapproved of its regional ambitions..

710. Given this new balance of power in a world that was split in two due to the Cold War, Democratic Kampuchea was aware that it could not do without China, not only because of the aid China provided during the war against the LON Nol regime, but also because China was the only regional power capable of providing it with logistical, technical and military support at a time when it needed to rebuild from the ground up. It was therefore important to take account of the geopolitical stakes, both in terms of positioning on the world stage in order to gain more support, and in terms of positioning in the region where it needed to compose with both China and the USSR as they each jockeyed for influence.

II. CHINA AND THE USSR LURKING IN THE SHADOWS

711. Both China and the USSR played a key role in the Khmero-Vietnamese conflict. In his testimony, while explaining the background to his Ph.D. thesis, Stephen MORRIS said that the Vietnamese alternated between the two major powers during the Cold War.[699] In the early 1970s, relations between the two countries deteriorated to the point where they were at the brink of an armed confrontation, and "continued to get worse".[700] The Cambodia-Vietnam conflict is a perfect illustration of how the Socialist Republic of Vietnam pitted the two powers against each other and how it played its cards in furtherance of its political and military agenda.[701]

712. Democratic Kampuchea's need to form alliances with "friendly" regimes meant developing stronger ties with China. It received economic, scientific, technical and military aid.[702] As is always the case in such instances, the aid was not entirely without strings attached. China was eager to preserve its influence in this part of Asia and to thwart Vietnam's "ambition to control Cambodia and Laos", as it had realised very early on, according to Stephen MORRIS.[703]

713. For its part, the Socialist Republic of Vietnam maintained very close ties with the USSR. It needed an ally which was as powerful as China; moreover, the Soviet Union's privileged position in

698 Stephen MORRIS: T. 20.10.2016, **E1/487.1**, p. 62, before 13.32.12.
699 Stephen MORRIS: T. 18.10.2016, **E1/485.1**, p. 59, before 13.48.04
700 Stephen MORRIS, T. 19.10.2016, **E1/486.1**, p. 119, around 15.42.07.
701 See *infra*, paras. 817-832.
702 Regarding assistance with military hardware: PAK Sok: T. 16.12.2015, **E1/369.1**, p. 81, before 14.35.41. Stephen MORRIS: T. 18.10.2016, **E1/485.1**, pp. 96-97, after 15.37.27.

Southeast Asia gave it influence in the region, all be it by proxy. China not only resented the rapprochement, but it also had a "rational fear" of it. It viewed it as a form of ingratitude on the part of Vietnam to which it had provided considerable aid before and during the [Vietnam] war.[704]

714. The jockeying for influence between China and the USSR was the reason why the US presidential advisor reported on 8 January 1978 that the conflict between Cambodia and Vietnam was a "proxy war" between those two countries.[705] Indeed, that the weapons used by the Vietnamese came from the USSR,[706] while those used by Democratic Kampuchea came from China.[707]

Part II. THE UNFOLDING OF THE CONFLICT ACCORDING TO THE EVIDENCE ON THE RECORD

715. Thanks to its victory in January 1979 and to its much broader experience in diplomacy as compared to Democratic Kampuchea, the Socialist Republic of Vietnam was able to shape its account of the facts by filtering the information it released about the conflict. It was so bent on punishing the former representatives of Democratic Kampuchea that it could not have an objective view of the conflict. In fact, the Prosecution seems to have bought into the Socialist Republic of Vietnam's propaganda about Democratic Kampuchea's hawkish disposition (Chapter I) while disregarding the evidence on the record, evidence that provides a much more nuanced picture (Chapter II).

Chapter I. THE PROSECUTION PROVIDES A ONE-SIDED VIEW OF THE CONFLICT

716. As for propaganda, the Socialist Republic of Vietnam had the advantage of having full control over its diplomatic communications during and after the conflict. When the Vietnamese troops entered Phnom Penh, all of the records in offices ended up in the hands of the new master of Cambodia. As to what became of those records, that remains an open question.

717. The Vietnamese authorities very swiftly mounted propaganda against the "POL Pot-IENG Sary clique", but were not so swift they were asked to provide documents to the Tribunal. The unanswered or partial/tardy replies to requests by the ECCC judges are testimony to that.[708] This

E Stephen MORRIS: T. 19.10.2016, **E1/486.1**, p. 121, before 15.48.32.

[705] Book by David CHANDLER , *POL Pot, Brother Number One,* 1992, **E3/17**, p. 139, ERN 00393057.

[706] Stephen MORRIS: T. 19.10.2016, **E1/486.**1, pp. 91-92, around 14.23.06.

[707] Stephen MORRIS: T. 19.10.2016, **E1/486.**1, p. 113, after 15.28.03.

[708] See summary of requests in Judge BOHLANDER's memorandum, 10.01.2017, **E327/4/2/1**. See also memorandum of 28.11.2016, **E327/4/8** (in which the Chamber sets out the action it undertook before concluding that it received no response from the Vietnamese Government).

could be part of the reason why little reference is made to contemporaneous Democratic Kampuchea documents in publications about the Cambodia-Vietnam conflict (Section I). The Chamber must consider all of the evidence before it in order to have a more objective and nuanced picture of the conflict (Section II).

Section I. DEMOCRATIC KAMPUCHEA RECORDS UNDER-EXPLOITED

718. The Chamber has admitted a large number of documents onto the record, most of which are copies of originals that were not made available to the parties. The question is: why is it that only some of the records which remained in Cambodia have resurfaced? Some testimonies revealed the practice of the new authorities of destroying post-1079records,[709] but the fact still remains that most authors and experts who have written about the conflict have had limited choice in their research and have relied mostly on Vietnamese sources.

719. The fact that Nayan CHANDA was unable or unwilling to attend for testimony in Case 002/02[710] shows the difficulty of having an unbiased view of the conflict. Even though the Prosecution presented Nayan CHANDA as an expert who relied on sources from both sides,[711] the date of publication of his book *Brother Enemy* and his sources (interviews, records and bibliography) as they appear on the back cover of his book shows that he mainly relied on Vietnamese sources[712] and moreover, that those sources were developed before the 1990s.[713] Indeed, in the *Duch* Trial Judgement, the Trial Chamber points out that Nayan CHANDA "acknowledged that he had not had access to internal Democratic Kampuchea documents such as those cited above."[714]

720. Similarly, Stephen MORRIS clearly testified that he relied mostly on Soviet archives from party cadres and diplomats who, in turn, obtained their information from the Socialist Republic of Vietnam.[715] In fact, he characterised the Vietnamese as "deceitful" in their diplomatic

[709] SUM Alat: T. 04.07.2013, **E1/218.1**, pp. 101--102, around 16.15.31; SEN Srun: T. 15.09.2015, **E1/347.1**, pp. 15-16, before 09.38.29. RI **E3/10616**, **E3/10617** and **E3/10618**.
[710] T. 16.08.2016, **E1/458.1**, pp. 27-42, from 10.09.00 to 10.35.29; WESU Report of 08.09.2016, **E29/492**.
[711] Co-Prosecutors' Rule 66 Final Submission, 16.08.2010, **D390**, para. 32.
[712] Book by Nayan CHANDA, *Brother Enemy: The War After the War*, 1986, **E3/2376,** notes from p. 415 ERN 00192600.
[713] Book by Nayan CHANDA, *Brother Enemy: The War After the War*, 1986, **E3/2376.** The first edition of this book is dated 1986 as mentioned on the copyright page of the English version at ERN 001972173.
[714] *Duch* Trial Judgment, 26.07.2010, para. 70.
[715] Stephen MORRIS: T. 20.10.2016, **E1/487.1**, p. 44, after 10.52.41. MORRIS stated that he spoke briefly with IENG Sary and SIHANOUK after the KD period, but admitted that he did not discuss the (DK) period with them: T. 19.10.2016, **E1/486.1**, pp. 102-109, after 15.03.110 (IENG Sary) and T. 19.10.2016, **E1/486.1**, p. 103, after 15.03.58

manoeuvring,[716] as MOSYAKOV had remarked earlier.[717]

721. In his critique of MORRIS's book, CHANDLER considers that Stephen MORRIS has a very narrow visions of Democratic Kampuchea's position vis-à-vis Vietnam, and correctly points out that:

> "On page 68 and elsewhere, Morris lambastes the Khmer Rouge for their "unrealistic" and "irrational" foreign relations, but fails to suggest what a sensible policy toward Vietnam might have been, aside from succumbing to Vietnamese patronage and demands. Vietnam itself, in any case, embarked soon on a similarly "irrational" policy towards China, drawing less on Marxist-Leninist quarrels or paranoia, as Morris seems to suggest, that on perception of threats to sovereignty, based in part on historical considerations.
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> On page 72, Morris claims that there is" little evidence" that the Thai and Vietnamese were attacking Cambodia in 1976. In fact a mass of Khmer Rouge documents that deal with national defense have surfaced in Phnom Penh since Morris completed his research. These material suggest that, from 1976 onward, frequent skirmishes along Cambodia's borders, initiated by Thai, Vietnamese, and Khmer forces, and probably springing from trigger happiness in many cases, helped to intensify Pol Pot's belief that Cambodian by enemies.".[718] (*emphasis added*)

722. Stephen MORRIS readily admitted – not without a tinge of sarcasm – that he did not have the opportunity to read documents given that they surfaced after he completed his book.[719] He also indicated that when he consulted Soviet archives, he did not have direct access to Democratic Kampuchea sources, but only to Vietnam's accounts of the situation as it perceived it.[720]

723. These examples clearly demonstrate that most of the researchers who published materials about the armed conflict prior to the establishment of the ECCC did not have access to a large portion of the evidence.

724. Ben KIERNAN, who wrote extensively about the Democratic Kampuchea period but did not

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(SIHANOUK).

[716] Stephen MORRIS: T. 19.10.2016, **E1/486.1**, pp. 14-15-17, around 09.32.37.

[717] Article by Dmitry MOSYAKOV entitled: "The Khmer Rouge and the Vietnamese Communists: A history of their relations as told in the Soviet archives, 2004, **E3/9644**, ERN 01085984.

[718] Article by David CHANDLER entitled: "Why Vietnam Invaded Cambodia: Political Culture and Causes of War", **E3/10703,** ERN 01335287.

[719] Stephen MORRIS: T. 20.10.2016, **E1/487.1**, pp. 48-49, before 11.03.58.

[720] Stephen MORRIS: T. 20.10.2016, **E1/487.1**, pp. 45-46, after 10.55.42.

respond to the Chamber's invitation to testify, was regularly quoted by the Prosecution throughout the trial. However, as Stephen MORRIS pointed out, Ben KIERNAN's views were tainted with partiality and were "in strong alignment with the Vietnamese Communist Party's interpretation of events in Cambodia."[721]

725. A large number of documents in Case 002/02, such as records of Standing Committee meetings, military division meetings, as well as telegrams relating to the fighting at the battlefront, contains a wealth of information.

Section II. THE NEED TO USE DEMOCRATIC KAMPUCHEA ARCHIVES FOR A MORE NUANCED PICTURE

726. One striking feature of period documents on the case file is that Democratic Kampuchea is portrayed as being hawkish (I) even though a large body of evidence shows that the CPK was aware of the military imbalance between the two countries (II) and that Democratic Kampuchea saw no interest in engaging in the conflict (III)

I. DEMOCRATIC KAMPUCHEA WRONGLY PORTRAYED AS HAWKISH

727. Democratic Kampuchea's position when the fighting first broke out in April and May 1975 was to do everything possible to avert conflict.[722] It had only recently emerged from a protracted war and had nothing to gain in embarking on another war for which it lacked both financial and military capabilities.

728. Such being the case, the priority was to rebuild the country in order to revive agricultural production as this was vital for both the people and the economy That was the message that IENG Sary delivered in his speech at the United Nations General Assembly in October 1977, in which he made thinly veiled reference to the tensions with Vietnam:

> "Despite its painful past history, it has no wish to open old wounds; it is looking to the present and to the future. We have no enmity; we have no designs against other countries for aggression, expansion or annexation. We covet not a single inch of anyone else's

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[721] Stephen MORRIS: T. 18.10.2016, **E1/485.1**, pp. 69-70, around 14.14.04: "Ben Kiernan is a very politicized person who has always had a strong political agenda. During the years of Pol Pot's rule, he was a strong supporter of Democratic Kampuchea, but after, and only after, Vietnam turned against Democratic Kampuchea, Kiernan became a critic of Pol Pot and the Khmer Rouge and subsequently, Kiernan has taken a position which might be considered in strong alignment with the Vietnamese Communist Party's interpretation of events in Cambodia. " (*emphasis added*).
[722] See *supra*, paras. 698-706.

territory. Our country is small; our population is small; our geographical situation and our political regime in no way predispose us to commit acts of aggression against other countries. Small weak countries do not swallow large countries. In world history only the reactionary ruling classes in large countries, like Hitler, invent pretexts for provoking small countries, accusing them of aggression and using such pretexts for committing acts of aggression against the small countries, and increasing their own territory at the expense of the latter."[723]

729. Despite the perceived diplomatic jab at Vietnam, the speech did convey Democratic Kampuchea's core argument, namely that given its size, it could not take on a large country like Vietnam. In his speech, IENG Sary also stated that the people of Cambodia were firmly resolved to defend "the independence, sovereignty and territorial integrity" of the country.[724] This was the same message which was conveyed to the Revolutionary Army of Kampuchea troops.

730. In his testimony, IENG Phan, a military official,[725] spoke about the statements of the higher echelon as to why it was ill-advised to engage in a war against Vietnam; he thus corroborated the speech and the minutes of meetings of the leadership at the start of the conflict,[726] and indicated that the same message was conveyed to civilians and military personnel.[727] In his testimony, CHUON Thy,[728] a former battalion commander, recounted a conversation with SON Sen, an army official, concerning the fact that Democratic Kampuchea had fewer troops than Vietnam.[729] In a February 1978 issue of the *Revolutionary Flag* , an internal party publication, the message was not to go to war at all costs, but rather to gain independence for "a small country" for which provoking a bigger country was ill-advised.[730]

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723 United Nations General Assembly, Thirty-Second Session, 28th Plenary Meeting, 11.10.1977, **E3/1586,** ERN 00779813. Speech by Mr. IENG Sary para. 45.
724 United Nations General Assembly, Thirty-Second Session, 28th Plenary Meeting, 11.10.1977, **E3/1586,** ERN, ERN 00779813. Speech by Mr. IENG Sary, para. 46.
725 See *infra*, para.743.
726 See *infra*, paras. 699-702. IENG Phan notably echoed what SON Sen said about not being "the ones who make trouble.": Minutes of Plenary Meeting of the 920nd Division, 07.09.1976, **E3/799,** ERN 00184780-81, read out in court: T. 31.10.2016, **E1/492.1**, pp. 101-102, after 15.47.20. The witness confirmed the instructions were also given by Ren, Ta Mok's son-in-law: T. 31.10.2016, **E1/492.1**, pp. 104-105, around 15.56.46. Lastly, he confirmed that he received similar instructions and was told "not do anything to cause trouble with the foreign neighbouring people" which were published in the magazine *Revolutionary Youth*, August 1975, **E3/749**, ERN 00532686, read out in court: T. 31.10.2016, **E1/492.1**, p. 104, after 15.56.46. CHUON Thy confirmed that it was needless "causing problems with other neighbouring countries [or going] into other countries.": T. 26.10.2016, **E1/490.1**, p. 103, after 15.39.40.
727 IENG Phan: T. 31.10.2016, **E1/492.1**, pp. 104-105, after 15.57.59.
728 IENG Phan: T. 31.10.2016, **E1/492.1**, pp. 100-101, around 15.44.08. See also around 15.45.05.
729 CHUON Thy: T. 26.10.2016, **E1/490.1**, p. 98, after 15.27.19.
730 *Revolutionary Flag*, February 1978, **E3/744**, ERN 00464067-68.

731. The misleading statements about the Kampuchea Krom are a good example of the testimonies which contributed to myth about Democratic Kampuchea being hawkish. Indeed, part of the Socialist of Republic of Vietnam's message was that Democratic Kampuchea was planning to recover some territories. Yet, already in 1977, as stated in a French diplomatic cable, it was widely accepted that even though POL Pot was opposed to the idea of an Indochinese Federation under Vietnamese control, he clearly had no plan to recover those portions of Vietnamese territory which used to belong to the Khmers.[731]

732. Steve HEDER shares this view and disputes KIERNAN's observations on this matter by explaining that the CPK leaders had clearly abandoned the plan to reclaim Kampuchea Krom.[732] IENG Phan, a former brigade commander, confirmed this, saying: "I do not know about the plans to take back Kampuchea Krom", and added that he received no orders to that effect.[733]

733. It therefore cannot be argued based on the evidence that going to war at all costs was part of the agenda, especially given that throughout the conflict POL Pot never lost sight of the fact that Democratic Kampuchea's armed forces were much weaker than Vietnam's.

II. Awareness of the Military Imbalance Between the Two Sides

734. Even at the height of the conflict, in their many speeches, POL Pot and the military leaders highlighted the imbalance between the two armed forces. Given that the POL Pot's "1 against 30" speech was the subject of much discussion at trial, it is important to analyse it further.[734]

735. POL Pot's famous speech about the "one against thirty" comparison between the two armies is ample proof that Vietnam's troops were numerically superior even though the speech has a tinge of propaganda in that it portrays the withdrawal of the Vietnamese troops as a victory for the Revolutionary Army of Kampuchea. The Prosecution questioned PRUM Sarat about an excerpt

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[731] Note entitled "The Situation in Cambodia: Mr Pol Pot's Official Visit to China and North Korea", 26.10.1977, **E3/484**, ERN 00771188-89.

[732] Article by Stephen HEDER entitled: "Racism, Marxism, Labelling and Genocide in Ben Kiernan's The Pol Pot Regime'", **E3/3995**, ERN 00773744-47. See also: "Interview of IENG Sary" by Steve HEDER, 17.12.1996, **E3/89**, ERN 00417637-38 in which IENG Sary explains that while the Southwest Zone may have had aspirations of liberating Kampuchea Krom, under the Democratic Kampuchea regime, no one, including POL Pot, NUON Chea, "had aspirations of liberating Kampuchea Krom".

[733] IENG Phan: T. 31.10.2016, **E1/492.1**, p. 35, after 10.49.55: "Let me clarify it. I do not know about the plans to take back Kampuchea Krom. The instruction from my superior was to defend our existing territory. I never received any instruction to take back Kampuchea Krom.".

[734] POL Pot's Speech, *Revolutionary Flag*, April 1978, **E3/4604**, ERN 00519832-33.

from the speech concerning the "one man must defeat 30 Vietnamese" slogan.[735]

736. PRUM Sarat answered in unequivocal terms:

> "From the statement he raised, and it is my understanding that that was the political line, used to stir up the fighting spirits of cadres and combatants to be ready in battlefields, whenever the clash erupted between Kampuchea and Vietnam. That was the real statement he made at the time and it was like a road map."[736]

> "In fact, this was a comparison of military forces, one against 30. It is clear in the document, I still stand by with the document which quotes the statement of comrade secretary. It was meant to encourage the soldiers to find the strategies to smash enemies." [737]

> "In fact, Vietnamese soldiers did not consist of 60 million and Cambodian or Democratic Kampuchean soldiers consisted of 2 million. The statement was meant to inspire Kampuchean soldiers to utilize and prepare the lines to attack and capture the victory."[738]

737. For PRUM Sarat or any objective observer, in his speech, POL Pot was clearly comparing the military forces, saying that there was a numerical imbalance in Democratic Kampuchea's disfavour and was therefore calling for the adoption of a guerilla strategy. In fact, in this part of his speech, POL Pot uses military terms such as "infantry", "spearhead", "division", "battalion", "regiment" and enumerates the weapons available to the Revolutionary Army of Kampuchea to counter the Vietnamese tanks.[739]

738. When questioned about the speech, CHUON Thy answered as follows:

> "That is what we could estimate because there was already a disparity in the population between the Khmer and the 'Yuon'. So, he knew that the 'Yuon' would have more weapons than us; however, we were the owners of the territory so that we could deploy our own strategy, such as guerrilla warfare, by planting mines. We could not use our actual forces to fight against their large number of forces."[740]

739. It therefore cannot be argued that the speech was an incitement to attack the Vietnamese civilian population. It was simply aimed at rallying the troops during the commemoration of the 17 April

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[735] *Revolutionary Flag*, "Presentation of the Comrade Secretary of the Communist Party of Kampuchea on the Occasion of on the Occasion of the 3rd Anniversary of the Great Victory (…)", 17.04.1978, **E3/4604**, ERN 005198345.
[736] PRUM Sarat: T. 26.01.16, **E1/382.1**, p. 70, at 15.41.34.
[737] PRUM Sarat: T. 26.01.16, **E1/382.1**, p. 68, around 15.37.59.
[738] PRUM Sarat: T. 26.01.16, **E1/382.1**, p. 69, before 15.39.15.
[739] *Revolutionary Flag*, "The Presentation of Comrade Secretary of the Communist Party of Kampuchea on the Occasion of the 3rd Anniversary of the Great Victory of 17 April […)]", 17.04.1978,**E3/4604**, ERN 00519834-35.
[740] CHUON Thy: T. 25.10.2016, **E1/489.1**, p. 93, before 15.17.28.

victory. As a matter of fact, when questioned about the speech, CHUON Thy answered that he was not familiar with the situation at the battlefront.[741]

740. Be that as it may, by underscoring the imbalance between the two forces and sidestepping the weaknesses of the Revolutionary Army of Kampuchea while advocating a guerrilla strategy, the speech reveals that POL Pot was aware that it was not possible to fight Vietnam only on the military level.

III. MILITARY IMBALANCE AND NON-HAWKISH INTENTIONS CONFIRMED BY ALL WITNESSES

741. The fact that the leaders were aware that a war against Vietnam was not winnable was confirmed by all witnesses from the army, who explained that the only instructions they received were to defend Cambodian territory both on land (A) and at sea (B).

A. Military imbalance and defending Cambodia's territory on land

742. The military imbalance was underscored by all the witnesses who fought in the war. MOENG Vet, who was assigned to a division in the East Zone under the command of the general staff, clearly stated that in addition to the fact that "during that time, the Vietnamese forces had a large number of weapons",[742] the imbalance was a constant challenge which required spreading out the troops in order to minimise losses.[743]

743. IENG Phan, who joined the Southwest Zone army in 1970, was a battalion chief under Division 2 during the liberation of Phnom Penh.[744] He was commander of Regiment 12.[745] He testified that all of the regiments in Brigade 2, under Division Commander SAM Bit,[746] were stationed at the border in "1976 or 1977" and that the fighting started in "early 1977".[747] In early 1976, Division 2 became Brigade 210.[748] SAM Bit remained in Takeo until mid-1978, when he was promoted to "brigade commander" and assigned to Svay Rieng and was wounded in late 1978.[749] He said that

[741] CHUON Thy: T. 25.10.2016, **E1/489.1**, p. 96, before 15.24.55, where he concludes: "Of course, if the forces came in overwhelming number, we would lose because Pol Pot was not fighting at the battlefield. Soldiers were also afraid of death. If we were overwhelmed, we would flee".
[742] MOENG Vet: T. 27.07.2016, **E1/449.1**, p. 89, before 14.36.43.
[743] MOENG Vet: T. 27.07.2016, **E1/449.1**, p. 79, at 14.15.36.
[744] IENG Phan: T. 31.10.2016, **E1/492.1**, p. 7, before 09.26.50.
[745] IENG Phan: T. 31.10.2016, **E1/492.1**, pp. 14-15, around 09.44.26.
[746] IENG Phan: T. 31.10.2016, **E1/492.1**, p. 39, before 10.54.33.
[747] IENG Phan: T. 31.10.2016, **E1/492.1,** pp. 15-16, after 09.44.26.
[748] IENG Phan: T. 31.10.2016, **E1/492.1**, pp. 16-17, after 09.46.38.
[749] IENG Phan: T. 31.10.2016, **E1/492.1**, pp. 23-24, after 10.05.25; p. 79-80, around 14.13.02.

the brigade and division commanders would meet every three days to discuss "the various plans, the attack plans, the ammunitions" only "because by that time, there was no talking about politics" because "Vietnam was everywhere".[750] Regular meetings were also held with Ta Mok.[751]

744. As IENG Phan was in charge of "around 1800 to 2000" soldiers in Brigade 210 and was assisted by his two deputies, SOKH Chhien and Cheang,[752] he was able to keep abreast of the fighting at the border over a long period of time and to gain a good understanding of the armed forces of the two countries. IENG Phan said that the Vietnamese army was larger and had a much bigger number of soldiers and also an ever increasing array of strategies. He also indicated that the aim was only to halt the advance of the Vietnamese in order to defend Cambodian territory.[753]

745. In regard to digging trenches, IENG Phan also underscored that while there were trenches on both sides, Vietnam's trenches were built with concrete Cambodia's were only built with wood.[754] He also pointed out that the Vietnamese had better weapons.[755] This is why the Revolutionary Army of Kampuchea was unable to penetrate deeper into Vietnamese territory.[756]

746. CHUON Thy testified to the same effect. After being promoted from private to battalion commander in Regiment 15[757] during the liberation of Phnom Penh, he was deployed to the border in June 1978[758] and he remained there until the Vietnamese invasion.[759] Just like IENG Phan, whom he only knew by name,[760] he was under Ren's command upon arrival.[761] He testified that POL Pot sent him to the border "to take the soldiers there to protect the area."[762] He said that he attended a meeting in June 1978 in Kampong Chhnang about protecting and building Cambodia.[763] In

[750] IENG Phan: T. 31.10.2016, **E1/492.1**, pp. 49-50, after 11.25.46. He also stated that he attended a meeting at SON Sen's mobile office in Kraol Kou concerning the Vietnamese attack on Chak Village: T. 31.10.2016, **E1/492.1**, p. 54, after 11.35.34; T. 01.11.2016, **E1/493.1**, pp. 56-57, around 11.21.23.
[751] IENG Phan: T. 01.11.2016, **E1/493.1**, pp. 36-37, around 10.38.34
[752] IENG Phan: T. 31.10.2016, **E1/492.1**, p. 17, before 09.51.16; T. 31.10.2016, **E1/492.1**, p. 44-45, after 11.05.19.
[753] IENG Phan: T. 31.10.2016, **E1/492.1**, pp. 17-18, after 09.51.16, p. 25-26, around 10.11.14, pp. 40-41, after 10.54.33; T. 01.11.2016, **E1/493.1**, p. 53, around 11.13.50.
[754] IENG Phan, T. 01.11.2016, **E1/493.1**, pp. 41-42, around 10.48.44. It should be noted regarding these trenches that according to an ARK report tractors were used: Southeast Zone Record, 03.06.1977, **E3/853**, ERN 00185243.
[755] IENG Phan: T. 31.10.2016, **E1/492.1**, p. 23-24, around 09.54.30.
[756] IENG Phan: T. 01.11.2016, **E1/493.1**, pp. 31-32, around 10.10.55, reacting to a press report read out by the Prosecution. See also: T. 31.10.2016, **E1/492.1**, pp. 26-27, after 10.15.31].
[757] CHUON Thy: T. 26.10.2016, **E1/490.1**, pp. 23-24, around 09.54.30.
[758] CHUON Thy: T. 25.10.2016, **E1/489.1**, p. 73, after 14.01.42.
[759] CHUON Thy: T. 25.10.2016, **E1/489.1,** p. 85 before 14.33.26].
[760] CHUON Thy: T. 26.10.2016, **E1/490.1**, pp. 27-28, around 10.02.29.
[761] CHUON Thy: T. 25.10.2016, **E1/489.1**, p. 80, after 14.17.38.
[762] CHUON Thy: T. 25.10.2016, **E1/489.1,** p.75 after 14.05.39.
[763] CHUON Thy: T. 26.10.2016, **E1/490.1**, p. 85, after [14.36.12.

particular, he stated that there was no plan to attack Vietnam and that their main task was to contain the Vietnamese forces which were far superior to theirs.[764]

747. He also confirmed IENG Phan's testimony that "[they]e had to fight with our limited forces, [they] had to fight and retreated when necessary" and that the "commander of each segment of the border" would call for reinforcements as necessary.[765]

748. MAK Chhoeun, a battalion commander in the Division 164 naval force, confirmed the testimony of other witnesses regarding the imbalance of forces and the fact that the sole aim was to defend the country.[766] Reacting to the instructions from the upper echelon, as recounted by IENG Phan, he confirmed that they reflected "[his] personal understanding".[767] He also indicated that they were reflected the instructions "issued by POL Pot nationwide", adding, in response a question put to him by Judge FENZ, that those instructions were disseminated through documents prepared during study sessions.[768]

749. The imbalance was therefore not in Democratic Kampuchea's favour. For instance, when tensions flare in 1977, only Vietnam was in a position to use air power[769] and heavy artillery.[770] In fact, CHUON Thy explained that his "unit" did not have any "anti-aircraft weapons" or any way to defend against "aerial attacks".[771]

750. In his testimony, Stephen MORRIS confirmed the numerical comparison between the armed forces of both countries in his book: 70,000 Democratic Kampuchea soldiers against 615,000 for the Socialist Republic of Vietnam.[772] He also said that in addition to the difference in numbers, account also has be taken of the difference in weaponry, experience and command.[773] This was also the reason why it was necessary to send reinforcements to the Eastern front in 1977 and 1978, as described in an April 1978 telegram from KE Pauk about troops being brought in from the Central

[764] CHUON Thy: T. 26.10.2016, E**1/490.1**, pp. 112-114, after 15.36.10.
[765] CHUON Thy: T. 25.10.2016, **E1/489.1**, p. 87, after 14.37.35.
[766] MAK Chhoeun: T. 13.12.2016, **E1/512.1**, p. 21, around 09.54.23, p. 25, after 10.05.16.
[767] MAK Chhouen: T. 13.12.2016, **E1/512.1**, pp. 27-28, around 10.11.57.
[768] MAK Chhouen: T. 13.12.2016, **E1/512.1**, p. 28-31, after 10.13.26]. MAK Chhoeun also confirmed having received instructions from MEAS Muth: MAK Chhoeun: T. 13.12.2016, **E1/512.1**, pp. 29-30 after 10.14.45.
[769] *Refugees Cite Major SRV-Cambodian Clashes, Reprisals*, 01.09.1977 (FBIS), **E3/143**, ERN 00168726.
[770] LONG Sat: T. 01.11.2016, **E1/493.1**, pp. 78-79, after 14.28.15; T. 02.11.2016, **E1/494.1**, pp. 55-46, around 11.23.15; LONG Sat: T. 27.07.2016, **E1/449.1**, pp. 71-72 after 14.19.01. See also: IENG Phan: T. 31.10.2016, **E1/492.1**, pp. 63-64, around 13.47.29.
[771] CHUON Thy: T. 26.10.2016, **E1/490.1,** p. 39, after 10.53.13.
[772] Book by Stephen MORRIS, *Why Vietnam Invaded Cambodia,* 1999, **E3/7338**, p. 103, ERN 01001770.
[773] Stephen MORRIS: T. 19.10.2016, **E1/486.1**, pp. 90-91, after 14.20.10.

Zone..[774]

751. CHUON Thy explained that the instructions he received were to attack only if the Vietnamese entered Cambodian territory.[775] Fighting broke out "two or three days after" the Vietnamese troops attacked his battalion's positions.[776]

B. Defending territory at sea

752. As part of the admission en masse of evidence from the Cases 003 and 004 investigations, the Chamber granted the Prosecution's request to call several witnesses.[777] PAK Sok was among such witnesses. It is important to note from the outset that PAK Sok's testimony was mainly about the alleged treatment of the Vietnamese at sea, which subject matter is not part of the factual or legal components of the Closing Order. The reasons stated in the Chamber's Decision of 26 May 2016 certainly left the Defence with a sense of puzzlement.[778]

753. The reason is because, while the Chamber recalled that "[...]the crimes charged in Case 002/02 relating to the treatment of the Vietnamese are based, to a large extent, on the underlying crimes alleged to have been committed in Svey Rieng and Prey Veng provinces",[779] it held that the treatment of the Vietnamese captured at sea was part of "the facts set forth in the Closing Order" by citing only endnote 3487 at paragraph 816 of the Closing Order about a telegram from MEAS Muth.[780]

754. Hence, despite citing this endnote in the Closing Order and the absence of charges concerning Vietnamese captured at sea,[781] the Chamber called PAK Sok for testimony, prompting the two defence teams to request the admission of additional evidence,[782] and a similar request from the

[774] Telegram from Pauk, 04.05.1978, **E3/1065.** The telegram contradicts LONG Sat' statements that Central Zone soldiers attacked East Zone soldiers: LONG Sat: T. 01.11.2016, **E1/493.1**, pp 94-95, around 15.32.55. The troops came to reinforce those on the ground, internal problems only arose later. In this regard see: CHHUN Samorn: T. 28.06.2016, **E1/445.1**, p. 18, before 09.50.41.
[775] CHUON Thy: T. 25.10.2016, **E1/489.1**, pp. 87-88, around14.40.07.
[776] CHUON Thy: T. 25.10.2016, **E1/489.1**, pp. 85-86, at 14.33.26; T. 26.10.2016, **E1/490.1**, pp. 28-29, after 10.07.19, pp. 34-35, around 10.39.17].
[777] International Co-Prosecutor's Request, 11.11.2015, **E319/36**; Prosecution request for the testimony of PAK Sok: T. 01.12.2015, **E1/360.1**, pp. 7-9, from 09.37.15 to 09.40.39; favourable ruling of the Chamber**:** T. 07.12.2015, **E1/363.1**, pp. 55-57, after 11.31.52.
[778] Decision, 25.05.2016, **E380/2**.
[779] Decision, 25.05.2016, **E380/2**, para. 8.
[780] Decision, 25.05.2016, **E380/2,** para. 21.
[781] No information about those charges is found in the evidence underpinning the indictment, see *supra*, paras. 78-86.
[782] NUON Chea Request, 22.12.2015, **E380**; KHIEU Samphan's Request, 23.12.2015, **E319/23/2**.

Prosecution.[783] The Trial Chamber opened a Pandora's box and expanded the scope of the case in order to include facts relating to the capture of Vietnamese at sea in Division 164, whereas that subject matter was not part of the as part of the Case 002 investigations.

755. In a case where the stated objective was to move fast (so as to hand down conviction at the soonest), it is noteworthy that that objective took backstage whenever there was an opportunity to secure additional inculpatory evidence. Consistent with the pattern observed throughout the proceedings, that was the only reason why the Trial Chamber called PAK Sok for testimony.

756. However, the facts relating to the treatment of the Vietnamese at sea will not be addressed, because they are out of scope. Only SOK Pak's testimony relating to the alleged military orders he received is relevant to the armed conflict. However, his testimony on the matter (1) runs counter to the rest of the evidence on record concerning the treatment of the Vietnamese by the armed forces in combat (2).

1. <u>Isolated testimony of PAK Sok regarding alleged instructions from the army to target Vietnamese civilians.</u>

757. It POK Sak's evidence must be assessed in light of the fact that while he held no specific rank within the Revolutionary Army of Kampuchea, he was nonetheless tasked with defending Cambodian territory (a). Moreover, his testimony about the source of the instructions that he alleged received from his battalion commander consists in mere speculation (b).

a. <u>Functions of an ordinary soldier tasked with defending Cambodian territorial waters</u>

758. PAK Sok testified that he joined the army in 1972 in his native province of Kampot, and that in 1976 he joined Division 164 of the Centre army in Kampong Som,[784] under the command of MEAS Muth;[785] the other military officials of the division being Ta Saroeun, Ta Hnan and Ta Doeun.[786] He testified that in 1975 while he was stationed on Tang Island as part of Regiment 62, and thereafter on Poulo Wai Island in 1976, he personally witnessed the capture of the island by the Vietnamese troops,[787] as well as the Mayaguez incident in which Democratic Kampuchea fought

783 International Co-Prosecutor's Request, 24.12.2015, **E382**.
784 PAK Sok: T. 16.12.2015, **E1/369.1**, p. 18, at 09.48.15].
785 PAK Sok: T. 16.12.2015, **E1/369.1**, pp. 14-16, at 09.43.43 and p. 18, between 09.43.43 and 09.447.20.
786 PAK Sok: T. 16.12.2015, **E1/369.1**, pp. 15-16, around 09.47.20.
787 PAK Sok: T. 05.01.2016, **E1/370.1**, pp. 37-38, around 11.02.45: "**Q**. Do you know when Vietnam recaptured Kaoh

American soldiers.[788] He said that he later joined the Division 164 naval force which was part of the Centre Army[789] and that he was transferred to Ou Chheu Teal Harbour in 1977.[790]

759. Witness PAK Sok described the role of his battalion as follows: "We were assigned to guard the territorial waters including Tang Island, the Poulo Wai Chas and Poulo Wai Thmei Islands. Our duties were to guard the areas and we would arrest anyone who trespassed the area."[791] His account confirms that the main role of the Democratic Kampuchea armed forces was to defend their territory.[792]

760. PAK Sok testified further that he was only an ordinary combatant throughout the Democratic Kampuchea period[793] and that he "was aware only what happened in [his] regiment"[794] and "did not know about any of those policies"[795] and also did not "attend any study session at any level higher than the battalion level.[796] The following were his answers to questions from the Defence:

> "**Q**. Did you participate in any meeting chaired by the regimental level on this particular issue? A. No, I did not. I never attended their meetings at the regimental level. Usually I attended meetings within my battalion Q. What about the meetings held at the divisional level; did you ever attend meetings at those levels on the issues that we are discussing now? **A**. In my capacity as a combatant I never attended a meeting at the divisional level. I did not even attend any meetings held at the regimental level."[797] (*emphasis added*)

761. He described the military hierarchy and how he used to receive his orders, saying: "we did not perform the tasks on our own initiative at the battalion level", and added that when he received his

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Poulo Wai? **A**. That happened in 1975. However, I cannot recall the month or the day. And my battalion was there, and we were attacked by the Vietnamese. And the Vietnamese captured the island in 1975. Here, I refer to the Poulo Wai Island. A battalion -- soldiers in one battalion were captured by the Vietnamese troops, and they were transferred to Trol Island. [...] By that time, I was hospitalized at Tang Island, and I heard about the capture of that island by the Vietnamese troops in late 1975. Many soldiers lost their lives, and soldiers were captured by the Vietnamese. Many soldiers from my unit lost their lives, and about 300 soldiers were captured by the Vietnamese. **Q**. But you also said that Vietnam recaptured Kaoh Poulo Island already in '75. Is that correct? **A**. Yes, that is correct (..) later on, it was returned to Kampuchea, my unit was assigned to station on that island, that is, Kaoh Poulo Wai Island, o by that time, I was reassigned from Tang Island to Poulo Wai Island after the Vietnamese troops had withdrawn from that island." (*emphasis added*).

[788] PAK Sok: T. 05.01.2016, **E1/370.1**, pp. 11-12, at 09.37.10, 17, at 09.51.07, p. 23 from 10.07.27.
[789] PAK Sok: T. 16.12.2015, **E1/369.1**, p. 17, around 09.48.15.
[790] PAK Sok: T. 16.12.2015, **E1/369.1**, pp. 18-19, after 09.53.36.
[791] PAK Sok: T. 05.01.2016, **E1/370.1,** p. 48, around 11.31.20.
[792] See *supra*, paras. 742-751.
[793] PAK Sok:T. 05.01.2016, **E1/370.1**, p. 7, around 09.24.43].
[794] PAK Sok: T. 05.01.2016, **E1/370.1**, p. 31, after 10.46.09.
[795] PAK Sok: T. 16.12.2015, **E1/369.1**, pp. 17-18, before 09.53.36.
[796] PAK So: T. 05.01.2016, **E1/370.1**, pp. 67-68, between 14.19.00 and 14.22.19
[797] PAK Sok: T. 05.01.2016, **E1/370.1**, p. 63, from [14.06.30to 14.08.22

orders from the battalion "perhaps a battalion may have received an order from the regiment."[798] He thus concluded that the orders to board and search the Mayaguez in 1975 "must have been an order from the division."[799] In response to a request by the Nuon CHEA Defence for clarification, he said, "I could make an objective conclusion that there must have been an order from the division; otherwise we were not able to perform the task."[800] He nonetheless specified that he did not know "whether [his] immediate superior respected the other higher categories." [801]

b. Orders purportedly received from his battalion commander

762. PAK Sok testified that he was assigned to a naval patrol unit which only went out "if an incident happened".[802] He himself "rarely went out" on patrol, because he was not among the people who were responsible of patrolling.[803] He recounted an incident in 1976 when a Vietnamese vessel fired on his group.[804] He indicated that the orders were to sink any armed Vietnamese vessels.[805] On this point, his testimony is consistent with that of the other former soldiers of the Revolutionary Army of Kampuchea concerning orders to retaliate when attacked.[806]

763. When the Prosecution confronted PAK Sok with his earlier statements with the OCIJ, he confirmed that he received the order "to kill the Vietnamese on the spot or send them ashore", adding that he "never executed anyone". Moreover, he did not know where the orders came from.[807]

764. In response to questions from the Defence, PAK Sok claimed that the order to "kill a few people" when "a small group of people [...] were arrested" came from his battalion commander, Bong Samnang,[808] who, in turn, had received the order "[b]ased on the instructions the battalion received

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[798] PAK Sok: T. 05.01.2016, **E1/370.1**, pp. 33-34, after 10.50.30.
[799]PAK Sok: T. 05.01.2016, **E1/370.1**, pp. 30-31, after 10.43.41.
[800] PAK Sok: T. 05.01.2016, **E1/370.1**, pp. 30-31 at 10.43.41.
[801] PAK Sok: T. 05.01.2016, **E1/370.1**, p. 73, at 14.38.16.
[802] PAK Sok: T. 16.12.2015, **E1/369.1**, p. 19, after 09.58.05.
[803] PAK Sok: T. 16.12.2015, **E1/369.1**, pp. 53-54, after 13.48.29.
[804] PAK Sok: T. 16.12.2015, **E1/369.1**, pp. 30-31, after 10.51.34. "I would like to tell you about this. In 1976, that was in 1976, which I already gave the answer, I myself arrested the ethnic Vietnamese from a boat consisting of around 10 people and among them they were armed and they shot at us. So there came an order from the upper level to sink them because they shot at us. So we sank their boat.".
[805] PAK Sok: T. 16.12.2015, **E1/369.1**, pp. 30-31, after 10.51.34; T. 05.01.2016, **E1/370.1,** pp. 52-53, around 13.37.29.
[806] See *supra*, paras. 742-751.
[807] PAK Sok: T. 16.12.2015, **E1/369.1**, p. 22, after 10.06.16: **Q**."So the orders that were given to kill people on the spot, who were the kinds of people that they ordered to kill on the spot on the sea? **A**. I did not know on this point. When I was ordered to make an arrest, I would carry out an order and I myself never executed anyone." (*emphasis added*).
[808] PAK So: T. 05.01.2016, **E1/370.1,** p. 62, around 14.04.42.

from the regiment."[809] The rest of his answers seem to indicate that he was only speculating given that he never attended any meeting concerning this matter:

> "**A**. The meetings were convened at the battalion level, that was the common plan of the battalion. We were informed that instructions that were relayed to us were from the upper level. That was clear to us and that's what we learned in the meetings. **Q**. Did you participate in any meeting chaired by the regimental level on this particular issue A. No, I did not. I never attended their meetings at the regimental level. Usually I attended meetings within my battalion. **Q**. What about the meetings held at the divisional level; did you ever attend meetings at those levels on the issues that we are discussing now? **A**. In my capacity as a combatant I never attended a meeting at the divisional level. I did not even attend any meetings held at the regimental level."[810] (*emphasis added*)

765. However, PAK Sok is the only witness who asserted that the instructions to target civilians came from the Revolutionary Army of Kampuchea. His testimony lacks credibility, especially considering that in their in-court testimony and interviews with the Co-Investigating Judges, all the other witnesses stated that they received orders to the contrary.

[809] PAK Sok: T. 05.01.2016, **E1/370.1,** pp. 61-62, after 14.02.41.
[810] PAK Sok: T. 05.01.2016, **E1/370.1,** p. 69 between 14.06.30 and 14.08.22.

2. <u>Corroborative testimonies of former Revolutionary Army of Kampuchea personnel</u>

766. Specifically in regard to the treatment of Vietnamese civilians during the armed conflict, in addition to PAK Sok's testimony, the Chamber heard that of MEAS Voeun, PRUM Sarat and MAK Chhoeun. The written records of interview of HEANG Ret and KOEM Men, former Division 164 officers, concern that same issue.

767. MEAS Voeun, a former Division 1 deputy battalion secretary in the West Zone, who was stationed in Koh Kong under the command of Ta Soeung,[811] summed up the distinction between Vietnamese involved in armed clashes and ordinary Vietnamese civilians. In response to a question from the Prosecution, he said that "he did not know what the policy was between '75 and '79", adding that the only policy he was aware of in regard to Vietnamese civilians was to assemble them "between '70 and '75".[812] He added that while some Vietnamese prisoners may have been sent to the rear, "there was no plan to eliminate **all** of the Vietnamese."[813] Quite logically, he indicated that they considered those people as enemies since "there were fightings",[814] adding prosaically that the enemy was whoever was holding gun and "firing upon [them]."[815] Finally, he clearly stated that the only plan at the time was to defend Cambodia's territory against possible attack by Vietnam:

> "I had certain knowledge about the policy of the leadership toward 'Yuon'. We knew that there were conflicts between the 'Yuon' and the Khmer people since 1979 (sic), and from that I could see, there was contradiction between the revolutionary resistance of Kampuchea and the 'Yuon' government. And for that reason, there had always been <u>conflicts</u> regarding land grabbing or <u>the incursion by the 'Yuon'</u>. So we had to defend the country, our territory and sovereignty and not to allow the 'Yuon' to invade us – that is the external 'Yuon', or the 'Yuon' outside, as they had plans to attack Kampuchea. And that was the measure that was taken. There was no document or any instruction to – in relation to the smashing of the internal 'Yuon' at all. However, the policy at the time was to counter the attempts to invade Cambodia by the external 'Yuon'."[816] (*emphasis added*)

768. PRUM Sarat, a former company commander,[817] testified to the same effect. Having witnessed the Poulo Wai incidents, he confirmed the attacks described by PAK Sok and IENG Phan, as well as

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[811] <u>MEAS Voeun</u>: T. 02.02.2016, **E1/386.1**, pp. 57-58, around [13.57.50].
[812] <u>MEAS Voeun</u>: T. 03.02.2016, **E1/387.1**, p. 8, around 09.22.08.
[813] <u>MEAS Voeun</u>: T. 03.02.2016, **E1/387.1**, pp. 19-20 around 09.47.05.
[814] <u>MEAS Voeun</u>: T. 03.02.2016, **E1/387.1**, p. 24, around 09.58.15.
[815] <u>MEAS Voeun</u>: T. 03.02.2016, **E1/387.1**, p. 29, around 10.07.02: "Personally, I have a view about the enemy who is holding gun and firing upon us and, on the other side, there were those "Yuons" -- that is, the ordinary "Yuon" people."
[816] <u>MEAS Voeun</u>: T. 03.02.2016, **E1/387.1**, pp. 5-6, from 09.13.58 to 09.16.12, commenting on his written record of interview, 17.01.2014, **E3/9740**, Q/A 8.
[817] <u>PRUM Sarat</u>: T. 25.01.2016, **E1/381.1**, pp. 99-100, around 15.54.24.

the capture in late 1975 of Khmer soldiers by Vietnamese troops, who were later released following the negotiations in 1977.[818] With his assignment to Regiment 140 within Division 164 at the Ou Chheu Teal Harbour in June 1976 after undergoing training for six months with "Chinese trainers",[819] he was put "in charge of the technical training" and also named naval commander.[820] He testified that Division 164 had MEAS Muth, Dim, Chhan and Nhan as its commanders.[821] Therefore not only was he well positioned to keep abreast of developments within the maritime boundaries, but also he was also in charge of relaying the Division's orders.

769. In his testimony, he was able to draw on his experience in confirming the testimony of HEANG Ret, a former member of the Southwest Zone's Division 3, of which Tak Mok was the commander.[822] When questioned about HEANG Ret's interview with the OCIJ investigators in which that he said that he understood that the Vietnamese enemies as being the "Vietnamese soldiers along the border,"[823] he answered as follows:

> "Regarding Heang Ret's testimonies or statements, these statements were true. There – the conflict of borders between Vietnam and Cambodia between 1975 and 1977 was – was the hot matter and during the time the Vietnamese refugee were travelling – passing Cambodian territorial sea water, they were not considered the enemies of the Democratic Kampuchea. Two targeted groups of people were considered enemies of the Democratic Kampuchea; one was the Vietnamese troops who were trying to attack and capture the territory sea of Cambodia including the island. And as for the internal enemies, they were those who instilled the contradiction within Kampuchea and they were those who try to initiate an issue within Kampuchea."[824]

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[818] PRUM Sarat: T. 26.01.2016, **E1/382.1**, p. 6, at 10.42.02 "I would like to tell the Court clearly that. At the beginning of 1975, there was a hot battle between the Vietnamese and Cambodian troops. Soldiers of Democratic Kampuchea, old and new Poulo Wai Islands, were arrested and placed on Kaoh Trol, or Trol Island. Later on, the fighting ended. I cannot recall the date when the fighting ended it ended in late 1975."; T. 27.01.2016, **E1/383.1**, pp. 50-51, at 11.09.49. "When I used the word "hot" in this context, it's that in early1975 -- although I cannot recall it exactly that it could have been in April -- there was a fighting between the forces of Vietnam and of Democratic Kampuchea at the islands. Vietnamese forces arrested 720 DK soldiers and detained them as prisoners of war in Kaoh Tral. The negotiation took place in 1977 between DK and the Vietnamese authority and as a result, those detainees or prisoners of war were returned to Kampuchea. (…) **A**. The arrests actually took place on the islands of Poulo Wai Chas and Poulo Wai Thmei which is -- which belongs to Kampuchea -- that is, it was part of the Kampuchean territorial waters."; T. 27.01.2016, **E1/383.1**, p. 48, around 11.15.39], and p. 65, at 13.43.46.

[819] PRUM Sarat: T. 25.01.2016, **E1/381.1**, p. 99, after 15.50.01; T. 27.01.2016, **E1/383.1**, pp. 87-88 around 15.04.49.

[820] PRUM Sarat: T. 25.01.2016, **E1/381.1**, p. 91, around 15.57.55.

[821] PRUM Sarat: T. 26.01.2016, **E1/382.1**, p. 55 at 15.04.35.

[822] WRI of HEANG Ret, 26.05.2014, **E3/9699,** Q/A 6-8.

[823] WRI of HEANG Ret, 26.05.2014, **E3/9699**, Q/A 70: "**Q**: You said that there were two kinds of enemies internal and the external. Do you think the Vietnamese fishermen were regarded as the external enemy and were taken to be killed? **A** 70: I do not think so The external enemy referred to the Vietnamese soldiers along the border Regarding the seizures of the Vietnamese boats to my knowledge the Vietnamese fishermen were not regarded as the external enemy but they had violated the territorial waters of Democratic Kampuchea."

[824] PRUM Sarat: T. 26.01.2016, **E1/382.1**, pp. 12-13, at 10.59.15.

770. MAK Chhoeun is a former soldier in Division 3 of the Southwest Zone army, which later merged with the East Zone army to become Division 164.[825] He was commander of Battalion 560 in Regiment 63, which was stationed in Koh Thmei and Koh Ses, across from Koh Tral, which was then under Vietnamese occupation,[826] and said that he remained there until "1978-79".[827] Echoing PRUM Sarat's testimony, he said, "we did not have specific purpose to invade other countries" but to protect Democratic Kampuchea's territory.[828]: "If they had come to attack and invade us, we had to counterattack and defend our territory."[829] He indicated that in the location where he was stationed, clashes mainly involved Vietnamese aboard armed fishing boats.[830]

> "Generally speaking, the Vietnamese came in with the form of their fishing boats but those boats were equipped with weapons. They came as close as to Koh Ream and Koh Sampoch; furthered form Koh Seh, close to the mainland. So the attack was inevitable. Usually, the Vietnamese forces attacked us first and we had to counterattack. Some soldiers were injured and some died. [...] The large ships or the warships did not come into our water, but several boats equipped with weapons crossed into our maritime frontiers and there was fighting at the rear of the island." [831]

> "I was referring to the fishing boats when they opened fires first along the borderline. We could counter fire so that they would return to their territory without coming across our boundary. If they did not open fire, we would chase them away but we did not shoot at them. It was not the invading war. Usually they came in the form of fishing boats."[832]

> "For the fishing boats, we did not shoot at them but we chased them away. When we knew that they did not fire upon us and when they entered our territorial water and when they spotted us, they would retreat. However, if we were fired upon, we would return fire."[833]

771. In answer to insistent questions from Judge LAVERGNE, who appeared to be accusing him of firing upon the boat without being sure whether or not its occupants were soldiers, MAK Chhoeun clearly stated that regardless of the type of vessel, if its occupants opened fired, they fired back:

> "Q. Very well. How could you tell whether they were wounded soldiers or soldiers if you did not go

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[825] MAK Chhoeun: T. 12.12.2016, **E1/511.1**, p. 76, around 14.50.00.
[826] MAK Chhoeun: T. 12.12.2016, **E1/511.1**, p. 77, after d14.52.00].
[827] MAK Chhoeun: T. 12.12.2016, **E1/511.1**, p. 79, before 14.58.56.
[828] MAK Chhoeun: 3 T. 12.12.2016, **E1/511.1**, pp. 85-86, after [15.15.35: A. When I was posted there on Koh Seh, because at Koh Tral, there were Vietnamese troops. Troops were deployed at Koh She since the time I was there, that is, to protect our boundary and we never crossed to the other side of Koh Tral boundary since we knew that Vietnam's forces were already there. Back then, we had no intention to seize back the island." He also said that he depended on a map from the divisional headquarters: T. 12.12.2016, **E1/511.1**, p. 86, around 15.18.10.
[829] MAK Chhoeun: T. 12.12.2016, **E1/511.1**, p. 80, before 15.01.30.
[830] MAK Chhoeun: T. 13.12.2016, **E1/512.1**, p. 9, at 09.18.51: "When their fishing boats entered our territorial water, they came in the form of fishing boats but they had weapons on their boats."
[831] MAK Chhoeun: T. 12.12.2016, **E1/511.1**, p. 81, after 15.05.00.
[832] MAK Chhoeun: T. 13.12.2016, **E1/512.1**, p. 20, before 09.52.25.
[833] MAK Chhoeun: T. 13.12.2016, **E1/512.1**, p. 11, at 09.26.36.

and check that, on the spot, and find out whether they were wearing military uniforms or not ? We are talking, indeed, of fishing vessels; you did not talk about military vessels. You say that those fighting vessels were armed; how were you able to tell that on board those fighting vessels there were soldiers?

A. I have already answered the question, so this is repetitive. I have clarified already that the firing that took place at the maritime territory was in the form of guerrilla-fashioned attack; we fired at each other to defend ourselves. I did not go to crosscheck whether or not they were soldiers. Anyone who were armed and fired at us, we would fire back at them."[834]

"I have already answered the question, but I will give you the answer once again. The fishing boats were mounted with the weapons. Those boats appeared to be fishing boats, but they had weapons on them."[835]

"As I have just stated, in our capacity as a border protecting force, in whatever forms of encroachment, if there were armed clashes from the other side, we had to return fire. And that's my view, and that's what happened."[836]

772. MAK Chhoeun testified further that he never saw Vietnamese military vessels because "[…] [his] spearheads' water was not really deep and Vietnamese ships could not travel."[837] He added that he never saw any unarmed fishing boats while on duty.[838] When he was asked whether any arrests took place, he answered, "Regarding the arrests of Vietnamese citizens, to my knowledge, nothing – did not happen […] on my island, we never captured anyone […]. I, myself, and my unit never captured any boats but we did fire at each other."[839]

773. MEAS Voeun explained the procedure for intervention at sea by the naval forces, saying that the orders were to fire back when they were "fired at", and that no orders were issued to kill unarmed civilians. When questioned about his previous statements, he answered:

"**Q**: (…) 'If a boat was inside our waters approximately 10 to 11 nautical kilometres from the coast, we had to go to search and capture the boat. But if the boat was 30 to 70 nautical kilometres from our coast, we had to watch it and then chase it away. Before we approached the boat we had to determine if it was a civilian boat or a fishing boat escorted by warships and so on. All this was general policy.' End of quote. Do you remember saying this to the investigators, Mr. Witness? **A**. Yes, that's my statement. **Q**. And once a boat would be in that area inside your waters, what would happen then? What would you or what would Division 1 soldiers or patrolmen do? What exactly would happen? **A**. When a ship encroached on our territorial waters, we would deploy our ship in order to inspect what kind of ships that encroached on our territorial waters, whether it was a large

[834] MAK Chhoeun: T. 13.12.2016, **E1/512.1**, pp. 34-35, between 10.49.55 and 10.52.25. (*emphasis added*)
[835] MAK Chhoeun: T. 13.12.2016, **E1/512.1**, p. 33, before 10.45.52.
[836] MAK Chhoeun: T. 13.12.2016, **E1/512.1**, pp. 12-13, after 09.30.38.
[837] MAK Chhoeun: T. 13.12.2016, **E1/512.1**, p. 35, before 10.52.25.
[838] MAK Chhoeun: T. 13.12.2016, **E1/512.1**, p. 14, around 09.35.00.
[839] MAK Chhoeun: T. 12.12.2016, **E1/511.1**, p. 88, after 15.22.05.

ship or a fishing boat. For a fishing boat we would chase it away. However, if we were fired upon, then we would return the fire."[840]

774. PRUM Sarat testified that he heard from the "upper echelon", without knowing "the details of the matter", that if the naval forces captured "Thai fishing vessels or any other vessels" in the "territorial waters", they "had to deliver them to the international relations section or department so that the matter could be handled at their level, in line with the policies of the Ministry of Foreign Affairs."[841] He testified further that it was important to distinguish between two types of vessels" "the patrol boats" which were used for stopping, boarding and seizing vessels, and those like the one he commanded, which were much bigger.[842]

775. Hence, PRUM Sarat's job was "to ensure that the vessel is ready for combat when there was an encroachment from the enemy"[843] and therefore it did not involve "capturing Vietnamese fishermen and seizing their boats."[844] Finally, he said that the only order received from Division 164 was "to defend the maritime boundary".[845] As concerns the study sessions led by SON Sen in 1976, which he attended, he said that they only discussed "the organization of the army" and combat.[846] He therefore did say that instructions were issued to kill Vietnamese civilians.

776. His testimony is consistent with KOEM Men's. In a written record of interview, KOEM Men, a former soldier, who in 1974 joined Division 3, which later became Division 164,[847] reports that he was in charge of a company before being promoted within Regiment 62's Battalion 623, which was stationed on Koh Tang Island.[848] He was on that island at the same time as PAK Sok[849] and he

[840] MAK Chhoeun: T. 02.02.2016, **E1/386.1**, p. 62, between 14.09.34 and 14.10.55.
[841] PRUM Sarat: T. 26.01.2016, **E1/382.1**, p. 38, after 14.02.55.
[842] PRUM Sarat: T. 27.01.2016, **E1/383.1**, pp. 42-43, at 11.02.28: "There were two categories of vessels. There is one group -- that is, the patrol boats stationed at various islands and their duty was to capture any boat encroaching the territorial seas. And, in fact, there were two boats used for that purpose; they were American boats. And, of course, it is the PCS boats. These two boats were tasked to patrol and seize any encroaching boat. And for us, our vessel was larger, so it could not be used for that specific purpose. Our vessel consumes two tons of fuel per hour. For that reason, it was not applicable for such a purpose and such purpose was tasked for those two PCS boats and I do not know whether those people involved with those two boats are alive."
[843] PRUM Sarat: T. 27.01.2016, **E1/383.1**, p. 34, before 10.41.20.
[844] PRUM Sarat: T. 27.01.2016, **E1/383.1**, p. 63, at 13.55.27: "The instructions that I received was to an extent that the soldiers who were on the vessels needed to perform their assigned tasks. And they had to be ready to attack the enemies who trespassed into territorial sea of Kampuchea. So it was not an obligation for me to go and capture the boats which trespassed into the territorial sea of Kampuchea, as I said. I received instruction on certain matters. I am now telling the truth from my heart."
[845] PRUM Sarat: T. 27.01.2016, **E1/383.1**, p. 23, before 09.59.56.
[846] PRUM Sarat: T. 26.01.2016, **E1/382.1**, p. 29 after 13.36.56.
[847] WRI, KOEM Men, 03.09.2015, **E3/10768**, Q/A 3, 10 and 14.
[848] WRI, KOEM Men, 03.09.2015, **E3/10768**, Q/A 17, 20 and 21.
[849] PAK Sok: T. 05.01.2016, **E1/370.1**, pp. 33-34, at 10.50.30.

indicated that Vietnamese vessels often violated Cambodian territorial waters and that the instructions were to stop the ones which were unarmed and shoot at those which were.[850]

777. Unlike ordinary soldiers like PAK Sok,[851] KOEM Men was able to attend the training sessions led by MEAS Muth,[852] as well as the second general staff meeting which was held on 25 November 1976, at which PRUM Sarat was also present.[853] KOEM Men's testimony corroborates PRUM Sarat's; they both testified that the training focused on defending the country, vigilance with regard to Vietnam's territorial ambitions and the role of the cooperatives.[854] KOEM Men therefore did not mention any order to target Vietnamese civilians.

778. MAK Chhoeun also testified that he attended "divisional meetings" led by Ta Mut, secretary of Division 164, or by his deputy, "Brother Dim".[855] The matters discussed included "the protection of the border and the defence of the country [...] and the protection of the islands."[856] Regarding instructions, he said: "at my location, I never received any instruction to fire and sink Vietnamese boats that attempted to flee to foreign countries."[857] He never saw any boats with refugees aboard.[858] In 1976, he attended a training session in Phnom Penh, which was led by POL Pot, mainly concerning the defence of the country and supplies.[859]

779. Like the other witnesses from Division 164, he did not report any orders from Division or elsewhere to kill Vietnamese civilians:

> "To my understanding, the refugees were not perceived as enemies since they fled from Vietnam to other countries, and they were not armed, so how could we fire at them because they were unarmed? [...] In my opinion, those Vietnamese people who fled their country to the other countries were not considered enemies. They were ordinary people. We, the soldiers, could not attack them or mistreat them. As I told the Court already about my opinion, and as for the opinion or the instruction of the division, I did not know. I could not say about it because the instruction from the upper echelon was that they were not considered enemy. If they fled, they would be allowed to flee off the areas. This

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[850] WRI of KOEM Men, 03.09.2015, **E3/10768**, Q/A 47.
[851] PAK Sok: T. 05.01.2016, **E1/370.1**, pp. 33-34, at 10.50.30, p. 63, at [14.08.22; WRI of KOEM Men, 03.09.2015, **E3/10768,** A. 100.
[852] WRI of KOEM Men, 03.09.2015, **E3/10768**, Q/A 47 and 99-115.
[853] WRI of KOEM Men, 03.09.2015, **E3/10768**, Q/A 99-115; DK Military report entitled "Second General Staff Study Session", 23.11.1976, **E3/847**, ERN 00195332; PRUM Sarat: T. 27.01.2016, **E1/383.1**, p. 8, before 09.21.26.
[854] WRI of KOEM Men, 03.09.2015, **E3/10768**, Q/A 99-115.
[855] MAK Chhoeun: T. 12.12.2016, **E1/511.1**, p. 90, before 15.31.55.
[856] MAK Chhoeun: T. 12.12.2016, **E1/511.1**, pp. 91-92, between 15.33.00 and 15.35.36.
[857] MAK Chhoeun: T. 13.12.2016, **E1/512.1**, p. 14, before 09.36.50.
[858] MAK Chhoeun: T. 13.12.2016, **E1/512.1**, p. 33, after 10.45.52.
[859] MAK Chhoeun: T. 12.12.2016, **E1/511.1**, p. 92, from 15.37.10.

was the common instruction from the Division that I could grasp."[860]

780. HEANG Ret's testimony confirms that the instructions given by MEAS Muth at a Division 164 congress were to allow the refugees fleeing to Thailand to proceed.[861]

781. The foregoing testimonies reveal that the armed conflict extended to the territorial waters and that clashes and exchange of gunfire occurred with Vietnamese vessels when they entered Cambodian waters. In the majority of cases, the vessels were armed, even those which were not military. All of the aforementioned witnesses confirmed that they had to defend Cambodian territory at all costs and deter Vietnamese attacks. Once again, that testimony only proves that there is no truth to the Prosecution's claim that the Khmer Rouge regime was spoiling for war.

CHAPTER II. SUMMARY TIMELINE OF THE ARMED CLASHES

782. The following summary timeline of the armed conflict focuses on the escalation of the border conflict from 1975 to 1976 (Section I), its further escalation from 1977 to 1978 (Section II) and finally, the defeat of Democratic Kampuchea in January 1979 (Section III).

783. The reason why facts relating to Vietnamese territory are discussed in this segment – facts that KHIEU Samphan does not have to address because the Chamber excluded them by severing the cases – is simply because the Prosecution and Judge LAVERGNE devoted a considerable amount of trial time to them by clearly subscribing to the claim that Democratic Kampuchea was mindlessly hawkish.[862] Such trial incidents are therefore sometimes mentioned in this section, but only in order to put them in better perspective with the evidence concerning facts that took place within Cambodian territory and their proper time frame.

Section I. ESCALATION OF THE BORDER CONFLICT IN 1975-1976

784. As recalled *supra*, in the wake of the 17 April 1975 victory, focus of the new Democratic Kampuchea regime was to rebuild the country. As it had only recently form a protracted war, there was no point in engaging in yet another conflict. The early clashes did not deter further negotiations

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[860] M MAK Chhoeun: T. 13.12.2016, **E1/512.1**, pp. 17-18, at 09.44.16 (*emphasis added*).

[861] WRI of HEANG Ret, 26.05.2014, **E3/9699,** Q/A 75: "In late 1977 attended an assembly in Phnom Penh in order to sum up the work. In the context of work of Division 164 heard MEAS Muth reporting about the Vietnamese boats that had entered Cambodian territorial waters. SON Sen said if those Vietnamese were refugees to Thailand we should not arrest them and we should let them travel on" (*emphasis added*)

[862] See *supra*, paras. 204-212.

(I), but the fighting grew in intensity (II).

I. THE EARLY CLASHES AND CONTINUED NEGOTIATIONS

785. Democratic Kampuchea records reveal that negotiations continued despite the border conflict, in line with the directives issued already in 1975 to protect the territory without seeking confrontation.[863] For the Revolutionary Army of Kampuchea, the point was to show their enemies evidence of their territorial claims on a map.

786. In that connection, a January 1976 telegram describes the outcome of a meeting with a Vietnamese delegation and the aggressive reaction of the Vietnamese on hearing to the arguments of the Cambodians; even so, the Cambodians kept their composure.[864] The violent reaction of the Vietnamese regarding the border demarcation shows that it was difficult to reach a compromise and why the conflict escalated, given that the political impediments to dialogue increased. Portraying Democratic Kampuchea as the aggressor and as the side always picking the fight does not reflect the reality. Indeed, several documents from 1976 indicate that the Revolutionary Army of Kampuchea was reacting to attacks launched by the Vietnamese and that the instructions were to strike back only when there was no other alternative. The following are some examples of documents concerning the timeline of the events.

787. The minutes of Standing Committee meetings provide invaluable insight into the instructions to show restraint in regard to the incursions and the shifting of boundary pillars by the Vietnamese troops.[865]

788. Clashes occurred throughout the period from January to December 1976,[866] but the truth of the matter is that the message continued to be that of always seeking a political solution rather than

[863] It is noteworthy that the naval forces received the same instructions. PAK Sok: T. 05.01.2016, **E1/370.1,** p. 52, at 13.35.04.
[864] Democratic Kampuchea Telegram, 26.01.1976, **E3/893**, ERN 00182620; PRUM Sarat, as former navy commander of Division 164, he had detailed knowledge of the geography of the islands: T. 26.01.2016, **E1/382.1**, pp. 41-42, after 10.38.11.
[865] Minutes of Meeting of Standing Committee, 22.02.1976, **E3/229**, ERN 00182625. In this example, it was Vietnamese soldiers who entered Cambodian territory given that they occupied former Lon Nol barracks. On shifting boundary pillars; see also: Standing Committee Report, Region 23 (KEO An), 20.02.1976, **E3/1019**, ERN 00324802; IENG Phan recounts an incident which took place in Takeo in early '77: T. 01.11.2016, **E1/493.1,** p. 32, before 10.12.32.
[866] Civil Party CHHUN Samorn, a former soldier and member of a special unit at the Vietnamese border, reported heavy fighting took plce in Svay Rieng Province. T. 28.06.2016, **E1/445.1**, pp. 12-14, between 09.36.54 and 09.43.50; p. 82, before 15.12.27; p. 84, before 15.18.35; pp. 52-53, before 13.41.03.

confrontation.[867] The reports prepared by Chhin, of Division 920, which was stationed at the border in Mondulkiri Province, are particularly enlightening in that regard, because they cover a period of several weeks and therefore show how the situation evolved over time and provide precise details concerning both the positions of the two armies and the concurrent attempts at dialogue. It is important to read the telegrams in a chronological order, as telegrams and reports can be misunderstood if read out of context. For example, an attack reported in a document as having occurred at a given moment may be understood as having been launched by the Cambodian side whereas a closer look at other parts of the document or at an earlier document may reveal that it was in fact a counter-attack based on its timing.

789. In February 1976, Chhin reported as follows:

> **22 February 1976**: "At 10:30 a.m. on 16 February 1976, Group 7 brought in the army, materials, mats, and pillows and positioned their troops in Ou Dam Bay and Ou [*illegible*]. There were 55 of them, equipped with all types of weapons as we were. There were six commanders, A Hoeung and A Thoeung. As for the rest, I do not know any of them. From 15-21 February, we held talks with them, but nothing had been achieved. Now we are preparing a plan of attack." (*emphasis added*)[868]

> **29 February 1976**: "We would like to report to you about the border situation as follows: At Pout Reak target, from the 15th to 24th of February 1376, The 7 in a group of 60 people armed with AR 15, 79, B41 and B40 trespassed 2 kilometers into our territory at Kodang point. We destroyed them using grenades. Although, with our attempts so far to struggle this issue with them through political means, they would not withdraw themselves. On 25 February we organized an attack that lasted one night and one day; and yet they did not withdraw themselves […] On 20 February 1976 while we were working at our side of the border at the north of Ou Pi Koun Rok to Pout Reak, The 7 sieged and intended to arrest us but we could escape. At 11.30 a.m. we started shooting and as a result, The 7 ran back into their territory."[869]

790. Group 7, a unit comprising of Vietnamese soldiers, was apparently ordered to carry out attacks at the border, and as Chhin reported regularly in a series of reports, it carried out calculated attacks insidr Cambodian territory. The interventions of the Revolutionary Army of Kampuchea were clearly in response to or aimed responding to such attacks, or at least preparing to respond thereto.[870]

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[867] Democratic Kampuchea telegram to Uncle 89, 23.01.1976, **E3/887**.
[868] Chhin's Report, 22.02.1976, **E3/1020**, ERN 00305246.
[869] Chhin's Report, 29.02.1976, **E3/8373**, ERN 00183693. The Prosecution cited only parts of the report during a key documents hearing in respect of the attack on 60 Vietnamese soldiers by Revolutionary Army of Kampuchea, but omitted the segment which states that they were heavily armed and on Cambodian territory and that the attack took place thereafter (T. 03.11.2016, **E1/495.1**, p. 18, after 09.43.55).
[870] Chhin's Report, 03.03.1976, **E3/923**, ERN 00185238 (*emphasis added*). The English version of this document

791. The March 1976 minutes of a Standing Committee meeting reassert the need for action in regard to political negotiations, even though defending against attacks, for example in Ratanakiri, Takeo and Kratie, remained a priority.[871] This was not simply a matter of Democratic Kampuchea seeking peace, but also a recognition that the Revolutionary Army Kampuchea forces could not measure up to the Socialist Republic of Vietnam forces in a full-scale war. The mere mention of the need to build forces and to bide time by negotiating "amicably" demonstrates that the Standing Committee was well aware that it had nothing to gain in seeking confrontation.

792. However, negotiations proved difficult, as revealed by the documents produced throughout 1976, owing mainly to attacks along the border.[872] Nonetheless, that did not deter Democratic Kampuchea from continuing to advocate dialogue at the front while negotiations were ongoing among the top leadership. For example, SON Sen refers to a May 1976 Standing Committee meeting at which "the instructions of the Party" were to "not let it get tense" despite the continued Vietnamese attacks.[873] SAO Sarun, a former a combatant in Mondulkiri, confirmed in answer to questions regarding SON Sen's statements that the Vietnamese continued to attack even while talks were ongoing.[874] Prior to that, he said that "[t]he Vietnamese started first the fighting."[875] Even so, Democratic Kampuchea's leaders were still hoping for progress in the negotiations. At a meeting of the Council of Ministers in late May 1976, it was noted that the situation was expected to improve significantly.[876]

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incorrectly indicates at ERN 00185238 that RAK soldiers were "pushing them to retreat one kilometer [into their territory]". The words in square brackets do appear in the French or in the original ERN KH 00052345. Moreover, it is clearly stated in the highlighted part of the excerpt quoted in French:"l*es ennemis se sont positionnés sur notre territoire de nouveau*" [the enemies were once again positioned on our territory] with specific cartographic details. So Cambodia's intervention was clearly aimed at defending national territory; Chhin's Report, 09.03.1976, **E3/1022.**

[871] Record of Meeting of the Standing Committee, 11.03.1976, **E3/217**, ERN 00182636. See also MOEUNG Vet, a soldier who was stationed on the Eastern Front in 1976: T. 27.07.2016, **E1/449.1**, p. 56, at 11.22.14; pp. 49-50.

[872] CHIN Saroeun, company head within Regiment 93 of Division 920 stationed in Mondolkiri in 1976 under Chhin's , and Say testified regarding the situation in the region: T. 03.08.2016, **E1/454.1**, p. 5, after 09.13.05: "I was not given any weapon to carry while I was in Division 920; only after I was transferred to Mondolkiri. And at that time, Vietnamese troops encroached on the Kampuchean territory and we in the sector army were equipped with arms."; Record of Meeting of the Standing Committee, 26.03.1976, **E3/218**, ERN 00182652. During a key document hearing, the Prosecution cited this record, but only in regard to Vietnam's position and its willingness to negotiate, but did not mention the response of the representative of Democratic Kampuchea or Cambodia's concerns (T. 03.11.16, **E1/495.1**, p. 18, after 09.45.58.

[873] Report of Meeting of the Standing Committee, 14.05.1976, **E3/221**, ERN 00182695-96.

[874] SAO Sarun: T. 30.03.16, **E1/411.1**, p. 6, before 09.14.56.

[875] SAO Sarun: T. 30.03.16, **E1/411.1**, p. 4 after 09.09.06.

[876] Minutes of Council of Ministers' 2nd Meeting, 31.05.1976, **E3/794**, ERN 00182675-76.

II. FURTHER ESCALATION OF THE CONFLICT

793. Nonetheless, the fighting on the ground continued to escalate. A report on the military situation between 15 July and 31 August 1976 describes the fighting in Mondulkiri and in the East Zone, as well as the relentless activity on the part of the Vietnamese.[877] In its reports and minutes of meetings, Division 920 often mentioned Group 7, an indication that that Group 7 was a Vietnamese unit operating along the border.

794. It is important to take account of the evidence concerning that unit's incursions into Cambodian territory, if only to disprove the claim that the Revolutionary Army of Kampuchea launched incursions into Vietnam in order to wage unprovoked attacks against the civilian population, as suggested the by Prosecution during the examination of Stephen MORRIS,[878] or by Judge LAVERGNE's cherry picking and inculpatory use of telegrams when examining LONG Sat.[879] This example reveals the Chamber's bias, which led it to render some rather odd decisions in the course of the proceedings.[880]

795. It turns out that even after having provided LONG Sat with a whole set of period documents with which he was unfamiliar,[881] Judge LAVERGNE was still unable to obtain the answers he was seeking regarding incursions into Vietnam by the Revolutionary Army Kampuchea. Indeed, LONG Sat, former chief nurse of Mobile Hospital 156, which was under Division 4 in the East Zone from 1977 to May 1978,[882] testified that his medical team was mostly "at the rear" of the front[883] and

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[877] Report on the situations from 15 July to 31 August 1976, undated, **E3/9289,** ERN 00233965;
[878] Stephen MORRIS: T. 19.10.2016, **E1/486.1**, p. 79, at 13.56.48.
[879] LONG Sat: T. 02.11.2016, **E1/494.1,** p.10 *et seq.*, from 09.33.46. After having given the witness a set of documents the previous day – and it should be emphasised that the witness had not seen the documents at the time relevant to the proceedings – Judge LAVERGNE tried to seek his comments on an attack against "Barracks 27", which was purportedly located inside Vietnamese territory and is mentioned in a telegram from Chhon dated 29.10.1977, **E3/891**. The witness did not have much say about the attack, as he did not personally witness it (p. *20 et seq.*, from 09.48.53 to 09.49.19). However, during questioning by the Defence, the witness remembered that Vietnamese attacks occurred earlier along the border, against Barracks 27: T. 08.11.2016, **E1/497.1**, pp. 14-15, at 09.34.56.
[880] T. 01.11.2016, **E1/493.1**, p. 13, after 09.31.42.
[881] LONG Sat T. 02.11.2016, **E1/494.1**, pp. 14-15, at 09.37.38. The witness was unfamiliar with the documents he was given in court; he even said that that they were fake: T. 01.11.2016, **E1/493.1** after 15.36.47. He also stated that Chhon was not SAO Phim's alias: T. 02.11.2016, **E1/494.1**, p. 97, before 15.56.40. Later, the witness also stated: "My unit was meant to save lives of people; for that reason, we were provided with limited information and we never received any magazine or any document. We were out of the loop". (T. 02.11.2016, **E1/494.1**, p. 61, before 14.10.17).
[882] LONG Sat: T. 08.11.2016, **E1/497.1**, p. 4, before 09.09.38.
[883] LONG Sat: T. 02.11.2016, **E1/494.1**, p. 5, before 09.13.44.

that "he did not engage in combat".[884] He, in fact, "never" attended division meetings.[885]

796. Bombarded with questions by Judge LAVERGNE, LONG Sat was forced to admit that he had "no idea" about the military strategy[886] and that he did not go to Barracks 27, which was the focus of the Prosecution and Judge LAVERGNE.[887] Thereafter, during cross-examination by the Defence, he said that the Vietnamese troops retreated after fierce fighting at the border.[888]

797. Expert Philip SHORT testified in Case 002/01 that "[…] there was fault on both sides of the land border. I think it can be well established that there were incursions by Cambodian troops into Vietnam and certainly Vietnamese incursions into Cambodia."[889] Nonetheless, when the Prosecution confronted Brigade Commander IENG Phana with a media report concerning a purported incursion into Vietnamese territory and about excerpt from Ben KIERNAN's book on the same topic, he answered :

> "The fighting was back and forth, but it would not be possible for us to enter deep into the Vietnamese territory. We could probably pass Praek Chik Vinh Tae or Vinh Tae canal for 100 or 200 meters and then we had to be retreated because we would be fought back by the Vietnamese side because Vietnam had a lot of soldiers."[890]

> "I would like to provide my comments in relation to the report of the Vietnamese troops. It is my understanding that the report is not true. I was there at my base. We did not have the right to attack into An Giang. The Southwest Zone's force, particularly my special battalion, had no rights to attack that far into the territory of Vietnam. I do not really understand about the report. You can check it for yourself, but the fact is we had no rights to attack that deep into the territory. We could only attack close to our border."[891]

798. CHUON Thy was taken aback when he was asked about the same media report in relation to an incursion by Division 340.[892] He asserted that the press could not possibly have been in a position to know the number of that particular division, since it had been created only recently,[893] adding

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[884] LONG Sat: T. 02.11.2016, **E1/494.1**, p. 40, at 11.09.07.
[885] LONG Sat: T. 07.11.2016, **E1/496.1**, p. 85, before 15.15.16], T. 08.11.2016, **E1/497.1**, pp. 5-6, around 09.12.51.
[886] LONG Sat: T. 02.11.2016, **E1/494.1**, p. 21, after 09.50.49, p. 19 before 09.53.29. The witness was therefore only making assumptions: T. 01.11.2016, **E1/493.1**, p. 79, before 14.31.09.
[887] LONG Sat: T. 02.11.2016, **E1/494.1**, pp. 64-65, at 14.17.49.
[888] LONG Sat: T. 02.11.2016, **E1/494.1**, pp. 18-19, around 09.40.18, answering questions from the Defence concerning the telegram from Chhon, dated 29.10.1977, **E3/981**, ERN 00314587. In this regard, see also: MOENG Vet: T. 27.07.2016, **E1/449.1**, p. 52, before 11.28.50.
[889] Philip SHORT: T. 09.05.2013, **E1/192.1**, p. 114, before 15.39.25. Concerning accusations and counter-accusations on the radio, see IENG Phan: T. 31.10.2016, **E1/492.1**, pp. 104-105, after 15.57.59.
[890] IENG Phan: T. 31.10.2016, **E1/492.1**, p. 26, after 10.15.31.
[891] IENG Phan: T. 31.10.2016, **E1/492.1**, p. 33, before 10.45.06.
[892] VNA Report, 12.10.1978, **E3/1608,** ERN S 00013179-80.
[893] CHUON Thy: T. 26.10.2016, **E1/490.1**, p. 55, at 11.28.20.

that he never entered Vietnamese territory.[894]

799. SOV Maing, who was stationed at Saen Monourom, in Ou Reang District, and at Dak Dam, in Region 105, Mondulkiri Province, was head of a company of 100 troops.[895] From 1976 to 1979, his company was tasked with surveillance of the border at Dak Dam,[896] not far away from Division 920 with which he collaborated.[897] He said that the fighting in Dak Dam started in 1976 and escalated in 1978.[898] SOV Maing described the instructions received for his troops: "[…] if they entered our territory, then we would fight them and if they did not, then we only stayed within our territory."[899]

800. The moving of border markers sparked many clashes.[900] Even so, in September 1976 the message to the soldiers was still to avoid confrontation, and instead defend the territory against any encroachment by Vietnamese troops.[901] So the message remained to fight back if attacked. IENG Phan confirmed MEAS Voeun's testimony that Democratic Kampuchea's policy at that time was not avoid being "the ones who make trouble".[902] Even so, the situation continued to deteriorate further.

Section II. ESCALATION OF THE CONFLICT IN 1977-1978

801. The attempt to reach an *entente cordiale* in 1975 and 1976 ended in failure. The year 1977 was marked by more frequent incursions into enemy territory (I) and the turning point was the Vietnamese invasion in December, which triggered open war (II).

I. INCREASINGLY FREQUENT INCURSIONS AND THE TURNING POINT IN 1977

802. Battles became increasingly frequent in 1977 as did incursions into Cambodian territory. The fighting was reported in many a telegram and report,[903] as confirmed by many witness in court.

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[894] CHUON Thy: T. 26.10.2016, **E1/490.1**, p. 517, after 11.22.05].
[895] SOV Maing: T. 27.10.2016, **E1/491.1**, p. 9, around 09.22.32.
[896] SOV Maing: T. 27.10.2016, **E1/491.1**, p. 14, before 09.41.24.
[897] SOV Maing: T. 27.10.2016, **E1/491.1**, pp. 14-15, around 09.43.49.
[898] SOV Maing: T. 27.10.2016, **E1/491.1,** p. 20, around 09.58.06 **p.** 21, before 10.01. 43.
[899] SOV Maing: T. 27.10.2016, **E1/491.1,** pp. 46-47, around 11.19.00; see also p. 48, after 11.23.39.
[900] Minutes of Meeting of Division 920, 16.12.1976, **E3/805**, ERN 00185237-38.
[901] Minutes of Meeting of Division 920, 07.09.1976, **E3/799**, ERN 00184781.
[902] IENG Phan, T. 31.10.2016, **E1/492.1**, pp. 101-102, around 15.49.34, confirming MEAS Voeun's DC-Cam: Interview , 11.12.2010, **E3/8752**, ERN 00849510-11.
[903] See for example: Report on the enemy situation along the border in the Eastern Zone, April 1977, **E3/852**, ERN 00183715-17, which describes activity and clashes in Svay Rieng, shelling and other incidents in April 1977. See also: Southeast Zone Report, 03.06.1977, **E3/853**, ERN 00185243-46. Details about incursions and rockets being fired by

Such witnesses include MOEUNG Vet, a former soldier who was assigned in 1976 to the Eastern front as part of Division 117, which was directly under the General Staff, i.e. SOU Met, MEAS Mut and SON Sen. MOEING Vet recounted fighting during that period.[904] In a written record of interview, NUON Paet, alias KHUM Kim, recounts a meeting with Ta Mok in late 1977 during which the two armed forces exchanged prisoners, including 330 Khmers and 100 Vietnamese who were being held on Poulo Wai Island. This happened following a Vietnamese incursion into Kampot Province.[905] Despite all of this, negotiations became increasingly tense. IENG Phan, who was stationed in Takeo, testified that "from early or mid-1977, attacks continued unabated between Kampuchea and Vietnam"[906] "because of the territorial integrity."[907]

803. A telegram dated 15 June 1977 describes the encounter between Chhean and a Vietnamese delegation and heightened tensions between the two countries. Each side accuses the other of responsibility for attacks and killings. The response from the Cambodian side is noteworthy: when Vietnam complained about the 14 June attacks, Chhean answered that Vietnamese troops violated Cambodia's territorial integrity and bombed civilians:

> "[...]; we had never had even an intention to invade any country Thus, do not mention the actual invasion (yet, they have sworn to protect their independence, sovereignty and territorial integrity...).
>
> I believe that the pits inside Cambodia caused by the bombing made by your army to kill Cambodian people who were busy working in our rice-fields would not disappear easily. This is the only example I offer to you, comrade.)
>
> When I started to mention about the aircraft, they changed the topic to talk about something else." [908]

Vietnamese forces onto Cambodian territory on June 1977. See also: Region 20 Report, 08.06.1977, **E3/854**, ERN 00386232: report on DK soldiers being wounded along the East Zone border DK. In regard to DK's response and the losses on the Vietnamese side, it is states that the Vietnamese "carried and dragged the bodies of their soldiers back to their territory", proof that the fighting took place on Cambodian territory.

[904] MOENG Vet: T. 27.07.2016, **E1/449.1**, p. 66, at 13.48.58] (regarding Division 117); pp. 48-49 (regarding the situation in Kratie from 1976 to 1977); p. 44, after 11.07.07 (regarding the places attacked by Vietnamese troops); p. 44, after 11.07.07; p. 48, before 11.19.12; p. 49, before 11.22.14; p. 77, before 14.33.38].

[905] WRI of NUON Paet *alias* KHUN Kim, 30.11.2009, **E3/422**, ERN 00414063-64. He also stated that at meeting attended by SON Sen, both officials said: "The Vietnamese wanted to annex Cambodia into the Indochinese Federation, therefore we had to prepare for counter-attack, to preventing the Vietnamese from attacking into Cambodia." He also reports a similar exchange of soldiers was undertaken by HOU Nim in mid-1977[ERN 00414065].

[906] IENG Phan: T. 31.10.2016, **E1/492.1**, p. 37, after 10.47.39.

[907] IENG Phan: T. 31.10.2016, **E1/492.1**, pp. 18-19, around 09.53.18; p. 19, at 09.58.42 "The dispute or conflict started from early 1977, and the fighting was fierce in mid-1977. We pushed them back, and they pushed us back. And we could only push the Vietnamese back to the border, at Praek Chik Vinh Tae (phonetic), but for Vietnamese troops, they could be able to push us almost to Takeo town."

[908] Telegram from Chhean, 15.06.1977, **E3/878**, ERN FR 00182770. Other documents describe increasingly heavy losses in mid-1977.

804. The two sides pointed the finger at each other. The negotiations eventually became a dialogue of the deaf.[909] In late August 1977, Chhean summed up Democratic Kampuchea's official position as presented to his Vietnamese interlocutors, namely, respect Vietnamese territory and defend Democratic Kampuchea's territory.[910]

805. It is important to note that the roles of the zone officials may have had a very strong influence on the day-to-day conduct of the military operations. The CPK leadership had to compose with the character and prerogatives of the military leaders who exercised authority over the troops since their days in the underground resistance.

806. MEAS Voeun, a former official of the West Zone division, also testified that Ta Mok had a great deal of authority over the various armed forces, thus confirming his OCIJ interview.[911] In response to a question by the President, LONG Sat said that in fact before December 1977 there was no Centre army in the East Zone, where he was stationed as a soldier,[912] and that there were three divisions, one of which was led by HENG Samrin.[913]

II. TELEGRAMS ATTESTING TO OPEN WARFARE

807. In a telegram issued in August 1977. Chhean conveyed the Socialist Republic of Vietnam's diplomatic strategy vis-à-vis the foreign embassies in Hanoi where "[c]urrently, it was common knowledge among embassies/ambassadors based in Hanoi regarding conflicts along our borders with Vietnam" had hitherto been kept secret "by provoking whispers and propaganda in order to slander us."[914] He also said that the Socialist Republic of Vietnam claimed to be conciliatory and that it circulated "rumours". He added: "[h]aving analyzed the situation, it is observed that Vietnam is reaching a new era where it is mobilizing the masses; while at the same time, it is advancing its aggression into our country [Cambodia]. Simultaneously, it is also applying tricks to blind other

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[909] See for example: Democratic Kampuchea telegram**,** 20.07.1977, **E3/880**. Signed by Chhean the telegram descries exchanges with Sun, a Vietnamese official. The Prosecution used this telegram in the examination of Expert MORRIS (T. 19.10.2016, **E1/486.1**, p. 101, around 14.33.49) concerning shots allegedly by Cambodians into Vietnamese territory between 16 and 18 July (beyond the scope of Case 002/02) but omitted to mention Hong's answers for the Cambodian side, as to an earlier attack by Vietnam (**E3/880**, ERN 00182767-68).
[910] Telegram from Chhean to M-81, 30.08.1977, **E3/884**, ERN 00182763.
[911] MEAS Voeun: T. 02.02.2016, **E1/386.1**, pp. 61-62, around 13.51.30; WRI, 15.01.2014, **E3/9738,** Q/A 4 and Q/A 24.
[912] LONG Sat: T. 01.11.2016, **E1/493.1**, pp. 79-80, around 14.20.36.
[913] LONG Sat: T. 01.11.2016, **E1/493.1**, pp. 78-79, around 14.18.18.
[914] Telegram from Chhean to M-81, 12.08.1977, **E3/882**, ERN 00182766.

people's eyes. Still it is not 100% open with this regard."[915] The that Chhean ends the telegram reflects his perception of the situation both as concerns Vietnam's attitude and the position of Democratic Kampuchea's allies, who mistrusted Vietnam, because they viewed it as an invader.[916]

808. In addition to the diplomatic offensive, clashes were more and more violent on the ground, in particular as of October, as evidenced in a number of telegrams from Chhon (SAO Phim) concerning the fighting in the East Zone. They clearly reveal that over time, the zone troops found it increasingly difficult to contain the advances of the Vietnamese troops.[917] For example, in December 1977, SAO Phim issued two telegrams in which he described a critical situation:

> **10.12.1977:** "The enemy situation at the Route 22 battlefield on December 09 is marked by their entry via Trach Khaol. Now they are deploying in the vicinity of Trapeang Smach, Prey Baut Kang and Sapoun, an area west of Trapeang Phlong and in the vicinity of Preah Pdao village."[918]
>
> **22.12.1977:** "The enemy is East of Memot at the Tea Hort-Da Village spearhead. The enemy hit us strongly and caused our ready lines to collapse, and the enemy entered and conducted strafing activities nearby houses, killing many people and buffaloes. Now the enemy is at Da Village, Phlak Samrong, Rong Ko on National Highway 7."[919]

809. During the examination of witness LONG Sat, President NIL Nonn made reference to several telegrams from Phuong about Vietnamese incursions into Cambodian territory and the attack on the rubber factory and the plantation he managed.[920] Those attacks, which took place between 23 and 27 December, notably sent the troops into disarray and forced the people in the area and the workers to flee.[921] They were a prelude to the entry en masse of Vietnamese troops in late December 1977.

810. Therefore, with the negotiations at a stalemate and the conflict escalating, those telegrams were describing the end of the military resistance of the Eastern troops and the entry of the Vietnamese

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[915] Telegram from Chhean to M-81, 12.08.1977, **E3/882**, ERN 00182767.
[916] Telegram from Chhean to M-81, 12.08.1977, **E3/882,** ERN 01313134-35.
[917] Telegram from Chhon, 26.10.1977, **E3/888,** ERN 00183615; Telegram from Chhon, 26.10.1977, **E3/889**, ERN FR 00946194; Telegram from Chhon, 27.10.1977, **E3/554** (for one-page documents, the Defence systematically omits the ERN); Telegram from Chhon, 06.11.1977, **E3/976**.
[918] Telegram from Chhon, 10.12.1977, **E3/8370**.
[919] DK telegram, 22.12.1977, **E3/8372**, ERN 00183632.
[920] Witness LONG Sat confirmed Phuong's functions and remembered the events relating to the plantation: T. 01.11.2016, **E1/493.1**, pp. 107-108, around 15.55.46.
[921] Telegram from Phuong, 23.12.1977, **E3/905;** Telegram from Phuong, 23.12.1977, **E3/906**; Telegram from Phuong, 24.12.1977, **E3/909**; Telegram from Phuong, 24.12.1977, **E3/908**; Telegram from Phuong, 27.12.1977, **E3/912**.

troops into a large portion of Cambodian territory.[922] It was against that background that Democratic Kampuchea caused quite a sensation by announcing the severing of diplomatic relations[923] [with Vietnam] and made the conflict official, much to the chagrin of Vietnam, as Expert Philip SHORT explains in his book.[924]

811. In his book, Stephen MORRIS confirms that this was the reason why it was not politically feasible for Vietnam to invade and dominate Cambodia, even though it already had the capacity to do so by late 1977.[925] The strategy was therefore to change the political game and lay the groundwork for a victory, which was only a matter of time. Expert Stephen MORRIS made frequent reference to the purportedly "irrational" nature of Democratic Kampuchea's leaders but, as Douglas PIKE points out in his highly insightful report, "[t]he Cambodians [saw] the issue in the [then] current war as Cambodian survival."[926]

Section III. DEMOCRATIC KAMPUCHEA'S DEFEAT AS EX[ECTED:1978-1979

812. In 1978 the conflict turned into an open war and was marked by Vietnam's effective diplomatic offensive (II) against the overwhelmed Democratic Kampuchea troops (I). It was the combination of those two factors which led to Cambodia's defeat on 7 January 1979.

I. THE DEMOCRATIC KAMPUCHEA ARMY OVERAWED

813. Given the military disparity described *supra*, the Vietnamese easily dominated the Democratic Kampuchea troops; the latter easily caved in from the moment when Vietnam felt free to deploy all of its military might.[927] On the witness stand, Expert Stephen MORRIS shared Nayan CHANDA's opinion that Democratic Kampuchea stood no chance against Vietnam in a

[922] IENG Phan: T. 31.10.2016, **E1/492.1**, pp. 19-20, before 09.57.25; SIN Oeng: T. 05.12.2016, **E1/506.1**, pp. 15-16, after 09.36.26. There was a Vietnamese incursion into Mondolkiri: DK telegram, 01.01.1978, **E3/248,** ERN 00631446; *Report on 2 March SRV Intrusion in Mondolkiri*, 03.03.1978 (SWB), **E3/1360**, ERN 00169884.
[923] Cambodia's Temporary Severance of Relations With Vietnam, 03.01.1978, **E3/267**, ERN S 00008724; Declaration of the Spokesperson of the Ministry of Propaganda and Information of Democratic Kampuchea, 06.01.1978, **E3/1263**, ERN 00337187-92; Diplomatic cable sent by the American Embassy in Bangkok to the US Secretary of State in Washington, from Canberra, February 1978, **E3/9727**.
[924] Book by Philip SHORT, *Pol Pot, Anatomy of a Nightmare,* 2004, **E3/9**, ERN 00658585-86.
[925] Book by Stephen MORRIS, *Why Vietnam Invaded Cambodia,* 1999, **E3/7338**, p. 102, ERN 01001769.
[926] Report by Douglas PIKE, "Vietnam-Cambodia Conflict, Report Prepared at the Request of the Sub-Committee on Asian and Pacific Affairs, Committee on International Relations, Congressional Research Service", 95th Congress", 04.10.978, **E3/2370**, ERN 00187396.
[927] See *infra*, paras. 817-832.

"conventional war".[928] Overall, the former combatants who testified about the armed conflict expressed the view that there were more losses on the Cambodia. The reason for that could be because Democratic Kampuchea had fewer of troops and Vietnam had more weapons and better trained troops, as noted *supra*.[929]

814. IENG Phan, a former brigade commander, testified that there were "more wounded soldiers" and "more deaths" on the Cambodian side due to Vietnam's superiority.[930] He said that the situation was chaotic when he reached Svay Rieng in mid-1978 with reinforcements for the troops already on the ground, who were under Ren (Ta Mok's son in law).[931].. He explained that things were not going well at all for the RAK as it was having difficulty containing the invasion of Takeo by enemy forces..[932]

815. Several former combatants testified that Khmer soldiers were captured and that the enemy troops enhanced their combat techniques, including through the use of mines.[933] Therefore, the claim that the Revolutionary Army of Kampuchea employed viciously brutal methods of warfare and that the Vietnamese employed nobler tactics is another myth.[934] The only universal truth is that there is no such as thing as a clean war, particularly trench warfare, as was the case in the border areas.

816. Most analysts agreed that with the increasingly powerful Vietnamese army and the heavy losses on the Democratic Kampuchea side, a new regime under Vietnamese trusteeship, as was the case in Laos, was to be envisaged[935] This was a cause of great concern for the Thais, given their domestic problems.[936] The evidence clearly indicates that Vietnam devised a strategy which help

[928] Stephen MORRIS: T. 19.10.2016, **E1/486.1**, pp. 92-93, around 14.26.32]: "[I]t was easy for the Vietnamese to achieve their military objectives in Cambodia, at that time, and by -- by --the Democratic Kampuchea forces were in no position to stage -- to wage a conventional war against the Vietnamese. Their only option was guerrilla war, which they did not pursue."
[929] See *supra*, paras. 742-751.
[930] IENG Phan: T. 31.10.2016, **E1/492.1**, p. 20, around 10.00.47.
[931] IENG Phan: T. 01.11.2016, **E1/493.1**, pp. 17-18, around 09.41.11.
[932] IENG Phan: T. 01.11.2016, **E1/493.1**, p. 43, before 10.59.30.
[933] RI, SOKH Chhien, 19.08.2009, **E3/428** ERN 00374950. IENG Phan: T. 01.11.2016, **E1/493.1**, p. 51, at 11.17.50 (confirming that both countries used mines as a tactic); T. 31.10.2016, **E1/492.1** p. 70, at [14.03.08] (confirming that in his Unit no Vietnamese were captured). See also: RI, KUNG Kim, 09.01.2009, **E3/3959**, ERN 00278680; CHUON Thy: T. 26.10.2016, **E1/490.1**, pp. 55-56, at 11.30.09; p. 58, at 11.36.15.
[934] Other witnesses testified that there were mines in the East Zone: LONG Sat: T. 08.11.2016, **E1/497.1**, p. 20, around 09.49.19. See also the testimony of Civil Party CHHUN Samorn: T. 28.06.2016, **E1/445.1**, p. 53, at 13.41.03. See also MOENG Vet: T. 27.07.2016, **E1/449.1**, p. 44, at [11.07.07; p. 73, from 14.22.38to 14.24.20.
[935] LONG Sat: T. 01.11.2016, **E1/493.1**, pp. 103-104, at 15.57.38]; BAN Seak: T. 06.10.2015, **E1/354.1**, pp. 24-25, at 10.06.40; BAN Seak, T.06.10.2015, **E1/354.1**, p. 25, before 10.11.19; WRI of KE Pich Vannak (deceased), 04.06.2009, **E3/35,** ERN 00346156.
[936] Diplomatic cable from the US Embassy in Bangkok to the US Secretary of State in Washington, from Canberra,

it achieve its purposes.

II. VIETNAM'S SUCCESSFUL STRATEGY

817. For the Vietnamese authorities, Democratic Kampuchea's resistance could no longer be tolerated, because they were considering variety of scenarios to oust the Khmer government then in place.[937] In order to win the war, they banked on an alliance with Khmers from within (A) and on a vast diplomatic offensive (B).

A. Alliance with CPK dissidents

818. In the end, the Vietnamese decided to use opponents of the Standing Committee as allies not only to topple the regime but also to replace it with a pro-Vietnamese leadership. In early 1978, Vietnam spread a rumour among friendly countries that alliances could be formed with "Patriotic Forces".[938]

819. By and by, however, things became clearer thanks to the dissidents who had settled in Vietnam. According to Dmitry MOSYAKOV, more meetings and training sessions were held with the Socialist Republic of Vietnam, and military forces were mobilised.[939]

820. The strategy of using Khmers from within Democratic Kampuchea is also discussed by Stephen MORRIS in his book. He recounts a September 1978 meeting between the Soviet ambassador in Hanoi and Le Duan during which the latter said that they were in the process of creating a resistance movement in Cambodia.[940]

821. LONG Sat, a relative of SAO Phim, recounted his experience as a dissident. He said that he gave up his post as head nurse[941] in order to join a group of dissident soldiers who were part of the underground movement from May to November 1978.[942] He recognised that there was an ongoing "internal conflict" in Democratic Kampuchea during that period.[943] He also said that he was

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August 1978, **E3/9724**, ERN 01186946-47, 01186947, 01186949-50, 01186951.

[937] Article by Dmitry MOSYAKOV entitled "The Khmer Rouge and the Vietnamese Communists: A history of their relations as told in the Soviet archives", 2004, **E3/9644**, ERN FR 01125320.

[938] *Abschrift eines Briefes des ADN-Korrespondenten in Hanoi vom 3.1.78, gez. Klaus-Dieter Pflaum*, 03.01.1978, **E3/540**, ERN 01246935.

[939] Article by Dmitry MOSYAKOV entitled "The Khmer Rouge and the Vietnamese Communists: A history of their relations as told in the Soviet archives", 2004, **E3/9644**, ERN 01085996-97.

[940] Book by Stephen MORRIS, *Why Vietnam Invaded Cambodia*, 1999, **E3/7338**, p. 109, ERN 01001776.

[941] LONG Sat: T. 01.11.2016, **E1/493.1**, pp. 63-64 around 13.52.42; T. 02.11.2016, **E1/494.1**, pp. 75-76, at 14.45.01.

[942] LONG Sat: T. 02.11.2016, **E1/494.1**, p. 25, at 10.06.50; T. 01.11.2016, **E1/493.1**, pp. 63-64 around 13.52.42. 15.08.28

[943] LONG Sat: T. 07.11.2016, **E1/496.1**, p. 83, before 15.08.28.

approached by a group comprised of "[…] Vietnamese with some Khmer [who] wanted to communicate and cooperate with Khmer forces."[944] "After such long discussion," he was "invited to go to Vietnam to collect munitions".[945] Following an operation to mobilise and lead Khmers into Vietnamese territory, he was "invited" [and flown] to Ho Chi Minh City by helicopter – along with OUK Bunchhoeun[946] – for purposes of establishing a front. He gave a detailed account of this journey and the training he received in detail.[947] Lastly, he said that in the process of establishing the front, he found himself at loggerheads with a number of prominent figures, who later held office in post-Democratic Kampuchea Cambodia, and with former East Zone cadres.[948]

822. The front was under Vietnamese control and enabled Vietnam to portray its planned invasion as a Khmer undertaking, hence why it was important to give the dissident groups a voice in the press.[949] However, at the end of the day, whenever they launched an attack, the Vietnamese forces were always on hand to lend them support.[950]

823. Civil party CHHUON Samorn also testified that he joined the Front army in fighting against the Revolutionary Army of Kampuchea forces,[951] and also that he attended training sessions as part of the cooperation with Vietnam.[952]

B. Preparedness on the diplomatic front

1. The Vietnamese as masters at diplomacy

824. Given the cold war context,[953] the Vietnamese had to be prepared at both the diplomatic and military fronts. As noted by Dmitry MOSYAKOV, it was crucial to secure the backing of the

[944] LONG Sat: T. 01.11.2016, **E1/493.1**, pp. 64-65, after 13.52.42.
[945] LONG Sat: T. 01.11.2016, **E1/493.1**, p. 65, around 13.56.17.
[946] LONG Sat: T. 02.11.2016, **E1/494.1**, pp. 91-92, at 15.40.47.
[947] LONG Sat: T. 01.11.2016, **E1/493.1**, p. 65, around 13.56.17.
[948] LONG Sat: T. 02.11.2016, **E1/494.1**, pp. 27-38, at 10.14.56, pp. 93-94, after [15.46.31.
[949] Article entitled "Hanoi's Role Is Unclear in Reports of Popular Uprising in Cambodia", *The Washington Post*, 10.08.1978, **E3/7265**, ERN 00166105; "Other Reports on Vietnam and Cambodia", 23.10.1978 (SWB), **E3/7315**, ERN S 00013210; Founding of Cambodian United National Front'", 05.12.1978 (SWB), **E3/7310**, ERN S00013294-95.
[950] MEAS Soeurn: T. 30.06.2016, **E1/447.1**, p. 16, between 09.41.30 and 09.42.50, "**Q**. Do you know whether Heng Samrin's forces were, at one point later, joined by the Vietnamese military forces? **A**. I am not certain about the time. All I know is that it happened in late 1978 and early 1979."
[951] CHHUN Samorn: T. 28.06.2016, **E1/445.1**, p. 94, before 15.38.28.
[952] CHHUN Samorn: T. 28.06.2016, **E1/445.1**, p. 96, after 15.42.05.
[953] See *supra*, paras. 707-714.

USSR.[954]

825. Indeed, by signing the treaty of friendship with the Soviet Union shortly before the invasion, Vietnam was guaranteed the support of a superpower in anticipation of a possible reaction from China.[955] In her testimony, Elizabeth BECKER describes a game of alliances in which the United States was player:

> "Just – if you remember, just before the invasion, Vietnam signed a friendship treaty with the Soviet Union. At that time both the Vietnamese and Democratic Kampuchea were visiting the different capitals of ASEAN, trying to get them on their side. So there was a who's going to be with whom atmosphere. And the United States was definitely leaning towards China, but the problem was, Democratic Kampuchea was the Chinese ally and the Unites States simultaneously was creating this incredible dossier about human rights violations in Democratic Kampuchea. So the policy makers were at wits' end. An example that's just – the State Department had their separate desks for Vietnam, Laos and Cambodia. And the nickname was 'Very Lost Causes'. That's how much it was a confusion for the United States."[956]

826. She also testified that the treaty of friendship "sealed the deal".[957] That was done in secret. As a matter of fact, Vietnam's secret dealings and its invasion plans caught the United States by surprise, as it had not realised that something was brewing in the region.

827. Expert Stephen MORRIS confirmed that the Socialist Republic of Vietnam worked towards securing the backing of the Soviet Union in the conflict, because that was also a way to gain the support of all of the Soviet bloc countries.[958] In addition to seeking the backing of the Soviet Union, Vietnam also embarked on a communication campaign with a view to getting world opinion on its side. In his report to the US Congress, Douglas PIKE pointed out that "[b]oth sides [made] bids for world public opinion, the Vietnamese far more skilfully than the Cambodians."[959] Expert Stephen MORRIS confirmed this in his testimony, explaining that "[…] the Vietnamese have a long history of --- a much more detailed history of training by the Soviets and the Chinese in these arts of propaganda."[960]

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[954] Article by Dmitry MOSYAKOV entitled "The Khmer Rouge and the Vietnamese Communists: A history of their relations as told in the Soviet archives", 2004, **E3/9644**, ERN 01085964.
[955] Stephen MORRIS: T. 20.10.2016, **E1/487.**1, pp. 68-69, at 13.49.55.
[956] Elizabeth BECKER: T. 09.02.2015, **E1/259.1**, pp. 27-28, around 10.10.46.
[957] Elizabeth BECKER: T. 09.02.2015, **E1/259.1**, pp. 86-87, around 15.11.09.
[958] Stephen MORRIS: T. 20.10.2016, **E1/487.1**, pp. 59-60, at 11.29.38.
[959] Report by Douglas PIKE entitled "The Vietnam-Cambodia Conflict, Report Prepared at the Request of the Sub-Committee on Asian and Pacific Affairs, Committee on International Relations, Congressional Research Service", 95th Congress, 4 October 1978, **E3/2370**, ERN 00187389.
[960] Stephen MORRIS: T. 19.10.2016, **E1/486.1**, pp. 63-64, after 11.38.35.

828. POL Pot's statements in late 1978, as recounted in Elizabeth BECKER's interview with him are noteworthy. His description of Vietnam as "a satellite of the Soviet Union" which "went and kissed the feet of the Soviet Union" in order to make "a military alliance" with a view to internationalising the conflict with Cambodia aptly reflects the strategy of the Socialist Republic of Vietnam.[961]

2. Democratic Kampuchea's ineffectual statements

829. Democratic Kampuchea's leaders found themselves in a tight spot, but their attempt to thwart Vietnam's diplomatic manoeuvring[962] was too little too late. It could, of course, count on its loyal allies, China and Korea.[963]

830. However, despite launching a media offensive to condemn the December 1977 invasion,[964] the Democratic Kampuchea government could not survive the onslaught of Vietnamese political maneouvring and its military defeats.[965] By early January 1979, it was all over and its forces were fleeing.[966]

831. Given those circumstances, IENG Sary's 3 January 1979 telegram/ultimatum to the Security Council was Democratic Kampuchea's last stand on the world stage before the debacle of 7 January.[967] Similarly, POL Pot's appeal to the Cambodian people was simply a disguised swan song.[968]

832. This was critical moment and a milestone in the conflict that had been going on for years, with a

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[961] Book by Elizabeth BECKER, *When the War Was Over: Cambodia and the Khmer Rouge Revolution*, 1986, **E3/20**, p. 414, ERN 00238137.
[962] Speech by NUON Cheaon the occasion of Teng Ying-chao's visit to Cambodia, 18.01.1978 (SWB), **E3/1407**, ERN S 00008681.
[963] Reports, information and memoranda on discussions on relations between Kampuchea and Vietnam,1977-1978, **E3/1773**, ERN 01246920-21; Chinese support for Cambodia in conflict with Vietnam, 03.07.1978 (SWB), **E3/7306**, ERN S 00010751; Military training courses at An Giang, 24.06.1978 (SWB), **E3/7306**, ERN S 00010751.
[964] Reports, information and memoranda and discussions on relations between Kampuchea and Vietnam,1977-1978, **E3/1773**, ERN 01246919; Cambodia's Temporary Severance of relations with Vietnam, 03.01.1978 (SWB), **E3/267**, ERN S 00008724-29; Foreign Broadcast Information Service collection of reports for July 1978, **E3/293,** 00169689-00169777. Press Communiqué of the Spokesperson of the Ministry of Propaganda and Information of Democratic Kampuchea, undated, **E3/9378 or E3/1262** ERN 00079722; Article entitled "Statement by IENG Sary, Minister of Foreign Affairs", *News from Kampuchea*, 17.03.1978, **E3/1583**, ERN S 00011305-10; Article entitled "Hanoi's Role Is Unclear in Reports of Popular Uprising in Cambodia", *The Washington Post*, 10.08.1978, **E3/7265**, ERN 00166105.
[965] Telegram from SAO Sarun, 23.04.1978, **E3/937** and 24.04.1978, **E3/1072** about enemy activity, Vietnamese incursions into Krong Teh and KR counter-attacks.
[966] CHUON Thy: T. 26.10.2016, **E1/490.1**, p. 72 around 13.44.55.
[967] Telegram from IENG Sary to the Security Council, 03.01.1979, **E3/555**, ERN 00081490.
[968] POL Pot's appeal to the Cambodian people, 04.01.1979 (SWB), **E3/7311**, ERN S 00013397.

diplomatic turnaround in November 1979, notably due to the alliance with SIHANOUK,[969]but it was yet another chapter in the protracted war.

Part III. IMPACT OF THE ARMED CONFLICT ON THE CONDUCT OF CASE 002/02

833. The reason why the Defence started its discussion of the facts of Case 002 with the general context of the armed conflict was to highlight the fact that the subject-matter approach, which was deemed to be more convenient in terms of hearing witnesses, had the major drawback of setting the armed conflict apart as though the other facts happened in parallel and were artificially separated from it. However, the point the Defence is making in this instance is that all of the facts falling with ECCC's temporal jurisdiction are intrinsically linked to the armed conflict, as discussed *infra*.

834. It is presumed that the Trial Chamber will take account of that in its assessment of the facts (Section I) and, by implication, their legal characterisation (Section II).

Section I. IMPACT OF THE CONFLICT ON CONSIDERATION OF THE FACTS

835. In Case 002/02, the charges of genocide concern the Cham and the Vietnamese. Those charges are discussed in detail hereinafter. Nonetheless, it is important to point out that the term "genocide" appeared very early on in propaganda used by Vietnam to justify its invasion of Cambodia.

836. However, Vietnam's "humanitarian" pretext did not hold up for long.[970] As Stephen MORRIS pointed out in his testimony, the Vietnamese had always sought to gain full control of Cambodia's affairs and fortunes, but their scheme was thwarted by the historic events which started unfolding in 1975.[971] The world started to view Vietnam differently, because everyone realised that it was not the liberator that it claimed to be. As Expert MORRIS observed:

> "Because the Vietnamese didn't simply overthrow the regime of Democratic Kampuchea but they occupied the country for 10 years and attempted to create a regime in their own image in Cambodia and, therefore, most people regarded the Vietnamese activity as not simply a defensive one, but an offensive one in order to create a client state in Cambodia."[972] (*emphasis added*)

837. Casting their intervention as a humanitarian initiative allowed them give a semblance of legitimacy

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[969] UNGA resolution, 34th session, The Situation in Kampuchea, A/RES/34/22, 09.11.1979, **E3/7247**, ERN 01306538.
[970] Stephen MORRIS: T. 19.10.2016, **E1/486.1**, pp. 67-68, after 11.46.25: "I don't believe that, in its intention, the Vietnamese invasion was a humanitarian one. I don't think humanitarian values are part of the ethos of the Politburo of the Vietnamese Communist Party. Although there may have been, and were, humanitarian consequences of the invasion, that wasn't the intention.".
[971] Stephen MORRIS: T. 20.10.2016, **E1/487.1,** pp. 23-25
[972] Stephen MORRIS: T. 19.10.2016, **E1/486.1**, p. 67, before 11.46.25.

to the invasion of a country that they had coveted for so long. Philip SHORT described the propaganda immediately launched by the Vietnamese regime which portrayed itself as the liberator in the eyes of the Cambodian.[973]

838. Witnesses, such as LONG Sat, who at first were offered jobs in the new regime,[974] were subsequently imprisoned without trial over accusations of fomenting a rebellion because they objected to some aspects of the new policy.[975]

839. After that, the Socialist Republic of Vietnam wasted no time in setting up the infamous People's Revolutionary Tribunal which "prosecuted" and convicted POL Pot and IENG Sary in August 1979.[976] It is worth noting that it was in regard to this Tribunal that the Socialist Republic of Vietnam introduced the phrase "genocide against the Khmer people", and then went on to use it as a slogan in the decades that followed.

840. It is also noteworthy that to this day, the Socialist Republic of Vietnam still uses the same kind of communication strategy. This how the Vietnamese authorities responded in their only response to the many requests by the ECCC for documents:

> "The Ministry of Foreign Affairs of the Socialist Republic of Vietnam presents its compliments to the [ECCC] and regarding to the document relating to the crimes caused by Khmer Rouge in Viet Nam during the period of 1975 to 1979.[977]." (*emphasis added*)

841. Therefore, the first consequence of taking account of the armed conflict and its impact is to devise an approach to the facts that does not conflate the manifestations of an alleged genocide with the domestic consequences of the war.

Section II. IMPACT ON THE LEGAL CHARACTERISATION OF THE FACTS

842. The Defence has indicated that it agrees with the Chamber that the armed conflict between Vietnam and Democratic Kampuchea started in May 1975. It continued beyond the temporal jurisdiction of the ECCC. This has two consequences.

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[973] Book by Philip SHORT, *POL Pot, Anatomy of a Nightmare,* 2004, **E3/9**, pp. 408-409, ERN 00396624-25.
[974] LONG Sat: T. 02.11.2016, **E1/494.1**, p. 29, at 10.38.43.
[975] LONG Sat: T. 02.11.2016, **E1/494.1**, pp. 32-33, from 10.47.05. See also: SUOS Thy: T. 03.06.2016, **E1/431.1**, pp. 48, before 11.26.56, T. 07.06.2016, **E1/433.1**, pp. 38-40, between 10.53.13 and 10.57.14.
[976] UN Document No. A/34/49, Judgement of the Revolutionary People's Tribunal, 19 August 1979.
[977] Letter from the Ministry of Foreign Affairs of the Socialist Republic of Vietnam to ECCC Office of the Co-Investigating Judges, 29.04.2011, **E319/54.1**.

843. The first consequence of the armed conflict between May 1975 and January 1979 is that the question as to whether the definition of the constitutive elements of crimes against humanity encompass a nexus with an armed conflict is a moot point. The other direct consequence of the armed conflict from May 1975 to January 1979 (and beyond) is that the Geneva Conventions were applicable to all the facts which took place during that period[978] since they apply regardless of whether the two States involved deny the existence of state of war,[979] as was the case at various degrees for the greater part of the conflict.

844. The foregoing in-depth analysis of the armed conflict and its impact is a necessary prerequisite to consideration of the facts and crimes. It is especially crucial to gaining an understanding of KHIEU Samphan's role and conduct during the entire Democratic Kampuchea period.

Heading III. ALLEGED CRIMES

Part I. COOPERATIVES AND WORKSITES

Chapter I. TRAM KOK

Section I. THE CHARGES

845. KHIEU Samphan is charged with facts which took place in the Tram Kok cooperatives, facts that the Co-Investigating Judges characterised in the Closing Order as the crime against humanity of extermination, enslavement, imprisonment, torture, persecution on political, racial or religious grounds and other inhumane acts (through attacks against human dignity, forced marriage and enforced disappearance).[980]

846. Some of these charges are discussed in other segments of the present Brief. This includes the facts underpinning the charges of persecution on political grounds against former Khmer Republic

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[978] Common Article 2 to the Geneva Conventions: "The Convention shall apply to all cases of declared conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.". As also noted in the *Duch* Trial Judgement, it suffices to demonstrate "a resort to armed force between States" (*Duch* Trial Judgement, 26.07.2010, para. 412).

[979] ICRC, Geneva Convention IV Commentaries (Jean S. Pictet, Managing ed. 1958) on Article 2, p. 26.

[980] Closing Order, paras. 1381, 1391, 1402, 1408, 1416, 1421, 1434, 1442 et 1470; Decision on Additional Severance, 04.04.2014, **E301/9/1**, para. 44; Annex: List of paragraphs and portions of the Closing Order relevant to Case 002/02, **E301/9/1.1**, pp. 2-4.

soldiers and officials at paragraph 1416 of the Closing Order, persecution on religious grounds against Buddhists, at paragraph 1421, and of forced marriages, at paragraph 1442.[981]

847. Analysis of the geographic scope (I) and substance of the remaining charges (II) helps determine the scope of the facts submitted to the Chamber's consideration. In some instances, such analysis reveals that the Co-Investigating Judges widely exceeded their *saisine* having regard to the case brought before them by the Co-Prosecutors at the outset.

I. Geographic scope of the facts charged in the Closing Order

848. At paragraph 302 of the Closing Order, the first paragraph under "Location and Establishment" of the Tram Kok cooperatives,, the Co-Investigating Judges set out the places falling within their remit as defined at paragraph 43 of the Co-Prosecutors' Introductory Submission, the sole paragraph concerning the Tram Kok cooperatives:

> "The eight subdistricts of Kus, Samrong, Trapeang Thom Tboung, Trapeang Thom Cheung, Tram, Kok, Nheng Nhang, Sre Ronong and Ta Pherm were part of Tram Kok District, Takeo Province. Applying the CPK's system of identifying administrative boundaries, they were located in District 105, Sector 13, Southwest Zone."[982]

849. The only difference between paragraph 43 of the Co-Prosecutors' Introductory Submission and paragraph 320 of the Closing Order lies in the terms used to designate the administrative unit under investigation. The Co-Investigating Judges call it a "sub-district", while the Co-Prosecutors call it a "commune". The Co-Investigating Judges do not explain why they elected to use a term other than the one used by the Co-Prosecutors;, moreover, elsewhere in the Closing Order, they use the two terms interchangeably in reference to the same places.[983]

850. At the end of paragraph 303 of the Closing Order, the second and last paragraph under "Location and Establishment", the Co-Investigating Judges conclude that:

> "In any event, it appears that by April 1977 all the subdistricts in Tram Kok District had been organised into cooperatives and appear to have remained in this state until the end of the CPK regime." (*emphasis added*)

[981] See *infra*, paras. 1487-1521 (Buddhists), paras. 2310 *et seq.* (marriages).
[982] Closing Order, para. 302. Despite of the occasional differences in translations on record, commune names are spelled in the present Brief in the same way as in paragraph 302 of the Closing Order, except where they are taken from a quotation, in which case they they will appear in square brackets.
[983] Closing Order, See for example paras. 317 and 1405 read together.

851. Their conclusion implies that Tram Kok District comprises all the eight communes (or sub-districts) named above, and therefore that the Trial Chamber is seised of all of the facts which took place throughout the district.

852. However, such inference deduction, as imposed by the terms used in the Closing Order, is incorrect. The evidence cited hereinafter disproves the idea of a district comprising the eight communes named in both the Co-Prosecutors' Introductory Submission and the Closing Order.[984] That has far-reaching consequences on the Chamber's jurisdiction.

II. SUBJECT MATTER SCOPE OF THE FACTS CHARGED IN THE CLOSING ORDER

A. Extermination

853. According to paragraph 1381 of the Closing Order, the Co-Investigating Judges found that the crime of extermination was established and that it concerned "people who were killed or who died en masse" at several sites, including the Tram Kok cooperatives.

854. At paragraphs 1382 and 1383, they find as follows:

> "1382. As regards the *actus reus*, the perpetrators' acts and omissions, either direct or indirect, caused the deaths of a very large number of people, including through the creation of conditions that were calculated to bring about the destruction of part of the population. Even in the absence of exact figures as to the number of deaths and the lack of identification of all of the victims' bodies, the evidence on the Case File is enough to establish the deaths of tens of thousands of people.
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> 1383. While there is no minimum threshold for the number of victims required to establish extermination, in each of the instances described above, taking into account the number of deaths, evidenced by documentary records, eye-witness accounts and the discovery by the witnesses of a large number of bodies in mass graves, <u>in addition to the relevant evidence set out *infra*</u>, the magnitude of the acts is sufficient and they were clearly of a collective nature." (*emphasis added*).

855. Paragraphs 1384 through 1387 describe the "relevant evidence" to consider in relation to each site. Those two paragraphs make no reference to the Tram Kok cooperatives.

[984] See *infra*, paras. 915-923.

856. Therefore, only the facts that occurred in the Tram Kok cooperatives as described at paragraphs 302-21 of the Closing Order delineate the scope of the facts characterised as extermination at paragraph 1381.

857. Excerpts at paragraphs 312, 313 and 320 concern deaths of people. According to paragraph 1382 of the Closing Order, only these facts can establish the crime of extermination.

1. Deaths from starvation

858. Paragraph 312 of the Closing Order states that "[s]ome witnesses recall people dying of starvation, while others either did not see or deny that people died of starvation." The first part of this finding is based on paragraph 43 of the Co-Prosecutors' Introductory Submission, which states that "[t]housands starved to death" in the Tram Kok cooperatives. KHIEU Samphan must answer thereto.

2. Deaths from health problems

859. At paragraph 313 of the Closing Order, after describing the health problems in the cooperatives, the Co-Investigating Judges describes deaths of people:

> "Many people living in the cooperatives had health problems, particularly the 'new people' who were not use to living in rural areas. Those who were sick were treated by subdistrict medics. However, treatment was rudimentary and the medicine used was locally produced. Patients were given intravenous medicine prepared from tree roots and herbal medicine. Patients were also injected with coconut juice mixed with penicillin. The medics were female CPK cadre who had not received any formal training. Many of them were only twelve to thirteen years old. When people died they were buried without the family being informed." (*emphasis added*)

860. On the one hand, the content of paragraph 313 notwithstanding, the last sentence does not link the deaths of the individuals to health problems, or to deficiencies in the health system arising from CPK policies. At the most, the sentence provides information about the eventual lack of funeral rites.

861. On the other hand, even if such a link were established, the Co-Prosecutors never seised the Co-Investigating Judges of health problems having occurred at Tram Kok. Arguably, such problems may be result of lack of food, of which the Co-Investigating Judges were seised. However, at paragraph 313, the Co-Investigating Judges do not link the lack of food to the occurrence of

illnesses. Instead, they only speculate that the illnesses were due to fact that city people were unused to rural life. They also assert that patients only received rudimentary care.

862. For example, at paragraph 43 of their Introductory Submission, whereas the Co-Prosecutors requested investigation of the death of "thousands of people" due to starvation, a problem that, according to them, was compounded by the orchestrated confiscation of food supplies by the CPK, the Co-Investigating Judges responded with an unpersuasive assertion regarding the acclimatisation of the city people, deficiencies in the public healthcare system and the fact that family members were not informed about the loss of loved ones.

863. Such findings are in breach of the Co-Investigating Judges' *saisine*. KHIEU Samphan need not answer to the factual allegations at paragraph 313, since the Chamber was not properly seised of them.

3. Killings of Vietnamese

864. Paragraph 320 of the Closing Order describes the testimony of one witness as to how Vietnamese who were sent back to Vietnam were treated:

> "A former teacher in the children's unit in Nheng Nhang Subdistrict recalls that in 1976, the Subdistrict chief announced that Subdistrict members of Vietnamese ethnicity would be sent back to Vietnam. She remembers the arrest and execution of people who had lied about their ethnicity hoping to escape. She says there were two phases in the treatment of the Vietnamese. In the first phase, the Vietnamese were in fact sent home. However, in the second phase, ethnic Vietnamese were taken away and executed."

865. Paragraph 43 of the Co-Prosecutors' Introductory Submission contains no allegation of killings of Vietnamese. The Co-Investigating Judges therefore entered the findings at paragraph 320 of the Closing Order in breach of their *saisine*.

866. Moreover, the alleged killing Vietnamese in Nheng Nhang Subdistrict allegedly took place in the broader context of sending ethnic Vietnamese back to Vietnam. However, as was stated before the start of Case 002/02 and recalled *supra*, the Co-Investigating Judges illegally seised themselves of those facts.[985] The Chamber is therefore has no jurisdiction over them.

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[985] See *supra*, paras. 219-276.

B. Enslavement

867. According to in paragraph 1391 of the Closing Order, the Co-Investigating Judges found that the crime of enslavement was established in relation to Tram Kok, because, according to paragraph 1392,

> "[…] the personnel of these cooperatives, worksites and security centers deliberately exercised total control and all of the powers attaching to the right of ownership over the persons placed there, without them being given any real right to disagree." (*emphasis added*)

868. The Co-Investigating Judges add at paragraph 1394 that:

> "Moreover, in all the places mentioned above, including security centers, the victims were forced to perform work without their consent, unpaid and without the opportunity to reap the direct benefits thereof. Work venues, duration and schedules were imposed. The victims could not refuse to perform any work assigned to them. The work, coupled with the constraints described above, stripped them of their free will, and amounts to enslavement." (*emphasis added*)

869. Therefore, according to the Co-Investigating Judges, the crime is committed through a combination of two factors: exercising total control over the prisoners and forcing them to perform work without their consent, unpaid.

870. Those findings are based on numerous facts, which are set out in paragraphs 302 to 321 of the Closing Order; KHIEU Samphan must answer thereto.

C. Imprisonment

871. According to paragraph 140 of the Closing Order, the Co-Investigating Judges found in that the crime of imprisonment was established in relation to Tram Kok. At paragraph 1405, the Co-Investigating Judges set out the facts falling under the characterisation at paragraph 1402:

> "In the Tram Kok Cooperatives, the commune militia arrested, held and interrogated people in a detention centre which was operated by the commune militia."

872. Therefore, according to the Co-Investigating Judges, the crime is established in relation to an unnamed site but is described as "a detention centre which was operated by the commune militia"

873. Paragraph 317 of the Closing Order refers to a subdistrict detention centre in the Tram Kok cooperatives This excerpt underpins the charge at paragraph 1405 of the Closing Order. The identical wording of paragraphs 317 and 1405 demonstrates the link that the Co-Investigating Judges established between the two paragraphs. For instance, according to paragraph 317:

> "The militia at the subdistrict level arrested, detained and interrogated people. According to some witnesses the militia did not have authority to carry out executions, which would be decided at the district level. One witness living in Smarong subdistrict recalls meetings at which people were accused of misconduct and he saw cadre shaving "X" shapes into the heads of men and women before parading them in front of the meeting: these people were then placed in a detention facility run by the subdistrict militia." (*emphasis added*)

874. That implies that there was "a detention facility run by the subdistrict militia" in Samrong Commune, one of the eight communes in Tram Kok District that are part of the judicial investigation.[986]

875. Even though the Co-Prosecutors did not specifically mention the alleged detention centre, the facts reported by the Co-Investigating Judges are part of the *saisine* as defined at paragraph 43 of their Co Introductory Submission, which concerns factual allegations of "unlawful detention".[987] KHIEU Samphan must answer thereto.

D. Torture

876. According to paragraph 1408 of the Closing Order, the Co-Investigating Judges found that the crime of torture was established in relation to several sites, including the Tram Kok cooperatives.

877. Paragraph 317 of the Closing Order describes factual allegations in relation to the Tram Kok cooperatives. As to their findings concerning factual allegations of detention, the Co-Investigating Judges state as follows:

> "Several District 105 documents confirm that the subdistrict militia would interrogate prisoners, using both 'hot' and 'cold' method, before involving the district. For example, in a document which appears to be from one of the subdistricts to the district, the writer reports that in respect to one youth who was accused of repeatedly stealing, 'I have even held (collective) meetings for judging him 3 times so far. Moreover, I have let the youths in the group and unit wrap his face with a plastic sheet, shackle and interrogate him, but still he was not deterred."

878. The Co-Investigating Judges entered all those findings in violation of their *saisine*. Paragraph 43 of the Co-Prosecutors' Introductory Submissions contains no factual allegations of interrogation or of physical or mental torture. The Co-Investigating Judges were without jurisdiction to investigate

[986] Co-Prosecutors' Introductory Submission, para. 43; Closing Order, para. 302.
[987] Co-Prosecutors' Introductory Submission, para. 43.

such facts.[988] Therefore, the Chamber was not properly seised of them and hence, KHIEU Samphan not need not answer thereto,

E. <u>Persecution on racial grounds</u>

879. At paragraph 1422 of the Closing Order, the Co-Investigating Judges recorded the crime of persecution on racial grounds in relation to the crimes committed against the ethnic Vietnamese minority in the Tram Kok cooperatives.[989] The reason for this characterisation is found at paragraph 320 of the Closing Order which concerns sending ethnic Vietnamese back to Vietnam; those facts were investigated without a mandate, as has been pointed out time and again.[990]

880. The Co-Investigating Judges entered those findings in violation of their *saisine*. At paragraph 43 of their Introductory Submission, the Co-Prosecutors do not allege that the crime of racial discrimination was committed at Tram Kok. KHIEU Samphan need not answer thereto.

881. However, one aspect of the Co-Investigating Judges' findings merits a closer look. In support of the illegal finding at paragraph 320 of the Closing Order, they cite "[a] report from the Ang Ta Soam Subdistrict […] about the registration of Khmer Krom". However, "Ang Ta Soam" is not among the districts named at paragraph 302 of the Closing Order, which lists only eight sub-districts (or communes) in Tram Kok and nothing further.

882. That is an unfair course of action, and it calls for a number of remarks. First, it needs no further demonstration that the Co-Investigating Judges have consistently seised themselves of facts of which they were not seised by the Co-Prosecutors. Also, their course of action demonstrates their obstinate quest for inculpatory evidence, in disregard of their obligation to also seek exculpatory evidence. That goes to show that not all the facts contained in the Closing Order were meant to be adjudicated; it also further illustrates what Judge LEMONDE said about the need to enter convictions "for the sake of history".[991] Finally, this course of action calls for caution, because the Co-Investigating Judges' *saisine* cannot be extended by including communes (or subdistricts) in Tram Kok District other than the eight that are part of the judicial investigation.

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[988] Co-Prosecutors' Introductory Submission, para. 122.
[989] Closing Order, para 1422.
[990] Closing Order, para. 320; see *supra*, paras. 219-276.
[991] See *supra*, para. 95.

F. Persecution on political grounds

883. At paragraph 1416 of the Closing Order, the Co-Investigating Judges record the crime of persecution on political grounds at several crime sites, including the Tram Kok cooperatives.

884. Paragraph 1417 starts out with general information about regarding the crime relating to all the crime sites:

> "The CPK authorities identified several groups as "enemies" based on their real or perceived political beliefs or political opposition to be wielding power within the CPK. Some of these categories of people, such as former ranking civilian and military personnel of the Khmer Republic, were automatically excluded from, the common purpose of building socialism. As for junior officials of the former regime, some were arrested immediately after the CPK took power, because of their allegiance to the previous government, and many were executed at security centres such as S-21 and at Tuol Po Chrey. The entire population remaining in the towns after the CPK came to power was labelled as 'new people' or '17 April people', and subjected to harsher treatment than the old people, with a view to reeducating them or identifying 'enemies' amongst them. Intellectuals, students and diplomatic staff who were living abroad were recalled to Cambodia and, upon arrival, were sent to reeducation camps or to S-21."[992] (*emphasis added*)

885. The Co-Investigating Judges therefore noted that three groups were regarded as "enemies": former Khmer Republic soldiers and officials, New People and Cambodians from abroad.

886. Also at paragraph 1417 of the Closing Order, the Co-Investigating Judges find that:

> "The categories of so-called 'enemies' continued to expand over time. Moreover, the identification of people as targets for persecution, on the basis that anyone who disagreed with the CPK ideology was excluded, amounts to persecution on political grounds."

887. No further information is provided as to the identity of the other "categories of so-called enemies". The Co-Investigating Judges deliberately create a loophole in their reasoning and urge the Chamber to step into it in a bid to make up for any shortcomings in their investigation. Such course of action is prejudicial to KHIEU Samphan.

888. As regards the last sentence of paragraph 1417, which already is vague, it is uncertain where the Co-Investigating Judges are coming from. Their assertion that "[…] anyone who disagreed with the CPK ideology was excluded" seems to transcend the definition of the groups at paragraph 1417. It implies that anyone could be a victim of persecution even without belonging to a group. Yet, as

[992] The facts relating to the S-21 and Prey Sar sites are discussed *infra*, para. 1175 *et seq*.

the Co-Investigating Judges themselves define it at paragraph 1415 of the Closing Order, persecution requires the group to have been defined by the CPK authorities.[993]

889. In this regard, the position of the Supreme Court Chamber on the upsurge of crimes during Democratic Kampuchea period is enlightening:

> "As the revolution wore on, however, individuals were indiscriminately apprehended, mistreated and eliminated without any attempt at rational or coherent justification on political grounds, in <u>actions that were no longer persecution but constituted a reign of terror where no discernible criteria applied in targeting the victims</u>."[994] (*emphasis added*)

890. Therefore, were the group is not clearly defined, there can be no crime. Instead of recording obscure and contradictory findings, the Co-Investigating Judges should have adopted that position, because it is consistent with their assertion at paragraph 1415.

891. Their inconsistency must under no circumstances prejudice KHIEU Samphan who will therefore only answer to charges of persecution in relation to the only three groups clearly defined at paragraph 1417. Requiring him to answer to charges relating to groups of which he neither knows the composition nor the appellation would amount to accusing him of crimes with which he is not charged.

892. Paragraph 1418 does specifically refer to the Tram Kok cooperatives:

> "In the cooperatives and worksites, and during population movements. <u>Real or perceived enemies of the CPK</u> were subjects to harsher treatment and living conditions than the rest of the population. Also, they were arrested *en masse* for reeducation and elimination at security centres and executions sites."[995] (*emphasis added*)

893. The instances of discrimination at Tram Kok therefore only relate to arrests and reeducation. The other facts concerning worksites, movement of population and killings at security centres and dedicated sites are addressed in the segments of the present Brief specifically dedicated to each crime site, following the same logic as in the Closing Order.[996]

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[993] This element introduced by the Co-Investigating Judges, transposes into the facts components of the legal definition of a crime on the premise that the definition of a group by a perpetrator is "based on a given set of criteria" and that the group is "identifiable." See *infra*, paras. 1212-1213.

[994] *Duch* Trial Judgement, 03.02.2012, para. 283.

[995] Closing Order, para. 1418. The passages concerning the alleged events at forced labour sites and during the movement of population do no relate to the Tram Kok cooperatives, hence why they are not mentioned here.

[996] See *infra*, para. 1220 *et seq*. (Kraing Ta Chan), para. 1175 *et seq*. (S-21), para. 1306 *et seq*. (Au Kanseng), para. 1351 *et seq*. (Phnom Kraol).

894. These facts characterised as persecution on political grounds at paragraphs 1417 and 1418 relate to those at paragraphs 304 to 306 and 319 regarding New People, and at paragraph 319 regarding Khmer Republic soldiers and officials. The facts underpinning the charge of political persecution of former Khmer Republic soldiers and officials are discussed *supra*.[997]

895. At paragraphs 304 through 306 of the Closing Order, the Co-Investigating Judges describe the treatment of evacuees from the cities upon arrival at the Tram Kok cooperatives. Former city dwellers were allegedly subjected to two types of discrimination. On the one hand, after settling in Tram Kok, they were occasionally "moved *en masse* from area to area within the District."[998] On the other hand, following the division of the population into three categories and unlike "base people", they "lacked political rights and could not be unit chiefs within the cooperatives."[999] Discrimination is not mentioned.

896. At paragraph 319, under "Treatment of Specific Groups", the only sentence referring former city dwellers implies another form of discrimination resulting from closer monitoring of New People:

> "The subdistrict militia kept a close eye on the persons who arrived from Phnom Penh. If they did anything against the CPK they were arrested and taken away."

897. These three elements underpin the finding at paragraph 1418 concerning the imposition of harsher living conditions for New People, whence the characterisation of political persecution.

898. Read separately, those are clearly forms of discrimination to which KHIEU Samphan must answer. However, that suddenly ceases to be the case when they are read in conjunction with the other facts relating to Tram Kok at paragraphs 302 and 321 of the Closing Order.

899. Paragraph 310 states that "[…] CPK cadres sometimes moved base people and new people out of their homes to live in different areas within the same district." That sentence is a carbon copy of the one in paragraph 304, which is cited *supra*, the only difference being that it makes no reference to discrimination since, like New People, base people were also displaced. Therefore, without discrimination, there can be no persecution.

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[997] See *infra*, para. 2258 *et seq*.
[998] Closing Order, para. 304.
[999] Closing Order, para. 305.

900. Further, numerous passages at paragraphs 311 and 312 under "Working and Living Conditions", and at paragraphs 315 to 318 under "Security" concern the fact that people in the cooperatives were indiscriminately arrested and taken away for all manner of reasons. The allegation that New People were treated differently, as described at 319 and discussed *supra*, therefore become a moot point.

901. This observation is further reinforced by the finding at 312, which states:

> "Several District 105 documents also record the arrest of people who had complained about work and living conditions in the cooperatives."

902. Now, no one in this Tribunal can argue in good faith that there is any difference between the phrase "said anything against the CPK" at paragraph 319 concerning New People and the phrase "complained about work and living conditions in the cooperatives" at paragraph 312 concerning all of the people in the cooperatives. It is therefore uncertain which particular form of discrimination former city dwellers suffered, since everyone in cooperatives was treated the same..

903. In retrospect, the similarity between paragraphs 312 and 319 helps under paragraphs 1417 and 1418 with regard to the legal characterisation of the facts.

904. The beginning of 1417 reads as follows: "[t]he CPK authorities identified several groups as 'enemies' based on their real or perceived political beliefs".

905. The rest of the paragraph is rather puzzling. *Prima facie*, it seems to suggest that New People were among the groups regarded as 'enemies, but then it goes on state that the CPK attempted to identify 'enemies' within this group. Now, one cannot have it both ways: either New People belonged to the 'enemy' groups and were therefore discriminated against or only some members of their group were labelled as such and therefore New People were not subjected to harsher treatment than the rest of the population. As rigour does not seem to be the focus for the Co-Investigating Judges, it is important to point out that their proposition is neither clear nor logical.

906. This epitomises the Co-Investigating Judges' tendency to take their assumptions for historical truths even where the evidence indicates otherwise.

907. At paragraph 1418, the Co-Investigating Judges refer to the same "real or perceived enemies" as at paragraph 1417 (therefore including New People or enemies hiding amongst them as per

paragraph 1417). They expound on how they were treated in the cooperatives and worksites and also during the movements of population during which they faced two kinds of discrimination: the imposition of harsher treatment and a arrest en masse for reeducation or elimination at dedicated sites.

908. However, the reason why paragraphs 302 to 321 of the Closing Order do not disclose any discrimination towing to the arrests in the cooperatives is because they only concern worksites and forced population movements and also because only the imposition of harsher treatment is revealed in regard to Tram Kok.

909. Given the similarities between paragraphs 304 and 310, and 312 and 319, the imposition of harsher treatment ultimately meant that "new people were not permitted to be unit chief in the cooperatives".[1000]

910. Therefore, KHIEU Samphan need only answer to facts concerning the suppression of what the Co-Investigating Judges describe as a "a political right".[1001]

G. <u>Other inhumane acts (through attacks against human dignity)</u>

911. According to paragraph 1434 of the Closing Order, the Co-Investigating Judges found that the crime of other in inhumane act through attacks against human dignity was established. This finding relies on new elements in paragraphs 302 to 321 of the Closing Order. KHIEU Samphan must answer to this charge.

H. <u>Other inhumane acts (through enforced disappearances)</u>

912. According to paragraph 1470 of the Closing Order, the Co-Investigating Judges found that the crime of other in inhumane act through enforced disappearances is established. This finding mainly echoes paragraphs 312, which states that "[o]thers who resisted were arrested and disappeared." KHIEU Samphan must answer to this charge as it recorded by the Co-Investigating Judges within the ambit of the case brought before them by the Co-Prosecutors.

[1000] Closing Order, para. 306.
[1001] Closing Order, para. 306.

Section II. EVIDENCE IN SUPPORT OF THE FINDINGS IN THE CLOSING ORDER

913. A review of the evidence underpinning the findings in the Closing Order reveals whether or not there was sufficient charges to send the Accused persons to trial. Contrary to expectation, it also reveals that the Co-Investigating Judges violated their *saisine* more than it appeared, in light of the information about the charges, as discussed *supra*.

914. For the two foregoing reasons, the evidence relied upon by the Co-Investigating Judges concerning the composition of Tram Kok (I) District, deaths from starvation, imprisonment (III) and torture (IV), the suppression of New People's "political rights" and the closer monitoring of former Khmer Republic officials and soldiers (VI) is discussed as follows.

I. COMPOSITION OF TRAM KOK DISTRICT

915. The Co-Investigating Judges' finding at paragraph 302 of the Closing Order, regarding the composition of Tram Kok District, cited *supra*, is based on a single endnote. The endnote in question refers to only one document, namely a site identification report dated 6 January 2010, which was produced by the OCIJ investigators.

916. The investigators begin their report with a recall of the scope of paragraph 43 of the Co-Prosecutors' Introductory Submission and use the term "commune" when referring to each of the eight locations under investigation.[1002] This confirms that use of "commune" or "subdistrict", as the Co-Investigating Judges chose to do at paragraph 302 of the Closing Order, does not affect one's understanding of the administrative divisions of Democratic Kampuchea.

917. The last page of the report is of greater interest than the mere terminological considerations. It features a map labelled as "showing the communes of Tram Kok District which are mentioned in the Introductory Submission".[1003] That implies that there are other communes in Tram Kok District

[1002] Site Identification Report, 06.01.2010,, ERN 00428010-11.
[1003] Site Identification Report, 06.01.2010, **E3/8051**, ERN FR 00450445.

which are not mentioned in the Co-Prosecutors' Introductory Submission. That therefore runs counter to the assertion at paragraph 303 of the Closing Order that the eight locations included in the *saisine* include "all of the subdistricts in Tram Kok district."[1004]

918. The impression one has looking at the heading of the map is reinforced when one takes a closer look at the actual map. The eight communes named in the Co-Prosecutors' Introductory Submission are circled to distinguish them from the other locations that are not part of the Co-Prosecutors' Introductory Submission. This includes, for example, Leay Bour, Otdam Souriya, Popel and Angk Ta Saom. However, the map provides no information about the size of the administrative divisions or on whether they are part of Tram Kok District, or for that matter, whether Tram Kok District includes other communes which are not named in the Closing Order or on the map.

919. The evidence relied upon by the Co-Investigating Judges in the Closing Order may provide some answers to those questions. As observed *supra*, at paragraph 320 of the Closing Order, the Co-Investigating Judges indicate that Ang Ta Saom Commune is located in Tram Kok District.[1005] Evidence in another finding at paragraph 320 confirms the existence of Ang Ta Saom Commune.[1006] That document also confirms the existence of "Leay Bo" Commune.[1007] Two other documents which are cited in support the same finding confirm the existence of "Khporb Trabek" and "Popel" communes.[1008]

920. This confirms both that there are more communes in Tram Kok District than the eight mentioned in the Co-Prosecutors' Introductory Submission and that the Co-Investigating Judges investigated beyond their *saisine*, concerning locations where no crimes were alleged by the Co-Prosecutors.

921. Had the judges been rigorous, they would have examined the investigators' map in light of the large body of evidence before them and would have had no difficulty in finding that there are other

[1004] See *supra*, paras. 848-852.
[1005] Closing Order, para. 320, endnote 1322, citing a Ang Ta Saom Commune report dated 26.04.1977, **E3/2435**, ERN 00322141. See *supra*, para. 881.
[1006] Closing Order, para. 320, endnote 1321 citing a Ang Ta Saom Commune report dated 23.05.1976, **E3/2447**, ERN 00355473.
[1007] Ang Ta Saom Commune report, 23.05.1976, **E3/2447**, ERN 00355473.
[1008] Closing Order, para. 320, endnote 1321 citing a report dated 06.05.1977, **E3/2050**, ERN 00276576, and a Popel Commune report, **E3/2424**, ERN 00322219.

communes besides the eight that are mentioned in the Co-Prosecutors' Introductory Submission. Also, if any new facts came to the knowledge of rigorous judges, such judges would have informed the Co-Prosecutors thereof, pursuant to Internal Rule 55(3), and thereby enabled the latter to submit a supplementary submission so as to supplement their *saisine*.[1009]

922. Owing to the failure to follow the procedural rules, all the findings in the Closing Order which were entered in reliance upon evidence concerning facts that are extrinsic to the eight initial communes, do not constitute charges to which KHIEU Samphan must answer.

923. The Chamber must now make sure that it has proof of all the findings it enters are based on evidence relating to the eight communes named in paragraph 43 of the Co-Prosecutors' Introductory Submission and paragraph 302 of the Closing Order. Any other course of action would amount to a grave violation of the rights of the Defence and would be prejudicial to the Accused.

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II. DEATHS FROM STARVATION IN THE COMMUNES OF TRAM KOK DISTRICT

924. Whereas the Co-Prosecutors allege that "mass starvation" occurred in Trak Kon and that "thousands of people starved to death",[1010] the Co-Investigating Judges simply state that "[s]ome witnesses recall people dying of starvation, while others did not see or deny that people died of starvation".[1011]

925. This finding is recorded on the premise that inculpatory and exculpatory evidence was gathered during the judicial investigation. In this regard, three people recalled that people died in three communes in Tram Kok District, while two others "denied" that any deaths occurred in three other communes in that district.[1012]

926. As to the occurrence of deaths, the first person reported events that occurred in Ang Bassei Village,

[1009] Internal Rule 55(3). See *supra*, para. 63.
[1010] Co-Prosecutors' Introductory Submission, para. 43.
[1011] Closing Order, para. 312.
[1012] Closing Order, para. 312, endnote 1283 citing by way of inculpatory evidence the WRI of SOKH Sot, **E3/5835** (D25/32), pp. 5-6, SIM Chheang **E3/7980** (D40/16), pp. 3-4 and of SOK Sim **E3/5519** (D232/67), pp. 6-7; Endnote 1284 citing as exculpatory material the WRI of TOP or TOB De **E3/7982** (D40/19), pp. 2-3 and WRI of NUT Nouv **E3/5521** (D232/70), pp. 14-16.

Cheang Torng Commune.[1013] The second person reported the death of an unnamed person in Pen Meas Village, Samraong Commune.[1014] The last person reported the death of three people: TA Bin, TA Mak and old YEAY Torng, in Ta So Village, Ta Phen Commune.[1015]

927. As to the non-occurrence of deaths, the first person, who was a member of a cooperative in Prey Kdey Village, Trapeang Thom Tboung Commune, reported that he "never saw people dying of starvation".[1016] The second person, a Khmer Rouge cadre who lived in Nheng Nhang Commune until 1977 and was later appointed chief of Sre Ronong Commune, reported that no one died of starvation in the locations at issue.[1017]

928. The Co-Investigating Judges found that in total, four people died in the two communes which are part of the judicial investigation (one in Samraong and three in Ta Phem).[1018] As for the three other communes that are part of the judicial investigation (Trapeang Thom Tboung Nheng Nhang and Sre Ronong), the Co-Investigating Judges noted that the people interviewed never saw anyone dying of starvation. The Co-Investigating Judges said nothing regarding the three other communes that are part of judicial investigation (Kus, Tram Kok and Trapeang Thom Cheung). Finally, the Co-Investigating Judges found that deaths occurred in a commune that is not part of the judicial investigation (Cheang Torng).[1019] This finding demonstrates that the Closing Order is rife with inculpatory evidence concerning facts that the Co-Investigating Judges did not receive the mandate to investigate. To extent that the finding is in violation of the procedural guarantees afforded to all accused persons, KHIEU Samphan need not answer thereto.

929. The inculpatory evidence obtained by the Co-Investigating Judges is flimsy. It relates to only two communes out of the eight in Tram Kok District that are part of the judicial investigation. Moreover, in terms of quantity speaking, it is similar to the exculpatory evidence which the Co-Investigating Judges refused to admit without explanation.

[1013] WRI of SOKH Sot, 31.10.2007, **E3/5835**, ENR 00223508. The witness does not specifically state that Ang Baksei is located in Cheang Torng Commune. However, other evidence on the record confirms that Ang Baksei Village is located Cheang Torng. In this regard see, for example: DC-Cam Interview of NGIM Noeun, 20.01.2011, **E3/9082**, ERN 01476136; Report from Ann, 20.08.1977, **E3/2434**, ERN 00231692-93.
[1014] WRI of SIM Chheang, 27.11.2007, **E3/7980**, ERN 00231692-94.
[1015] WRI of SOK Sim, 23.11.2009, **E3/5519**, Q/A 5 and 43.
[1016] WRI of TOP or TOB De, 28.11.2007, **E3/7982**, ERN 00233140-43.
[1017] WRI of NUT Nouv, 01.12.2009, **E3/5521**, Q/A 32, 36 and 100.
[1018] Closing Order, para. 302. See *supra*, paras. 848-852.
[1019] See *supra*, paras. 848-852.

930. Insofar as the Co-Investigating Judges were unable to find proof in support of the Co-Prosecutors' allegations of "widespread famine" and "thousands of deaths" from starvation, they should have ruled that KHIEU Samphan had no case to answer, since, without further proof, the four deaths could not be ascribed to CPK policies.

931. KHIEU Samphan should not have been sent to trial for facts of extermination which took place within the eight communes of Tram Kok District that are part of the case. At most, in Case 002/02, he should only answer to facts which took place in Samraong and Ta Phem.

III. FACTUAL ALLEGATIONS OF IMPRISONMENT

932. The Co-Investigating Judges characterised as imprisonment the factual allegations of unlawful detention which occurred in a detention facility run by the subdistrict militia. Analysis of the evidence in support of this finding reveals that the only location named is not found in Tram Kok District. Even though their finding appears to be within their *saisine*, the Co-Investigating Judges overstepped its scope.

933. Already, the endnote relating to paragraph 317 discloses a discrepancy. According to paragraph 317, one person who lived in Samraong remembered that men and women were tortured. However, in endnote 1309, which underpins this finding, and the finding that those people were subsequently sent to the facility run by the subdistrict militia, are based on the evidence of two witnesses, namely PIL Kheang and BUN Thien.

934. Far from resolving the discrepancy, a reading of the written records of interview at issue reveals that the evidence is rigged and that the -Co-Investigating Judges further violated their *saisine*.

935. First, PIL Kheang is the only witness who recounted the head shavings described at paragraph 317. Also, even though he lived in Samraong, which is located in Tram Kok District, he was later sent to "the Pung Ror cooperative, located in Kvav Commune, Traing District". That is where the alleged head shaving incident occurred following which the individuals "were placed in the detention facility", that is not named..[1020] However, the Co-Investigating Judges lacked jurisdiction

[1020] WRI of PIL Kheang, 27.09.2007, **E3/5135**, ERN 00233133, 00233134 and 00233135.

to investigate facts that occurred in Traing District. That is a violation of their *saisine*.

936. As for BUN Thien, he testified that "in the commune there was no security office, there was only a detention facility for militiamen."[1021] On the one hand, this single statement seems to suggest that there was no "detention facility run by the sub-district militia" given that, as observed *supra*, it was never stated that "commune" and "sub-district" differ in meaning.[1022] On the other hand, during the Democratic Kampuchea period, BUN Thien lived first in Sanlong Commune and later in Chi Khmar Commune, both of which are located in Traing and not in Tram Kok District.[1023] Therefore, absent proof to the contrary, none of his statements relates to any of the eight communes that are part of the judicial investigation. Finally, as noted *supra*, the Co-Investigating Judges were without jurisdiction to investigate facts pertaining to Traing.

937. The violation of *saisine* by the Co-Investigating Judges observed here echoes that concerning ethnic Vietnamese in Tram Kok.[1024] It further reflects the Co-Investigating Judges' pattern of disregarding procedural rules and the rights of the Accused.

938. The Chamber must censure such practices and decline jurisdiction over those facts. This goes to the fairness of the proceedings.

IV. FACTUAL ALLEGATIONS OF TORTURE

939. As observed *supra*, the Co-Investigating Judges violated their *saisine* by investigating the factual allegations of torture set out at paragraph 317 of the Closing Order. The Co-Investigating Judges' impermissible use of the three reports cited in the endnote to support their findings is further proof their unconscionable conduct.[1025]

940. Prima facie, the inculpatory use of paragraph 317 seems to suggest that torture occurred in the "infamous" security centre run by the sub-district militia. However, not surprisingly, careful reading of the three reports reveals that there is no truth to that. No documentary proof of the

[1021] WRI of BUN Thien, 17.08.2009, **E3/5498**, ERN 00384401.
[1022] See *supra*, para. 849.
[1023] WRI of BUN Thien, 17.08.2009, **E3/5498**, ERN 00384397, 00384398, and 00384403.
[1024] See *supra*, paras. 219-276 (deportation), paras.864-866 (extermination), para. 879 (persecution on racial grounds).
[1025] Closing Order, endnotes 1310-1311 citing Reports **E3/2445** (D157.63) "on Phuong", **E3/2447** (D157.73) on "King Hin and Hy Dy" and **E3/4094** (D157.14) "on Sokha *alias* Soeun".

alleged security centre exists.

941. Further, two of the reports do not indicate where the people were sent to or where they were tortured; it therefore cannot be it ascertained whether the facts at issue occurred in the communes of Tram Kok District that are part of the judicial investigation. Also, one of the two reports is undated.[1026] As for the last report, it consists of a compilation of two documents from Ang Ta Saom and of Leay Bo, two communes, over which communes the Co-Investigating Judges have no jurisdiction.[1027]

V. ALLEGED DENIAL OF THE "POLITICAL RIGHTS" OF THE NEW PEOPLE

942. As noted *supra*, KHIEU Samphan needs only to answer to factual allegations of denying New People their "political rights", in that they were not allowed to serve as unit chiefs in the cooperatives.[1028]

943. The Co-Investigating Judges' finding at paragraph 305 is based on the excerpts from the written record of interview of PHNEOU Yav and PIL Kheing, who were base people from Samraong Commune.[1029]

944. PHNEOU Yav described the structure of the cooperatives and named a number of unit chiefs, but did not indicate if the individuals in question were New People or Base People. It is quite likely that those chiefs were chosen from among the Base People, but PHNEOU Yav did not state so. Therefore, the written record of interview fails to reflect discrimination against New People.[1030] As a matter of fact, his answer to a question about where New People stayed and what they ate indicates that they were treated in the same way Base People.

> "Soon after the new people arrived, they had them live in handicraft workshops or schools. As for eating, they had those people eat at the communal kitchen in the village."[1031]

[1026] Report, 12.06.77, **E3/2445**, ERN 00363653**;** Report, **E3/4094**, 00322102-03.
[1027] Two Reports, **E3/2447,** ERN 00355473-00355474.
[1028] See *supra*, paras. 883-910.
[1029] Closing Order, para. 305 and endnote 1245 citing the WRI of PHNEOU Yav, **E3/5515** (D232/62), pp. 4-5 and WRI of of PIL Khieng, **E3/5135** (D40/15), pp. 3-4.
[1030] WRI of PHNEOU Yav, 12.11.2009, **E3/5515**, Q/A 13.
[1031] WRI of PHNEOU Yav, 12.11.2009, **E3/5515**, Q/A 6.

945. Further, after the New People arrived, PHNEOU Yav was assigned to "Unit 1" which comprised base people together, whereas New People were in "Unit 3".[1032] In answer to questions about his experience within the unit, he said that he was unaware of what was went on in unit 3. It therefore cannot be argued that PHNEOU Yav provided information about the suppression of the rights of that segment of the population, given that he did not interact with them.

946. As for PIL Khieng, he reported that New People "had no right to be the unit chief or group chief."[1033] However, in answer to following question, he did not refer discrimination against New People; instead, he said that that they received "were given the same amount of rice as the Base People."[1034]

947. Based on one single item of inculpatory evidence, with very little to support it, and based on one single commune in Tram Kok district, which also encompassed a major exculpatory element evidencing the absence of discrimination against the New People, the Co-Investigating Judges should have found that the charges were insufficient to send the Accused to trial.

948. Such being the case. KHIEU Samphan toned not answer to allegations of suppression of the "political rights" of the New People.

Section III. <u>THE EVIDENCE PRODUCED</u>

949. Much of the evidence produced at trial (I) falls outside the Chamber's *saisine* (II). Some of it suggests that some crimes may be established (III).

<u>I – CATALOGUE OF THE EVIDENCE</u>

950. Between 8 January and 18 May 2015, thirty witnesses gave testimony during the trial segment on the Tram Kok cooperatives and the Kraing Ta Chan security centre.

[1032] WRI of <u>PHNEOU Yav</u>, 12.11.2009, **E3/5515**, Q/A 12, 13-24, 27.
[1033] WRI of PIL Khieng, 27.11.2007, **E3/5135**, ERN 00233132-33.
[1034] WRI of PIL Khieng, 27.11.2007, **E3/5135**, ERN 00233133.

951. In the course of those 50 trial days of testimony (equivalent to twelve and a half weeks at the rate of four trial days per week), seventeen witnesses, one expert and fourteen civil parties took the witness stand. Seven of the fourteen civil parties testified concerning facts, six concerning the impact of the crimes and one (THANN Thim) first testified about the impact of the crimes and was later recalled in regard to facts.

952. Regarding the seventeen witnesses who testified, it is important to point out that four of them were not interviewed during the Case 002 judicial investigation (i.e., about 24% of the witnesses who testified during this particular segment).[1035] Three of the four were Democratic Kampuchea cadres, bringing the total number of cadres heard during this particular segment to five; one was a former Kraing Ta Chan detainee, bringing ;the total number of former prisoners heard during this segment to three.[1036] Those numbers are reflective of the deficiencies in the judicial investigation.

953. Virtually all those witnesses gave testimony on both the Tram Kok cooperative and the Kraing Ta Chan security centre. The Kraing Ta Chan security centre is discussed *infra*.[1037]

954. Witnesses also testified about Tram Kok District during other trial segments. They include SAO Van, MOENG Vet and LONG Vun.

955. Furthermore, in addition to the written records of interview from Case 002, many written records from Cases 003 and 004 concerning the Tram Kok cooperative were introduced en masse in the course of the Case 002 proceedings..

II. OUT-OF-SCOPE EVIDENCE

956. It is not possible to catalogue all the out-of-scope evidence that the Chamber admitted throughout the proceedings. The tendering en masses of evidence concerning out-of-scope sites (A) and of evidence concerning the alleged exchange between Vietnamese and Khmer Krom (B) are clear examples of this headlong rush. That proves that the Trial Chamber lost control of the trial which

[1035] The witnesses who were interviewed by investigators in Case 002 are NEANG Ouch, KHOEM Boeurn, EK Hoeun and VORNG Sarun.
[1036] NEANG Ouch, KHOEM Boeurn and EK Hoeun were KR officials, VORNG Sarun was a prisoner at Kraing Ta Chan.
[1037] See *infra*, para. 1220 *et seq*.

lasted more than four calendar months even though the charges were narrowly defined.

A- Facts concerning out-of-scope communes

957. As noted *supra*, the Chamber was not properly seised of facts that occurred in communes other than those which are named in paragraph 302 of the Closing Order. Any evidence relating to communes that not named in that paragaraph is out of scope.

958. Some of the out-of-scope communes were named in court by Witness PECH Chim. After having indicated that Tram Kok District comprised fourteen communes and recalled the ones named at paragraph 302 of the Closing Order, he mentioned "Ang Ta Saom, Leay Bour, Popel, Cheng Tong [...] Pok Angmei" and "Bong Knai", even though the two latter communes do not appear on the investigators' map.[1038] He ended his testimony by saying "[t]hat should be all".[1039]

959. All of the evidence relating the facts that occurred in those communes is out of scope. This also concerns Witness MEAS Sokha's testimony about facts outside the territory of "Cheang Torng commune" where he lived.[1040] For the same reasons, the testimony concerning the facts in "Leay Bour commune", where NEANG Ouch lived starting in June 1977, ought to be struck from the record.[1041] The same applies to the testimony of Civil Party UNG Saroeun concerning the death of her child and that of Civil Party CHOU Koemlan concerning the loss of her husband and her child, which occurred in "Leay Bour commune".[1042]

960. Also regarding Leay Bour Commune, EK Hoeun, a very well informed witness, testified that that "500 people died of hunger"[1043] but without naming his sources or providing further details. No credibility can be afforded to that claim and others by this witness, who had a lot to say, but never revealed the source of knowledge; in fact, neither the Co-Prosecutors nor Judge LAVERGNE

[1038] Site Identification Report, 06.01.2010, **E3/8051**, ERN FR 00450445.
[1039] PECH Chim: T. 23.04.2015, **E1/291.1**, p. 53, between 11.29.20 and 11.32.19; T. 24.04.2015, **E1/292.1**, pp. 49-50, from 11.24.20 to 11.28.30.
[1040] MEAS Sokha: WRI, 31.10.2007, **E3/5825**, ERN 00223494; T. 08.01.2015, p. 34, around 10.04.40.
[1041] NEANG Ouch: T. 09.03.2015, **E1/273.1**, pp. 14-15, after 09.38.50.
[1042] UNG Saroeun: T. 26.03.2015, **E1/283.1**, pp. 5-8, from 09.14.32 to 09.21.10; CHOU Koemlan: T. 26.01.2015, **E1/252.1**, p. 49, around 11.10.25 and pp. 53-55 between 09.14.01 and 09.22.47; T. 27.01.2015, **E1/253.1**, pp. 33-35, between 10.52.09 and 11.00.32.
[1043] EK Hoeun: T. 08.05.2015, **E1/299.1**, p.17, after 09.43.08.

questioned him about his sources, and also the facts he described are out of scope.[1044]

961. This is also the case for nearly all the testimony of Witness KHOEM Boeurn, chief of Cheang Torng Commune during the Democratic Kampuchea period, who was not interviewed by the investigators in Case 002 but was called to testify at the request by the Co-Prosecutors based on his written record of interview concerning Case 004.[1045]

962. Both in-court or period documentary evidence concerning Khpob Trabek Commune was also added to the 002/02 case file.[1046] All of that evidence is out of scope. More specifically, it is noteworthy that in response to a question by Judge LAVERGNE regarding the out-of-scope "Khpob Trabek Dam" dam, Witness SAUT Saing said that it is located in "Ou Saray commune, Tram Kok District", which is also out of scope.[1047]

963. Other evidence produced at trial relates to alleged detentions at the Angk Roka site. Such evidence is out of scope, since the Trial Chamber was not seised of factuals allegationspertaining to detention at this site. Although the Co-Investigating Judges investigated a mystery detention facility in Traing District without the jurisdiction to do so,[1048] they indeed never investigated factual allegations of detention at Angk Roka, which is located in "Cheang Tong Commune", Tram Kok District.[1049]

B - Facts concerning the Vietnamese ethnic minority

964. The evidence concerning the Vietnamese in Tram Kok is out of scope. As noted *supra*, in their Introductory Submission, the Co-Prosecutors never seised the Co-Investigating Judges of factual allegations pertaining to this specific group of people.[1050]

965. It is important to point out at this juncture that, in breach of their *saisine*, the Co-Investigating

[1044] See example, EK Hoeun: T. 07.05.2015, **E1/298.1**, p. 59, around 13.39.07 without disclosing the source of his knowledge, where the witness states that people died of hunger at a location that is not named in the Closing Order and is beyond the scope of the case (Office 204 in Prey Kduoch).
[1045] Co-Prosecutors' Request, 05.03.2015, **E319/17**, paras. 5-10.
[1046] RY Pov: T. 12.02.2015, **E1/262.1**, around 09.13.57 and 10.42.55; RIEL San: T. 17.03.2015, **E1/278.1**, around 09.29.14; DK Report, 06.05.1977, **E3/2050**, ERN 00276576.
[1047] SAUT Saing: T. 24.03.2015, **E1/281.1**, pp. 76-78, between 14.31.51 and 14.37.45.
[1048] See *supra*, paras. 932-938.
[1049] KHIEV Neou, WRI, 23.07.2009, **E3/507**, ERN 00358141; EM Phoeung: T. 16.02.2015, **E1/263.1**, p. 12, after 09.35.45.
[1050] See *supra*, paras. 219-276.

Judges found that the crime of deportation was committed in the Tram Kok cooperatives.[1051] The Trial Chamber then decided of its own motion not to include this charge in the scope of Case 002/02. Even though the Trial Chamber gave no explanation, the Annex to the Severance Decision very clearly states that the crime of deportation is not among the charges against KHIEU Samphan in Case 002/02 in relation to Tram Kok.[1052]

966. The Trial Chamber did that in order to remedy the Co-Investigating Judges' violations. However, a great deal of evidence was produced concerning deportation even though the Trial Chamber had no jurisdiction over that subject matter.

967. For that reason, a large portion of Civil Party RY Pov's testimony should be stricken from the record. He is a Khmer Krom who returned from Vietnam in 1976 as part the alleged exchange arrangement.[1053]

968. This is also the case for portions of Witness CHEANG Sreimon's testimony concerning the departure of ethnic Vietnamese from his commune, Nheng Nhang. His testimony is noteworthy in that it reveals the casual attitude of the Co-Investigating Judges who relied on this witness' solely on the basis of his written record of interview in asserting that "ethnic Vietnamese were taken away and executed".[1054] When CHEANG Sreimon was questioned about this in court, despite the illegality of the Co-Investigating Judges' finding,[1055] he readily admitted that his claim was only based on rumour:

> "[p]eople said that those people were sent to Krang Ta Chan area which was a killing site [...] That was my understanding and I was 100 percent certain that other people who were sent towards that direction were sent and they never returned."[1056]

969. So the Trial Chamber had precious little to show and the assertion about the hate crime recorded in the Closing Order boiled down to a flimsy hypothesis that would not have been sufficient to send the Accused to trial for extermination, had the Co-Investigating Judges been keen to ascertain it

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[1051] Closing Order, paras. 1397-1398.
[1052] Decision on Additional Severance, 04.04.2014, **E301/9/1**; Annex: List of paragraphs and portions of the Closing Order relevant to Case 002/02, **E301/9/1.1**, p. 4 ("Deportation (paras. 1397 to 1401)) (assessment was limited to the policy to target Vietnamese in Prey Veng and Svay Rieng"); See *supra*, paras. 219-276.
[1053] RY Pov: T. 12.02.2015, **E1/262.1**.
[1054] Closing Order, para. 320, endnote 1320 referring to the written record of interview of CHEANG Sreimon **E3/5832** (D232/58), pp. 6-8.
[1055] See *supra*, paras. 864-866.
[1056] CHEANG Sreimon: T. 29.01.2015, **E1/254.1**, p. 83, after 15.35.56.

already at the investigation phase.

III- EVIDENCE CONCERNING CERTAIN CRIMES

970. Some of the evidence produced may suggest that the constitutive elements of the crime of enslavement, as alleged at paragraph 1391 of the Closing Order, are established.

971. Moreover, the Co-Investigating Judges characterised attacks against human dignity (paragraph 1434 of the Closing Order) and enforced disappearances as other inhumane acts.

972. According to Supreme Court Chamber's "holistic" approach, in the period relevant to the charges, the residual category of other inhumane acts as a crime against humanity was not subdivided such as it is the Closing Order or in the Case 002/01 Trial Judgement.[1057] The Defence does not dispute this analysis nor that acts that could be generically characterised as other inhumane acts may have occurred in the Tram Kok cooperatives.

973. Be that as it may, the Defence recalls that the crimes of enslavement and other inhumane acts may be established in the case at hand only if they occurred in one of the eight communes that are part of the judicial investigation.[1058]

IV- DISCUSSION OF THE RELEVANT EVIDENCE

974. As stated *supra*, the factual allegations pertaining to the treatment of the former Khmer Republic officials and soldiers and Buddhists, as well as those pertaining to forced marriage are discussed in other segments of the present brief.[1059] The evidence relating to that subject matter is discussed in those segments.

975. The only factual allegations to which KHIEU Samphan must answer in this instance are the deaths from starvation in Samraong and Ta Phem communes, which are characterised as extermination.

I - NO DEATHS FROM STARVATION OCCURRED IN THE COMMUNES WITHIN

[1057] Case 002/01 Appeal Judgement, paras. 572-590.
[1058] See *supra*, para. 848.
[1059] See *supra*, para. 846.

THE SCOPE OF THE CASE

976. It will be recalled that even though the Co-Prosecutors specifically requested the Co-Investigating Judges to investigate "the thousands of people [...] who died of starvation", the latter were at pains to find that some deaths from starvation occurred, only four of which occurred in the communes that are part of the judicial investigation, namely Samraong and Ta Phem.

977. In a rare demonstration of probity, they also specified that no deaths occurred in at least three other communes that are part of the judicial investigation. They were less forthcoming as concerns the last three communes that are part of the judicial investigation. To the extent that the evidence produced did not allow the Co-Investigating Judges to conclude that crimes were committed in six out of the eight communes, the Trial Chamber cannot consider itself properly seised of facts that occurred in those six communes.[1060]

978. Since the Trial Chamber did not call the only two individuals– SIM Chheang concerns facts in Samraong and SOK Sin concerning facts in Ta Phem – who were interviewed by the Co-Investigating Judges for testimony about facts within the scope of their *saisine*, no adversarial debate was held in regard to those facts. Accordingly, no convictions may be returned merely based on written records of interview of those individuals.[1061]

979. The evidence concerning Samraong Commune (A) and Ta Phem Commune (B) cannot support a finding that deaths from starvation occurred in those communes.

A- Samraong Commune

980. Among the witnesses who were called for testimony, only Civil Party RY Pov (1) and Witnesses PHNEOU Yav (2) and PHAN Chhen (3) reported that they lived in localities called Samraong.[1062] Although there is no doubt as to whether the second civil party lived in the commune located in Tram Kok District, such is not the case for the first and third civil parties.

[1060] See *supra*, paras. 924-931.
[1061] WRI of SIM Chheang, 27.11.2007, **E3/7980;** WRI of SOK Sim, 23.11.2009, **E3/5519**.
[1062] WRI of RY Pov30.10.2013, **E3/9604**, Q/A 24 and T. 12.02.2015, **E1/262.1**, p. 49, around 11.23.02; PHNEOU Yav: T. 17.02.2015, **E1/264.1**, p. 5, at 09.13.18; PHAN Chhen: T. 24.02.2015, **E1/268.1**, p. 61, after 14.01.48.

1- RY Pov

981. RY Pov testified that he lived in several places during the Democratic Kampuchea period after returning from Vietnam in February 1976. He said that he lived in Tnaot Chrum Village, Khpob Trabaek Commune, Tram Kok District, before being sent to a mobile unit in Kbal Pou "in the south of Takeo Province".[1063] He was uncertain as to when he moved to that location; he also said that he moved "from Stueng village, Khpob Trabaek commune, to Samraong commune", adding: "I worked ploughing the field and digging canals at Pong Tuek village."[1064] Finally, he reported in his written record of interview that he was sent to "Prey Ta Khab village, Samraong Commune".[1065]

982. In his testimony, RY Pov reported that two people died in his mobile unit:

> "In my youth mobile unit at Ou Krouch, there were two members who died from starvation. However, they then said that they died of syncope. And, in fact, there was a wound infection on their leg, and it got worse because of the insufficient food, And because they were sick, they were not allowed to give any food, and later on they died of starvation at that Ou Krouch." [1066]

983. In the absence of details from live testimony by RY Pov, who did not report those two deaths in his civil party application in 2009 or to the OCIJ investigators in 2013, it is uncertain whether those deaths actually occurred in "Ou Krouch", Samraong Commune. [1067].

984. Indeed, in Zylab (database containing all of the Court's the evidence irrespective of whether it is part of the record), "Ou Krouch" is mentioned in only two other documents besides RY Pov's deposition. Those two documents relate to LEUNG Lam's Civil Party Application, according to which "Ou Krouch" "village" is situated in Kampong Svay District, Kampong Thom Province[1068].

985. However, according to that internet website, "Ou Krouch" is located in Trapeang Prasat Commune, Trapeang Prasat District, Oudor Meanchey Province.[1069]

[1063] RY Pov: T. 12.02.2015, **E1/262.1**, p. 32, around 10.40.14.
[1064] RY Pov: T. 12.02.2015, **E1/262.1**, p. 48, around 11.20.58.
[1065] WRI of RY Pov, 30.10.2013, **E3/9604**, Q/A 24.
[1066] RY Pov: T. 12.02.2015, **E1/262.1**, p. 45, around 11.07.27.
[1067] Civil Party Application, 19.7.209, **E3/5482**; WRI, 30.10.2013, **E3/9604**.
[1068] Victim Information Form, 11.01.2010, E3/6510, ERN 01320243; Report on Civil Party Application, 26.03.2010, D22/2508/1, ERN 00551008.
[1069]

986. It may be that the place referred to by RY Pov is the village called Trapeang Phlu, which is situated in Tram Kok District, but is still unofficially called "Ou Krouch"; however, that village is not part of Samraong Commune, but rather of Ou Saray Commune;[1070] the latter is outside the Trial Chamber's *saisine*.

987. In conclusion, RY Pov's testimony is out of scope both in regard to the entire segment on the exchange of Vietnamese and Khmer Krom and to the alleged deaths from starvation.[1071]

2- PHNEOU Yav

988. Witness PHNEOU Yav never reported deaths from starvation in his interview with the investigators or in his in-court testimony.[1072]

3- PHAN Chhen

989. In his testimony, Witness PHAN Chhen said that he lived in Samraong Commune.[1073] This commune is actually called "Samraong Yaong", as PHAN Chhen told the investigators several times. He also said that it is located in Tonle Bati District, Takeo Province.[1074]

B- Ta Phem Commune

990. As for Ta Phem Commune, none of the witnesses lived there. Only Civil Party Bun Saroeun, who testified on the impact of the crimes, lived there during the Democratic Kampuchea period.[1075] His testimony cannot support the finding that the constitutive elements of the crimes were established. Whatever the case, Civil Party Bun Saroeun did not report any deaths from starvation.

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https://www.google.com.kh/search?q=ou+krouch&rlz=1C1GGRV_enKH754KH757&oq=ou+krouch&aqs=chrome..69i57.6991j0j8&sourceid=chrome&ie=UTF-8.

1070 *Cities and Provinces of Cambodia (English and Khmer Language)*, June 2008, pp. 113 (EN) and 2017 (KH): https://mekhea.files.wordpress.com/2010/07/cities-and-provinces-of-cambodia-15072008-v-2b.pdf. See also: D250/3/5.3, ERN 00526996.

1071 See *supra*, paras. 964-967.

1072 WRI, of PHNEOU Yav, 12.11.2009, **E3/5515**; T. 16.02.2015, **E1/263.1**, pp. 93-96; T. 17.02.2015, **E1/264.1**, pp. 3-82.

1073 T. 24.02.2015, **E1/268.1**, p. 1, after 14.01.48; T. 25.02.2015, **E1/269.1**, pp. 5-6, around 09.13.15.

1074 WRI of PHAN Chhen, 09.09.2009, **E3/5524**, ERN 00426304; WRI, 11.10.2014, **E3/9465**, A4.

1075 BUN Saroeun: T. 03.04.2015, **E1/288.1**, pp. 22-57.

991. Moreover, according to three civil party applications, deaths occurred in Ta Phem Commune, all of them in different circumstances.[1076] None of the civil parties concerned was called for testimony by either the Co-Prosecutors or the Civil Parties. Moreover, none of their statements was recorded within a judicial framework; the statement of one of the three civil parties was recorded and forwarded to the ECCC by ADHOC, while those of the other two were recorded by DC-Cam.[1077] Due to lack of an adversarial debate concerning that evidence and the problems already highlighted concerning the organisations which record statements outside a legal framework, the evidence is of very low probative value.[1078] A crime cannot be established solely in reliance thereupon.

992. Further, Witness SAO Van testified that he was in charge of "food supplies" for three communes in Tam Kok District, including Ta Phem.[1079] Despite charging KHIEU Samphan with deaths from starvation in Ta Phem, the Co-Prosecutors did not deem it necessary to question him about those deaths even though he was very familiar with issues relating to food supplies in the commune. Instead, they chose to question him about the alleged killing of former Khmer Republic soldiers and officials,[1080] whereas that subject matter is outside of the scope of the Co-Investigating Judges' *saisine*.[1081]

993. Finally, it is noteworthy that KEV Chandara indicated that he was the chief of this commune, but only post-Democratic Kampuchea, from 1979 to 1982.[1082]

Section V. LEGAL CHARACTERISATION

994. As concerns the facts which took place in the Tram Kok cooperatives, KHIEU Samphan is to answer only to deaths from starvation, which are characterised as extermination.

[1076] CHUM Nhor's Civil Party Application, 07.09.2008, **E3/7088a**, 00477414-21; SOK Yun's Civil Party Application, 15.09.2008, **E3/7089a**, 00477424-31; MEAS Sokun's Civil Party Application, 07.04.2009, **E3/6186**, ERN 01332315-16.

[1077] DC-Cam recorded the statements of CHUM Nhor (**E3/7088a**) and SOK Yun (**E3/7089a**). ADHOC recorded that of MEAS Sokun (**E3/6186**).

[1078] See *supra*, paras. 557-563.

[1079] SAO Van: T. 01.02.2016, E1/385.1, pp. 80-81, around 15.30.17

[1080] SAO Van: T. 01.02.2016, **E1/385.1**, pp. 89-90, from 15.55.05 to 15.58.50.

[1081] See Co-Prosecutors' Introductory Submission, para. 43.

[1082] KEV Chandara: T. 02.02.2015, **E1/255.1**, pp. 38-39, around 11.11.45.

<u>DEFINITION OF EXTERMINATION (CRIME AGAINST HUMANITY)</u>

995. The *actus reus* of extermination consists in the act of killing on a large scale.[1083]

996. As for the *mens rea*, the author(s) of the crime must have been driven by the specific intent to kill on a large scale or to subject a large number of people to conditions of living that would inevitably lead to death.[1084]

<u>LEGAL CHARACTERISATION OF THE FACTS</u>

997. Analysis of the facts reveals that it has not been established that any deaths from starvation occurred in the communes of Samron and Ta Phem; those are the only facts that the Co-Investigating Judges put to the Chamber for determination. Consequently, the crime of extermination cannot be established.

Chapter II. <u>THE TRAPEANG THMA DAM WORKSITE</u>

Section I. <u>CHARGES</u>

998. The charges against KHIEU Samphan concern facts that took place at the Trapeang Thma Dam worksite, and are characterised in the Closing Order as murder, extermination, enslavement, persecution on political grounds and other inhumane acts constituting crimes against humanity through attacks against human dignity, enforced disappearances and forced marriages.[1085]

999. The acts characterised as forced marriage at paragraph 1442 of the Closing Order are discussed *infra* in the segment on the alleged countrywide policy on the regulation of marriage.[1086]

1000. Analysis of the other charges helps discern the scope of the facts that were submitted to the Chamber's consideration. It reveals instances where the Co-Investigating Judges widely exceeded their *saisine* in relation the case that the Co-Prosecutors brought before them at the outset.

[1083] Case 002/01 Appeal Judgement, para. 517.
[1084] Case 002/01 Appeal Judgement, paras. 517-522.
[1085] Closing Order, paras. 1373, 1381, 1391, 1416, 1434, 1442, 1470; Decision on Additional Severance, 04.04.2014, **E301/9/1**, para. 34; Annex: List of paragraphs and portions of the Closing Order relevant to Case 002/02, **E301/9/1.1**, pp. 2-4
[1086] See para. 2319 *et seq, infra*..

I. MURDER

1001. According to paragraph 1373 of the Closing Order, the Co-Investigating Judges found the elements of the crime of murder to be established with respect to a number of crime sites, including the Trapeang Thma Dam.

1002. According to paragraph 1377, the Co-Investigating Judges investigated specific facts which are characterised as killings at worksites, including the Trapeang Thma Dam, in respect of which they noted that "victims were usually killed *in situ*". This reveals that only killings by execution are characterised as murder as a crime against humanity of.

1003. Such murders are described at paragraphs 344, and 346 to 349 of the Closing Order. KHIEU Samphan is to answer thereto.

II. EXTERMINATION

1004. According to paragraph 1381 of the Closing Order, the Co-Investigating Judges found that the crime of extermination was established in regard to the "people who were killed or who died en masse" at numerous crime sites, including the Trapeang Thma Dam. Paragraphs 1382 and 1383, which are cited *supra*, set forth some general elements to consider concerning all the sites with respect to which extermination is alleged.[1087] It is also stated that other elements "in addition to the relevant evidence" are to be taken into account for each of the sites with respect to which the commission of murder has been established.

1005. Those elements are set out at paragraph 1387 in regard to all the worksites:

> "Moreover […] many people died as a result of the conditions imposed […]; such conditions included deprival of food, accommodation, medical care and hygiene. This was also the case at **worksites**, with the added factor of hard labour." (*emphasis supplied*)

1006. No reference is specifically made to killings by execution. It therefore follows that the Co-Investigating Judges characterised as extermination only deaths resulting from the living conditions are Co-Investigating Judges. It is to be noted that the Co-Investigating Judges specified those instances where they characterised facts relating to execution both as murder and extermination. Examples of this are found at paragraph 1385 of the Closing Order concerning the crimes

[1087] See *supra,* para. 854.

committed at security centres and at the Prey Sar worksite, and also at paragraph 1386 concerning the killing of Vietnamese and Cham.

1007. The factual underpinning of the charge of extermination is found at paragraphs 341 and 342 of the Closing Order. KHIEU Samphan is to answer thereto.

III. ENSLAVEMENT

1008. According to paragraph 1391 of the Closing Order, the Co-Investigating Judges found that the crime of enslavement was established in relation to the Trapeang Thma Dam worksite. The factual underpinning of this charge is at paragraphs 334 to 345 under "Working and Living Conditions". KHIEU Samphan is to answer thereto.

IV. PERSECUTION ON POLITICAL GROUNDS

1009. According to paragraph 1416 of the Closing Order, the Co-Investigating Judges found that the crime of persecution on political grounds had been established in relation to the Trapeang Thma Dam worksite. As noted *supra*, paragraph 1417 identifies only three groups as having been the target of political persecution, namely former Khmer Republic officials, new people and Cambodians returning from abroad.[1088]

1010. According to paragraph 1418, which is cited *supra*, members of those groups were subjected to harsher living conditions at the worksites and were arrested en masse.[1089]

1011. Paragraphs 323 to 349 of the Closing Order concerning the Trapeang Thma Dam worksite only refer to New People. It is to be noted that despite the Co-Prosecutors' allegations at paragraph 46 of the Introductory Submission, the Co-Investigating Judges found no evidence of discrimination against former Khmer Republic officials.

1012. The treatment of New People at the Trapeang Thma Dam worksite is discussed in paragraphs 335, 343 and 346 of the Closing Order.

1013. Paragraph 335 states that the workers included New People, but describes no discrimination against the latter.

[1088] See *supra*, paras. 883 to 885.
[1089] See *supra*, para. 892.

1014. Paragraph 343 states that New People "were subjected to harsher working conditions, such as larger working quotas or unjustified punishments."

1015. Concerning the arrest of workers, paragraph 346 states that "[s]ome workers, especially 'new people' would be arrested by CPK cadres." No discrimination against new people is disclosed here or elsewhere in paragraph 346. The paragraph simply states that new people would be arrested, just as were other people.

1016. In the final analysis, KHIEU Samphan is only charged the facts alleged at paragraph 343 of the Closing Order.

V. OTHER INHUMANE ACTS THROUGH ATTACKS AGAINST HUMAN DIGNITY

1017. According to paragraph 1434 of the Closing Order, the Co-Investigating Judges found that the crime of other inhumane acts through attacks against human dignity was established in relation to the Trapeang Thma Dam worksite. The factual underpinning of this charge is found at paragraphs 334 through 345 of the Closing Order; KHIEU Samphan is charged therewith

VI. OTHER INHUMANE ACTS THROUGH ENFORCED DISAPPEARANCES

1018. According to paragraph 1470 of the Closing Order, the Co-Investigating Judges found that the crime of other inhumane acts through enforced disappearances was established in relation to the Trapeang Thma Dam worksite. The factual underpinning of this charge is found at paragraphs 336, 346 and 348 concerning disappearances.

1019. The Co-Investigating Judges entered all of those findings by exceeding their *saisine*. In fact, paragraph 46 of the Co-Prosecutors' Introductory Submission, the only paragraph which clearly defines the Co-Investigating Judges' jurisdiction over the facts relating to the Trapeang Thma Dam worksite, makes no reference to disappearances of workers.

1020. There are instances in the Introductory Submission where the Co-Prosecutors specifically seise the Co-Investigating Judges of facts relating to disappearances. One example is found at paragraph 47 concerning Kampong Chhnang Airport, where it is stated that "[t]he people who disappeared were constantly replaced by new detainees." Another example is found at paragraph 67, which states that at Phnom Kraol "[d]etainees at the prison believed that the prisoners taken away were being executed."

1021. This does not concern the facts relating to the Trapeang Thma Dam worksite at paragraph 46 of the Co-Prosecutors' Introductory Submission. Accordingly, KHIEU Samphan should not be required to answer to a charge which was unlawfully brought against him.

Section II. EVIDENCE UNDERPINNING THE FINDINGS IN THE CLOSING ORDER

1022. Careful analysis of the evidence cited in the Closing Order helps discern whether or not it sufficiently supports the charges upon which the accused persons were sent to trial.

1023. The evidence cited by the Co-Investigating Judges in regard to persecution of new people is discussed *infra*. It demonstrates yet again that the Co-Investigating Judges' practice of interpreting each and every item of evidence against the accused by claiming that such evidence corroborates matters which, in many instances, such evidence does even imply.

1024. It noted *supra*, KHIEU Samphan is charged with persecution based solely on the finding at paragraph 343 of the Closing Order that former Khmer Republic officials were subjected to harsher conditions.[1090] This finding is based on three written records of interview of three different individuals.

1025. The first record is by DAN Sa, who reported that workers who failed to meet the work quotas would be punished by reduction of their food rations, and that it was new people who bore the brunt of such punishment. DAN Sa did not report that new people were subjected to different treatment or to harsher living conditions.[1091]

1026. The second record is by DAN Thew, who reported that "beatings" were administered to those who were considered "lazy" He gave the example of one person who was subjected to such punishment. That person belonged to the new people group, but DAN Then did not say that this was the reason for the harsh treatment the person received.[1092]

1027. The third record is by SAOM Phan, who reported that his unit comprised mainly new people and that workers who were thought to be "malingering" were subjected to harsh treatment. He did not

[1090] See *supra*, paras. 1009 to 1016.
[1091] WRI of DAN Sa, 29.01.2009, **E3/9354**, ERN 00289931-32.
[1092] WRI of DAN Thev, 19.12.2008, **E3/7802**, ERN 00280020-21.

report that those who were treated harshly were new people or that belonging to the new people group was the reason for the harsh treatment.[1093]

1028. Based thereupon, the finding at paragraph 343 that new people were treated differently is based on evidence that cannot support it. The Co-Investigating Judges should have noted that the charges hadnot been sufficiently established and therefore refrained from sending KHIEU Samphan to trial on charges of persecution. Accordingly, KHIEU Samphan need not address that charge in the present Brief.

Section III. THE EVIDENCE PRODUCED

1029. A significant portion of the evidence produced at trial (I) is extrinsic to the Chamber's jurisdiction (II). Other evidence appears to suggest that the elements of some of the crimes may be established (III).

I. CATALOGUE OF THE EVIDENCE

1030. In the period between 27 July 2015 and 2 December 2015, the Chamber heard fifteen persons (i.e., eleven witnesses and four civil parties, two of whom testified regarding the impact of the crimes) in relation to the Trapeang Thma Dam worksite. Five of the eleven witnesses were not interviewed during the Case 002 investigation (45.45%).[1094]

1031. Some twenty written records of interview from Case 002 and no less than forty from Cases 003 and 004 concerning the Trapeang Thma Dam worksite were admitted into evidence.

II. OUT-OF-SCOPE EVIDENCE

1032. Much of the evidence produced is out of scope, including that concerning facts which the Co-Investigating Judges investigated without any mandate, for example those relating to disappearances.[1095]

1033. Another such example is the evidence concerning an alleged detention facility called Phnom Trayong. Contrary to the Co-Prosecutors' claim at paragraph 46 of the Introductory Submission concerning "a nearby security office" where workers were allegedly executed, the Co-Investigating

[1093] WRI of SAOM Phan, 30.01.2009, **E3/510** ERN 00290357.
[1094] LAT Suoy, CHHIT Yoeuk, CHHUM Seng, TAK Buy and PAN Chhuong.
[1095] See *supra*, paras.1018 -021.

Judges noted at paragraph 348 of the Closing Order that "[n]o witnesses report[ed] of any security centre being located at the working site." It therefore follows that KHIEU Samphan is not charged with any crimes that were committed beyond the confines of the Trapeang Thma Dam worksite.

1034. Even though the Co-Investigating Judges' finding was crystal clear, Judge LAVERGNE still proceeded to question Witness CHHIT Yoeuk concerning an alleged security centre called Phnom Trayong.[1096] After the Defence pointed out that the facts relating to that location were extrinsic to the Chamber's jurisdiction, Judge LAVERGNE explained that his line of questioning was relevant in that it helped provide a better understanding of "how [the witness'] work was organized when he was in charge of supplying rice to all the mobile units."[1097] The Trial Chamber consistently found out-scope facts to be relevant. Yet, such a course of action is without legal basis and simply causes undue delay to the proceedings.

1035. Also, all of the answers provided in court to the Co-Prosecutors' questions concerning another site called Chamkar Knuol are out of scope.[1098] Indeed, the Chamber (unexpectedly) found the Defence's objection to those questions to be with merit.[1099]

III. EVIDENCE CONCERNING CERTAIN CRIMES

1036. Some of the evidence appears to indicate that the legal elements of the crimes of murder and enslavement, as alleged in paragraphs 1373 and 1391 of the Closing Order, were established.

1037. Furthermore, the Co-Investigating Judges characterised the attacks against human dignity (paragraph 1434 of the Closing Order) as other inhumane acts. According to the Supreme Court Chamber's "holistic" approach, in the period relevant to the charges, the residual category of crimes against humanity of other inhumane acts were not subdivided in the same way as they are in the Closing Order or in the subsequent Case 002/01 Trial Judgement.[1100] The Defence does not dispute that opinion nor that acts generically characterised as other inhumane acts may have been committed at the Trapeang Thma Dam worksite.

[1096] CHHIT Yoeuk: T. 13.08.2015, **E1/330.1**, pp. 102-103, around 16.00.10.
[1097] T.. 13.08.2015, **E1/330.1**, pp. 102-104, around 16.03.30
[1098] See for example: LAT Suoy: T.. 11.08.2015, **E1/328.1**, pp. 58-62, between 14.00.34 and 14.07.55; T.12.08.2015, **E1/329.1**, pp. 36-38, around 10.38.33.
[1099] SOT Sophal: T, 30.09.2015, **E1/352.1**, pp. 20-22, between 14.00.34 and 14.07.55.
[1100] Case 002/01 Appeal Judgement, paras. 572 -590.

Section IV. DISCUSSION OF THE RELEVANT EVIDENCE

1038. The only charges that KHIEU Samphan is to answer to in the instant are those relating to deaths caused by the living conditions at the Trapeang Thma Dam worksite, which are characterised in the Closing Order as extermination..

1039. Some testimonies and written records of interviews seem to indicate that a number of deaths resulted from starvation and exhaustion. One example is Witness SOT Sophal's testimony.[1101]

1040. Be that as it may, some witnesses testified that the sick received treatment. For example, Witness KAN Thol testified that anyone who was sick for more than five days was taken to hospital.[1102] CHHUM Seng attested to such hospitalisations.[1103] Also, LAT Suoy and Civil Party NHIP Horl testified that some patients were cured.[1104] Additionally, it is reported in many a written record of interview that hospitals were operational and catered for the needs of the sick.[1105]

1041. Also, witness LAT Suoy reported the manufacturing of traditional medicines for treating the sick.[1106] These traditional treatments, pejoratively dubbed "rabbit droppings", were largely denigrated throughout the trial. It is nonetheless worth noting Michael VICKERY's observations to the effect that peasants preferred such treatments. He noted further that "the assertion that villagers preferred traditional medicine is not just propaganda, as some readers might think" and that "backwoods villagers prefer traditional medicine, and some useful medical products can be manufactured locally." Finally, he noted that some traditional medicines "had a few notable successes".[1107]

1042. Also noteworthy is Witness MUN Mot's testimony that that the sick were treated using modern medicines.[1108]

1043. Thus, despite the widely divergent views on the quality of the measures taken, the mere fact that those measures were taken demonstrates that the Trapeang Thma Dam worksite staff did not have

[1101] SOT Sophal: T., 29.09.2015, **E1/351.1**, p. 81, at around 15.06.20; T. 30.09.2015, **E1/352.1**, p. 41, around 10.59.51.
[1102] KAN Thol: T.11.08.2015, **E1/328.1**, p. 12, around 09.32.53.
[1103] CHHUM SENG: T.,19.08.2015, **E1/333.1**, pp. 17-18, at around 09.40.30.
[1104] LAT Suoy: T. 12.08.2015, **E1/329.1**, p. 91, around 15.21.40; NHIP Horl: T. 25.08.2015, **E1/336.1**, p. 21, at around 10.01.05.
[1105] WRI, 16.06.2014, **E3/9575**, Q/A 113; WRI, 15.08.2014, **E3/9549**, Q/A 68; WRI, 21.01.2014, **E3/9494**, Q/A 14 and 27; WRI, 16.10.2014, **E3/9535**, Q/A 27.
[1106] T.,12.08.2015, **E1/329.1**, p. 91, 15.21.40.
[1107] Book by Michael VICKERY, *Cambodia, 1975-1982*, **E3/1757**, pp. 181-183, ERN 00397096-98.
[1108] T., 26.10.2015, **E1/356.1**, pp. 39-39, around 14.10.06.

the intent to kill the workers by knowingly imposing working conditions which would inevitably lead to death.

Section V. LEGAL CHARACTERISATION

I. DEFINITION OF EXTERMINATION (CRIME AGAINST HUMANITY)

1044. The *actus reus* of extermination consists in the act of killing a large number of people.[1109] As for *mens rea*, the perpetrators(s) must have the specific intent to kill a large number of people or to impose living conditions that will inevitably lead to death.[1110]

II. LEGAL CHARACTERISATION OF THE FACTS

1045. Careful analysis of the facts reveals that the deaths at the Trapeang Thma Dam worksite were not the result of acts imposed by its staff with the intent to kill a large number of people. For that reason, the crime of extermination is not established.

Chapter III. THE 1ST JANUARY DAM WORKSITE

Section I. CHARGES

1046. KHIEU Samphan is charges in regard to for facts which took place at the 1st January Dam worksite, facts that the Co-Investigation Judges characterised as murder, extermination, enslavement, persecution on religious and political grounds and other inhumane acts constituting Crimes Against Humanity through attacks against human dignity, enforced disappearances and forced marriage.[1111]

1047. The charge of persecution on political grounds for acts committed against former Khmer Republic officials is discussed *infra* in a segment on persecution at various sites.[1112] Similarly, the facts characterised as forced marriages at paragraph 1442 are discussed *infra* in a section on the regulation of marriage.[1113]

[1109] Case 002/01 Appeal Judgement, 23.11.2016, para. 517.
[1110] Case 002/01 Appeal Judgement, 23.11.2016, paras. 517-522.
[1111] Closing Order, paras. 1373, 1381, 1391, 1416, 1420, 1434, 1442, 1470; Decision on Additional Severance, 04.04.2014, **E301/9/1**, para. 44; Annex: List of paragraphs and portions of the Closing Order relevant to Case 002/02, **E301/9/1.1**, pp. 2-5.
[1112] See *infra*, para. 2258 *et seq.*
[1113] See *infra*, para. 2319 *et seq.*

1048. A review of the other charges helps discern the scope of the facts put to the Trial Chamber for determination. In many instances, it reveals that the Co-Investigating Judges widely exceeded their *saisine* over and beyond the case the Co-Prosecutors submitted to them through the Introductory Submission.

I. MURDER

1049. According to paragraph 1373 of the Closing Order, the Co-Investigating Judges found that the crime of murder was established in relation to a number of crime sites, including the 1st January Dam worksite. As noted *supra* concerning the Trapeang Thma Dam worksite, only deaths by execution at the 1st January Dam worksite were characterised as murder.[1114] However, unlike the Trapeang Thma Dam worksite where persons were allegedly "killed on the spot", it is stated at paragraph 1377 that at the 1st January Dam worksite, persons were "arrested and taken away to be killed nearby".

1050. Such killings are described at paragraphs 366 and 367 of the Closing Order. Paragraph 366 alleges that loudspeakers were played to cover the screams of the victims, while paragraph 367 alleges that:

> "Some witnesses saw the arrests, others heard of people being killed [...]. One witness saw one person being killed. The nearby Wat Baray Choan Dek Pagoda was known as a place where people were taken to be killed, but people were also killed in other locations."

1051. The Co-Investigating Judges entered those findings by exceeding their *saisine*. In fact, at paragraph 45 of the Co-Prosecutors' Supplementary Submission, the only paragraph concerning investigation of facts that took place at the 1st January Dam worksite, there is no reference to places where people were killed, beyond the premises of the worksite. Rather, that paragraph only states that "deaths [occurred] on this site" and not that "persons [were] taken away" and "killed nearby".

1052. Moreover, the Wat Baray Choan Dek Pagoda is mentioned at paragraph 45 of the Co-Prosecutors' Supplementary Submission simply to indicate that the dead were taken there for burial. It is not described as "known" to be a place where people were taken to be killed, contrary to the Co-Investigating Judges' illegal finding.

[1114] See *supra*, paras. 1001-1003; Closing Order, para. 1377.

1053. Analysis of the facts described in the Co-Prosecutors' Introductory Submission in regard to S-21 clearly reveals that the Co-Investigating Judges have no jurisdiction over that location. Paragraph 54 of the Co-Prosecutors' Introductory Submission specifically states that the Choeung Ek site was used for the execution of S-21 prisoners. Such is not the case for the Wat Baray Choan Dek Pagoda, in relation to which the Co-Prosecutors' Introductory Submission only alleges that mass graves were located there.

1054. After having found that there were one or more execution sites near the Dam, as stated in paragraphs 367 and 1377 of the Closing Order, the Co-Investigating Judges should have notified the Co-Prosecutors accordingly so as to enable them to request a supplementary submission allowing them investigate those new facts. Since the Co-Investigating Judges follow those basic rules of procedure, it was impermissible for them to investigate new facts which occurred elsewhere than at the Dam worksite.

1055. Accordingly, KHIEU Samphan is to answer only to charges relating to the deaths which occurred at the 1st January Dam worksite.

II. <u>Extermination</u>

1056. According to paragraph 1381 of the Closing Order, the Co-Investigating Judges found that the crime of extermination was established specifically in regard to "people who were killed or who died en masse" at the many execution sites, including the 1st January Dam worksite.

1057. The reasoning described *supra* regarding the Trapeang Thma Dam worksite, whereby only the deaths resulting from living conditions were characterised as extermination, also applies here.[1115]

1058. That charge is based on the deaths described at paragraph 363 of the Closing Order, according to which paragraph, among the workers, "some [...] died from diseases, starvation and/or overwork".

1059. Paragraph 45 of the Co-Prosecutors' Introductory Submission only refers to the death of "20,000 people [...] as a direct result of starvation, overwork or execution". That would indicate that the Co-Investigating Judges were not authorised to investigate deaths resulting from the outbreak of diseases.

[1115] See *supra*, paras. 1004-1007; Closing Order, paras. 1381, 1382, 1383 and 1387.

1060. However, unlike their findings concerning the Tram Kok cooperatives, in this instance, the Co-Investigating Judges established a nexus between lack of food and deaths resulting from diseases, at least as concerns members of the new people group.[1116] Indeed, paragraph 360 of the Closing Order states that receiving small rations were among the reasons why workers became sick.

1061. Therefore, the Co-Investigating Judges' findings concerning the deaths resulting from health problems should be considered as having been entered within the scope of their *saisine*. KHIEU Samphan must answer to those facts.

III. ENSLAVEMENT

1062. According to paragraph 1391 of the Closing Order, the Co-Investigating Judges found that the crime of enslavement was established in relation to the 1st January Dam worksite. This charge is based on the facts described at paragraphs 358-363, under "Working and Living Conditions". KHIEU Samphan must answer thereto.

IV. PERSECUTION ON POLITICAL GROUNDS

1063. According to paragraph 1416 of the Closing Order, the Co-Investigating Judges found that persecution on political grounds was established in relation to the 1st January Dam worksite. As noted *supra*, only three groups are identified at paragraph 1417 as having been subjected to political persecution, namely, former Khmer Republic officials, New People and Cambodians returning from abroad.[1117]

1064. At paragraph1418, which is cited *supra*, it is alleged that at worksites, members of these groups were subjected to harsher living conditions and were arrested en masse.[1118]

1065. The allegation of political persecution is based on paragraph 360 of the Closing Order which specifically states that "workers were treated differently depending on their unit and/or on whether they were new people".

1066. All the foregoing findings of the Co-Investigating Judges are plainly illegal. As a matter of fact, paragraph 45 of the Co-Prosecutors' Introductory Submission makes no reference to discrimination

[1116] See *supra*, paras. 859-863.
[1117] See *supra*, paras. 883-885.
[1118] See *supra*, para. 892.

or even to putting workers into categories. It only states that "tens of thousands of Sectors 41, 42 and 43 workers were forced to work in the construction of the dam".

1067. It will be noted that in instances where the Co-Prosecutors wanted the Co-Investigating Judges to investigation discrimination against a specific group, they stated specifically stated so. A case in point is the Tram Kok cooperatives, as discussed *supra*, where, according to according to paragraph 43 of the Co-Prosecutors' Introductory Submission, "former Khmer Republic officials were discriminated against".[1119]

1068. Accordingly, KHIEU Samphan need not answer to the factual underpinning of that allegation.

V. PERSECUTION ON RELIGIOUS GROUNDS

1069. According to paragraph 1420, the Co-Investigating Judges found that the crime of persecution on religious grounds was established in regard to the Cham at the 1st January Dam worksite. Like the charge of persecution on political grounds referred to *supra*, this charge is based on paragraph 360 of the Closing Order, as well as paragraph 366, according to which, "many of the people who disappeared were (…) Cham".

1070. For the same reasons as those stated *supra* in relation to persecution on political grounds, the Co-Investigating Judges entered all these findings by by acting in excess of their *saisine*. Therefore, KHIEU Samphan need not answer thereto.

VI. OTHER INHUMANE ACTS (THROUGH ATTACKS AGAINST HUMAN DIGNITY)

1071. According to paragraph 1434, the Co-Investigating Judges found that the elements of the crime of humanity of other inhumane acts (through attacks against human dignity) were established in relation to the 1st January Dam worksite. This charge, to which KHIEU Samphan must answer, is based on the facts described at paragraphs 358-363 of the Closing Order.

VII. OTHER INHUMANE ACTS (THROUGH ENFORCED DISAPPEARANCES)

1072. According to paragraph 1470 of the Closing Order, the Co-Investigating Judges found that the crime against humanity of other inhumane_acts through enforced disappearances had been

[1119] See *supra*, paras. 883-910.

established in regard to the 1st January Dam worksite. This charge is based on the factual allegations of disappearance at paragraph 366, which states that people "disappeared from the Dam worksite".

1073. Here again, the Co-Investigating Judges entered this finding by exceeding their *saisine*, given that paragraph 45 of the Co-Prosecutors' Introductory Submission makes no reference to disappearances.

1074. As noted *supra*, in some instances in their Introductory Submission, the Co-Prosecutors expressly requested the Co-Investigating Judges to investigate factual allegations of disappearance.[1120] This does not include the facts described at paragraph 45 of the Co-Prosecutors' Introductory Submission regarding the 1st January Dam worksite, which paragraph only refers to people being executed or dying as a result of living conditions.

Section II. THE EVIDENCE PRODUCED

1075. Much of the evidence produced at trial (I), is extrinsic to the Chamber's *saisine* (II). Other evidence suggests that certain crimes may be established (III).

I. CATALOGUE OF THE EVIDENCE

1076. In the period from 19 May 2015 to 1 September 2015, thirteen individuals (eight witnesses and five civil parties, including two who testified on the impact of the crimes) testified in relation to the trial segment on the1st January Dam worksite.

1077. In addition to some thirty written records of interview from Case 002, at least two from Case Files 003 and 004 concern the 1st January Dam worksite.[1121]

II. OUT-OF-SCOPE EVIDENCE

1078. Much of the evidence produced is out of scope, including that underpinning the facts that the Co-Investigating Judges investigated illegally. Examples include the factual allegations of disappearance at the 1st January Dam worksite.[1122]

[1120] See *supra*, paras. 1018-1021.

[1121] WRI, 23.05.2014, **E3/9563**; WRI, 04.07.2015, **E3/9755**.

[1122] AU Hau: T. 19.05.2015, **E1/301.1**, p. 27, around 10.43.18; MEAS Laihuor: T. 25.05.2015, **E1/304.1**, p. 91, around 15.08.12,, p. 101, around 15.33.59;UN Ron: T. 28.05.2015, **E1/307.1**, p. 35, around 10.57.45;SEANG Sovida: T. 02.06.2015, **E1/308.1**, p. 50, around 11.00.26; UT Seng: T. 02.06.2015, **E1/308.1**, pp. 110-111, around 15.49.22; SOU Soeun: T. 04.06.2015, **E1/310.1**, p. 27, around 10.39.35; KANG Ut: T. 25.06.2015, **E1/322.1**, p. 27, around 10.39.35.

1079. Another example is the evidence produced concerning the executions at Wat Baray Choan Dek Pagoda, which many witnesses alleged in their trial testimony.[1123] In regard to those facts, the Trial Chamber rejected the Defence's challenge to its jurisdiction.[1124] As noted *supra*, the Co-Investigating Judges entered its findings on this matter in excess of their *saisine*.[1125] Therefore, whatever its views, the Trial Chamber could not properly seised of those facts.

III. <u>EVIDENCE CONCERNING CERTAIN CRIMES</u>

1080. Part of the evidence produced might suggests that the ingredients of the crime of enslavement as alleged at paragraph 1391 of the Closing Order are established.

1081. Moreover, the Co-Investigating Judges characterised as other inhumane acts attacks against human dignity (paragraph 1434 of the Closing Order). According to the Supreme Court Chamber's "holistic" approach, in the period relevant to the charges, the residual category of other inhumane acts as a crime against humanity was not subdivided such as it is the Closing Order or in the Case 002/01 Trial Judgement.[1126] The Defence does not dispute that view nor that facts falling under the generic category of other inhumane acts may have occurred at the 1st January Dam worksite.

Section III. <u>DISCUSSION OF THE RELEVANT EVIDENCE</u>

1082. The only facts to which KHIEU Samphan must answer in this instance are those relating to deaths resulting from poor living conditions at the 1st January Dam worksite.

1083. Some in-court testimonies or written records of interview support the finding that deaths occurred from starvation, diseases or overwork.

1084. That said, according to a number of witnesses, makeshift hospitals and medical facilities were set up to allow workers to have some rest and the benefit of traditional and modern medical care practices.[1127] In this regard, the Defence reasserts its submissions in the segment on the Trapeang

[1123] <u>AU Hau</u>: T. 19.05.2015, **E1/301.1** p. 75, around 14.46.33; <u>MEAS Laihuor</u>: T. 25.05.2015, **E1/304.1**, pp. 97-99, around 15.23.57, p. 108, around 15.49.03; T. 26.05.2015, **E1/305.1**, pp. 58-60, around 13.48.18; T. 27.05.2015, **E1/306.1**, pp. 17-18, around 09.50.06; <u>HUN Sethany</u>: T. 27.05.2015, **E1/306.1**, pp. 31-32, around 10.53.02; <u>SEANG Sovida</u>: T. 02.06.2015, **E1/308.1**, pp. 40-41, around 10.55.25; <u>UT Seng</u>: T. 03.06.2015, **E1/309.1**, p. 17, around 09.44.15; <u>KANG Ut</u>: T. 25.06.2015, **E1/322.1**, p. 24, around 10.31.53; <u>UM Chi</u>: T. 30.07.2015, **E1/326.1**, p. 59, around 13.20.36.

[1124] T. 25.05.2015, **E1/304.1**, pp. 99-100, around 15.27.41, pp. 102-104, around 15.37.17, p. 108, around 15.49.03.

[1125] See *supra*, paras. 1049-1055.

[1126] Case 002/01 Appeal Judgement, paras. 72-590.

[1127] <u>AU Hau</u>: T. 20.05.15, **E1/302.1**, pp. 9-11, 09.25.47-09.30.05. <u>PECH Sokha</u>: T. 20.05.15, **E1/302.1**, p. 98, around

Thma Dam worksite as concerns traditional and modern medical practices both before and during the Democratic Kampuchea period.[1128]

1085. It is also worth recalling that many witnesses reported that the measures were taken to improve sanitation.[1129]

Section IV. LEGAL CHARACTERISATION

I. DEFINITION OF EXTERMINATION (CRIME AGAINST HUMANITY)

1086. The *actus reus* of extermination consists in the act of killing on a large scale.[1130] As for the *mens rea*, the perpetrator(s) of the killings must have the specific intent to kill a large number of people or to subject them to conditions calculated to bring about their death.[1131]

II. LEGAL CHARACTERISATION OF THE FACTS

1087. A review of the facts reveals that the deaths which occurred at the 1st January Dam worksite were not the result of acts decided upon by the worksite staff with the intent to bring about the death of a large number of people. Accordingly, the crime of extermination cannot be established.

Chapter IV. KAMPONG CHHNANG AIRPORT WORKSITE

Section I. CHARGES

1088. KHIEU Samphan is charged with facts which occurred at the Kampong Chhnang Airport worksite; those facts are characterised in the Closing Order as murder, extermination, enslavement,

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16.00.21; T. 21.05.15, **E1/303.1**, pp. 32-33, around 10.45.49, pp. 45-46, around 11.21.29. MEAS Laihuor: T. 25.05.15, **E1/304.1**, pp. 76-77, around 14.08.34; T. 26.05.15, **E1/305.1**, pp. 24-25, around 10.01.55. HUN Sethany: T. 27.05.15, **E1/306.1**, p. 54, around 13.53.34. UN Ron: T. 28.05.15, **E1/307.1**, p. 11, around 09.27.45, pp. 13-14, around 09.32.30, pp. 30-31, around 10.41.03. SEANG Sovida: T. 02.06.15, **E1/308.1**, pp. 26-27, around 10.02.28. SOU Soeun: T. 04.06.2015, **E1/310.1**, p. 64, around 14.19.14. UM Chy: T. 30.07.2015, **E1/326.1**, p. 80, around 14.11.40.

[1128] See *supra*, paras. 1041-1153.

[1129] PECH Sokha: T. 21.05.15, **E1/303.1**, p. 49, around 11.30.45. SEANG Sovida: T. 02.06.15, **E1/308.1**, pp. 41- 42, around 10.57.22 and SOU Soeun: T. 05.06.2015, **E1/311.1**, p. 73, around 14.37.10. UT Seng: T. 03.06.2015, **E1/309.1**, p. 34, around 10.48.35..

[1130] Case 002/01 Appeal Judgement, 23.11.2016, para. 517.

[1131] Case 002/01 Appeal Judgement, 23.11.2016, paras. 517-522.

persecution on political grounds and other inhumane acts constituting Crimes Against Humanity through attacks against human dignity and enforced disappearances.[1132]

1089. Analysis of the charges helps discern the scope of the facts put to the Trial Chamber for determination. It also reveals in some instances that the Co-Investigating Judges significantly exceeded their jurisdiction with respect to the mandate initially conferred upon them by the Prosecutors.

I. MURDER

1090. According to paragraph 1373 of the Closing Order, the Co-Investigating Judges found that the crime of murder had been established with regard to the "persons killed [...] in the security centers", including the one at Kampong Chhnang Airport. They add at paragraph 1374 that "the victims deaths were the result of the perpetrators' acts or omissions; those acts or omissions were the main cause of the victims' deaths."

1091. At paragraph 1377, the Co-Investigating Judges indicate first that at the worksites "some people were executed". Specifically with regard to the Kampong Chhnag Airport site, they then claim that "victims were [...] arrested and taken away to be killed nearby".

1092. In line with the paragraphs relevant to legal characterisation, the Co-Investigating Judges therefore only characterised as murder as a crime against humanity only in regard to execution at Kampong Chhnag Airport.

1093. The facts underpinning this charge are described at paragraphs 393-398 of the Closing Order under "Security". Those facts are divided into three sets of facts concerning which the Co-Investigating Judges recorded findings:

- the executions that occurred at that site or in the vicinity: paragraphs 393-395;
- sending workers to S-21: paragraph 396; and
- the executions of Southeast Zone soldiers at Mongol Khan Pagoda concurrent with the rearming of many workers to fight the Vietnamese in early 1979: paragraph 398.

[1132] Closing Order, paras. 1373, 1381, 1391, 1416, 1434 and 1470; Decision on Additional Severance, 04.04.2014, **E301/9/1**, para 44; Annex: List of paragraphs and portions of the Closing Order relevant to Case 002/02, **E301/9/1.1**, pp. 2-4

1094. Only the set first fact is of particular interest. The second set of fact concerns S-21, concerning which no deaths of the people that were sent there are alleged.

1095. Regarding the third set of facts, the Co-Investigating Judges entered their finding in breach of their *saisine*. Paragraph 47 of the Co-Prosecutors' Introductory Submission, the only paragraph which defines their *saisine* with regard to the facts at the Kampong Chhnang Airport worksite, refers to people who were arrested for committing offences and were taken away for execution. Those facts are unrelated to the events during which the people who were allegedly killed had been apparently fooled by individuals with authority over them during the conflict with Vietnam when workers were rearmed. Moreover, the reason for their execution is not mentioned. Finally, the deaths occurred at a pagoda located in a district (Teuk Phos) other than that where Kampong Chhnang Airport was located (Rolea Pier).[1133] Those facts are unrelated to the operation of the worksite. Therefore, KHIEU Samphan is not charged therewith.

1096. As concerns to the first subject and the executions alleged at paragraphs 393-395 of the Closing Order, sending KHIEU Samphan to trial based upon those facts is unconscionable.

1097. At paragraph 393 of the Closing Order, after noting that people had been arrested, The Co-Investigating Judges recorded the finding that:

> "Many witnesses said they could not be sure about the real fate of the disappeared persons as they did not see the execution."

1098. Moreover, at paragraph 395, after describing the testimony of a witness about the alleged existence of a "pit containing workers who had been executed in 1977", they point out that:

> "However, there are no human remains currently visible at the surface at this site."

1099. Again at paragraph 395, the Co-Investigating Judges recorded the finding that:

> "None of the witnesses personally observed the execution of workers from Kampong Chhnang Airport Construction Site. There is no evidence of any executions taking place at Kampong Chhnang Airport Construction Site itself."

1100. Finally, at the end of paragraph 396 regarding the transfer of prisoners to S-21, they indicated:

> "[…] some witnesses state that to their knowledge there were no disappearances, arrests or killings of workers."

[1133] Closing Order, paras. 383 and 398

1101. In the minds of impartial investigating judges, who are seeking both inculpatory and exculpatory evidence, there is no question that such elements would lead to dismissal of the case.

1102. In order to find to the contrary, the Co-Investigating Judges, whose sole preoccupation is their place in "history", rely on their flawed and far-fetched conclusions at the beginning of paragraph 395:

> "Several witnesses understood that he prisoners who had disappeared had been killed; they indicate that it was mainly workers from or associated with the East Zone. One witness heard that people were taken to be killed west of the airport. Another states that he saw dead bodies in pits at Piem Lok Mountain, approximately five kilometers from the airport; he presumed that those bodies were those of workers from Kampong Chhnang Airport Construction Site but he could not say so definitively." (*emphasis added*)

1103. For example, at the close of their investigation, the Co-Investigating Judges concluded that there were no eyewitnesses of the executions alleged at paragraph 47 of the Co-Prosecutors' Introductory Submission, no mass graves and/or bones and that it is highly likely that no executions took place at the Kampong Chhnang Airport worksite.

1104. Even so, they sent KHIEU Samphan to trial on the basis of shaky testimony from witnesses who "understood", "heard that" and "could not say definitively" that workers were executed at the Kampong Chhnang Airport worksite.

1105. Such an investigative procedure fails to meet the standards of exemplarity promoted by international justice as the example to follow.. No one should be sent to trial based on insufficient charges.[1134] KHIEU Samphan therefore need not address findings which violate his basic rights.

II. EXTERMINATION

1106. According to paragraph 1381 of the Closing Order, the Co-Investigating Judges found that the crime of extermination had been established, notably with regard to the "people who were killed or who died en masse [...] at the worksites," including Kampong Chhnang Airport. The general elements to take into account for all the sites where extermination is alleged are indicated are set forth at paragraphs 1382 and 1383, which are cited *supra*.[1135] In these paragraphs it is also stated

[1134] See *supra*, para. 87
[1135] See *supra*, para. 854

that elements "in addition to the relevant evidence" are to be taken into account for each of the sites in respect of which the crime is established.

1107. Those elements are set forth at paragraph 1387 for all the forced labour worksites in general:

> "Moreover [...] many people died as a result of the conditions imposed [...]; such conditions included deprival of food, accommodation, medical care and hygiene. This was also the case at **worksites**, with the added factor of hard labour." (*emphasis supplied*)

1108. According to the relevant paragraphs concerning legal characterisation, the Co-Investigating Judges therefore characterised only the deaths resulting from the living conditions at the Kampong Chhnang Airport worksite as extermination.

1109. Considering the weaknesses in the Co-Investigating Judges reasoning regarding the allegations of execution at the Kampong Chhnang Airport worksite which are characterised as murder, they made the right decision not to also characterise those facts as extermination.[1136]

1110. The charge of extermination in relation to the deaths resulting from the living conditions is based on the conclusions at paragraphs 391 and 392 of the Closing Order.

1111. Paragraph 391 concerns deaths resulting from work-related accidents:

> "Several witnesses state that the workers were regularly injured or killed by rocks. One witness saw the death of a person who was hit by fragments projected by a rock explosion."

1112. Paragraph 392 concerns living conditions in general:

> "Witnesses explain that a number of workers died from starvation, illness, overwork and exhaustion."

1113. Here again, the Co-Investigating Judges entered many of those findings in breach of their *saisine*. Paragraph 47 of the Co-Prosecutors' Introductory Submission refers to two types of deaths, first those resulting from starvation: "and the workers slowly starved."

1114. Then the deaths by execution, which the Co-Investigating Judges did not characterise as extermination.

1115. So these are not deaths resulting from accidents at the worksite, from illnesses or exhaustion. Exhaustion can be considered as resulting from gruelling work and lack of food. However, the link between lack of food and the occurrence of illness is no so direct. Given the conclusion at

[1136] See *supra*, paras. 1090-1105

paragraph 392 of the Closing Order where hunger is linked to illness, the link between those two factors and death cannot be taken for granted.

1116. Consequently, KHIEU Samphan need only answer to the deaths from starvation or from exhaustion resulting gruesome work and food deprivation.

III. ENSLAVEMENT

1117. According to paragraph 1391 of the Closing Order, the Co-Investigating Judges found that the crime of enslavement had been established in relation to the Kampong Chhnang Airport worksite. As discussed *supra*, according to paragraphs 1392 and 1394, the Co-Investigating Judges found that the crime was realised through a combination of two factors: exercising total control over the prisoners and forcing them to perform work without their consent, unpaid.[1137]

1118. The finding that a crime was committed is based on the Co-Investigating Judges' factual findings at paragraphs 389 to 392 of the Closing Order under "Living and Working Conditions"

1119. KHIEU Samphan must answer to the facts underpinning that charge.

IV. PERSECUTION ON POLITICAL GROUNDS

1120. According to paragraph 1416 of the Closing Order, the Co-Investigating Judges found that the crime of persecution on political grounds was established in relation to the Kampong Chhnang Airport worksite.

1121. As discussed in the segment on the Tram Kok cooperatives, only three groups, which were clearly defined by the Co-Investigating Judges at paragraph 1417 of the Closing Order, were allegedly victims of the crime of persecution on political grounds: former Khmer Republic officials, new people and Cambodian returnees.[1138]

1122. That legal characterisation runs counter to the facts described at paragraphs 383-398 regarding the Kampong Chhnang Airport worksite, in respect of which none of the groups named at paragraph 1417 of the Closing Order is mentioned.

[1137] See *supra*, paras. 867-869
[1138] See *supra*, paras. 883 -885

1123. Since none of the groups named at paragraphs 1417 of the Closing Order is mentioned, the charge at paragraph 1416 is unfounded. KHIEU Samphan need not answer thereto.

V. OTHER INHUMANE ACTS (THROUGH ATTACKS AGAINST HUMAN DIGNITY)

1124. According to paragraph 1434 of the Closing Order, the Co-Investigating Judges found that the crime of other inhumane acts (through attacks against human dignity) had been established in relation to the Kampong Chhnang Airport worksite.

1125. The elements relied upon by the Co-Investigating Judges in finding the crime had been established are stated at paragraph 1437: insufficient food in quantity and quality, appalling living conditions and inadequate medical care. These elements are described at paragraphs 389-92 of the Closing Order concerning detention conditions.

1126. Once again, at paragraph 47 of the Co-Prosecutors' Introductory Submission, the health-related problems at the Kampong Chhnang Airport worksite are not mentioned. Therefore, KHIEU Samphan must answer to all of the facts underpinning the charges, except for the ones relating to health problems.

VI. OTHER INHUMANE ACTS (THROUGH ENFORCED DISAPPEARANCES)

1127. According to paragraph 1470 of the Closing Order, the Co-Investigating Judges found that the crime of other inhumane acts through attacks against human dignity had been established in relation to the Kampong Chhnang Airport worksite. They then describe the evidence underpinning the crime is at paragraphs 1471 and 1472. That evidence is set forth *infra*.[1139]

1128. The Co-Investigating Judges' allegations are based on a finding at paragraphs 393-398 of the Closing Order where the disappearance of workers is mentioned several times under "Security".

1129. KHIEU Samphan must answer to those charges.

Section II. THE EVIDENCE PRODUCED

1130. Much of the evidence produced at trial (I) falls outside of the Trial Chamber's jurisdiction (II). Some of it suggests that some crimes may be established (III).

[1139] See *supra*, paras. 1277-1279

I. CATALOGUE OF THE EVIDENCE

1131. Between 9 June 2015 and 30 July 2015, the Chamber heard eight persons (six witnesses and two civil parties) during the segment on the Kampong Chhnang Airport worksite.[1140]

1132. Witnesses also gave testimony on Kampong Chhnang Airport during the hearings concerning other segments of the trial. They included MOENG Vet, SOY Saom CHUON, Thy IENG Phan and NHOEK Ly.

1133. Furthermore, in addition to written records of interview in Case 002, statements from Cases 003 and 004 which were tendered en masse during Case 002 refer to the Kampong Chhnang Airport.

II. OUT-OF-SCOPE EVIDENCE

1134. Once again, some of the evidence falls outside of the Trial's Chamber's jurisdiction. Since it is not possible to provide complete catalogue, a few examples of evidence relating to the work of witnesses at worksites other than the one at Kampong Chhnang Airport will suffice to drive the point home.

1135. For example, the answers of witness KEO Kin regarding his work in the nearby rice fields should be struck from the record.[1141] The same should apply to KHIN Vat's answers concerning his transfer to a farm away from the Kampong Chhnang Airport worksite.[1142]

III. EVIDENCE REGARDING CERTAIN CRIMES

1136. Some of the evidence suggests that the constitutive elements of the crime of enslavement, as alleged at paragraph 1391 of the Closing Order, have been established.

1137. Moreover, the Co-Investigating Judges characterised attacks against human dignity (paragraph 1434 of the Closing Order) and enforced disappearances (paragraph 1470) as other inhumane acts.

1138. According to the Supreme Court Chamber's "holistic" approach, at the time relevant to the facts, the residual category of the crime of humanity of other inhumane acts was not subdivided in the same way as it is in the Closing Order and the 002/01 Trial Judgement.[1143] The Defence neither not

[1140] Witnesses: CHAN Man, KEV Kin, KEO Leou, SEM Hoeun, Him Han, KHIN Vat; civil parties: KONG Siek, CHUM Samoeur.
[1141] KEO Kin: T. 11.06.2015, **E1/314.1**, pp. 25-28, after 10.00.07.
[1142] KHIN Vat: T. 29.07.2015, **E1/325.1**, p. 57, around 13.39.20; pp. 59-60, around 13.46.32; p. 69, around 14.14.20.
[1143] Case 002/01 Appeal Judgement, paras. 572 to 590

dispute this opinion nor that acts that could be generically characterised as other inhumane acts may occurred at the Kampong Chhnang Airport worksite.

Section III. DISCUSSION OF THE RELEVANT EVIDENCE

1139. The only facts that KHIEU Samphan is to answer to in this instance are those concerning the deaths from starvation and from exhaustion resulting from gruelling work; the Closing Order characterises those facts as extermination.

1140. Some witness testimonies or rewritten records of interview seem to indicate that deaths occurred at the Kampong Chhnang Airport worksite. This includes the testimony of Witnesses CHAN Man and KEO Leou whose written records of interview were used in support of the charges in the Closing Order.[1144] Witness SEM Hoeun also testified about deaths from living conditions.[1145]

1141. The witnesses also indicated that sometimes the quantities of food were sufficient and that people who became ill because of malnutrition received treatment. Whatever opinion one may hold about the quality of the medical care, that testimony shows that deaths were neither planned nor intended.

1142. For example, Witness CHAN Man explained that the food was sometimes adequate:

> "**Q**. Was any measure taken against – to prevent future reoccurrence of such issues including desperation by workers? For example, in terms of lack of food, was food issue resolved, because as you said the airport worksite at Kampong Chhnang was an important project from the point of view of the Party? Was food issue faced by workers resolved?
> **A**. There were some sorts of solutions to the food issue. Sometimes when there was enough rice to cook, the gruel we had was rather thick and the fish was brought in from the Great Lake but it was not abundant. It is very difficult for me to describe about the food situation at that time."[1146]

1143. As for witness KEO Leou, he described the care provided to the sick:

> "**Q**. And if a worker was feeling ill – well, did you ever see any of the workers ill or unwell, and would they get medical treatment – did they get medical treatment, from what you saw?
> **A**. For workers who were ill, only when their condition was serious – that is, they could not get up anymore, then the person would be sent to the medical unit."[1147]

[1144] See, for example, CHAN Man: WRI, **E3/5278**, 04.03.2009, ERN 00292823-24; WRI of KEO Leou: **E3/467**,ERN 00205074; T. 12.06.2015, **E1/315.1**, pp. 14-15, after 14.15.48, pp. 25-26, after 15.10.20.
[1145] SEM Hoeurn: T. 22.06.2015, **E1/319.1**, pp. 56-57, at around 13.49.39,
[1146] CHAN Man: T. 09.06.2015, **E1/312.1**, pp. 71-72, at around 14.25.20.
[1147] KEO Loeu: T. 12.06.2015, **E1/315.1**, p. 26, at around 15.12.39.

1144. Those elements prove that the staff at the Kampong Chhnang Airport worksite was not driven by the intent to cause the death of its workers.

Section IV. LEGAL CHARACTERISATION

I. DEFINITION OF EXTERMINATION (CRIME AGAINST HUMANITY)

1145. The *actus reus* of extermination consists in killing a on a large scale.[1148] As for its *mens rea*, the perpetrators(s) must have had the *dolus directus* of killing a large number of people or subjecting them to living conditions calculated to lead to their deaths.[1149]

II. LEGAL CHARACTERISATION OF THE FACTS

1146. Analysis of the facts reveals that the deaths which occurred at the Kampong Chhnang Airport worksite were not the result of acts decided upon by the worksite staff with the intent to kill a large number of people. Therefore, the crime of extermination cannot be established.

Chapter V. ALLEGED POLICY ON COOPERATIVES AND WORKSITES

1147. Case 002/02 concerns on facts which occurred in cooperatives and worksites. These two subject matters are directly linked to the overall situation in the country at the relevant time and the way in which the CPK planned to put Cambodia's economy back on its feet.

1148. At paragraphs 156 and 157 of the Closing Order, the Co-Investigating Judges state that the CPK leadership designed and implemented a common purpose consisting of five policies which included "the establishment and operation of cooperatives and worksites".

1149. At paragraph 169 of the Closing Order, the Co-Investigating Judges describe what they consider to be the purpose of the cooperatives and worksites, stating: "amongst other activities: rapidly increasing the production of paddy to three tons per hectare per crop; creating a country-wide irrigation network; increasing production of other products such as rubber and salt; and building infrastructure such as airfields or dams.". They state further that: "[t]hese matters were to be achieved regardless of their impact on the population". Lastly, they state that: "[a]nother objective

[1148] Case 002/01 Appeal Judgement, 23.11.2016, para. 517
[1149] Case 002/01 Appeal Judgement, 23.11.2016, paras. 517-522.

of this policy was to further the policy relating to detecting, defending against, re-educating and 'smashing' the enemy".

1150. KHIEU Samphan does not dispute that "put[ting] the population to work in order to provide food for internal consumption and for export" was among those objectives, but he strongly disputes that security was. Moreover, the Co-Investigating Judges' analysis completely ignores one important aspect of the situation, namely the impact of the armed conflict on the country's economy. Yet, the CPK's policies and decisions at the national and local levels cannot be dissociated from the war, given that it created a crisis situation.

1151. Democratic Kampuchea could not function "normally" in the context of a wartime economy (Section I). Even so, fomenting abuses was not among its objectives, as evidenced by official CPK documents (Section II).

Section I. WARTIME ECONOMY

1152. The dire situation in which Cambodia was plunged on 17 April 1975 was in itself a nearly insurmountable challenge for the new regime. Everything needed rebuilding. There was no manufacturing, the coffers were empty and the agricultural sector was devastated. It is somewhat puzzling that so much hearing time was devoted to the situation in the country at that time as well as the lack of food, hospitals and infrastructure, while ignoring the situation which prevailed prior to that.

I. MODERNISING AN OBSOLETE, OUTMODED SYSTEM WAS A NECESSITY

1153. In his book, Michael VICKERY highlights the fact that not many researchers and pundits on Democratic Kampuchea have focussed on life in the countryside in the pre-Khmer Rouge came period.[1150] He identifies the root causes of the "resentment" which was felt in places far removed from the cities, where the people lived in virtual "autarchy" and were accustomed to harsh living conditions.[1151] Michael VICKERY also highlights the importance of traditional medicine in rural areas, explaining that people continued to use traditional medicines continued to throughout the

[1150] Book by Michael VICKERY, *Cambodia: 1975-1982*, 1984, **E3/1757**, ERN 00396917-18.
[1151] Book by Michael VICKERY, *Cambodia: 1975-1982*, 1984, **E3/1757**, ERN 0396918-19.

period of Democratic Kampuchea.[1152] Lastly, he points out that the agriculture system was outdated and that many farmers were in debt.[1153]

1154. However, the modernisation of an outdated agricultural system which was the root cause of poverty in the rural areas appeared to be the only life raft in an atypical post-war context, marked by restrictions and a stagnant economy. The motto was "If we have rice, we can have everything".[1154] "War is waged with rice and the rice field is made with water". François PONCHAUD uses that age-old Khmer saying to explain why in Khmer Rouge vocabulary, dam construction sites were referred to as battlefields. It literally meant waging war in order to build a sustainable irrigation system.

1155. Relations with China, a major ally in the armed conflict and provider of technical assistance, also reflected the need to build new infrastructure, such as the airport at Kampong Chhnang, where the work was supervised by SON Sen.[1155]

1156. This is also why at that critical juncture in the country's history, when it was facing acute shortages, the idea of collective ownership and production within the framework of a communist ideology appeared to be worth the effort for all segments of society to work towards ensuring the country's survival.[1156] The aim was not to work for the benefit of a few, but rather to build a new society in which everyone could enjoy the fruits of a collective effort.

1157. Nevertheless, it should be acknowledged that the then prevailing chaos in the country, coupled with the incompetence of many leaders, officials and cadres, impaired a political programme, whose purpose was certainly not to enslave or brutalise the people. However, before turning to the directives specifically given to cadres on the management of cooperatives and worksites, it is

[1152] Book by Michael VICKERY, *Cambodia: 1975-1982*, 1984, **E3/1757**, ERN 00397096.
[1153] Book by Michael VICKERY, *Cambodia: 1975-1982*, 1984, **E3/1757**, ERN 00396931.
[1154] Article by François PONCHAUD, entitled "Kampuchea: A Revolutionary Economy A", 25.01.1979, **E3/2412**, ERN 00598519.
[1155] Meeting of the Standing Committee, 09.10.1975, **E3/182**, ERN 00183393; Minutes of Meeting of the Standing Committee, 15.05.1976, **E3/222**, ERN 00182665; Summary of the Decisions of the Standing Committee in the Meetings of 19, 20, 21 April 1976, **E3/235**, ERN 00183418; Minutes of Meeting of Standing Committee, 22.02.1976, **E3/229**, ERN 00182625; "What was China's Khmer Rouge Role?", 17.12.2011 (*The Diplomat*), **E3/7294**, ERN 00994170-72-; Shining a Light on the Forgotten Khmer Rouge Tunnels, 27-28 March 2010 (*The Cambodia Daily Weekend*), **E3/7321**, ERN 00583653-56.
[1156] of POL Pot's Interview with Yugoslav journalists, March 1978, **E3/5713**, ERN 00750097-98, 00750099-00; KHIEU Samphân's Speech, 15.04.1977, **E3/201**, ERN 00419512-13. See also PRAK Yut: T. 21.01.2016, **E1/380.1 (closed session)**, pp. 68-70, after 13.55.40; YOU Vann: T. 18.01.2016, **E1/377.1 (closed session)**, pp. 50-51, around 11.14.03, pp. 61-62, around 13.37.47..

important to point out that for the CPK, putting the economy back on its feet was akin to waging war.

II. STRUGGLE TO REVIVE THE ECONOMY UNDERMINED BY THE WAR AT THE FRONT

1158. It was against this background that a large number of soldiers were demobilised after the war in 1975 in order to participate in the major national reconstruction projects. In addition to military instructions, many records of division meetings emphasise the need to support the population.[1157] However, mobilisation at the border detracted from the ability to attend to other urgent matters. It certainly meant that soldiers could not be requisitioned for agricultural or reconstruction projects at that critical time.

1159. For example, after the liberation, IENG Phan, a battalion commander, spent three months at Prey Sar "farm[ing]" before being sent to Takeo to guard the border.[1158] There are many more testimonies about mobilisation in 1977. KHUN Kim alias NUON Paet, a battalion commander at post-liberation construction sites, testified that he "went back to [his] military work" in 1977 "[after [they were] invaded by [...] Vietnamese soldiers]".[1159] SAM Bit, Kampot Region Secretary and Ta Mok's deputy "[called on many mobile units to return to the front line]".[1160] CHAN Morn gave the example of his cousin who was sent from a mobile unit to the front line.[1161]

1160. NUON Trech also testified that he was mobilised from Kampong Chhnang Airport.[1162] KEO Loeur testified that soldiers had their weapons "removed" in 1975.[1163] A member of Unit K-4, which comprised wounded soldiers from Division 310, testified that in October 1977 "soldiers who

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1157 See for example: Minutes of the Meeting of Division 920, 16.12.1976, **E3/805**, ERN 00923161 ("Method for leading the attack [...] 4. Re: The border poles, we must keep watching closely. If the enemy moves any poles into our territory, we must remove them. [...] III. Strategic works of the military living in Mondolkiri are how to improve the image of the society and the geography locally, and how to defend the border successfully. Our tasks are to defend the border successfully, to unite with the people, to support the people, to help the people with rice farming works, to be the role model for the people and to improve the livelihood of the people, and the military. Housing for the military must be prepared nicely.").

1158 IENG Phan: T. 31.10.2016, **E1/492.1**, p. 12, after 09.38.27.

1159 WRI of KHUN Kim alias NUON Paet, **E3/360,** ERN 00268854 (the witness was called for testimony, but not testify before the Chamber for health reasons.); WRI of KUNG Kim, 09.01.2009, **E3/3959**, ERN 0027868. In this earlier written record of interview, he reported that at a meeting at Kampong Chhnang Airport, soldiers who had been remobilised and redeployed to the border were told that many Cambodians had been killed and that houses and paddy fields were set afire.

1160 WRI of KHUN Kim alias NUON Paet, 30.04.2008, **E3/360,** ERN 00268855.

1161 CHAN Morn: T. 10.06.2015, **E1/313.1**, pp. 60-61, before 13.57.21

1162 NUON Trech: T. 06.12.2016, **E1/507.1**, p. 68, around 13.56.31; T. 07.12.2016, **E1/508.1**, pp. 28-29, before 10.07.21.

1163 KEO Loeur: T. 15.06.2015, **E1/316.1**, pp. 66-57, after 15.15.08.

recovered from their injuries could be sent back to the battlefield".[1164] CHUON Thy testified that he "undertook agricultural and road reparation works" before being transferred to Svay Rieng in 1978.[1165]

1161. The loss of financial and military resources owing to the armed conflict adversely affected Democratic Kampuchea's ability to rebuild on a solid foundation. The insecurity at the border and its consequences on people's livelihoods and their movements,[1166] the rationing due to food shortages in the cooperatives and at the battle fronts, and the fact that the instability made it impossible to make any long-term economic plans, were all the direct consequences of the armed conflict.[1167]

Section II. THE OBJECTIVE WAS TO IMPROVE THE PEOPLE'S LIVING CONDITIONS

1162. Despite the war and its negative consequences, the objective of cooperatives and worksites was indeed to improve the people's living conditions, beginning with those of the farmers who had been Cambodia's forgotten people for decades. With its Marxist outlook, the CPK no doubt painted an idealised picture of the poor farmer as symbolising a new and more egalitarian society in an independent Democratic Kampuchea, without anticipating the resentment described in VICKERY's writings, which led to excesses in some areas.

[1164] KEO Loeur: T. 15.06.2015, **E1/316.1**, pp. 62-63, around 14.42.03.

[1165] CHUON Thy: T. 25.10.2016, **E1/489.1**, pp. 73-74, around 14.01.42; T. 26.10.2016, E**1/490.1**, pp. 107-108, around 15.48.35.

[1166] See for example: Telegram from Phuong, 15.01.1978, ERN 00183644-45 on the impact of the fighting in Memot: the torching of infrastructure, death or theft of livestock; Division 260 Political Section Report, 15.04.1978, **E3/860**, ERN 00185201 (impact of the fighting in Tramoung District: "1. Regarding the Yuon enemy that invaded the Eastern Zone East, especially Tramoung district at Kdol and... We have attacked them and they ran back into their country. 2. The Yuon enemy that entered Kdol village took many cows, buffaloes, hundreds of pigs and chickens – only a few left from their seizure. [...] 4. I would like to tell the party that in Kdol village there were many pigs, chickens, cows and buffaloes. I have told the district committee and region many times that they should have moved these [properties] back into [the territory] but they did not listen to me. Now Yuon have taken almost 95%. I would like to request the party to take measures."). IENG Phan testified that people left Svay Rieng: T. 31.10.2016, **E1/492.1**, p. 57, before 13.32.52 ("Upon my arrival, people had been evacuated already because of the intense fighting between the Vietnamese and Kampuchean troops."). CHUON Thy: T. 25.10.2016, **E1/489.1**, p. 81, after 14.21'33 (he confirms "When we arrived, we did not see any civilians there, not even a single civilian; there were only soldiers.").

[1167] See attacks on rubber plantations, a tradable commodity: MOENG Vet: T. 27.07.2016, **E1/449.1**, pp. 46-47, around 11.13.32.

1163. That does not mean that the plan was not driven by objectives that are far removed from the crimes with which KHIEU Samphan is charged (I). Moreoveer, agriculture was the only means to acquire the resources needed for the people's livelihood (II).

I. OBJECTIVES OF THE OF COOPERATIVES AND WORKSITES

1164. In the minutes of the Meeting of the Standing Committee, which was at the centre of the policy, the only policy was: "The Party's axiom is to sort out living standards."[1168] Cooperatives were only aimed at achieving that objective, and not at going after the enemy, contrary to what is stated in the Closing Order.

1165. Cooperatives were primarily aimed at improving the means of production so as to enable people to have "more fish, more meat and vegetables" and, in broader terms, to enjoy better living conditions.[1169] Improvements in daily living standards were to be viewed as a revolutionary duty,[1170] and as an integral part of the country's defence as the rallying point of the people's commitment to the Revolution.[1171]

1166. Furthermore, the various issues of *The Revolutionary Flag* contained details on the specific measures to be taken regarding the people, which included rationing owing to shortages' and proposing remedial solutions in the form of crops, livestock, clothing and shelter.[1172] The aim of using the people as a source of labour was not to enslaving them but rather to ensure that the country made it through that critical period by securing the means to acquire machinery.[1173] Such measures

[1168] Record of the Standing [Committee's] visit to the Northwest Zone, 20-24.08.1975, **E3/216**, ERN 00850976.
[1169] *Revolutionary Flag*, August 1975, **E3/5**, ERN 0401509.
[1170] *Revolutionary Flag*, October-November 1975**, E3/748**, ERN 00495818: "The promotion of people's living standards should be considered as fundamental and on-going duties.".
[1171] *Revolutionary Flag*, October-November 1975, **E3/748**, ERN 00495819-20; *Revolutionary Flag*, November 1976**, E3/139**, ERN 00455283-84 ("Why did the Party designate 13 bushels? Because of the economic and political meaning. The objective was let people have enough to eat. For centuries the labouring people have not had enough to eat. During war, the people had to withstand many pitiful hardships, not being able to make ends meet. After liberation, during 175 and 1976, during this one-and-a-half-year period, the people still have shortages. Therefore, this is why we have gone all out to increase production during 1976 to supply the people so they will have enough. When the people have enough to eat, the people are warm and push the movement of socialist revolution and building the country to even greater leaps.").
[1172] *The Revolutionary Flag*, February-March 1976, **E3/166**, ERN 00517832-33.
[1173] *Revolutionary Flag*, February-March 1976, **E3/166**, ERN 00517834.

were also a preoccupation for the army, [1174] and were advocated throughout the Democratic Kampuchea period. [1175]

1167. Paragraph 172 of the Closing Order refers to the minutes of a 1976 meeting in order to show that shortages were reported during visits to bases, but does not mention that efforts were made to resolve those issues and that the situation improved as compared to the previous year.[1176] Moreover, the already critical situation was further exacerbated by other the challenges other duch as natural disasters, including the severe flooding in 1978[1177] and the failure to grow the right crops.[1178]

1168. Some witness accounts concerning the conditions in the worksites omit to mention the recommendations on working conditions and sanitation, which included the Party's non-discrimination policy. Both the Co-Investigating Judges and the Co-Prosecutors omit to mention that when referring to telegrams.[1179]

1169. Yet, CPK publications contained a clear message on the need to treat the people well. As far as the CPK was concerned, it was the responsibility of the cadres to take good care of the people, who were referred to rather poetically in one issue of *The Revolutionary Flag* as "precious diamonds".[1180]

1170. Party youth were especially urged to take keen interest in understanding the problems the people were facing and to do everything to resolve them.[1181] By contrast, cadres who did not conform to those principles were excoriated and denounced as engaging in counter revolutionary conduct[1182] which was at odds with the Party's principles.[1183]

[1174] Minutes of army meeting, 15.12.1976, **E3/804**, ERN 00233719.
[1175] Nhim's report, 11.05.1978, **E3/950**, ERN 00185216; Nhim's report, 16.05.1978, **E3/863**, ERN 00321961.
[1176] Minutes, 2nd Council of Ministers Meeting, 31.05.1976, **E3/794**, ERN 00182676, 00182679, 00182681-00182682, 00182684.
[1177] See for example KAN Thorl: T. 11.08.2015, **E1/328.1**, p. 45, after 11.32.40 ("It was in 1978 when there was severe flooding"), p. 80, around 15.15.55; SEN Sophon: T. 28.07.2015, **E1/324.1**, p. 11, at 09.26.00; MEAS Soeurn: T. 29.06.2016, **E1/446.1**, p. 40, after 10.57.00; NUON Trech: T. 07.12.2016, **E1/508.1**, p. 27, after 10.04.15.
[1178] DK Telegram, 10.01.1978, **E3/918**, ERN 00182758.
[1179] Telegram from KE Pauk, 02.04.1976, **E3/511**, ERN 00182658.
[1180] *Revolutionary Flag*, November 1976**, E3/139**, ERN 00455303.
[1181] *Revolutionry Female and Male Youths*, November 1975, **E3/750**, ERN 00522453 ("[They] are the servants and the flesh and blood of the people. [They] must have a practical measure and personally use their best ability to help the people to solve their livelihood problem."), ERN 00522254-57; *Revolutionry Female and Male Youths*, April 1976, **E3/732**, ERN 00611521.
[1182] *Revolutionry Youths*, April 1976, **E3/732**, ERN 00392441-42, 00392445.
[1183] *Revolutionary Flag*, July 1976, **E3/738**, ERN 0018530; Statute of the Communist Party of Kampuchea, undated, **E3/214**, ERN 00184033.

1171. The treatment of New People was a key component of the way cooperatives operated, as highlighted in the of CPK letter concerning non-discrimination.[1184] Rallying and mobilising the people were considered crucial to ensuring the success of the Revolution.[1185] In Case 002/01, Steve HEDER was questioned about an article he wrote about a number of CPK publications whose content demonstrates that all forms of discrimination against the New People in the cooperatives were forbidden.[1186]

II. AGRICULTURE: THE ONLY SOURCE OF CAPITAL

1172. The Prosecution's easy argument that Democratic Kampuchea experienced shortages because it was exporting its rice reflects a rather narrow view of the country's international trade policy. The fact of the matter is that faced with the lack of manufacturing and empty coffers, the country was in dire need of funds to purchase goods and products which were not available locally and were a necessity for the people.[1187] Medicines were high on that list.[1188] It was therefore vital to maintain a modicum of trade relations with friendly countries.[1189]

1173. Rice for export was considered as surplus,[1190] with some set aside to cater for any shortages.[1191] The inaccurate reports from the bases concerning surpluses are testimony that CPK Standing

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[1184] Record of Standing [Committee's] visit to the Northwest Zone, 20-24.08.1975, **E3/216**, ERN 00850975 ("The important problem is to sort out the political situation of the people, and do whatever is necessary to make the people stable in a monolithic bloc of solidarity with the State power. The Revolutionary State must govern the people well in every domain, politically, ideologically and organisationally. If things are done in this manner, no enemy will be able to attack us.".), ERN 00850976 ("In order to be able effectively to defend the country, the issue of people's living standards in the cooperatives must be resolved. We are striving to sort things out for the new people too, to make them satisfied with the Revolution and make them see that this regime is one and belongs to them and they no longer so that they no longer desire to anywhere else.").

[1185] *Revolutionary Flag*, October-November 1977, **E3/737**, ERN 00182586-88.

[1186] Article by Steve HEDER entitled: "Reassessing the Role of Senior Leaders and Local Officials in Democratic Kampuchea Crimes: Cambodian Accountability in Comparative Perspective", March 2003, **E3/4527**, ERN 00661462-63.

[1187] Record of Standing [Committee's] visit to the Northwest Zone, 20-24.08.1975, **E3/216**, ERN 00850978; Minutes of Standing Committee's Meeting on "Party's Four-Year Plan to Build Socialism in All Fields, 1977-1980", 21.07-02.08.1976, **E3/213,** ERN 00104023-24; Article by François PONCHAUD entitled "Liberated Cambodia", January 1976, **E3/4589**, ERN 00323686.

[1188] Interview of KHO Vanny, 22.09.2005, **E3/5659**, ERN 00442652-53; WRI of KE Pich Vannak, 04.06.2009, **E3/35**, ERN 00346150-51.

[1189] KHIEU Samphan Receives Yugoslav Trade Delegation, 03.02.1977 (FBIS), **E3/1485**, ERN 00168405-06; Philip SHORT, *Pol Pot: Anatomy of a Nightmare*, **E3/9**, pp. 389-390, ERN 00396508; Minutes of Meeting of the Standing Committee, 22.02.1976, **E3/230**, ERN 00182546-47.

[1190] *Revolutionary Flag*, April 1976, **E3/759**, ERN 00517865; *Revolutionary Flag*, October-November 1977, **E3/737**, ERN 00182592.

[1191] Minutes of Meeting on Base Work, 08.03.1976, **E3/232**, ERN 00182633 ("Propose the genuine/true amount of rice. Upper echelon need to know the amount so it can easily make arrangements, for one thing in solving the livelihood of the people, but for another thing about sale and exchange as well. (…) As for 103, previously, *Angkar* decided to

Committee was not in full control of the situation all across the country.[1192] That is also reflected in reports about problems being covered up by the upper echelon.[1193] The abuses arose from wrongful conduct on the part of chairmen of the cooperatives.[1194]

1174. So it again this all revolves around the fact that there is a big difference between the way that policies were envisaged and how they were actually implemented on the ground. Indeed, that is the essence of our submissions on joint criminal enterprise (JCE), because the only policy to which KHIEU Samphan subscribed was that which enabled him to resolve the problems facing the people. He neither encouraged nor contributed to the commission of the crimes which occurred on the ground. An impartial trier of fact ought to take account of that.

Part II. SECURITY CENTRES

Chapter I. S-21

Section I. CHARGES

1175. As to the facts which occurred at the S-21 Security Centre, KHIEU Samphan is charged with the crimes of murder, extermination, enslavement, imprisonment, torture, persecution on political grounds, persecution on racial grounds, other inhumane acts including attacks against human dignity as crimes against humanity.[1195] He is also charged with the crimes of wilful killing, torture,

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take 1,000 tonnes. Now, only 500 tonnes will be taken. This amount is to be kept in at that location first, as reserves, in case there are shortages.").

[1192] MEAS Voeun: T. 04.10.2012, **E1/130.1**, pp. 69-71, 13.59.50-14.07.34 MEAS Voeun was sent to the region of Preah Vihear in late 1978 owing to the actions of KANG Chap, head of the new North Zone vis-à-vis the people. During his conversation with POL Pot, the latter reportedly asked him to investigate the matter, thereby demonstrating that he did not have total control of the situation. See also regarding the false reports from the bases: Interview of KHO Vanny, 22.09.2005, ERN 00442658-59.

[1193] NHIP Horl: T. 25.08.2015, **E1/336.1**, p. 36, before 10.52.41; MAM Soeurn *alias* HENG Samuoth: T. 28.07.2015, **E3/324.1**, pp. 91-92, after 15.37.03; T. 29.07.2015, **E3/325.1**, pp. 39-40, after 10.42.27. See also statements by SIHANOUK in an interview which was played during in the Case 002/01 closing arguments: T. 25.10.2013, **E1/234.1**, pp. 45-48, 11.00.33-11.05.45.

[1194] Interviews With Kampuchean Refugees at the Thai-Kampuchea Border, by Masato MATSUSHITA and Steve HEDER, February-March 1980, **E3/1714**, ERN 00170702 ("We then understood that one of the problems was [that] each co-op was supposed to be a little self-independent society and that co-oops were supposed to provide statistics on rice production, population and the needs of the people to the higher levels. The mount of rice to be sent to the State was the sole responsibility of the co-op chairman but many co-op chairmen inflated the production figures in order to make themselves look good in the eyes of the Party, and sent rice to the State at the expense of popular consumption."); Excerpts from book by R. A. BURGLER, *The Eyes of the Pineapple*, 1990, **E3/7260**, ERN 00995822.

[1195] Closing Order, paras. 1373, 1376, 1379-1380 (murder), paras. 1381-1383, 1385, 1387-1390 (extermination), paras. 1391-1396 (enslavement), paras. 1402-1404, 1406-1407 (imprisonment), paras. 1408-1414 (torture), paras. 1415-1418, 1424-1425, (persecution on political grounds), paras. 1415, 1422-1423 (persecution on racial grounds), paras. 1434-1435, 1438-1441 (attacks against human dignity); Annex: List of paragraphs and portions of the Closing Order

inhumane treatment, wilfully causing great suffering or serious injury to body or health, wilfully depriving a prisoner of war or civilian of the right to a fair and regular trial, unlawful confinement of a civilian as grave breaches of the Geneva Conventions.[1196]

1176. The facts relating to former Khmer Republic soldiers, which are characterised as political persecution as a crime against humanity, are discussed *infra* in the segment on the crimes alleged against them.[1197]

1177. Moreover, unlawful deportation of a civilian as a grave breach of the Geneva Conventions is mentioned in the Annex on the list of paragraphs and portions of the Closing Order relevant to Case 002/02. The Trial Chamber is not seised of factual allegations of deportation. In fact, the only acts in the Closing Order which could qualify as unlawful deportation of a civilian relate to the capture of Vietnamese civilians by the Kampuchea Revolutionary Army on Vietnamese territory and their subsequent transfer to S-21.[1198] When the Trial Chamber decided to sever the trials, it expressly excluded those facts from the case[1199] and therefore cannot adjudicate them.

Section II. THE EVIDENCE PRODUCED

I. ORAL EVIDENCE

1178. During the substantive hearings concerning S-21, the Chamber heard ten witnesses (NHEM En, TAY Teng, LACH Mean, PRAK Khorn, MAK Thim, HIM Huy, SUOS Thy, KAING Guek Eav *alias* Duch, NOEM Oem, HIN Sotheany,[1200]) one civil party (CHUM Mey) and one expert (VOEUN Vuthy).

relevant to Case 002/02002/02, **E301/9/1.1**, pp. 3-4.

[1196] Closing Order, paras. 1491-1493 (wilful killing, paras. 1498-1500 (torture), para.1501-1503 (inhumane treatment), paras. 1504-1506 (causing great suffering to physical or mental health), paras. 1507-1510 (wilfully depriving a prisoner of war or a civilian of the right to a fair and regular trial), paras.1515-1517 (unlawful deportation of a civilian), paras. 1518-1520 (unlawful confinement of a civilian); Annex: List of paragraphs and portions of the Closing Order relevant to Case 002/02, **E301/9/1.1**, p. 5.

[1197] See *infra*, paras. 2273-2276.

[1198] Closing Order, paras. 1515-1517.

[1199] Annex: List of paragraphs and portions of the Closing Order relevant to Case 002/02, **E301/9/1.1**, pp. 2 and 5.

[1200] HIN Sotheany was not heard in regard to the facts but rather in regard to the OCIJ prisoner list.

II. DOCUMENTARY EVIDENCE

1179. In terms of documentary evidence, the record contains a number of written records of interview from Cases Files 002 Case and 003/004, as well as trial transcripts from Cases Files 002/01 and 001.

1180. In addition to that, it also contains a large number of S-21-related documents. Some were authenticated or simply commented upon by KAING Guek Eav *alias* Duch ("Duch") during both his trial and his testimony in Case 002/02. Although the documents he identified must be distinguished from those on which he simply made assumptions, the Defence does not dispute that prisoner lists were established at S-21 or that the majority of the persons on those lists were executed after detention.

1181. It is however important to take a closer look at three prisoner lists which were prepared by the Co-Prosecutors and the Office of the Co-Investigating Judges (OCIJ), and admitted into evidence (A), as well as one record of interview which was admitted into evidence shortly before closure of the hearings. (B).

A. OCIJ Prisoner Lists

1182. A first S-21 prisoner list comprising 12,273 entries was prepared by the Prosecution on 19 May 2009 in Case 001 and automatically admitted into evidence in Case File 002/02 on 7 February 2014 (Document E3/342).[1201] A second list of S-21 prisoners comprising 15,101 names was prepared by the OCIJ and automatically admitted into evidence by the Trial Chamber on 5 April 2016 (Document E3/10604).[1202] Subsequent to that, on 8 August 2016, the Prosecution prepared a third list of 1,606 prisoners who were not on the OCIJ list (Document E393/2.1). Despite the Defence's objection to the admission of this list which was to be considered as an in-house working document in support of the Prosecution's claims rather than as an item of evidence per se,[1203] the Trial Chamber still proceeded to admit it on 16 December 2016.[1204] On 17 April 2017, the Prosecution amended its earlier list, reducing it to 1,592 entries.[1205]

[1201] Memorandum, 07.02.2014, **E302/5**.
[1202] Memorandum, 05.04.2016, **E393**.
[1203] *Réponse de KHIEU Samphân.* 03.10.2016, **E393/3/1**.
[1204] Memorandum, 16.12.2016, **E393/4**.
[1205] OCP Request for Correction, 17.04.2017, **E393/2/Corr-1** and **E393/2.1/Corr-1**.

1183. It should be emphasised that in and of themselves those lists do not amount to evidence but rather, to the product of a review of the evidence on the record. This is why the Defence did not object to admitting documents that the OCIJ relied upon in preparing its list.[1206] The Trial Chamber must therefore base its findings on that evidence and not on the lists, as they are simply a means for it to reference for the evidence. It is important to highlight this point, because the lists prepared by the Prosecution, which is a party to case, and by definition partial, are the result of review and interpretation of the evidence for inculpatory purposes.

1184. Moreover, the Trial Chamber should refrain from drawing any hasty conclusions based on period documents which were used to establish the lists. The reason is because, for example, some of the people on those lists may still be alive; one example is the man listed as No. 1248 on the OCIJ's list, who was interviewed by DC-Cam in 2003 and 2006...[1207]

B. <u>Document E3/10770</u>

1185. Some discussion is in order concerning a document which was admitted towards the closure of the evidentiary hearings, in particular concerning the way it was handled by the Trial Chamber. The document at issue is E3/10770[1208] consisting of a bound material which was presented as an original; it is about 250 pages long and consists of S-21 prisoner records for the year 1977 (the "record") in table form. It was obtained through Walter HEYNOWSKI. The parties were not informed of its existence until 7 December 2016.[1209] They discussed its admissibility at the 9 December 2016 hearing.[1210] They were afforded very little time to acquaint themselves with it before the hearing on its admissibility. The Defence was therefore unable to thoroughly analyse it.. Even so, it demonstrated that there is a big difference between a document that is already on the case file and a page from the record concerning an entry dated 25 October 1977,[1211] thereby raising questions about the reliability of the document at issue.

[1206] T. 02.05.2016, **E1/425.1**, p. 63, at 13.51.30.
[1207] OCIJ S-21 prisoner list , **E3/10604**, No. 1248, NHEM Sal, where it is stated as follows: "(D01139)-p.80 or (ERN 01009876-01009981), and (D15712)-p.10 and p.11. This person was interviewed by DC-Cam in 5 August 2003 (TKI0280) and on 6 September 2006 (for DC-Cam "Searching for the Truth" Magazine) during which he stated that he was sent from S-21 to Prey Sa and then he managed to escape. (D01139)-p.80 states that this person entered into S-21 on 19 April 1976. But (D15712), pp.10 and p.11, states that this individual was sentto at S-21 on 22 April 1976".
[1208] S-21 Prisoner List Daily Report, **E3/10770**.
[1209] Memorandum, 07.12.2017, **E443/2**.
[1210] T. 09.12.2016, **E1/510.1**, pp. 7-23, 09, between 15.11 and 09.46.43.
[1211] T. 09.12.2016, **E1/510.1**, pp. 22-23, pp. 7-23, between 09.15.11 and 09.46.43.

1186. It was therefore only logical for the Defence to request the testimony of the only two witnesses, SUOS Thy and Duch, who were in a position of to authenticate the record and to elaborate on its content.[1212] Surprisingly, the International Co-Prosecutor opposed the request.[1213] The Defence also requested that Walter HEYNOWSKI be called to testify, to enable it can to question him about the chain of custody of the record. The request to recall the two witnesses was denied, and after several attempts, the Trial Chamber decided not to call Walter HEYNOWSKI for testimony. The Trial Chamber admitted the record into evidence by means of a memorandum dated 27 December 2016, i.e. two weeks before the conclusions of the substantive hearings.[1214]

1187. Considering the virtually total lack of original documents on the case, it is quite regrettable that the only document presented as an original was treated so lightly. On the one hand, the information provided by Walter HEYNOWSKI notwithstanding, the circumstances in which he gained custody of the record raise more questions than answers. Indeed, based on his exchanges with the Trial Chamber, it is unclear who he received the document from or why he was able to take it with him to Germany.

1188. Photographs in the record were taken when it was received by the ECCC. The staples on some of the photographs raise questions as to what the record appeared like originally.[1215] Were they originally loose pages which were later collated to form a record at the time relevant to the facts? When exactly were they collated, and by whom? What do the numbers and annotations appearing on the bound log signify? Were any additions made to the record after the Democratic Kampuchea period? Who handled the record during the more than 40 years it was not in Cambodia? Legitimate as they are, those questions remain unanswered in a case of such significance.

1189. The mere fact that SUOS Thy acknowledged having kept the record during his stint at S-21[1216] was sufficient for the Trial Chamber to dispense with recalling him.[1217] According to the Trial Chamber, the parties had ample opportunity to question Witnesses Duch and SUOS Thy as to the content of

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[1212] T. 09.12.2016, **E1/510.1**, pp. 17-18, pp. 7-23, between 09.15.11and 09.46.43, pp. 21-22, between 09.42.09 and 09.44.58.
[1213] T. 09.12.2016, **E1/510.1**, pp. 20-21, between 09.40.44 and 09.42.42
[1214] Memorandum, 27.12.2016, **E443/3**.
[1215] Photos from orange log book, **E3/10789**, ERN 01376695, 01376712.
[1216] T. 06.06.2016, **E1/432.1**, pp. 74-78, from 14.29.36 to 14.39.52.
[1217] Memorandum, 27.12.2016, **E443/3**, para.4.

dozens of similar records, which were available on the case file at the time of the witnesses' testimony.[1218]

1190. However, "dozen of pages" is nothing compared to the 250-page record. Moreover, as highlighted by the Defence, the difference between one of the sheets admitted into evidence and Walter HEYNOWSKI's record only raised more issues, especially given that a more in-depth analysis raised further issues about the record.

1191. For example, it is plain that many pages have annotations of different ink colours on different pages or on the same pages.[1219] Many figures were crossed out and corrected[1220] and different handwritings appear on the same page.[1221] Since it was SUOS Thy who kept the record, he could have answered such questions and ascertained whether the markings, deletions or annotations were made by him or other members of the S-21 personnel, or for that matter, whether they were made after the Democratic Kampuchea period.

1192. Absent the testimony of Walter HEYNOWSKI, who had custody of the log for several decades, it is uncertain whether those markings and annotations were already in place when he first consulted the record or whether they were added subsequent to that. No opportunity was afforded to question him about how the record was obtained, how it was used it and the conditions of its custody.

1193. The foregoing remarks are important, in that the Trial Chamber ought to take full account of the fact that it was a mistake to admit the record into evidence. Much has been said and written about the number of people who were detained and executed at S-21, and the Trial Chamber will no doubt be tempted to draw conclusions therefrom in its deliberations. However, Record E3/10770 will inevitably be afforded very low probative value given that it was the Trial Chamber's decisions were are the reason why legitimate questions about its reliability went unanswered. That is why the Chamber should omit it from its deliberations.

[1218] Memorandum, 27.12.2016, **E443/3**, para.4.
[1219] S-21 Prisoner List Daily Report, **E3/10770**, see for example ERN 01460424, 01460454, 01460459, 01460517 and 01460737.
[1220] S-21 Prisoner List Daily Report, **E3/10770**, see for example ERN 01460609-10, 01460562-63.
[1221] S-21 Prisoner List Daily Report, **E3/10770**, see for example at ERN 01460430, 01460435, 01460699.

III. FACTS OUTSIDE THE SCOPE OF CASE 002/02

1194. Even if the Trial Chamber were to accept testimony on factual allegations characterised as rape committed at S-21, the fact still remains that such facts are not part of the charges against KHIEU Samphan.[1222] The Trial Chamber must therefore exclude from its deliberations any and all evidence admitted and heard on facts with which KHIEU Samphan is not charged.

1195. As to the crimes possibly committed at Prey Sar (S-24), the Co-Investigating Judges decided to address them separately from those relating to S-21.[1223] For instance, the facts relating to Prey Sar are discussed in the segment concerning worksites, while the facts relating to S-21 are discussed in the segment concerning security centres. In the Annex to the Severance Decision, the Trial Chamber identified the paragraphs of the Closing Order relating to the crimes allegedly committed at the worksites. The Prey Sar worksite is not mentioned there.[1224] Consequently, facts which could amount to crimes at Prey Sar are extraneous to Case 002/02. The Trial Chamber must therefore strike from the record any and all evidence admitted and heard in regard to facts with which KHIEU Samphan is not charged.

Section III. DISCUSSION OF THE RELEVANT EVIDENCE

[1222] See *supra*, paras. 171-203.
[1223] Closing Order, para.415.
[1224] Annex: List of paragraphs and portions of the Closing Order relevant to Case 002/02, **E301/9/1.1**, p. 2.

1196. As regards the evidence concerning S-21, including statements by Duch, who was chairman of the security centre, and by guards who were part of its staff, the Defence does not dispute that some facts of the facts which occurred there can be characterised as murder, extermination, enslavement, torture, persecution on political, racial, or religious grounds and other inhumane acts (attacks against human dignity) as crimes against humanity, or that facts can be characterised as wilfully causing great suffering or serious injury to body or health, or as wilfully depriving a prisoner of war or a civilian the rights of a fair and regular trial, and unlawful confinement of a civilian, which constitute grave breaches of the Geneva Convention. However, as regards persecution on racial grounds, the evidence does not support the conclusion that the crime of persecution was committed there.

1197. In the Closing Order, the legal characterisation of the factual allegations pertaining to the racial persecution of Vietnamese people hinges very broadly speaking on the fact that "[t]he CPK considered the Vietnamese to be racially distinct from the Cambodian people, based on biological and particularly matrilineal descent [...]. Vietnamese people were deliberately and systematically identified and targeted due to their perceived race."[1225] In the factual characterisation of the crimes relating to S-21, the Co-Investigating Judges laid out the facts relating to the presence of Vietnamese prisoners at that facility, their arrest, the reasons therefor and their execution.[1226]

I. ARREST OF VIETNAMESE AND THEIR PRESENCE AT S-21

A. Presence of foreigners at S-21

1198. According to the Closing Order, the majority of the S-21 prisoners were Cambodians. They were mainly former members of the Revolutionary Army of Kampuchea of all ranks, former general staff personnel, former CPK cadres, S-21 personnel,[1227] and individuals from all professional categories with ties to those suspected of subversive activities against the regime.[1228] It is also alleged that the prisoners included a number of foreign nationals, such as Thais, Laotians, Indians, Westerners and Vietnamese.[1229] These facts were not disputed during the substantive hearings.

[1225] Closing Order, para. 1422.
[1226] Closing Order, paras. 433, 437-438, 454-455, 468.
[1227] Closing Order, paras. 424-431.
[1228] Closing Order, para. 432.
[1229] Closing Order, para. 433.

B. Uncertainty about the number of Vietnamese at S-21

1199. In their testimony, Witnesses LACH Mean, PRAK Khan, HIM Huy, SUOS Thy, Duch and NOEM Oem confirmed that there were Vietnamese[1230] prisoners at S-21. Some witnesses testified that they saw only Vietnamese soldiers,[1231] while others testified that they saw civilians.[1232] Duch testified that the majority were Vietnamese soldiers.[1233] Although there are lists of Vietnamese prisoners on the case file, their total number was not discussed during the proceedings.[1234] LACH Mean said that he once saw [about] three trucks at S-21 with more than 100 Vietnamese aboard.[1235]

C. Uncertainty as to when Vietnamese were first sent to S-21

1200. The Co-Investigating Judges noted that according to the registers, the first arrest of a person described as Vietnamese occurred on 7 February 1976,[1236] but then went on to say that according to Duch, there were a small number of Vietnamese prisoners at S-21 as already in 1975. Nonetheless, with regard to the first point, no cross-reference to a register, and with regard to the second point, Duch's in-court testimony[1237] is contradicted by the testimony he gave in Case 002/02. For example, at the hearing on 13 June 2016, he testified that to his recollection, Vu Dinh Ngo was the first Vietnamese soldier to be arrested, on 6 January 1978.[1238]

1201. Based on such shifting testimony and what transpired from the testimonies of other witnesses during that particular trial segment, the exact date on which Vietnamese were first sent to S-21 cannot be ascertained. Those testimonies only show that a large number of Vietnamese prisoners was sent there when the armed conflict with Vietnam escalated in 1977-1978.[1239] The majority of

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1230 LACH Mean: T. 25.04.2016, **E1/421.1**, pp. 89-90, around 15.33.53; PRAK Khan: T. 27.04.2016, **E1/423.1**, pp. 104-105, between 15.57.03and 15.59.05; HIM Huy: T. 04.05.2016, **E1/427.1,** pp. 80-81, between 14.26.19 and 14.27.20; SUOS Thy: T. 07.05.2016, **E1/433.1**, pp. 30-36, 10.32.50 - 10.44.48; Duch: T. 16.06.2016, **E1/439.1**, pp. 39-40, between 11.03.36 and 11.05.26; NOEM Oem: T. 15.09.2016, **E1/474.1**, p. 61, between 13.52.32 and 13.54.08.
1231 HIM Huy: T. 04.05.2016, **E1/427.1,** pp. 80-81, between 14.26.19 and 14.27.20.
1232 PRAK Khan: T. 27.04.2016, **E1/423.1**, pp. 104-105, between 15.57.03 and 15.59.05; SUOS Thy: T. 07.05.2016, **E1/433.1**, pp. 30-36, between 10.32.50 and 10.44.48.
1233 T. 13.06.2016, **E1/436.1**, , p. 94, around 15.09.18; T. 16.06.2016, **E1/439.1**, pp. 11-12, between 09.29.14 and 09.31.01, p. 30, before 10.40.05, pp. 39-40, between 11.03.36 and 11.05.26.
1234 Regarding the lists, see for example **E3/9423**, **E3/9424**, **E3/9525**, **E3/9426**.
1235 T. 25.04.2016, **E1/421.1**, p. 89, around 15.33.53.
1236 Closing Order, para. 433.
1237 T. 001, 10.06.2009, **E3/525**, p. 2.
1238 T. 13.06.2016, **E1/436.1**, p. 90, around 15.01.08; T. 16.06.2016, **E1/439.1**, pp. 11-13, 09.26.54 - 09.33.10.
1239 LACH Mean: T. 25.04.2016, **E1/421.1**, p. 94, around 15.33.53; T. 26.04.2016, **E1/422.1**, pp. 31-32, between 10.48.02 and 10.51.06; PRAK Khan: T. 27.04.2016, **E1/423.1**, pp. 104-105, between 15.57.03 and 15.59.05; SUOS Thy: T. 07.05.2016, **E1/433.1**, pp. 29-30, between 10.30.26 and 10.32.50.

the testimonies indicate that most of the prisoners were captured at the Vietnamese border during the armed conflict.[1240]

II. DETENTION CONDITIONS AND INTERROGATIONS

1202. The detention conditions of the Vietnamese are not discussed in the Closing Order or in-court testimonies. Duch is quite obviously the key witness in this trial segment, and his testimony is therefore crucial to the assessment of the evidence. According to him, Vietnamese were interrogated with a view to obtaining confessions, some of which were broadcast on the radio. The aim was to show that Vietnam had a plan to invade Cambodia and create an Indochinese federation.[1241] MAM Nai, who worked at S-21, and PHAN Than Chan, an S-21 prisoner who spoke Vietnamese, were assigned to interrogating Vietnamese detainees who were allegedly subjected to abuse in the process.[1242] MAM Nai was also assigned to interrogating some foreigners at S-21.[1243]

A. Duch confronted with PHAN Than Chan's statements concerning interrogation of Vietnamese soldiers

1203. In an interview with RITHY Phan, PHAN Than Chan described the interrogations of Vietnamese prisoners and gave his own opinion about the conflict with Vietnam.[1244] According to him, Vietnamese detainees often told the truth during interrogation, namely that they were ordinary folks who happened to be fleeing to Thailand but were forced to say that they were soldiers so that their confessions could broadcast on the radio.[1245] He also said that Vietnamese were given military uniforms and insignia to wear.[1246]

[1240] HIM Huy: T. 04.05.2016, **E1/427.1**, pp. 26-27, after 09.56.55, pp. 84-85, between 14.26.18 and 14.27.18; Duch: T. 16.06.2016, **E1/439.1**, pp. 44-45, between 11.03.10 and 11.05.52.
[1241] Duch: T. 13.06.2016, **E1/436.1**, pp. 90-91, between 15.01.08 and 15.04.36; T. 16.06.2016, **E1/439.1**, pp. 19-21, 09.44.07 - 09.48.30; T. 001, 10.06.2009, **E3/525**, ERN 00339696-97.
[1242] Duch: T. 13.06.2016, **E1/436.1**, pp. 82-84, between 15.00.14 and 15.04.30; Duch: T. 16.06.2016, **E1/439.1**, p. 19 after 09.48.34, p. 32, around 10.44.15; WRI of Duch in Case 001, 23.08.2007, **E3/452**, ERN 00147566-00147567; WRI of Duch before the Military Court, 02.06.1999, **E3/528**, ERN 00327318; UNHCR Interview of Duch, 06.05.1999, **E3/347**, ERN 00185016.
[1243] PRAK Khan: T. 28.04.2016, **E1/424.1**, p. 20, around 09.47.53 09.46.11; Duch: T. 08.06.2016, **E1/434.1**, pp. 86-87, between 15.14.58 and 15.17.35.
[1244] Interviewed PHAN Than Chan (S21 survivor), **E3/2352R**, between 00.48.21 and 00.54.51 (transcript of this interview is in Document **E3/2352**).
[1245] T. 16.06.2016, **E1/439.1**, pp. 35-36, between 10.54.11 and 10.55.11.
[1246] T. 16.06.2016, **E1/439.1**, pp. 36-37, between 10.55.11 and 10.56.05.

1204. When confronted with the aforementioned written record of interview, Duch said that PHAN Than Chan was exaggerating and wanted to "[…] alleviate the Vietnamese [what had done]"[1247] during the armed conflict. He explained, for example, that incursions by Vietnamese troops did take place and that the uniforms were indeed those of Vietnamese who were captured,[1248] contrary to PHAN Than Chan's claim that those uniforms were a ploy. Whilst Duch admitted that a small number of civilians may have coerced to confess that they were spies, he firmly maintained that the ones held at S-21 were mostly Vietnamese soldiers.[1249]

B. It cannot be concluded that Vietnamese prisoners were treated differently

1205. The Prosecution also confronted Duch with an excerpt from S-21 interrogator Tuy's notebook containing details about a proposed new method for prisoner interrogation.[1250] Devised in October 1978, the method allegedly consisted in subjecting Khmer prisoners to less beatings and subjecting foreigners, ethnic Vietnamese and CIA imperialists to the absolute methods of the Special Branch.[1251] Duch explained that there was indeed a plan to stop interrogating Khmer prisoners and focus on foreigners, Vietnamese prisoners and putative members of the CIA,[1252] and that POL Pot even went so far as asking to cease interrogations of S-21 prisoners altogether.[1253] He explained that he instructed his subordinates accordingly. However, he said, "Brother NUON" called for him and mocked him, saying that he "knew the Party line well". Duch then immediately held another meeting with his subordinates and instructed them to resume interrogating Khmer and foreign prisoners.[1254] Aside from Duch's statements about an aborted plan to change interrogation methods, nothing in the testimonies of other witnesses supports the claim that foreign detainees were treated any differently than Khmer detainees.

C. Vietnamese soldiers captured mainly at the border

1206. When Duch was confronted with another excerpt from the interrogator's notebook concerning the problem of Vietnamese who were hiding in Kampuchea, some of whom had been captured in the

[1247] T. 16.06.2016, **E1/439.1**, p. 37, after 10.57.10.
[1248] T. 16.06.2016, **E1/439.1**, pp. 39-40, between 11.03.36 and 11.05.26.
[1249] T. 16.06.2016, **E1/439.1**, pp. 39-40, between 11.03.36 and 11.05.26.
[1250] T. 14.06.2016, **E1/437.1**, pp. 24-50, between 09.54.43 and [11.20.19; *The Pon-Tuy Notebook*, **E3/834**, ERN 00184522 (no French translation).
[1251] *The Pon-Tuy Notebook*, **E3/834**, ERN 00184522 (no French translation).
[1252] T. 14.06.2016, **E1/437.1**, pp. 49-50, between 11.16.40 and 11.18.34.
[1253] T. 14.06.2016, **E1/437.1**, pp. 49-50, between 11.16.40 and 11.18.34.
[1254] T. 14.06.2016, **E1/437.1**, p. 50, between 11.18.34 and 11.20.19.

Northwest,[1255] he answered that those were Vietnamese soldiers who were stationed at the border and that he did not recall any Vietnamese being captured in the Northwest Zone.[1256] He added that all Vietnamese civilians were repatriated to Vietnam after 17 April 1975 following an agreement between POL Pot and Le Duan. Le Duan wanted them to return in view of the then impending elections.[1257]

D. Propaganda film and Vietnamese soldiers

1207. Witnesses LACH Mean and HIM Hut testified that a film featuring Vietnamese soldiers was produced and shown to S-21 personnel.[1258] Duch also admitted that a film about Vietnamese soldiers was made by SENG Lytheng, a nephew of POL Pot.[1259] He, however, did not recognise the clip that Judge LAVERGNE showed him.[1260] Challenging the testimonies of HIM Huy and LACH Mean, who were not shown the clip, he asserted that the film from which the clip was taken was not screened at S-21.[1261] In support of his claim, he said that the decor in his house differed from what it was back then, and therefore that the clip was "[…] a later fabrication," like the segments where Vietnamese soldiers are shown marching near Mao Tse Tung Boulevard.[1262] As for SUOS Thy, he testified that he did not recall any such film being screened during training sessions. When Judge LAVERGNE showed him the same clip he had shown to Duch, he said that he could not recognise it.[1263]

1208. On this subject, it is interesting to note that in his live testimony, SENG Lytheng confirmed that he made a film featuring Vietnamese prisoners[1264] and remembered that it was shot in Phnom Penh, but that it was very short and featured only one Vietnamese soldier.[1265] So this description too does not match Film E3/2354R, which was shown in court. SENG Lytheng's film and the camera he used to shoot it were later reportedly handed to the Chinese.[1266]

[1255] T. 13.06.2016, **E1/436.1**, pp. 91-93, between 15.20.50 and 15.26.40.
[1256] T. 13.06.2016, **E1/436.1**, pp. 92-94, between 15.24.24 and 15.28.44.
[1257] T. 13.06.2016, **E1/436.1**, pp. 94-98, between 15.28.44 and 15.40.22.
[1258] LACH Mean: T. 26.04.04.2016, **E1/422.1**, pp. 31-34, between 10.48.02 and and 10.55.25; HIM Huy: T. 04.05.2016, **E1/427.1**, pp. 82-84, between 14.28.46 and 14.34.05.
[1259] T. 13.06.2016, **E1/436.1**, p. 88, at 15.13.58.
[1260] Documentary: *Cambodia-Kampuchea*, **E3/2354R**, between 00.13.29 and 00.13.40.
[1261] T. 16.06.2016, **E1/439.1**, pp. 40-43, between 11.07.07and 11.15.06.
[1262] T. 16.06.2016, **E1/439.1**, p. 44, after 11.18.10.
[1263] T. 03.06.2016, **E1/431.1**, p. 85, between 15.40.30 and 15.43.57.
[1264] T. 29.11.2016, **E1/503.1**, p. 64, after 14.23.48.
[1265] T. 29.11.2016, **E1/503.1**, p. 64, after 14.23.48.
[1266] T. 29.11.2016, **E1/503.1**, p. 66, before 14.31.39.

1209. It worth recalling that for propaganda purposes during and after the Democratic Kampuchea period, Cambodians, Vietnamese and Chinese made wide use of scripted films or even films created specifically for that purpose. The testimonies concerning the propaganda film which was made at S-21 do not support the conclusion that the clip shown by Judge LAVERGNE is from the film which was shown to S-21 personnel. The only evidence that is not in dispute is that there were Vietnamese soldiers at S-21 whose confessions were used for propaganda purposes.

E. Vietnamese civilians at S-21, spies like the rest

1210. According to Duch, Vietnamese civilians were regarded as spies.[1267] However, it cannot be convincingly argued that they were treated differently simply because they were Vietnamese, given that according to various testimonies, the majority of foreigners who were arrested, including the small number of Westerners and Thai fishermen, were also registered as spies.[1268] Moreover, Duch testified fact that "[…] the main task of S-21 was to conduct activities to counter-espionage regarding any spies from Vietnam or the US or any other country."[1269]

1211. Vietnamese were therefore regarded as enemies of the revolution, just like CIA and KGB agents. In fact, the interrogators were instructed to find out the ties between prisoners and the CIA, the KGB and the Vietnamese Workers' Party networks.[1270] Duch explained that this was only a label used to smash opponents of the regime.[1271] He added that "[…] the purpose of smashing people was to aim at those who opposed the revolution."[1272] Similarly. HIM Huy testified that "[d]uring the study sessions, we were told everyone who was arrested by Angkar was the enemy who was against Angkar."[1273] In sum, anyone who was taken to S-21 irrespective of their nationality was regarded as a traitor of the nation, or, more broadly speaking, as an enemy.[1274].

[1267] Duch: T. 13.06.2016, **E1/436.1**, p. 95, around 15.09.18; T.16.06.2016, Duch: **E1/439.1**, p. 12, around 09.31.01, pp. 16-17, between 09.43.05 and 09.44.35, p. 39, after 11.03.36.
[1268] LACH Mean: T. 25.04.2016, **E1/421.1**, pp. 97-98, between 15.54.52 and 15.56.09; Duch: T. 16.06.2016, **E1/439.1**, p. 30, at 10.40.05.
[1269] T. 16.06.2016, **E1/441.1**, p. 85, before 15.08.12.
[1270] LACH Mean: T. 25.04.2016, **E1/421.1**, , pp. 97-98, between 15.54.52 and 15.56.09.
[1271] Duch: T. 09.06.2016, **E1/435.1**, pp. 64-65, between 14.04.39 and 14.08.15.
[1272] T. 09.06.2016, **E1/435.1**, p. 66, after 14.09.57.
[1273] T. 04.05.2016, **E1/427.1**, p. 5, before 09.11.17.
[1274] LACH Mean: T. 25.04.2016, **E1/421.1**, pp. 97-98, between 15.54.52 and 15.56.09; Duch: T. 15.06.2016, **E1/438.1**, p. 58, between 13.54.40 and 13.56.10.

Section IV. LEGAL CHARACTERISATION

I. DEFINITION OF PERSECUTION (CRIME AGAINST HUMANITY)

1212. As regards *actus reus*, persecution consists in an act or omission which discriminates in fact or infringes upon a fundamental right laid down in international customary or treaty law.[1275] As regards the requisite discrimination in of the *actus reus*:

> "[…] discrimination in fact' occurs where a victim is targeted because of the victim's membership in a group defined by the perpetrator on specific grounds, namely on a political, racial or religious basis, and the victim belongs to a sufficiently discernible political, racial or religious group, such that requisite persecutory consequences must occur for the group."[1276]

1213. The *mens rea* of the crime of persecution requires proof that the perpetrator of the act or omission acted with direct the intent to commit discrimination on political, racial or religious grounds.[1277]

II. LEGAL CHARACTERISATION OF THE FACTS

1214. The evidence appears to indicate that Vietnamese prisoners were taken to S-21 around 1977/1978. It may be that they were arrested, imprisoned and interrogated with the aim of obtaining confessions and, in the process, may have been subjected to ill-treatment before being killed. While commission of those acts was a violation of the fundamental rights of the prisoners, it does not amount to discrimination in fact on a racial grounds. As a matter of fact, such acts did not target Vietnamese only on racial grounds, but rather all S-21 prisoners on account of their being opponents of the regime.

1215. The armed conflict with Vietnam was the reason for most of the arrests of Vietnamese. This is why confessions of Vietnamese were broadcast on the radio. Be that as it may, analysis of the evidence reveals that prisoners, Vietnamese or otherwise, were regarded as enemies of the CPK. According to the witness accounts, all foreign civilians were regarded as spies for the CIA, the KGB or for Vietnam. Vietnamese were killed at Tuol Sleng and not at Choeung Ek, but other prisoners, including staff members, high ranking cadres and Westerners, were also killed near S-21. So there was no discrimination in fact against Vietnamese people.

[1275] Case 002/01 Trial Judgement, para. 427; *Duch* Appeal Judgement, 03.02.2012, para. 226.
[1276] Case 002/01 Trial Judgement, para. 428; Case 002/01 Appeal Judgement, para. 667.
[1277] Case 002/01 Trial Judgement, para. 427; *Duch* Appeal Judgement, 03.02.2012, para. 226.

1216. It has been established that categorising people as CIA, KGB or Vietnamese agents was just a label used to smash anyone who opposed the regime. Anyone who was held at S-21 was regarded as an enemy of the regime and – according to testimonies – was to be killed for that reason. All foreigners, including Vietnamese, were regarded as spies, and hence opponents of the regime. Those elements in no way demonstrate any intent to discriminate on racial grounds.

1217. That was indeed that the Trial Chamber adopted in the *Duch* case.[1278] It found Duch guilty of persecution on political grounds, because S-21 prisoners were perceived as opponents to the regime.[1279] Indeed, the Trial Chamber considered that "[...] the CPK policy concerning Vietnamese nationals, as well as religious and other minorities, was to regard all such individuals as "spies" acting against the Party."[1280]

1218. In fact, the Supreme Court Chamber did not disagree with the Trial Chamber on this point, but struck the convictions for persecution on political grounds with respect to an unspecified number of individuals who had been detained at S-21 as a result of indiscriminate targeting.[1281] Indeed, the Supreme Court Chamber considered that:

> "As the revolution wore on, however, individuals were indiscriminately apprehended, mistreated and eliminated without any attempt at rational or coherent justification on political grounds, in actions that were no longer persecution but constituted a reign of terror where no discernible criteria applied in targeting the victims."[1282]

1219. Therefore, the Trial Chamber should also adopt such reasoning in assessing the facts relating to S-21. In any event, in light of the evidence on record, no constitutive element of the crime of persecution against Vietnamese people on racial grounds has been established. Therefore, the Trial Chamber cannot enter any convictions in respect of that crime.

Chapter II. KRAING TA CHAN SECURITY CENTRE

Section I. CHARGES

[1278] *Duch* Trial Judgement, 26.07.2010, paras. 386-387.
[1279] *Duch* Trial Judgement, 26.07.2010, paras. 381-396.
[1280] *Duch* Trial Judgement, 26.07.2010, para. 386.
[1281] *Duch* Appeal Judgement, 03.02.2012, para. 284.
[1282] *Duch* Appeal Judgement, 03.02.2012, para. 283.

1220. KHIEU Samphan is charged with factual allegations pertaining to the Kraing Ta Chan security centre which are characterised as the crime against humanity of murder, extermination, enslavement, imprisonment, torture, persecution on political and racial grounds, and other inhumane acts (through attacks against human dignity and enforced disappearance).[1283]

1221. The charge of persecution on political grounds as concerns facts relating to former Lon Nol officials and soldiers is not discussed in this segment, but *infra*, in the segment on the treatment of those officials during the Democratic Kampuchea period.[1284]

1222. Careful analysis of the other charges helps discern the scope of the facts put to the Chamber for determination. It reveals instances where the Co-Investigating Judges largely exceeded their *saisine*, as compared to case that was originally submitted to them by the Co-Prosecutors.

I. MURDER

1223. According to paragraph 1373 of the Closing Order, the Co-Investigating Judges found that the crime of murder had been established with regard to "persons killed [...] in the security centres," therefore including Kraing Ta Chan. Moreover, according to paragraph 1374, the Co-Investigating Judges found that "[...] the victim's deaths were the result of the perpetrators' acts or omissions; those acts or omissions were the main cause of the victims' deaths."

1224. At paragraph 1376, the Co-Investigating Judges provide more details on deaths in all the security centres listed at paragraph 1373:

> "As regards **security centres**, for the entire period of the regime, the personnel of these centres, both directly and indirectly, caused the death of a large number of detainees. In most instances, the prisoners were killed deliberately through a variety of means, including summary executions in or near the **security centres**. Moreover, many prisoners died as a result of torture and ill-treatment." (*emphasis supplied*)

1225. The description of the facts at Kraing Ta Chan at paragraphs 489-514 of the Closing Order discloses those that are characterised as crime against humanity of murder in light of the foregoing.

1226. In many instances, the Co-Investigating Judges refer to deaths at Kraing Ta Chan either by execution (paragraphs 500, and 510-514, under "Disappearances and Executions"), disease

[1283] Closing Order, paras, 1373, 1381, 1391, 1402, 1408, 1422, 1416, 1434 and 1470; Decision on Additional Severance, 04.04.2014, **E301/9/1**, para. 44; Annex: List of paragraphs and portions of the Closing Order relevant to Case 002/02, **E301/9/1.1**, pp. 2-4.
[1284] Closing Order, paras. 1416-1418; See *infra*, paras. 2258 *et sec.*

(paragraphs 500, 502 and 508), hunger (paragraphs. 502 and 508), vermin (paragraph 502) or injuries sustained during interrogation (paragraph 508).

1227. As is the case in many instances, the Co-Investigating Judges entered many of those findings by exceeding their *saisine* as defined at paragraphs 43 through 60 of the Co-Prosecutors' Introductory Submission.

1228. According to paragraph 43 concerning the Tram Kok Cooperatives, the Co-Investigating Judges were seised of facts relating to the killing of New People who were sent to Kraing Ta Chan.

1229. According to paragraph 60 concerning the Kraing Ta Cham security centre, the Co-Investigating Judges were only seised of facts relating the execution of prisoners, regardless of which group they belonged to:

> "Between 1975 and 1978, CPK officials executed up to 12, 000 people at a security and detention facility at Kraing Ta Chan in Kus Commune, Tram Kok District, Takeo Province, Southwest Zone. Detainees included "new people," the families of former soldiers, and various inhabitants of Takeo Province. Detainees were shackled at all times and executed on a regular basis, including by clubbing to death. Shortly before the collapse of Democratic Kampuchea, in 1978, all remaining prisoners were executed. In exhumations carried out after 1979, the remains of approximately 2,000 detainees were discovered at or near this facility. The remains of a further 10,000 people may be present in undisturbed mass graves at this location." (*emphasis added*)

1230. The Co-Investigating Judges were therefore only seised of the death of the people who were executed at Kraing Ta Chain security centre. However, they were not seised of deaths resulting from living conditions at that centre (food rations, health, hygiene) or those resulting from torture. In the absence of *saisine*, any charges relating to such circumstances are unlawful. KHIEU Samphan need not answer thereto.

1231. The Co-Investigating Judges' lack of *saisine* is all the more crystal clear, because in instances where the Co-Prosecutors seised them of deaths resulting from the living conditions or torture at other sites, , they specifically stated so.

1232. For example, at paragraph 55 of the Co-Prosecutors' Introductory Submission regarding facts relating to S-21, Co-Prosecutors state that "[o]ther detainees died during torture or from malnourishment and inhumane conditions." Similarly, at paragraph 59 of the regarding the Koh

Kyang Security Centre, they clearly state that "[…] each day five or six prisoners died of illness, hunger or harsh interrogation."[1285]

1233. Further, regarding the execution at Kraing Ta Chan, the only facts of which they were seised of in the Co-Prosecutors' Introductory Submission, the Co-Investigating Judges found that those executions concerned Vietnamese. According to paragraph 500 of the Closing Order:

> "[…] Vietnamese […] were initially sent back to Vietnam but those who remained were later arrested and executed, probably at Kraing Ta Chan."

1234. On the other hand, the Co-Investigating Judges were never seised of the treatment of Vietnamese at Kraing Ta Chan. Paragraph 500 reveals that the Co-Investigating Judges obtained the information on the alleged executions of Vietnamese by illegally investigating on their treatment in Tram Kok District.[1286]

1235. Therefore, the Co-Investigating Judges did not investigate the deaths at Kraing Ta Chan as specifically requested by the Co-Prosecutors, but rather, took liberties with the Introductory Submission, to KHIEU Samphan's detriment. Given that this is aimed at obtaining evidence only in respect of the crimes alleged by the Co-Prosecutors, the finding concerning the execution of Vietnamese at Kraing Ta Chan should be dismissed so as to ensure fairness of the proceedings. KHIEU Samphan need not answer thereto.

1236. In the final analysis, KHIEU Samphan need only answer to the executions at Kraing Ta Chan, except those of members of the Vietnamese minority.

II. EXTERMINATION

1237. According to paragraph 1381 of the Closing Order, the Co-Investigating Judges found that the crime of extermination had been established in regard to "[…] people who were killed or who died en masse […] in the security centers" including Kraing Ta Chan. The general elements to take into account for all of the sites where extermination is alleged are set out paragraphs 1382 and 1383,

[1285] See also Co-Prosecutors' Introductory Submission, para. 43, concerning the Tram Kok cooperatives ("thousands of people starved to death"), paras. 57-58 concerning the Prey Damrei Srot security centre ("many of whom died starvation, overwork"), para. 61 the Sang security centre ("prisoners died from disease and starvation regularly"), para. 67 concerning the Phum 3 security centre (as many as 2,000 were killed by starvation").
[1286] See *supra*, paras. 219-276.

which are cited *supra*.[1287] Those paragraphs also specify that other "relevant evidence" needs to be taken into account with regard to each of the sites where the crime has been established.

1238. That evidence is found at paragraph 1385 for all the security centres, including Kraing Ta Chan in general, and also for Kraing Ta Chan in particular:

> "As regards **security centers** and the **Prey Sar worksite**, in addition to individual killings, there is sufficient evidence of executions and deaths, as a result of torture and other acts of violence, of both a massive and collective character. This includes documentary records establishing the deaths of more than 12,000 people at **S-21** and more than 15,000 at **Kraing Ta Chan**."

1239. Some other relevant evidence is found at paragraph 387:

> "Moreover […] many people died as a result of the conditions imposed […] in **security centers**; such conditions included deprival of food, accommodation, medical care and hygiene." (*emphasis supplied*)

1240. Therefore, aside from evidence about the scale of the crimes, no facts that were not taken into account in the characterisation of murder were used for the characterisation of extermination.[1288] In regard to the deaths by execution and the ones resulting from torture, the connection between the crimes of murder as described at paragraph 1376 and extermination as described at paragraph 1385 is clear. As for the deaths resulting from the living conditions as described at paragraph 1387 of the Closing Order in regard to extermination, they are akin to those resulting from "ill-treatment" as described at paragraph 1376 in regard to murder.

1241. The Defence's earlier submissions on the illegality of some of the Co-Investigating Judges' conclusions in support of the characterisation of murder apply without exception to the facts characterised as extermination.[1289]

1242. Therefore, KHIEU Samphan need only answer to charges relating to the execution of prisoners at Kraing Ta Chan, except Vietnamese prisoners.

III. ENSLAVEMENT

[1287] See *supra*, para, 854.
[1288] See *supra*, paras. 1223-1236.
[1289] See *supra*, paras. 1223-1236.

1243. According to paragraph 1391 of the Closing Order, the Co-Investigating Judges found that the crime of enslavement had been established in regard to Kraing Ta Chan. As discussed *supra*, according to paragraphs 1392 and 1394, the Co-Investigating Judges found that this crime was committed through a combination of two factors: exercising total control over the prisoners and forcing them to perform work without their consent, unpaid.[1290]

1244. The crime was established based on the Co-Investigating Judges' factual findings at paragraphs 497 to 505 of the Closing Order under "Arrest and Detention". Paragraph 503 is the particularly enlightening concerning the working conditions at Kraing Ta Chang:

> "Some prisoners recall being forced to work inside the prison compound performing a variety of labour. Those who worked were given more food than those who remained shackled in the detention buildings. Those who worked on the rice fields were not shackled but were under guard. Some of those who worked outside returned at night to be shackled in the main detention buildings."[1291]

1245. The Co-Investigating Judges' findings about the detainees' work at Kraing Ta Chan are illegal given that it is not mentioned anywhere at paragraphs 43 and 60 of the Co-Prosecutors Introductory Submission that prisoners were made to perform work without their consent.

1246. The Co-Investigating Judges introduced new facts to enable them to enter the finding that the crime had been established. In light of that, KHIEU Samphan need not answer to the factual allegations pertaining to that charge.

IV. IMPRISONMENT

1247. According to paragraph 1402 of the Closing Order, the Co-Investigating Judges found that the crime of imprisonment had been established in regard to Kraing Ta Chan, because "[…] the personnel […] intentionally imposed serious, arbitrary deprivations of liberty on the detainees, in violation of legal guarantees."[1292]

1248. This characterisation is based on factual allegations of imprisonment set out at paragraphs 497505 of the Closing Order.. KHIEU Samphan is to answer thereto.

[1290] See *supra*, paras. 867-869.
[1291] See also Closing Order, para, 501, where it is put more succinctly that "[people] were put to work".
[1292] Closing Order, para. 1403. See also Closing Order, para. 1405.

V. TORTURE

1249. According to paragraph 1408 of the Closing Order, the Co-Investigating Judges found that the crime of torture had been established in regard to Kraing Ta Chan. The charge described at paragraph 1408 is based on the factual allegations of torture at paragraphs 507-509 of the Closing Order.

1250. The Co-Investigating Judges entered all those finds by exceeding their *saisine*. Paragraphs 43 and 60 of the Co-Prosecutors' Introductory Submission make no reference to interrogation or to physical or psychological torture. It was therefore not within the Co-Investigating Judges' *saisine* to investigate such facts.

1251. Once again, in those instances where the Co-Prosecutors wanted the Co-Investigating Judges to investigate factual allegations of torture, they specifically stated so.

1252. For example, paragraph 52 of the Co-Prosecutors' Introductory Submission concerning S-2 reads as follows: "[t]he vast majority of detainees were tortured to extract confessions." Also, at paragraph 59 concerning the Koh Kyang security centre, the co-Prosecutors allege that "[…] thousands of people were imprisoned, tortured and subsequently killed […]" At paragraph 63 concerning the Kok Kduoch Security Centre, they allege that "[t]he prisoners were kept shackled at all times and were tortured regularly."[1293]

1253. Paragraphs 43 and 60 of the Co-Prosecutors' Introductory Submission make no reference to any such facts. Therefore, since the Trial Chamber was not properly seised of factual allegations of torture at Kraing Ta Chan, KHIEU Samphan need not offer a response.

VI. PERSECUTION ON POLITICAL GROUNDS

1254. According to paragraph 1416 of the Closing Order, the Co-Investigating Judges found that the crime of persecution on political grounds had been established in regard to Kraing Ta Chan.

1255. As noted in the segment on the Tram Kok cooperatives, at paragraphs 1417 of the Closing Order, the Co-Investigating Judges clearly identify only three groups as having been victims of

[1293] See also: Co-Prosecutors' Introductory Submission, paras. 49, 50, 53 and 55 concerning S-2; Co-Prosecutors' Supplementary Submission, 11.09.2009, **D202**, para. 7 concerning the Kbal Chheu Puk security centre ("Interrogation, torture and execution of prisoners regularly occurred at this security centre.").

persecution on political grounds, namely former Khmer Republic high-ranking civilian and military personnel, new people and Cambodians returning from abroad.[1294]

1256. At paragraph 1418, the Co-Investigating Judges provide details on how persecution was implemented at the various crime sites:

> "In **cooperatives and worksites**, and during **population movements**, real or perceived enemies of the CPK were subjected to harsher treatment and living conditions than the rest of the population. Also, they were arrested *en masse* for reeducation and elimination at **security centres** and **execution sites**. (*emphasis supplied*)

1257. Only the factual allegations of arrest, reeducation and elimination of individuals concern Kraing Ta Chan and demonstrate the discrimination they suffered.

1258. However, it is not alleged the members of the groups identified by the Co-Investigating Judges at paragraph 1417 were subjected to harsher living conditions. The Co-Investigating Judges' conclusion is reflective of their earlier findings in respect of Tram Kok where they struggled to reach the conclusion that the suppression of the New People's "political rights" was the only proof of discrimination. Since all prisoners received the same treatment in regard to that, it is only normal that the Co-Investigating Judges did not attempt stretch their finding in order to claim that prisoners belonging to the New People group were subjected to harsher treatment at Kraing Ta Chan.

1259. As noted *supra*, the factual allegations concerning the charge of political persecution of former Khmer Republic soldiers and officials are discussed *infra*.

1260. New People are mentioned twice in the Closing Order in connection with the facts underpinning the Co-Investigating Judges' legal characterisations.

1261. Paragraph 498 states that "[…] when *new people* arrived at Tram Kok they were made to write biographies."

1262. On the one hand, this assertion is based on the treatment of former Khmer Republic soldiers and officials given that – according to paragraph 498 – biographies were a means to identify former Khmer Republic soldiers and officials among new arrivals in order to send them to Kraing Ta Chan. These facts are therefore discussed in the segment on former Khmer Republic soldiers and officials.

[1294] See *supra*, paras. 884-885.

1263. On the other hand, the Co-Investigating Judges' allegations reveal that, unlike former Khmer Republic soldiers and officials, New People were not sent to Kraing Ta Chan simply because they were members of the new people group; this undermines the Co-Investigating Judges' characterisation at paragraph 1416 of the Closing Order of New People as enemies.[1295]

1264. At paragraph 500 concerning the composition of the prison population, the Co-Investigating Judges state that:

> "Men, women, and children were all detained at Kraing Ta Chan, including whole families. Eight witnesses were former detainees. Witnesses remember that most of the detainees were new people originating from Phnom Penh. However, 'base people', former Khmer Republic soldiers, CPK cadre, Chinese, Vietnamese and Cham also contributed to the population."

1265. This contradicts thecharge of discrimination, given anyone and everyone irrespective of age, gender, nationality or status, could be arrested. The Co-Investigating Judges are perhaps claiming that the members of the new people group were more prone to arrest than their fellow citizens, a claim that is not supported by any data. Moreover, nothing indicates that New People were arrested because of their membership of the New People group; in light of that, the claim at paragraph 1416 [= 1424] of the Closing Order that the New People group was considered as an "enemy" group sounds all the more specious.

1266. Also specious is the Co-Investigating Judges' claim at paragraph 501 of the Closing Order that:

> "The evidence suggests that prisoners were divided into two categories: serious and light offenders."

1267. Paragraph 501 makes no reference to the groups identified at paragraph. 500 and, therefore, that includes New People.

1268. Therefore, the claim that members of the new people group were more likely to be perceived as perpetrators of serious offences is false. Yet, that would have been the only finding about discrimination which may be characterised as political persecution.

1269. Finally, paragraphs 510-514 of the Closing Order, under "Disappearances and Executions", make no reference to the new people group. Contrary to the claim at paragraph 1418, the Co-Investigating

[1295] See *supra*, paras. 883-910.

Judges did not rely on this narrative for their allegation that the new people group suffered discrimination.

1270. All this demonstrates the illusions that the Co-Investigating Judges created throughout their investigation. Their conclusion that new people were perceived as an enemy group is not supported by the facts underpinning it.

1271. In the final analysis, those findings only serve the Co-Investigating Judges' purposes in regard to characterisation of the crimes and their obstinate persistence to seek punishment. To the extent that discrimination against the New People at Kraing Tan Chan is not mentioned anywhere in the cited paragraphs of the Closing Order, the charges should have been found insufficient to send KHIEU Samphan to trial. Therefore, he need not answer to this charge.

VII. PERSECUTION ON RACIAL GROUNDS

1272. According to paragraph 1422 of the Closing Order, the Co-Investigating Judges found that the crime of racial persecution had been established in regard to Kraing Ta Chan. The facts underpinning this charge are found at paragraph 500 of the Closing Order and are cited at paragraph 1233 of the present Brief.

1273. It noted *supra*, the Co-Investigating Judges were not seised by the Co-Prosecutors of any factual allegations of racial discrimination in regard to the Kraing Ta Chan site.[1296] Their findings are all illegal and KHIEU Samphan is not accountable therefor. Once again, this goes to the fairness of the proceedings.

VIII. OTHER INHUMANE ACTS (THROUGH ATTACKS AGAINST HUMAN DIGNITY)

1274. According to paragraph 1434 of the Closing Order, the Co-Investigating Judges found that the crime of other inhumane acts (through attacks against human dignity) had been established in regard to Kraing Ta Chan.

1275. Paragraph 1438 describes the evidence relied upon by the Co-Investigating Judges in finding the crime established (lack of proper food for the prisoners, appalling detention conditions, lack of proper sanitation…). That evidence is described at paragraphs 497-505 of the Closing Order concerning detention conditions.

[1296] See *supra*, para. 1234.

1276. Further, paragraph 1438 also refers to "mistreatment by guards and interrogators", as discussed at paragraphs 506-509 concerning "Interrogation". As stated *supra* regarding torture, all the Co-Investigating Judges' findings on this matter are illegal given that they were never seised of this subject matter in the Introductory Submission.[1297] Therefore, KHIEU Samphan is not charged therewith.

IX. **OTHER INHUMANE ACTS THROUGH ENFORCED DISAPPEARANCE**

1277. According to paragraph 1470 of the Closing Order, the Co-Investigating Judges found that the crime of other inhumane acts (in the form of attacks against human dignity) had been established in regard to Kraing Ta Chan.

1278. They then went on to describe the constitutive elements of the crime. Paragraph 1471 refers, *inter alia*, to placing people outside of the protection of the law and "the refusal to provide access to [the victims], or convey [to them] information on the fate or whereabouts of such persons."[1298]

1279. Paragraph 1472 refers to "putting in place measures designed to conceal the fate of individuals who had disappeared by ensuring that witnesses did not reveal information about them."

1280. The Co-Investigating Judges' allegation' are based on evidence described at paragraphs 510-514 of the Closing Order under "Disappearances and Executions".

1281. Once again, the findings on disappearance are clearly illegal. The Co-Investigating Judges were neither seised of the operative part of paragraph 43 of the Introductory Submission regarding the Tram Kok Cooperatives nor of paragraph 60 also of the Introductory Submission regarding Kraing Ta Chan on disappearances.

1282. At paragraph. 60, the Co-Prosecutors assert that "up to 12,000 people" were executed at Kraing Ta Chan, meaning all of the prisoners at that site based on number of bone samples that were later found there later.[1299] According to the Co-Investigating Judges, it would seem that this conclusion needs to be qualified; however, it is not for Co-Investigating Judges to make up for the Prosecution's failings.

[1297] See *supra*, paras. 1249-1253.
[1298] Closing Order, para. 1471.
[1299] At paragraph 60, the Co-Prosecutors assert that some 2000 people were found and that an estimated 10,000 are in mass graves in the area.

1283. Here again, there are instances in the Introductory Submission where the Co-Prosecutors specifically seised the Co-Investigating Judges of factual allegations of disappearance.[1300] It is not so for the factual allegations pertaining to Kraing Ta Chan. Therefore, the Trial Chamber cannot pronounce thereupon. Therefore, KHIEU Samphan is not charged therewith.

Section II. THE EVIDENCE PRODUCED

1284. A significant portion of the evidence produced at trial (I) falls outside the Trial Chamber's *saisine* (II). Other evidence seems to suggest that some of the crimes have been established (III).

I. CATALOGUE OF THE EVIDENCE

1285. Between 8 January 2015 and 18 May 2015, thirty-two witnesses testified in the segment concerning both the Tram Kok Cooperatives and the Kraing Ta Chan security centre.

1286. As stated in the segment on the Tram Kok Cooperatives, during the 50 days of hearings, seventeen witnesses, one expert and fourteen civil parties gave testimony. Seven of those 14 civil parties testified about the facts, six about the impact of the crimes while one (THANN Thim) testified first about the impact of the crimes and later about the facts.

1287. Four of the seventeen witnesses who testified were not interviewed during the Case 002 investigations (i.e. about 24% of the witnesses heard during that trial segment).[1301]

1288. Nearly all those witnesses testified about both the Tram Kok cooperatives and the Kraing Ta Chan security centre. However, some gave further details about Kraing Ta Chan. They included Khmer Rouge cadres with links to Kraing Ta Chan (PHAN Chhen, PECH Chim), guards at that site (SREI Than, VANN Soeun, SAUT Saing) and prisoners (SAY Sen, MEAS Sokha, VORNG Sarun). VORNG Sarun, whose testimony was requested by the NUON Chea Defence, is among the four witnesses who were not interviewed during the investigations.

1289. Witnesses also gave details about Kraing Ta Chan during other trial segments.[1302]

[1300] Co-Prosecutors' Introductory Submission, paragraph 47 concerning Kampong Chhnang Airport ("The people who disappeared were constantly replaced by new detainees.") and paragraph 64 concerning the Phnom Kraol security centre (" These people disappeared and were presumably killed."),

[1301] NEANG Ouch, KHOEM Boeurn, EK Hoeun and VORNG Sarun.

[1302] For example, SANN Lorn: T. 28.01.2016, **E1/384.1**; SAO Van: T. 01.02.2016, **E1/385.1,** T. 02.02.2016, **E1/386.1**.

1290. Furthermore, in addition to written records of interview already on file in Case 002, other written records about Kraing Ta Chan from cases 003 and 004 were added en masse to the record in the course of the Case 002 proceedings.

II- OUT-OF-SCOPE EVIDENCE

1291. A large portion of the evidence concerning Kraing Ta Chan is out of scope. This is includes all the evidence concerning the allegations of rape at the security centre in respect of which the accused persons were not charged.[1303]

1292. Even so, witnesses were questioned about such evidence. Any and all answers to such questioning should be struck from the record. The same applies to Witness SORY Sen's answers to Judge FENZ' questions.[1304] Witness VANN Soan's evidence on the subject should also be struck from the record.[1305]

1293. Other out-of-scope evidence includes some accounts on performing work at the centre or in the nearby countryside. As noted *supra*, the Co-Investigating Judges were not seised in the Introductory Submission of factual allegations of forced labour at Kraing Ta Chan. Therefore, the Trial Chamber is not seised of such facts. Any evidence relating thereto is out-of-scope and must be stricken from the record.

1294. This concerns for example, the accounts of Witnesses MEAS Sokha, SORY Sen and VORNG Sarun concerning work performed by prisoners.[1306]

III. EVIDENCE THAT CANNOT SUPPORT CRIMINAL FINDINGS

1295. Some of the evidence is seriously lacking in terms of reliability, authenticity and credibility, and ought to be stricken from the record; this includes Document E3/2107 and SORY Sen's testimony.

[1303] See *supra*, paras.171-203.
[1304] SORY Sen: T. 05.02.2015, **E1/257.1**, pp. 34-36, between 10.45.50 and 10.52.48.
[1305] VANN Soeun: T. 04.03.2015, **E1/271.1**, pp. 86-89, between 15.11.48 and 15.17.56.
[1306] MEAS Sokha: T. 21.01.2015, **E1/249.1**, p. 9, around 10.05.24 and p. 75, between 14.18.06 and 14.20.08. SORY Sen: T. 04.02.2015, **E1/256.1**, pp. 44-48, between 11.16.53 and 11.27.35; T. 05.02.2015, **E1/257.1**, pp. 72-80, between 15.40.02 and 16.02.10; T. 25.03.2015, **E1/282.1**, pp. 110-111, between 16.19.58 and 16.21.31. VORNG Sarun: T. 18.05.2015, **E1/300.1**, pp. 27-28, around 10.47.18 and p. 65, around 14.01.34.

A. Document E3/1207 is not authentic

1296. Document E3/2107 is an undated report from the chief of Kraing Ta Chan to the Tram Kok district committee. Its authenticity was called into question during the examination of Witness SREY Than,[1307] particularly concerning a handwritten annotation, which is re-transcribed below:

"Reeducation Office 105
Up until today we have smashed 15,000 enemies
May the party be advised
Reeducation Office District
Ann"[1308]

1297. On 19 May 2015, owing to the doubts about the authenticity of the Document, KHIEU Samphan requested a forensic analysis.[1309] On 17 November 2015, the Trial Chamber replied via memorandum in which it stated that the requester had "not demonstrated that it is necessary to order a forensic handwriting analysis of the Document (E3/2107)".[1310] It also indicated that some of KHIEU Samphan's arguments went to the weight and probative value of the Document and therefore ruled that "[t]hese are matters for consideration by the Trial Chamber during its deliberations on the facts of the case [...]."[1311]

1298. The Trial Chamber should omit Document E3/2107 in its deliberations. In his Request, KHIEU Samphan listed all of questions about the authenticity of the document. He refers to his earlier submissions, as very briefly summarised herein. On the one hand, the annotation at issue appears on a separate page that is attached to the Document with no explanation whatsoever, and it features two different handwritings, which, in turn, differ from the ones appearing elsewhere in the Document.[1312] This creates a lot of confusion regarding a document whose original, if indeed there is one, quite obviously no one has seen. On the other hand, the figures appearing in the Document are at odds with the evidence led on the matter during the hearing on the merits.[1313]

1299. Unsurprisingly, the Co-Investigating Judges had no comments about the reliability of this impeaching document, given that they relied upon it in determining the estimated number of

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[1307] T. 24.02.2015, **E1/268.1**, pp. 44-46 between 11.32.44 and 11.37.25.
[1308] Kraing Ta Chan Centre report, undated, **E3/2107**, ERN EN 00290205. ERN FR 00655725, ERN KH 00068049.
[1309] KHIEU Samphân's Defence Request, 19.05.2015, **E349**.
[1310] Memorandum, 17.11.2015, **E349/1**, para. 8.
[1311] Memorandum, 17.11.2015, **E349/1**, para. 7.
[1312] KHIEU Samphân's Defence Request, 19.05.2015, **E349,** paras. 8-11.
[1313] Memorandum, 17.11.2015, **E349/1**, paras, 12-17.

deaths.[1314] The Trial Chamber must not adopt that same laid-back attitude vis-à-vis the Document at issue and should refrain from relying upon it.

B. SORY Sen is not a credible witness

1300. Witness SORY Sen testified at length about Kraing Ta Chan.[1315] In many instances, he made serious accusations against two former guards at the site, namely Witness SREI Than and Civil Party SAUT Saing who, inexplicably, each had a different status during the trial. Both denied all of the accusations.

1301. On 23 April 2015, KHIEU Samphan filed a Request for a confrontation between the three individuals.[1316] The Defence refers to its submissions in which it highlights the inconsistencies in the in-court testimonies.

1302. On 12 June 2015, the Trial Chamber rejected KHIEU Samphan's Request, notably on the ground that the measure requested would have "limited benefits" and would not "[…] contribute further to assessing the credibility of the witnesses and Civil Parties" or "[…] to ascertaining the truth".[1317]

1303. Yet there were flagrant inconsistencies in the testimonies which concerned core elements of the commission of crimes within the scope of the case. Given the clarity of each of the testimonies at issue, it is obvious that either SORY Sen, or SREI Than or SAUT Saing was untruthful. The variation in the account in Witness SORY Sen's testimony reinforces the suspicion of untruthfulness on his part.[1318] Therefore, the Trial Chamber must assume the consequences of its inflexible decision. By refusing to allow a confrontation between those individuals at only one hearing, the Trial Chamber – whatever it may claim – lost an opportunity to reveal the truth. It must therefore strike SORY Sen's testimony in its entirety from the record, he being the one on whom suspicion of untruthfulness weighs the most.

IV. EVIDENCE CONCERNING CERTAIN CRIMES

[1314] Closing Order, paras.514, endnote 2231.
[1315] SORY Sen: T. 04.02.2015, **E1/256.1;** T. 05.02.2015, **E1/257.1**; T. 06.02.2015, **E1/258.1**; T. 25.03.2015, **E1/282.1**.
[1316] KHIEU Samphan's request, f 23.04.2015, **E348**.
[1317] Decision on KHIEU Samphan's Request, 12.06.2015, **E348/4**, paras. 13-14.
[1318] KHIEU Samphan's request, 23.04.2015, **E348/4**, para.14.

1304. Some of the evidence produced may seem to suggest that the constitutive elements of the crimes of murder, extermination, imprisonment and other inhumane acts (in the form of attacks on human dignity) have been established in regard to the Kraing Ta Chan site.

1305. The Trial Chamber may enter such a finding only on two conditions: that it stays within the bounds of its *saisine in rem* and that assesses the evidence before it with utmost rigour.

Chapter III. AU KANSENG

Section I. CHARGES

1306. KHIEU Samphan is charged with factual allegations pertaining to the Au Kanseng security centre, which are characterised as murder, extermination, enslavement, imprisonment, persecution on political and racial grounds, as well as other inhumane acts (in the form of attacks on human dignity) amounting to crimes against humanity. Those factual allegations are also characterised as wilful killing and wilfully depriving a prisoner of war or a civilian the rights of fair and regular trial within the meaning of the Geneva Conventions,[1319] Analysis of each of the charges helps discern the scope of the facts put to the Trial Chamber for determination.

I. CRIMES AGAINST HUMANITY

A. Murder

1307. According to paragraph 1373 of the Closing Order, the Co-Investigating Judges found that the crime of murder had been established notably in regard to the "persons killed [...] in the security centres", such as Au Kanseng. As observed *supra*, the Co-Investigating Judges provided more details concerning the murders in general at paragraph 1374 of the Closing Order than they did at paragraph 1376 concerning the murders which occurred in the security centres, in particular.[1320]

[1319] Closing Order, paras. 1373, 1381, 1391, 1402, 1416, 1422, 1434, 1494 and 1511; Decision on Additional Severance, 04.04.2014, **E301/9/1**; Annex: List of paragraphs and portions of the Closing Order relevant to Case 002/02, **E301/9/1.1**, pp. 2-5.
[1320] See *supra*, paras. 1223-1224.

1308. The narrative of the facts which occurred at Au Kanseng between paragraphs 589 and 624 of the Closing Order helps discern those which are characterised as murder having regard the foregoing segments.

1309. In several instances, the Co-Investigating Judges refer to deaths resulting from "illness and malnutrition" (paragraph 608, see also paragraph 623) or from executions (paragraphs 616-623).

1310. The Co-Investigating Judges entered the findings on deaths from illness in violation of their *saisine*. At paragraph 67 of the Introductory Submission, the only paragraph concerning *saisine*, the Co-Prosecutors assert that "as many as 2,000 people were killed by starvation and execution" at Au Kanseng. They make no reference to deaths from illness or from lack of medical care or proper sanitation.

1311. Furthermore, the wording of paragraph 608 of the Closing Order shows that there is no correlation between the deprival of food and illness, because the paragraph contrasts "illness" with "malnutrition". Therefore, KHIEU Samphan need not answer to factual allegations of which the Co-Investigating Judges were not seised.

1312. As regards the alleged executions, the Co-Investigating Judges cite the examples of the Jarai ethnic minority (paragraphs 618-623) and a group of six ethnic Vietnamese (paragraph 622). The Co-Investigating Judges were not seised of factual allegations pertaining to the Jarai or Vietnamese minorities. However, insofar that those factual allegations relate to executions which occurred at Au Kanseng, the Co-Investigating Judges' findings are squarely within the scope of their *saisine*.

1313. The Defence is anticipating the Co-Prosecutors' remarks regarding the lack of coherence between the earlier statement and the one concerning the alleged killing of Vietnamese at Kraing Ta Chan.[1321] The Defence submits that the Co-Investigating Judges entered their finding concerning Kraing Ta Chan in violation of their *saisine*, because they had made findings on the death of Vietnamese while investigating their deportation from Tram Kok District to Vietnam, whereas they were not seised of deportation. Therefore, their illegal investigation had a windfall effect hence why their findings must be censured and rejected in the interest of fair proceedings. Au Kanseng is a different matter. The Co-Investigating Judges were seised of factual allegations of killings, and their investigation on the ground seems to reveal killings of Jarai and Vietnamese.

[1321] See *supra*, paras. 1233-1235.

1314. In conclusion, KHIEU Samphan is to answer to all of the alleged deaths at Au Kanseng with the exception of those resulting from illnesses.

B. Extermination

1315. According to paragraph 1381 of the Closing Order, the Co-Investigating Judges found that the crime of extermination had been established notably in regard to "people who were killed or who died en masse [...] in the security centres," including Au Kanseng.

1316. According to reasoning akin to that which is discussed *supra* concerning the charges relating to Kraing Ta Chan, the Co-Investigating Judges only characterised as extermination deaths that were previously characterised as murder.[1322] No additional fact was recorded.

1317. KHIEU Samphan must therefore answer to all the alleged deaths at Au Kanseng with the exception of those resulting from illnesses.

C. Enslavement

1318. According to paragraph 1391 of the Closing Order, the Co-Investigating Judges found that the crime of enslavement had been established in regard to Au Kanseng. As noted *supra*, the Co-Investigating Judges found at paragraphs 1392 and 1394, that the crime of enslavement was committed through a combination of two factors: exercising total control over the prisoners and forcing them to perform work without their consent, unpaid.[1323]

1319. The Co-Investigating Judges considered the crime established based on their factual findings at paragraph 605 of the Closing Order where it is stated several times that prisoners at the centre were made to perform work.

1320. KHIEU Samphan must answer to all the facts in support of the alleged crime.

1321. According to paragraph 1402 of the Closing Order, the Co-Investigating Judges found that the crime of imprisonment had been established in regard to Au Kanseng, because "the personnel of

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[1322] See *supra*, paras. 1237-1241.
[1323] See *supra*, paras. 867-869.

these sites intentionally imposed serious, arbitrary deprivation of liberty on the detainees, in violation of legal guarantees."[1324]

1322. This characterisation is based on the factual allegations pertaining to detention at paragraphs 605-609 of the Closing Order; KHIEU Samphan is charged therewith.

1323. According to paragraph 1416 of the Closing Order, the Co-Investigating Judges found that the crime of persecution on political grounds had been established in regard to Au Kanseng.

1324. As discussed in the segment on the Tram Kok cooperatives, the Co-Investigating Judges identify only three groups at paragraph 1417 of the Closing Order as having been victims of the crime of persecution on political grounds: ex-Khmer Republic soldiers and officials, New People and Cambodians returning from abroad.[1325]

1325. This legal characterisation runs counter to the facts at paragraphs 589-615 of the Closing Order regarding Au Kanseng, where no reference is made to any of the groups listed at paragraph 1417 of the Closing Order. Therefore, KHIEU Samphan is not charged therewith.

1326. According to paragraph 1422 of the Closing Order, the Co-Investigating Judges found that the crime of persecution on racial grounds had been established in regard to Au Kanseng concerning the Vietnamese minority.

1327. The evidence underpinning this charge is found at paragraph 622 concerning the execution of ethnic Vietnamese. It is uncertain whether the Co-Investigating Judges wished to include the alleged crimes against the Jarai in Au Kanseng under the characterisation of persecution

1328. The answer to that question is immaterial, given that, in any case, the Co-Investigating Judges were never seised of racial discrimination in relation to Au Kanseng.

1329. That is a good illustration of the potential risks described at paragraph 1313 of the present Brief. As the Co-Investigating Judges were seised of executions at Au Kanseng, the findings concerning the deaths of ethnic Vietnamese and Jarai were within the scope of their *saisine*. However, their *saisine* did not permit them to investigate subjecting those people to a particular form of treatment.

[1324] Closing Order, para. 1403, 1405.
[1325] See *supra*, paras. 884-885.

Therefore, any findings they entered in relation to those allegations are illegal. KHIEU Samphan is not charged therewith.

1330. According to paragraph 1434 of the Closing Order, the Co-Investigating Judges found that the crime of other inhumane acts (through attacks against human dignity) had been established in regard to Au Kanseng.

1331. Paragraph 1438 describes the evidence that the Co-Investigating Judges relied upon in finding that the crime was established (insufficient food for the prisoners, appalling detention conditions, wantonly insufficient sanitation facilities …). That evidence is further described at paragraphs 605 to 609 of the Closing Order, under "Detention".

1332. As noted *supra*, KHIEU Samphan must answer to all of those facts, with the exception of those relating the medical care provided to the prisoners; the Co-Investigating Judges were not seised of those facts.

1333. Also, paragraph 1438 describes "mistreatment by guards and interrogators" in relation to paragraphs 610 to 615 on "Interrogations". All the Co-Investigating Judges' findings on this matter are illegal, given that they were never seised thereof in the Introductory or Supplementary Submission.[1326] Therefore, KHIEU Samphan is not charged therewith.

II. GRAVE BREACHES OF THE GENEVA CONVENTIONS

A. Wilful Killing

1334. According to paragraphs 1494 and 1495, the Co-Investigating Judges found that wilful killing, which constitutes grave violation of the Geneva Conventions, was committed against "the Jarai detainees […] including women and children."

1335. As discussed in regard to the charges relating to the crime against humanity of murder, this charge is based on the evidence described at paragraphs 618-621 and 623 of the Closing Order. KHIEU Samphan is charged therewith.

B. Wilfully depriving a prisoner of war or a civilian the rights of fair and regular trial

[1326] See Co-Prosecutors' Introductory Submission, para. 67.

1336. According to paragraphs 1511 to 1514, the Co-Investigating Judges found that the personnel of Au Kanseng security centre deprived Jarai detainees of the rights of fair and regular trial, an offence falling within the definition of grave violation of the Geneva Conventions.

1337. Paragraph 1513 of the Closing Order lists some of rights allegedly denied to the Jarai. They include the right to be tried by an independent and impartial court, the right to be promptly informed of the offence with which they were charged, and the right to be presumed innocent.

1338. The segment on the factual allegations pertaining to the treatment of the Jarai in Au Kanseng (paragraph 618-621 and 623) does not specify whether the Jarai were denied the attributes of legal personality guaranteed those who suffered inhumane or degrading treatment in rural Cambodia in the 70s or accused in Phnom in an international case in 2017.

1339. Therefore, that charge is not properly substantiated since it is not based on any material fact that is supported by persuasive evidence. Therefore, KHIEU Samphan is not charged therewith.

1340. Moreover, even if the charge were to be considered properly substantiated, it would still be illegal given that paragraph 67 of the Introductory Submission concerning Au Kanseng makes no reference to denying prisoners their fundamental rights.

Section II. THE EVIDENCE PRODUCED

1341. A large portion of the evidence produced at trial (I), falls outside the Trial Chamber's jurisdiction (II). Other evidence suggests that some of the crimes could be established (III).

I. CATALOGUE OF THE EVIDENCE

1342. In the period from 2 March 2016 to 22 March 2016, three witnesses testified during the trial segment on the Au Kanseng security centre. Two of them are former prisoners at Au Kanseng while one is a former cadre.

1343. Those three individuals were on the Trial Chamber's original list which was released on 13 January 2016.[1327] One last person, Witness CHHAOM Se, was added to the list. On 4 May 2016, the Trial

[1327] Email of Senior Trial Attorney, entitled Scheduling – Au Kanseng Security Center", 13.01.2016.

Chamber notified the parties that latter had died.[1328] According to usual procedure, that person's statements can be used in lieu of their oral testimony, after having taken all the due precautions.[1329]

1344. The case file also contains many written records of interview. They include those of persons who were interviewed by the investigators in the course of the Case 002 investigation.

II. OUT-OF-SCOPE EVIDENCE

1345. One again, the Trial Chamber left the door open to presenting out-of-scope of evidence.

1346. This includes the evidence concerning interrogation and torture at Au Kanseng whereas no crime characterised as torture was submitted to the Trial Chamber for determination by way of the Closing Order.[1330]

1347. Other examples include: the answers of one witness to Prosecution Counsel FARR's questions about his [the witness'] work in a rubber plantation, a location that is outside the ambit of Case 002.[1331]

III. EVIDENCE CONCERNING CERTAIN CRIMES

1348. Some of the evidence produced suggests that the constitutive elements of the crime of murder, extermination, enslavement, imprisonment as crimes against humanity, as well as wilful killing as a violation of the Geneva Conventions, have been established.

1349. Moreover, at paragraph 1434 of the Closing Order, the Co-Investigating Judges characterise attacks against human dignity as other inhumane acts.

1350. According to the Supreme Court Chamber's "holistic" approach, at the relevant time, the residual category of other inhumane acts constituting crimes against humanity was not subdivided in the same way as it is in the Closing Order and the Case 002/01 Trial Judgement.[1332] The Defence

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[1328]Email of Senior Trial Attorney, entitled "2-TCW-840", 04.05.2016.

[1329] See *supra*, paras. 525-551.

[1330] See for example, PHAN Thol: T. 02.03.2016, **E1/395.1**, pp. 62-66, between 13.40.18 and 13.51.02; MOEUNG Chandy: T. 03.03.2016, **E1/396.1**, pp. 41-48, between 11.02.50and 11.19.45; MOEUNG Chandy: T. 21.03.2016, pp. 97-99, between 15.28.30 and 15.35.32.

[1331] PHAN Thol: T. 02.03.2016, **E1/395.1**, pp. 35-39, between 10.39.55and 10.47.43.

[1332] Case 002/01 Appeal Judgement, paras. 572-590; See *infra*, paras. 2400-2406 and 2410.

neither disputes this opinion nor that acts that could be generically characterised as other inhumane acts may have occurred at Au Kanseng.

Chapter IV. PHNOM KRAOL

Section I. CHARGES

1351. KHIEU Samphan is charged with facts which took place in the Phnom Kraol security centre, facts that which the Co-Investigating Judges characterise in the Closing Order as murder, extermination, enslavement, imprisonment, torture, persecution on political grounds and other inhumane acts (through attacks against human dignity and forced disappearances) as crimes against humanity.[1333]

1352. A closer look at the layout of the Phnom Kraol site helps understand how the various charges fit together (I). Careful analysis of the charges reveals the scope of the facts put to the Trial Chamber for determination. It also reveals that the Co-Investigating Judges significantly exceeded their *saisine* as compared to the mandate originally entrusted to them by the Co-Prosecutors (II).

I. GEOGRAPHIC SCOPE OF THE CHARGES

1353. Under "Legal Findings" in the Closing Order, the Co-Investigating Judges indicate that the crimes were committed at "Phnom Kraol". However, careful analysis of the facts at paragraphs 625-642 of the Closing Order concerning the "Phnom Kraol Security Centre" reveals a number subtle points about the layout of the place.

1354. Under "Location and Establishment", the Co-Investigating Judges indicate that there was a Security Office called Phnom Kraol, as well as two "related" sites, namely Offices K-11 and K-17.[1334]

1355. At paragraph 626, the Co-Investigating Judges provide more details about the layout, location and use of each of those three sites:

> "Phnom Kraol prison was a one-room complex constructed of wooden pillars, a bamboo lattice floor and a thatched roof. K-17 consisted of a two-storey building with wooden walls and a zinc roof and functioned as both the Office of the Secretary of Sector 105 and, briefly as a detention centre itself. K-11 was located approximately 1 kilometre Northeast of Phnom Kraol prison, and served as both a

[1333] Closing Order, paras. 1373, 1381, 1391, 1402, 1408, 1416, 1434 and 1470; Decision on Additional Severance, 04.04.2014, **E301/9/1**; Annex: List of paragraphs and portions of the Closing Order relevant to Case 002/02, **E301/9/1.1**, pp. 2-5.

[1334] Closing Order, para. 625.

detention centre and as the military office. It consisted of a wooden building with bamboo walls, a thatched roof and a plywood floor."

1356. They then indicate at paragraph 627 that the Trapeang Pring site was the "security centre's execution site."

1357. Based thereupon, it is to be understood that under the generic heading of "Phnom Kraol" in the "Legal Findings" segment of the Closing Order, the Co-Investigating Judges are actually referring to all four sites: Phnom Kraol, K-11, K-17 and Trapeang Pring.

1358. They entered their finding based on an investigation undertaken on the basis of paragraph 64 of the Co-Prosecutors' Introductory Submission, as well as paragraphs 8-11 of the Supplementary Submission.

1359. Only one security centre called Phnom Kraol is named at paragraph 64 of the Introductory Submission. and it is described as having been "an administrative office of Sector 105 before becoming the security centre of the sector" which was in operation from 1977 to 6 January 1979. Two categories of people were detained there: high ranking prisoners placed "on the wooden top floor" and ordinary prisoners on "the ground floor". Although only the "Phnom Kraol" site is mentioned, the description of this location is more reflective of K-17 rather than of Phnom Kraol, as described at paragraph 626 of the Closing Order.

1360. This is confirmed by the Supplementary Submission filed by the Co-Prosecutors on 11 September 2009 in order "to clarify and supplement the factual matters to be investigated by the Co-Investigating Judges."[1335]

1361. The Co-Prosecutors seised the Co-Investigating Judges of facts which took place at the "two security offices" identified through the investigation undertaken pursuant to paragraph 64 of the Introductory Submission. The two security offices in question are K-11 and the Phnom Kraol Dam..[1336]

1362. According to the Co-Prosecutors, both security offices were in operation "from April 1975 to January 1979", unlike the former Sector 105 administrative office which is mentioned at paragraph 64 of the Introductory Submission.

[1335] Supplementary Submission, 11.09.2009, **D202**, paras. 1 and 8.
[1336] Supplementary Submission, 11.09.2009, **D202**, paras. 8-11.

1363. Moreover, paragraph 89 of the Supplementary Submission mentions the Trapeang Pring execution site, which the Co-Investigating Judges were also requested to investigate.

1364. It is important to point this out, because under "Phnom Kraol" in the "Legal Findings" segment of the Closing Order, the Co-Investigating Judges may elect to deal with each of the four sites named *supra*. However, the facts of which they were seised in respect to each site are in some instances described differently in the Introductory Submission and in the Supplementary Submission.

II. SUBJECT MATTER SCOPE OF THE CHARGES

A. Murder

1365. According to paragraph 1373 of the Closing Order, the Co-Investigating Judges found that the crime of murder was established in regard to the "persons killed [...] in the security centres", including Phnom Kraol. At paragraph 1374, they give further details about the murders in general, and at paragraph 1376, the ones which were committed at security centres, in particular.[1337]

1366. The description of the facts relating to Phnom Kraol at paragraphs 625-642 of the Closing Order reveals which facts were characterised as murder in light of the foregoing.

1367. Only paragraphs 641 and 642 concern deaths of prisoners, or to be more precise, their execution. According to paragraph 641, some prisoners were beaten to death at Phnom Kraol. Also, some people were allegedly transported out to K-11 to be executed. At paragraph 642, the Co-Investigating Judges allege that the place called Trapeang Pring was used as an execution site and that 200 people were buried there. They also alleged that other prisoners were "killed within the prison vicinity."

1368. KHIEU Samphan must answer to all of the factual allegations of execution in the Closing Order.

B. Extermination

1369. According to paragraph 1381 of the Closing Order, the Co-Investigating Judges found that the crime of extermination had been established, notably with regard to the "the people who were killed or who died en masse [...] in the security centers," including Phnom Kraol.

[1337] See *supra*, paras. 1223-1224.

1370. Based on reasoning akin to that which is expounded *supra*, in determining the charges relating to Kraing Ta Chan, the Co-Investigating Judges only characterised as extermination the deaths which were earlier characterised as murder.[1338] No additional fact was recorded.

1371. KHIEU Samphan must answer to the same factual allegations as those under "A. Murder", *supra*.[1339]

C. Enslavement

1372. According to paragraph 1391 of the Closing Order, the Co-Investigating Judges found that the crime of enslavement had been established in regard to Phnom Kraol.

1373. As noted *supra*, according to paragraphs 1392 and 1394, the Co-Investigating Judges found that the crime was committed through a combination of two factors: exercising total control over the prisoners and forcing them to perform work without their consent, unpaid.[1340]

1374. The Co-Investigating Judges found that this crime had been established based on the factual findings at paragraphs 636 and 638 of the Closing Order concerning allegations of forcing the prisoners to perform work.

1375. At paragraph 636, the Co-Investigating Judges alleged that "there are reports of light offenders being unshackled and taken out to work during the day" without specifying which work site(s) they are referring to.

1376. At paragraph 638, the Co-Investigating Judges alleged that "some prisoners were made to work during the day, their hands remained tied while doing so."

1377. The Co-Investigating Judges entered only one of those two findings, the one at paragraph 636, within the scope of their *saisine* as defined at paragraph 8 of the Supplementary Submission concerning forced labour:

> "Office K-11 was used primarily as a temporary detention facility, from which prisoners were sent either to Phnom Kraol for detention, local worksites for re-education […]." (*emphasis added*).

[1338] See *supra*, paras. 1237-1241.
[1339] See *supra*, paras. 1365-1368.
[1340] See *supra*, paras. 867-869.

1378. The Co-Prosecutors seised the Co-Investigating Judges only of factual allegations of forced labour of prisoners at K-11, but not of factual allegations concerning prisoners at K-17 and Phnom Kraol.

1379. Therefore, KHIEU Samphan need only answer to the factual allegations at paragraph 636 concerning K-11.

D. Imprisonment

1380. According to paragraph 1402 of the Closing Order, the Co-Investigating Judges found that the crime of imprisonment was established in regard to Phnom Kraol, because "the personnel of these sites intentionally imposed serious, arbitrary deprivation of liberty on the detainees, in violation of legal guarantees."[1341]

1381. That characterisation is based on all of the factual allegations of detention at paragraphs 634 to 638 of the Closing Order, to which KHIEU Samphan must answer.

E. Torture

1382. According to paragraph 1408 of the Closing Order, the Co-Investigating Judges found that the crime of torture was established in regard to Phnom Kraol. The factual allegations of torture are set out at paragraphs 639 and 640, and they underpin the charge at paragraph 1408.

1383. The Co-Investigating Judges entered all those findings by acting in excess of their *saisine*. Paragraph 64 of the Introductory Submission and paragraphs 8-11 of the Supplementary Submission make no reference to interrogation, or, for that matter, to physical or mental torture. The Co-Investigating Judges were therefore without jurisdiction to investigate those facts.

1384. A similar breach of *saisine* is described *supra* under the factual allegations concerning Kraing Ta Chan. As noted earlier, in instances where the Co-Prosecutors wanted to seise the Co-Investigating Judges of factual allegations of torture, they specifically stated so.[1342]

1385. Therefore, since the Trial Chamber was not properly seised of factual allegations of torture in regard to Phnom Kraol, KHIEU Samphan is not charged therewith.

[1341] Closing Order, para. 1403. See also, para. 1405.
[1342] See *supra*, paras. 1249-1253.

F. Persecution on political grounds

1386. According to paragraph 1416 of the Closing Order, the Co-Investigating Judges found that the crime of persecution on political grounds had been established in regard to Phnom Kraol.

1387. As noted in the segment on the Tram Kok cooperatives, at paragraph 1417 of the Closing Order the Co-Investigating Judges clearly identify only three groups as having been victims of the crime of political persecution: former Khmer Republic soldiers and officials, new people and Cambodians returning from abroad. [1343]

1388. That legal characterisation runs counter to the factual allegations at paragraphs 625-642 concerning Phnom Kraol, since none of the groups listed at paragraph 1417 of the Closing Order is mentioned there. The only reference to prisoners is found at paragraph 634 of the Closing Order:

> "All the former prisoners of Phnom Kraol who were interviewed, attest that they were arrested on suspicion of being traitors to the revolution either because of associations with the Vietnamese or because of alleged connections to the CIA."

1389. Accordingly, the charge recorded at 1416 is without foundation since none of the groups listed at paragraph 1417 of the Closing Order is identified there or anywhere else. KHIEU Samphan need not answer thereto.

G. Other inhumane acts (through attacks against human dignity)

1390. According to paragraph 1434 of the Closing Order, the Co-Investigating Judges found that the crime of other inhumane acts (through attacks on human dignity) was established in regard to Phnom Kraol.

1391. Paragraph 1438 sets out the elements upon which the Co-Investigating Judges relied in finding that the crime had been established (lack of proper food for the prisoners, appallingly oppressive conditions of detention, squalor). That evidence is described at paragraphs 634 to 638 of the Closing Order concerning detention conditions.

[1343] See *supra*, paras. 884-885.

1392. Paragraph 1438 also describes "mistreatment by guards and interrogators". As noted *supra* regarding the crime of torture, all of the Co-Investigating Judges' findings on this subject are illegal.[1344]

1393. KHIEU Samphan must therefore answer to all the factual allegations except the ones relating to torture.

H. <u>Other inhumane acts (through enforced disappearance)</u>

1394. According to paragraph 1470 of the Closing Order, the Co-Investigating Judges found that the crime of other inhumane acts (through attacks against human dignity) was established in regard to Phnom Kraol.

1395. They then went on to describe the evidence concerning this crime. Paragraph 1471 refers notably to placing persons outside of the protection of the law and to "the refusal to provide access to [the victims], or convey information [to them] on the fate or whereabouts of such persons."[1345]

1396. Paragraph 1472 also describes putting into place "measures destined to conceal the fate of individuals who had disappeared by ensuring that the witnesses did not reveal information about them."

1397. The Co-Investigating Judges' allegations are based on a finding at paragraph 641 of the Closing Order under "Executions and Disappearances", where it is stated that former prisoners saw "people being taken away at night who were never seen again."

1398. According to paragraph 64 of the Introductory Submission, the Investigating Judges were only seised of factual allegations of disappearance at the site called "Phnom Kraol", i.e. K-17.[1346] The Supplementary Submission describes other instances of disappearance at "K-11" or "Phnom Kraol".[1347]

1399. Therefore, KHIEU Samphan need only answer to factual allegations of forced disappearance in regard to K-17.

[1344] See *supra*, paras. 1382-1385.
[1345] Closing Order, para. 1471.
[1346] See *supra*, paras.1353-1364.
[1347] Supplementary Submission, 11.09.2009, **D202**, paras. 8-11.

Section II. EVIDENCE UNDERPINNING THE FINDINGS IN THE CLOSING ORDER

1400. Analysis of the evidence in the Closing Order reveals whether the charges upon which the Accused were sent to trial were sufficiently established. Contrary to expectation, it also reveals that the Co-Investigating Judges breached their *saisine* even further than it appeared having regard to the information underpinning the charges, as discussed *supra*.

1401. As revealed by their findings concerning "Phnom Kraol" under "Legal Findings" in the Closing Order, the Co-Investigating Judges omitted to take account of the lay-out of the Phnom Kraol site and the specific mandate entrusted to them in respect to each of the sites.

1402. For those reasons, the evidence they relied upon concerning forced labour (I) and enforced disappearances (II) is analysed as follows.

I. FORCED LABOUR

1403. As stated *supra*, according paragraphs 636 and 638 of the Closing Order, the Co-Investigating Judges found that the crime of enslavement had been established in regard to "Phnom Kraol".[1348] Paragraph 636 makes no reference to detention sites. Paragraph 638 concerns Phnom Kraol. Now, the Co-Investigating Judges were only seised of factual allegations of forced labour at K-11. Therefore, their finding at paragraph 638 is illegal.

1404. Analysis of the evidence underpinning the finding at paragraph 636 reveals that that evidence too is illegal. It is based on two written records of interview by two different individuals, UONG Dos and SOVAN Han.

1405. The first individual reported that he did perform work, but was only detained at the Phnom Kraol prison.[1349] The second individual also performed work during the Democratic Kampuchea period, but only in Phnom Penh. She reported that she went to K-17, but did not report forced labour or detention.[1350] Therefore no evidence supports the allegations in the Introductory Submission.

1406. Reliance upon such evidence to enter findings amounts to a violation of *saisine* and manipulation of evidence, a course of action that the Co-Investigating Judges have resorted to in many instances and which has an impact on the *saisine* of the Trial Chamber. KHIEU Samphan should not have

[1348] See *supra*, paras. 1372-1379.
[1349] WRI of UONG Dos, 29.10.2008, **E3/7703**, ERN 00242170-71.
[1350] WRI of SOVAN Hân, 26.11.2008, **E3/365**, ERN 00186496-96.

been sent to trial in respect of factual allegations of forced labour, characterised as enslavement. He therefore need not address that charge in the present Brief.

II. FACTUAL ALLEGATIONS PERTAINING TO DISAPPEARANCE

1407. It stated *supra*, the Co-Investigating Judges were seised of factual allegations pertaining to disappearance only in relation to the K-17 site. Yet, neither the finding concerning the crime of enforced disappearance at "Phnom Kraol" at paragraph 1470 of the Closing Order nor the facts underpinning it distinguishes between the various crime sites.

1408. Only an analysis of the evidence underpinning the finding at paragraph 641 reveals whether the charges were sufficiently established. However, instead, it reveals that the Judges further exceeded their *saisine*. The two persons who testified on that subject, namely CHAN Tauch and UONG Duos, were prisoners at Phnom Kraol only and not at K-17.

1409. The Co-Investigating Judges deliberately concealed the fact that the evidence is out of scope, and entered illegal findings based on facts of which they were not seised.

1410. KHIEU Samphan cannot continue to be the victim of such injustice. He therefore need not answer to allegations of forced disappearance in regard to Phnom Kraol.

Section III. THE EVIDENCE PRODUCED

1411. A significant portion of the evidence produced at trial (I) is outside the scope of Chamber's *saisine* (II). Other evidence suggests that some crimes may be established (III).

I. CATALOGUE OF THE EVIDENCE

1412. Between 10 March 2016 and 7 April 2016, the Trial Chamber heard six individuals, i.e. five witnesses and one civil party during the trial segment allocated to the Phnom Kraol security centre. The civil party was not interviewed during the Case 002 investigations.[1351]

1413. Two of the five witnesses who testified were former K-17 detainees, while three were former Khmer Rouge cadres who never held any position in the hierarchy of any of the detention centres. As for the civil party, his place of detention is out of scope.[1352]

[1351] See *infra*, paras. 1419-1428.
[1352] See *infra*, paras. 1429-1438.

1414. That means that by the time the hearings ended, no former K-11 or Phnom Kraol prisoners had given testimony, and neither had any guards or cadres at any of the three detention centres.

1415. Moreover, two other persons who testified in Case 002/02 spoke about the Phnom Kraol security centre. During a trial segment allocated to the crimes committed pursuant to the policy on the regulation of marriage, Civil Party KUL Nem also spoke about the Phnom Kraol security centre.[1353] Witness SAO Champi, a former Khmer Rouge cadre who testified during the trial segment on the conflict, was also examined concerning Phnom Kraol.[1354] They both had very little to offer by way of information.

II. OUT-OF-SCOPE EVIDENCE

1416. Once again, much of the evidence is extrinsic to the Trial Chamber's *saisine*. As it is not possible to list it all, a few items will suffice to drive the point home. The testimony of Civil Party SUN Vuth is clearly out of scope. Indeed, the fact the Trial Chamber called him to testify shows that it ignores whatever the Defence has to say.

A. Non-exhaustive catalogue of out-of-scope evidence

1417. The catalogue includes evidence in support of facts that the Co-Investigating Judges investigated in breach of their *saisine*, such as those concerning interrogations in the various sites on the Phnom Kraol security premises.[1355]

1418. It also includes evidence that is extrinsic to the Closing Order and by implication, to the Trial Chamber's *saisine*. As such, the evidence concerning work at worksites in Mondulkiri area,[1356] the Nang Khi Loek re-education centre,[1357] the arrests and executions at out-of-scope sites,[1358]

[1353] KUL Nem: T. 24.10.2016, **E1/488.1**.
[1354] SAO Champi: T. 27.10.2016, **E1/491.1**.
[1355] See for example: all the evidence cited in endnotes 639 and 640 of the Closing Order; CHAN Tauch: T. 10.03.2016, **E1/399.1** pp. 19-20, between 09.53.46-09.56.36.
[1356] See for example, CHAN Tauch: WRI, 23.10.2008, **E3/7694**, ERN 00242143; T. 10.03.2016, **E1/399.1**, pp. 25-26, between 10.07.22and 10.10.31, pp. 61-63, between 13.44.22and 13.49.30; NET Savat: T. 11.03.2016, **E1/400.1**, p. 19, around 09.59.28; BUN Loeung Chauy: T. 28.03.2016, **E1/409.1**, p. 11, around 09.37.41, p. 12, around 09.40.47.
[1357] BUN Loeung Chauy: T. 28.03.2016, **E1/409.1**, pp. 22-23, between 10.07.20 and 10.10.25.
[1358] BUN Loeung Chauy: T. 28.03.2016, **E1/409.1**, p. 7, around 09.27.09 (arrest of Kasy at K-16 and execution); SUN Vuth: T. 30.03.2016, **E1/411.1;** T. 30.03.2016, **E1/412.1** (detention at an undisclosed location).

disappearances at out-of-scope sites,[1359] the treatment of Vietnamese in Mondolkiri Province, Khmer Rouge incursions into Vietnam[1360] and the treatment of former Khmer Republic officials in Mondolkiri Province should to be omitted from the deliberations.[1361]

B. Civil Party SUN Vuth's testimony

1. Procedural Background

1419. On 5 February 2016, the Trial Chamber released to the parties the list of witnesses it proposed to hear during the trial segment allocated to the Phnom Kraol security centre.[1362]

1420. On 10 and 11 March 2016, the Trial Chamber heard the testimony of the first two witnesses CHAN Tauch and NET Savat, the only former prisoners on the witness list.[1363]

1421. On 16 March 2016, the Co-Prosecutors requested the Trial Chamber to call "a replacement witness or civil party for the two former detainees who are now deceased (Sok El and Aum Mol)."[1364] With this in mind, they proposed to call, among others, Civil Party SUN Vuth, a former Division 920 soldier, who, they claimed, was "'detained in a special security center near a mountain' in Koh Nhek district (the location of Phnom Kraol)". They also recalled that in the Closing Order the Phnom Kraol site comprises various units and that CHAN Tauch and NET Savat were detained at K-17. However, SUN Vuth was detained at Phnom Kraol, meaning that his testimony helped support the allegations in the Closing Order.[1365]

1422. On 21 March 2016, the Trial Chamber heard the parties' oral responses the Co-Prosecutors' Request. The Defence moved for its dismissal.[1366]

[1359] CHAN Tauch: T. 10.03.2016, **E1/399.1**, p. 48, around 11.17.32, p.63, around 13.49.30; NET Savat: T. 11.03.2016, **E1/400.1**, p. 36, around 11.08.20; SUN Vuth: T. 30.03.2016, **E1/411.1**, p. 63, around 14.01.20.
[1360] CHAN Tauch: T. 10.03.2016, **E1/399.1**, p. 53, around 11.29.33; BUN Loeung Chauy: T. 28.03.2016, **E1/409.1**, p. 54, around 13.56.01, pp. 55-58, between 13.58.26 and 14.08.20; SAO Sarun: T. 29.03.2016, **E1/410.1**, pp. 84-92, between 15.11.34 and 15.34.01.
[1361] CHAN Tauch: T. 10.03.2016, **E1/399.1**, p. 53, around 11.29.33; BUN Loeung Chauy: T. 28.03.2016, **E1/409.1**, pp. 15-21, between 09.48.59 and 10.05.21 (treatment of former Khmer Republic officials in the Northeast region).
[1362] Email of Senior Trial Attorney, entitled "Phnom Kraol Security Centre Witness List and Time Allocations", 05.02.2016.
[1363] CHAN Tauch: T. 10.03.2016, **E1/399.1;** NET Savat: T. 11.03.2016, **E1/400.1**.
[1364] Co-Prosecutors' Request, 16.03.2016, **E390**, para. 6.
[1365] Co-Prosecutors' Request, 16.03.2016, **E390**, paras. 6-7.
[1366] T. 21.03.2016, **E1/405.1**, pp. 4-20, between 09.12.58 and 09.43.32

1423. On the one hand, the reason for the Request was misleading. The Co-Prosecutors used the death of SOK El and AUM Mol as justification for their Request, whereas neither one of those two individuals was on the Trial Chamber's initial list of 5 February 2016. The Request was simply aimed at re-launching long-dormant accusations following the testimonies of CHAN Tauch and NET Savat.[1367]

1424. On the other hand, the Defence pointed out that Civil Party SUN Vuth testimony made no reference to the Phnom Kraol Security Centre. Therefore the claim that SUN Vuth was detained there is false.[1368]

1425. On hearing that, in regard the Defence's second point, Prosecution Counsel LYSAK sought to reassure the Trial Chamber and the parties that the Request had merit:

> "Last, in response to the specific points made about these two witnesses by the Khieu Samphan team, the prison at which the civil party, 2-TCCP-1016, is clearly the Phnom Kraol security office. It's described in his civil party application as a security centre near a mountain in Kaoh Nheaek district. That's Phnom Kraol. It's the only security office next to a mountain. It's the only place, also, where Division 920 soldiers were detained, so there's no question that this person is relevant to this segment."[1369] (*emphasis added*)

1426. In the face of such assurance, the Defence was only to able reiterate that the name "Phnom Kraol" appeared nowhere in SUN Vuth's statement.[1370]

1427. On 24 March 2016, the Trial Chamber granted the Co-Prosecutors' Request, thereby choosing Dale LYSAK's unfounded claims over the facts and ignoring the legitimate concerns of the Defence.[1371]

1428. Much to Dale LYSAK's chagrin, SUN Vuth's testimony confirmed the Defence's reservations, namely that the SUN Vuth was never detained at any of the sites listed in the Closing Order.

2. Out-of-scope testimonies

1429. The Co-Prosecutors requested SUN Vuth's testimony in order to obtain evidence on one of the sites listed in the Closing Order, namely the eponymous Phnom Kraol.

[1367] T. 21.03.2016, **E1/405.1**, pp. 10-13, between 09.24.27 and 09.29.22. See *infra*, paras. 1446-1448.
[1368] T. 21.03.2016, **E1/405.1**, pp. 14-15, between 09.29.40 and 09.33.48.
[1369] T. 21.03.2016, **E1/405.1**, p. 17, between 09.37.04 and 09.39.04 (final English version of transcript).
[1370] T. 21.03.2016, **E1/405.1**, pp. 18-19, between 09.39.45 and 09.41.10.
[1371] T. 24.03.2016, **E1/408.1**, p. 2, after 09.07.51. The statement on the reasons for the decision was issued on 11.07.2016, **E390/3**.

1430. At paragraph 626 of the Closing Order, Phnom Kraol is described as a "one-room complex constructed of wooden pillars, a bamboo lattice floor and a thatched roof." Moreover, according to paragraph 637 of the Closing Order, there may have been as many as 385 prisoners at that location.

1431. When questioned about this site, Witness BUN Loeung Chauy, a former Khmer Rouge guard, said that:

> "That security office was not better than a place to keep cattle, but the security office could house perhaps 100 prisoners. The wall was made from bamboo with a thatch roof, and there were fence surrounding that security office, which the prisoners could not flee." [1372]

1432. He also said that the prison was located near a dam which "was not too small" since "vehicles could run on the road" and "there were gates, water gates in that dam."[1373]

1433. As none of the witnesses was a prisoner, guard or cadre at the site at issue, it is difficult to provide more detailed description of the place.

1434. When asked to describe the site and where it was located so as to dispel any doubts as to whether his testimony was pertinent, he answered:

> "I cannot recall everything in detail; however, there was a stream which is called Ou Chbar and, as I said there is a small mountain or a hill nearby and it was close to the forest and there was a prison there and I did not know how long the prison had been built. The – that building was 10 metres long and 5 to 6 metres wide. There were 3 rooms within that building. Initially, I was placed in a room to the south in that building and I was detained alone because I was important; however, two days later, two more detainees were placed in that room with me, maybe because the other two rooms were full of detainees."[1374]

1435. He added:

> "No fence surrounding the perimeter. As for the interrogations location, it was a small hut where hammocks could be tied and three of four people could sleep there [...]. As I said, that prison was not used to detain prisoners on a permanent basis. I did not know whether it might be used for the immediate arrests. That might be the provisional prison. But it was not built properly. If it was built well, I could not have fled."[1375]

1436. Finally, in a bid to paint a full picture, to the question "[d]o you remember, was there a reservoir in the area of this prison?", he answered:

[1372] BUN Loeung Chauy: T. 28.03.2016, **E1/410.1**, p. 29, around 10.40.55.
[1373] BUN Loeung Chauy: T. 28.03.2016, **E1/410.1**, pp. 33-37, between 10.50.19 and 11.01.25.
[1374] SUN Vuth: T. 30.03.2016, **E1/411.1**, pp. 64-66, between 14.03.13 and 14.07.37.
[1375] SUN Vuth: T. 30.03.2016, **E1/411.1**, pp. 97-99, between 15.47.54 and 15.51.41.

> "No, no reservoir, but there was a stream. Not so big, a small stream with water flowing most of the time, but in the dry season, water remained in holes there."[1376]

1437. There is no point in dwelling any further on a witness whose testimony is clearly extraneous to the charges against KHIEU Samphan. The Defence simply finds it regrettable that his testimony was not heard during the oral responses to the Co-Prosecutors' Request, as that would have saved everyone the inconvenience of sitting through an entire day of utterly pointless hearings.

1438. That would also have helped the Trial Chamber avoid being criticised for bias.

III. EVIDENCE CONCERNING THE CRIMES OF IMPRISONMENT AND OTHER INHUMANE ACTS (THROUGH ATTACKS AGAINST HUMAN DIGNITY)

1439. Some of the evidence on record seems to suggest that the constitutive elements of the crime of imprisonment, as alleged in paragraph 1402 of the Closing Order, were established.

1440. Further, at paragraph 1434 of the Closing Order, the Co-Investigating Judges characterise attacks on human dignity as other inhumane acts.

1441. According to the Supreme Court Chamber's "holistic" approach, at the relevant time, the residual category of other inhumane acts as crimes against humanity was not subdivided in the same way as it is in the Closing Order and the Case 002/01 Trial Judgement.[1377]

1442. The Defence neither disputes that opinion nor that crimes falling under the generic category of other inhumane acts may have been committed at Phnom Kraol.

Section IV. DISCUSSION OF THE RELEVANT EVIDENCE

1443. The only facts to which KHIEU Samphan is to answer in this instance are those relating to the executions, which are characterised in the Closing Order as murder and extermination.

1444. It will be recalled that the Co-Investigating Judges found that people were beaten to death at Phnom Kraol and that others were taken from K-11 to be executed possibly at Trapeang Pring, where, according to the Closing Order, at least 200 people were executed. Finally, prisoners were allegedly executed "within the [Phnom Kraol] prison vicinity."[1378]

[1376] SUN Vuth: T. 30.03.2016, **E1/411.1**, p. 99, between 15.51.41 and 15.54.09.
[1377] Case 002/01 Appeal Judgement, paras. 572-590.
[1378] Closing Order, paras. 641 and 642.

1445. Upon analysis, none of the testimonies supports the finding that people were killed at the "Phnom Kraol security center".

I. CHAN TAUCH'S TESTIMONY

1446. Witness CHAN Tauch testified that his fellow detainees "were not sent to be killed."[1379] Then, when questioned about what he told the investigators: he said that people were taken away to be killed,[1380] adding that:

> "And it is my personal conclusion that when those people were taken out, it means that they were taken out and killed."[1381]

1447. CHAN Tauch also testified that he did not hear of the killings while he was in detention, but learnt of them "later". Moreover, he did not link the fact that he learnt about the killings belatedly to what happened to the prisoners at the Phnom Kraol security centre; it is therefore uncertain whether he was referring to those people in particular.[1382] Finally, when he was questioned about Trapeang Pring, he answered that he did not know where it is located.[1383]

II. NET SAVAT'S TESTIMONY

1448. Witness NET Savat was questioned about this subject and confronted with his statements, he neither corroborated them nor reported any deaths of prisoners:

> "**Q**. Did you ever hear where these people were taken? Did you ever hear anything about executions of people who had been detained and where it was that people were taken to be executed?
> **A**. I did not know about that. However, what I could say is that some detainees were taken and placed on a vehicle and drove away. And I did not know what happened to them later.
> **Q**. I want to read another short excerpt from your DC-Cam interview, E3/7696; Khmer, 00231531; English, 00384152; French, 00384258. You said – quote: 'Some killings happened, but not at the prison. They did along the way to Kratie.' And earlier in the interview, you talked about hearing that people on the upper floor had been transported to the west. Who is it that you heard – who is it that told you that prisoners who were taken away were send to the west to the – in the direction of Kratie? Who is it that you heard that from?
> **A**. I heard it from other people but I personally did not see that. People whispered from one to another about this."[1384]

[1379] CHAN Tauch: T. 10.03.2016, **E1/399.1**, p. 21, before 09.57.54
[1380] WRI, of CHAN Tauch: 23.10.2008, **E3/7694**, ERN 00243144.
[1381] CHAN Tauch: T. 10.03.2016, **E1/399.1**, p. 28, before 10.14.09.
[1382] CHAN Tauch: T. 10.03.2016, **E1/399.1**, pp. 44-45, between11.07.22 and 11.10.31.
[1383] CHAN Tauch: T. 10.03.2016, **E1/399.1**, pp. 63-64, before 13.51.23.
[1384] NET Savat: T. 11.03.2016, **E1/400.1**, pp. 37-39, between 11.10.16 and 11.18.15.

III. BUN LOEUNG CHAUY'S TESTIMONY

1449. Witness BUN Loeung Chauy, a former detainee, was inconsistent in answering questions about executions. First, he said that as far as he knew, after one week in detention at Phnom Kraol, "the serious offenders [...] were sent away and killed", but he failed to name a single person who was killed, whereas some of the alleged victims were reportedly his relatives.[1385] Moreover, his answer raises doubt as to whether any killings took place:

> "**Q**. Did you have any relatives who were sent to Phnom Kraol who did not survive the regime?
> **A**. I would like to recall their names. Those who were arrested together with my uncle never returned. Many of them, which – whom I cannot count all, they have never returned. Only one or two came back. And my younger in law, as I said, came back and returned, and the others, I could not recall their names, because they went back to their birth villages."[1386]

1450. He also testified that he never saw what went on inside the centre given that he was not allowed access. He said that the closest he ever got to the centre was within "50 or 100 metres".[1387] He testified further that he heard about people being taken away to be killed, but did not name the source of his knowledge.[1388]

1451. Finally, when was questioned about the Trapeang Pring site, he answered that he knew that pits were dug there, but did not say whether he saw any bones or whether any prisoners at Phnom Kraol were executed at the Trapeang Pring site.[1389]

1452. Such testimony cannot establish a crime beyond reasonable doubt, given that it is neither pertinent nor substantiated, and moreover, it was given by someone who was detained and never held any position of responsibility at the location at issue; also, he did not name the source of his knowledge regarding such serious charges against KHIEU Samphan.

IV. OTHER EVIDENCE

1453. The case file contains other evidence about the death of prisoners at the Phnom Kraol security centre.[1390]

[1385] BUN Loeung Chauy: T. 28.03.2016, **E1/409.1**, p. 25, around 10.36.22.
[1386] BUN Loeung Chauy: T. 28.03.2016, **E1/409.1**, p. 25, around 10.36.22.
[1387] BUN Loeung Chauy: T. 28.03.2016, **E1/409.1**, p. 26, around 10.39.39
[1388] BUN Loeung Chauy: T. 28.03.2016, **E1/409.1**, p. 28, around 10.45.07.
[1389] BUN Loeung Chauy: T. 28.03.2016, **E1/409.1**, pp. 28-35, between 10.45.07 and 11.03.50.
[1390] See Closing Order, paras. 641-642, endnotes 2787-2796.

1454. In view of the contradictions between the in-court testimonies of Witnesses CHAN Tauch and NET Savat – who, once again, are the only ones who could possibly have witnessed the alleged crimes –, and their statements before the Co-Investigating Judges, the Trial Chamber cannot enter findings in reliance on testimony that was not subjected to adversarial debate.

1455. The Co-Prosecutors will no doubt rely on the testimony of SOK El, who appears on their initial list,[1391] on the premise that, because he is deceased, they can use his statements in lieu of oral testimony. While the procedure allows for that, in this instance, the Trial Chamber may rely on such evidence only by exercising utmost caution in view of the defects arising from an exclusively inculpatory investigation.[1392]

1456. The multiple turns and twists observed during the proceedings preclude recording findings against KHIEU Samphan solely on the basis of written records of interview as they are of inherently low probative value.

Section V. LEGAL CHARACTERISATION

I. MURDER (CRIME AGAINST HUMANITY)

A. Definition

1457. The *actus reus* of the crime of murder is an act or omission of the accused, or one or more persons for whose acts or omissions the accused bears criminal responsibility that caused the death of the victim.[1393] As to the *mens rea*, the perpetrator must have had the specific intent to kill.[1394]

B. Legal characterisation of the facts

1458. Careful analysis of the facts has shown that no deaths could be established at the various sites of the Phnom Kraol security centre. Therefore, the crime of murder cannot be established.

[1391] Co-Prosecutors' List of witnesses, civil parties and experts, 28.07.2014, **E307/3/2.2**.
[1392] See *supra*, paras. 525-551.
[1393] Case 002/01 Trial Judgement, para. 412.
[1394] See *supra*, paras. 394-429.

II. EXTERMINATION (CRIME AGAINST HUMANITY)

A. Definition

1459. The material element of extermination is defined by the act of killing on a large scale.[1395] As to the *mens rea*, the perpetrator(s) of the killings must have had the specific intent to kill on a large scale or to subject a large number of people to conditions of life calculated to bring about their death.[1396]

B. Legal characterisation of the facts

1460. Careful analysis of the facts shows that no deaths could be established at the different sites of the of Phnom Kraol security centre. Therefore, the crime of extermination cannot be established.

Chapter V. ALLEGED POLICY ON SECURITY CENTRES

1461. The charges against Khieu Samphan relate to crimes committed at S-21, Kraing Ta Chan, Au Kanseng and Phnom Kraol security centres; he has addressed those charges *supra*.[1397] According to the Co-Investigating Judges, the establishment and operation of those security centres served the alleged policy of "the reeducation of the bad elements and killing of 'enemies', both inside and outside the Party ranks."[1398] The Trial Chamber is seised of factual allegations pertaining to the implementation of that policy.[1399]

1462. According to the Closing Order, the CPK designed five policies, including the one at issue in this instance, with a view to achieve the common purpose. In reality, the Co-Investigating Judges devised an empirical definition of these policies for the sole purpose of impeaching KHIEU Samphan, their aim being to establish a nexus between crime sites, where KHIEU Samphan's action was patently non-existent, and his roles and functions during the Democratic Kampuchea period.

1463. Having failed to establish KHIEU Samphan's direct responsibility in committing or ordering the committing of the crimes, the Co-Investigating Judges resorted to fabrication, by linking the

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[1395] Case 002/01 Appeal Judgement, para. 517.
[1396] Case 002/01 Appeal Judgement, paras. 517-522.
[1397] See *supra*, Chapter I. S-21, Chapter II. Kraing Ta Chan, Chapter III. Au Kanseng and Chapter IV. Phnom Kraol.
[1398] Closing Order, paras. 157 and 178-203.
[1399] Decision on Additional Severance, **E1/301/9/1**; Annex: List of paragraphs and portions of the Closing Order relevant to Case 002/02, **E301/9/1.1**, p. 1.

commission of those crimes to the establishment of policies put in place by the leadership of the CPK party, of which KHIEU Samphan happens to have been a member.

1464. So the nexus was no longer between the Accused and the crime but rather between the Accused and the policy which purportedly resulted in commission of the crime.

1465. Such patently unjust reasoning very quickly shows limits and fails to prove the existence of an alleged policy on security centres.

1466. On the one hand, security centres were used to isolate individuals that were considered to be a threat to the stability of Democratic Kampuchea. The fact that rebellions took place is irrefutable, and the Khmer Rouge dealt with firmly (I).

1467. On the other hand, there is ample evidence that the security centres were under the control of the military. However, as the Trial Chamber correctly found in the Case 002/01 Judgement, KHIEU Samphan held no power within the party's military leadership. (II).

1468. Finally, it is important to recall that the Kraing Ta Chan security centre was not part of the military structure, a fact that the Co-Investigating Judges ignored, because they were not very familiar with dealing with heterogeneous situations when it came to recording their findings (III).

Section I. A SECURITY STATE FACED WITH INSECURITY

1469. Stephen MORRIS testified that purges were the result of paranoia on the part of the regime.[1400] Whether or not it was paranoia, he did nonetheless report that in the Soviet archives he found evidence of failed uprisings against Democratic Kampuchea in 1977, thereby confirming the accounts about attempts to overthrow the regime.[1401] A number of witnesses testified to the same effect.

[1400] Stephen MORRIS: T. 19.10.2016, **E1/486.1**, p. 116, L 12-21: "I believe that it was a paranoid fantasy on the part of Pol Pot to think that people within the party who had been loyal to the party throughout a long period of time, were, in fact, agents of Vietnam. Instead I think it was not only paranoia but also an attempt to explain weakness in [the] conflict with Vietnam. In other words, the people like in the Eastern Zone who took the brunt of the fighting of Vietnam and who were not successful in the fighting with Vietnam must have been traitors in order not to defeat Vietnam. Again, this is a part of a paranoid political culture, which permeates all revolutionary movements.."

[1401] Stephen MORRIS: T. 19.10.2016, **E1/486.1**, pp. 31-32, after 10.07.54: "What I encountered was evidence of attempted insurgency, but not necessarily a coup d'etat. The concept of a coup d'etat was not something that I encountered in my - - in my research. Again, that's not to say that such things did not occur. I say only what I saw, what I read, and I did not read about attempted coup d'etats. I did read about attempted insurgencies against the government of Democratic Kampuchea.."

1470. PRUM Sarat testified that he heard about such reports during training sessions with SON Sen.[1402] MEAS Voeun testified about incidents recounted to him by his friends concerning the "SAO Phim's barracks" along the Vietnamese border and a letter concerning a coup plot.[1403] Other witnesses testified that they personally witnessed facts and incidents which attested to internal strife and chaos in various parts of Democratic Kampuchea. In his testimony, SIN Oeng, one of SAO Phim's former bodyguards, confirmed his earlier statements regarding a meeting "to [launch] the resistance movement."[1404]

1471. Also, SIN Oeng testified that he learned after 1979 that Centre and East Zone forces engaged in armed confrontations.[1405]

1472. NONG Nim is a relative of SAO Phim, and was a driver in the latter's defence unit. Like SIN Oeng, he testified that he saw ROS Nhim visiting SAO Phim in Battambang. He confirmed SIN Oeng's testimony regarding clashes between the Centre and the East Zone.[1406]

1473. BAN Seak, who was appointed Krouch Chhmar secretary in 1978, testified that he was informed by his hierarchy that HENG Samrin, CHEA Sim and "cadres of the [East Zone]" who had joined the Vietnamese were implicated in treason. He stated that it was necessary to "gather the forces" to deal with the unrest in that location. Indeed, according to his testimony, "there was a movement to rebuild the national salvation forces, there were resistance forces that were very active then." Because of that, he was asked to "recruit soldiers among them for the frontline battlefields."[1407]

1474. According to BAN Seak, the situation was "tense" following to the creation of a national salvation front and a "rebellion" of "combatants from mobile units". He explained that when he attempted to recruit soldiers, the Centre army became "concerned" thinking that he was trying to organise a rebellion; the problem was compounded when 100 soldiers he had trained "fled to the forest together with the weapons."[1408]

[1402] PRUM Sarat: T. 26.01.2016, **E1/382.1**, p. 32, at 13.47.47

[1403] MEAS Voeun: T. 02.02.2016, **E1/386.1**, pp. 77-79, between 15.06.16 and 15.12.25, pp. 80-81, after 15.15.01.

[1404] SIN Oeng: T. 01.12.2016, **E1/505.1**, pp. 102-105, between 15.49.07 and 15.57.56. See also SIN Oeng: T. 05.12.2016, **E1/506.1**, pp. 76-77, around 14.21.45.

[1405] SIN Oeng: T. 01.12.2016, **E1/505.1**, p. 94, around 15.25.15.

[1406] NONG Nim: T. 12.12.2016, **E1/511.1**, pp. 9-10, between 09.25.15 and 09.29.16, pp. 17-18, around 09.51.02, pp. 43, around 11.14.03.

[1407] BAN Seak: T. 05.10.2015, **E1/353.1**, p. 60, after 13.51.11, p. 61, at 13.54.29, p. 75, around 14.31.45, p. 90, before 15.32.59.

[1408] BAN Seak: T. 05.10.2015, **E1/353.1**, p. 22, after 10.02.18; T. 06.10.2015, **E1/354.1**, p. 62, after 14.16.50.

1475. MEAS Sœurn, son of CHAN Seng Hong, the local head of the CPK in the East Zone, also testified about clashes between the different forces, including HENG Samri's forces, against the Centre forces.[1409]

1476. SEM Om, who was in charge of a radio communication system within a unit based in Trapeang Thlong in Kampong Cham Province, testified that he heard "the Khmer-speaking person saying on the channel that we should join hands together to take part in toppling Pol Pot."[1410]

1477. Moreover, desertions and incidents involving soldiers put the rest of the troops at risk.[1411] MOENG Vet recounted one particular incident when a radio operator gave the wrong instructions, resulting in the death of 200 soldiers.[1412] According to him, this kind of incident was also the reason for the purges and the suspicions about leakage of intelligence, as well as the flight of soldiers and the emergence of rebel movements in that Zone.[1413]

1478. IENG Phan testified that he received confirmation after the reintegration that "amongst Vietnamese troops, there were Khmer soldiers who were trained in Vietnam and who fled from the East Zone" between late 1977 and mid-1978 and are "military commanders at present."[1414]

1479. As the Democratic Kampuchea regime was facing threats from both within and without, it became paranoid about security, something that would not have happened had the situation been otherwise. By creating insecurity in various parts of the country, the armed conflict spawned suspicion in the areas along the border and elsewhere in the country. As a result, people were arrested because they were regarded as a threat to Democratic Kampuchea's continuity and survival and not because of a any alleged ideology predating the operation of the security centres.

[1409] MEAS Soeurn: T. 30.06.2016, **E1/447.1**, pp. 15-16, between 09.37.42 and 09.42.50.
[1410] SEM Om: T. 20.09.2016, **E1/477.1**, pp. 38-39, around 10.50.24, pp. 79-80, around 14.27.55.
[1411] MOENG Vet: T. 26.07.2016, **E1/448.1**, p. 57, between 13.47.08 and 13.47.28 "For example, some soldiers shot their own arms and then those injured soldiers were sent for hospitalization at the rear. And there were situations where those soldiers, themselves, created chaotic situations such as saying that their injuries were more severe than they really were, those few soldiers had an impact on 100 or 200 other soldiers who were at the front battlefield"
[1412] MOENG Vet: T. 28.07.2016, **E1/450.1**, pp. 15-15, between 09.35.11 and 09.37.25"However, I was talking about the radio operator asking soldiers who fired the shelling and then the shelling missed the target and it dropped on our soldiers Two hundred of them were killed. At the time, hundreds of soldiers were eating a meal here and the operators were eating a meal there, and there was an incident in which the 200 soldiers were killed. And the shelling missed the target and dropped on our soldiers. As a result, 200 of them were killed. Perhaps you could make it clearer for me about the statement that I made the other day."
[1413] MOENG Vet: T. 27.07.2016, **E1/449.1**, p. 71, around 14.19.01, p. 73, at 14.24.20, pp. 99-100, after 15.54.11.
[1414] IENG Phan: T. 31.10.2016, **E1/492.1**, p. 94, around 15.28.06.

Section II. SECURITY WAS UNDER THE CONTROL OF THE MILITARY

1480. Three of the security centres at issue in the instant case were under the control of the military.

1481. S-21 was mostly administered by Military Division 703. Ta Nat, the first chairman of S-21, was a member of Division 703, which, in turn, was under the military command.[1415] Hor, who was deputy chairman of S-21 when Duch became chairman, was also a member of Division 703, as were SUOS Thy, HUY Sre, HIM Huy, Meng, Peng, and, broadly speaking, 95% of the S-21 cadres.[1416]

1482. In his testimony, Duch confirmed that S-21 cadres were regarded as members of the armed forces. S-21 was a military entity throughout its existence.[1417]

1483. The witnesses who testified about the Au Kanseng and Phnom Kraol security centres also confirmed that S-21 was under the control of the military.[1418]

1484. Those facts are not in dispute. Therefore, since the Trial Chamber correctly found that KHIEU Samphan never held any command responsibility in the military, it cannot hold him responsible for having implemented the policy alleged by the Co-Investigating Judges.[1419]

Section III. KRAING TA CHAN WAS UNDER THE CONTROL OF THE DISTRICT

1485. Many a witness testified that, unlike the other sites at issue in the instant case, the Kraing Ta Chan security centre was under the control of the district.[1420] Moreover, no witnesses testified that information relating to this security centre was relayed beyond the sector level.[1421]

1486. That is proof that of the Co-Investigating Judges' finding was about the existence of a CPK policy is pure fabrication, since no evidence links Kraing Ta Chan to the CPK leadership. Therefore, the

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[1415] SUOS Thy: T. 06.06.2016, **E1/432.1**, pp. 27-28, between 10.32.33 and 10.35.51, pp. 37-38, between 10.57.22 and 10.59.35. Duch: T. 08.06.2016, **E1/434.1**, p. 8, before 09.19.20.
[1416] Duch: T. 14.06.2016, **E1/437.1**, pp. 95-96, around 15.39.44; T. 21.06.2016, **E1/441.1,** p. 35, after 10.43.55.
[1417] Duch: T. 20.06.2016, **E1/440.1**, p. 42, around 11.11.23; Interview of Duch by UNHCR, 0406.05.1999, **E3/347**, ERN 0002523.
[1418] For Au Kanseng, see PHAN Thol: T. 02.03.16, **E1/395.1**, p. 46, after 11.04.40. CHIN Kimthong: T. 21.03.16, **E1/405.1**, p. 39, after 10.51.58. For Phnom Kraol, see BUN Loeung Chauy: T. 28.03.16, **E1/409.1**, p. 27, before 10.43.32; T. 29.03.16, **E1/410.1**, p. 29, around 10.40.55. SAO Sarun: T. 30.03.16, **E1/411.1**, p. 50, after 11.32.10.
[1419] Case 002/01 Trial Judgement, para. 365.
[1420] See for example, KHOEM Boeun: T. 05.05.15, **E1/297.1**, p. 72, after 15.07.05. PHAN Chhen: T. 24.02.15, **E1/268.1**, p. 71, before 14.33.11.
[1421] See for example, NEANG Ouch: T. 10.03.15, **E1/274.1**, p. 59, before 14.13.21, p. 79, after 15.36.23. PECH Chim: T. 24.04.15, **E1/292.1**, pp. 42-43, after 11.09.40.

events that took place there do not amount proof of the implementation of a policy, one that was fabricated by the Co-Investigating Judges for the purpose of impeaching KHIEU Samphan.

Part III. TREATMENT OF SPECIFIC GROUPS

Chapter I. BUDDHISTS

1487. According to the Closing Order and the Severance Decision, KHIEU Samphan is charged with crimes against Buddhists at the Tram Kok cooperatives.[1422] (Section I)

1488. However, the Co-Investigating Judges entered such findings by exceeding the scope of the facts put to them by the Co-Prosecutors for determination (Section II). The Co-Prosecutors then took advantage of the Co-Investigating Judges' breach of *saisine,* which was actually the result of failings on the part of the Co-Prosecutors.(Section III)

1489. That means that the Trial Chamber was illegally seised of those factual allegations and therefore must decline jurisdiction thereupon so as to safeguard the fairness of the proceedings. (Section IV)

Section I. THE CHARGES ACCORDING TO THE CLOSING ORDER

1490. At paragraph 1421 of the Closing Order, the Co-Investigating Judges characterise the factual allegations against KHIEU Samphan as political persecution as a crime against humanity.

1491. The facts underpinning this charge are found at paragraph 321 of the Closing Order in the segment concerning the Tram Kok cooperatives, under "Treatment of Specific Groups":

> "In parts of Tram Kok, the CPK banned religion and disrobed monks from as early as 1972. By April 1975 this policy was instituted district-wide. One witness, a former monk, recalls that after April 1975 all monks who had been born in Takeo or Phnom Penh were instructed to stay at Ang Rakar Pagoda in Tram Kok. CPK cadre later came and told them to disrobe. Witnesses recall the destruction of Buddhist statues and the conversion of monasteries into meeting halls, pig farms and warehouses. People were not permitted to burn incense. Those monks who had been disrobed were sent to join the army or made to work. In addition, family members were not allowed to cremate bodies or hold funeral ceremonies."

[1422] Closing Order, para. 1421; Decision on Additional Severance, 04.04.2014, **E301/9/1**, para. 38; Annex: List of paragraphs and portions of the Closing Order relevant to Case 002/02, **E301/9/1.1**, p. 4.

Section II. THE CO-INVESTIGATING JUDGES' *SAISINE* AS DEFINED IN THE INRODUCTORY SUBMISSION

1492. Paragraph 43 of the Introductory Submission concerning the Tram Kok cooperatives contains no allegations about the treatment of Buddhists. Paragraph 72 of the Introductory Submission concerning the treatment of Buddhists contains no allegations about the Trak Kok cooperatives. That alone should have deterred the Co-Investigating Judges from acting in excess of their *saisine*.

1493. The Co-Investigating Judges recorded illegal findings based upon a broader interpretation of their *saisine* as defined at paragraph 72 of the Introductory Submission.

1494. At paragraph 72 of the Introductory Submissions, under "Buddhists in Kandal, Kratie, Kampot, Stung Treng and Battambang Provinces", the Co-Prosecutors describe the following facts:

> "Buddhists were discriminated against pursuant to a CPK policy that required the elimination of all religions. Essentially all Buddhist monks were disrobed, many pagodas were damaged or destroyed, and many monks were killed. This policy was implemented at *wats* throughout Democratic Kampuchea, including: Wat Chambak, Tuol Sdei village, Tuol Sdei sub-district, Cheatrea district, Svay Rieng province; Wat Ta Kut and Wat Me in Chey Tauch village, Chey Thorn sub-district, Ksach Kandal district, Kandal province; Wat Antung Vien also known as Wat Mony Wanaram Antung Vien in Antung Vien village, Kantuot sub-district, Kratie district, Kratie province; Wat Damnak Trayoeng in Touk Meas district, Kampot province; Wat Chey Mongkul in Kamphun village, Kamphun sub-district, Se San district, Stung Treng province; Wat Samrong in Samrong village, Samrong sub-district, Ek Phnom district, Battambang province."[1423]

1495. The facts at paragraph 72 are divided into two sets of events, as follows:

1496. The first set of events at the beginning of paragraphs 72 includes the elimination of religious practice for "Buddhists", who were viewed as the "practioners of Buddhism" encompassing worshippers and monks. (I)[1424]

1497. The second set of events, consisting of the rest of paragraph 72, includes attacks against "Buddhist monks" and places of worship in seven *wats* in six different provinces. Only monks were targeted in this instance, but not ordinary worshippers (II).

[1423] This paragraph is purposely quoted in English to avoid any confusion with the French translation. The French translation refers to "*Bouddhistes*" in two instances, while the English refers first to "*Buddhists*" and then later to "*Buddhist monks*".
[1424] Co-Prosecutors' Introductory Submission, para. 12(d).

I. *SAISINE* IN OVER FACTUAL ALLEGATIONS PERTAINING TO "BUDDHISTS"

1498. A careful reading of paragraph 72 of the Co-Prosecutors' Introductory Submission reveals inaccuracies, but the paragraph does not empower the Co-Investigating Judges to investigate factual allegations "of treatment of Buddhists throughout Democratic Kampuchea", contrary to their claim at paragraph 206 of the Closing Order.

1499. The heading for all the facts described at paragraph 72 seems to suggest that the *saisine* is limited to the five provinces of Cambodia. However, some of those events allegedly took place in a *wat* located in another province, Svay Rieng.

1500. That discrepancy only concerns the factual allegations pertaining to "Buddhist monks". It therefore cannot be argued that the Co-Investigating Judges were seised of factual allegations concerning "Buddhists" beyond the territory of the five provinces listed under the heading at paragraph 72, i.e. Kandal, Kratie, Kampot, Stung Treng and Battambang.

1501. Now, the Tram Kok cooperatives are located in Takeo Province. Therefore, Co-Investigating Judges were without jurisdiction to investigate them in respect of the facts described at the beginning of paragraph 72 of the Co-Prosecutors' Introductory Submission.

II. *SAISINE* OVER FACTUAL ALLEGATIONS PERTAINING TO "BUDDHIST MONKS"

1502. In regard to attacks against "Buddhist monks" and places of worship, the Co-Investigating Judges deliberately exploited the phrase "This policy was implemented at wats throughout Democratic Kampuchea, including...", which appears at paragraph 72 of their Introductory Submission, before listing the seven *wats* which illustrate their point.

1503. A closer look at that phrase and the rest of paragraph 72 clearly reveals that the Co-Investigating Judges' *saisine* only includes factual allegations concerning some *wats*. Therefore, it was impermissible for the Co-Investigating Judges to claim, as they do at paragraph 206, that they were seised of facts "throughout Democratic Kampuchea".

1504. Moreover, there are many arguments against the notion of a *saisine* that includes other *wats* beyond the ones listed at paragraph 72 of the Co-Prosecutors' Introductory Submission.

1505. First, at paragraph 72, the Co-Prosecutors describe facts which took place in various parts of Cambodia in order to support the claim that a CPK policy existed prior to those facts.

1506. This is why they listed seven *wats* located in six different provinces. The six provinces located in five of the seven zones which were created by the Khmer Rouge after the liberation, illustrate the alleged countrywide implementation of a policy against Buddhists.[1425] The Co-Prosecutors' list is also aimed at supporting their overall theory about the functioning of Democratic Kampuchea, according to which:

> "The CPK was structured in a hierarchical fashion, which enabled the highest CPK administrative body, the Standing Committee of the CPK Central Committee, to create, formulate, direct, order and monitor CPK policies. The lower CPK administrative organs – the Zones, Sectors, Districts and Branches – would implement and report upon these policies throughout the entire territory of Democratic Kampuchea."[1426]

1507. Therefore, it was not the intention of the Co-Prosecutors to seise the Co-Investigating Judges of facts that took place in all the *wats* throughout Cambodia, but rather only of facts that took place in *wats* which they considered to encapsulate their case.

1508. Second, in both the Introductory and Supplementary Submissions, the Co-Prosecutors refer to other *wats* in four instances, but they omit to explain what happened to the Buddhists there.[1427] This is particularly true in regard to three of the wats: Wat Tlork, Wat Kirirum and Wat O Trau Kuon (called "Au Trakuon" in the Closing Order).[1428] The Co-Investigating Judges were seised of facts which took in those wats, because they were used as detention centres during the Democratic Kampuchea period,[1429] The Co-Prosecutors could not have been unaware that there were monks at those *wats* in the pre-Khmer Rouge period and that the *wats* had been damaged and turned into prisons. Yet, the Co-Prosecutors omit to mention that or any other facts regarding the prohibition of religious practice at those sites.[1430]

1509. The Co-Prosecutors were at liberty to choose the facts they submit to the Co-Investigating Judges for investigation. They elected not to request the Co-Investigating Judges to investigate facts

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[1425] At paragraph 72 of the Introductory Submission, the Co-Prosecutors only named the provinces where the *wats* they listed were situated. The Co-Investigating Judges as per paragraph 743 of the Closing Order, named the zones where those provinces are situated. Accordingly, the South-West Zone, the North-West Zone, the East Zone, the North-East Zone and Sector 505 are listed in paragraph 72 of the Introductory Submission. Only the North Zone and the West Zone are not listed.

[1426] Co-Prosecutors' Introductory Submission, para. 22.

[1427] Co-Prosecutors' Introductory Submission, para. 45 (Wat Baray Choeung Daek, presumably, in Kompong Thom Province de Kompong Thom), para. 66 (Wat Tlork, Svay Rieng Province) and paragraph 68 (Wat Kirirum Battambang Province); Supplementary Submission, 31.07.2009, **D196**, paras.. 8-12 (Wat O Trau Kuon, Kampong Cham Province).

[1428] Closing Order, paras. 776-783.

[1429] Co-Prosecutors' Introductory Submission, para. 66 (Wat Tlork) and para. 68 (Wat Kirirum).

[1430] Co-Prosecutors' Introductory Submission, para. 66 (Wat Tlork) and para. 68 (Wat Kirirum).

concerning Buddhists at the aforementioned *wats* and also to not explain what happened to the Buddhists in the Tram Kok cooperatives.

1510. So given that the Co-Prosecutors did not request the Co-Investigating Judges to investigate the treatment of Buddhists at the other *wats* listed in their Submissions, it cannot be argued that they intended to seise them of facts which took place at the *wats* that are not listed anywhere in their Submissions.

1511. Third, according to paragraph 743 of the Closing Order, the Co-Investigating Judges found that "the destruction of pagodas and use of pagodas for other purposes occurred throughout every area of Cambodia during the CPK regime." They then listed all of the places in Democratic Kampuchea where such attacks took places and cited numerous written records of interview in the endnotes. Even though the Co-Prosecutors seem to have noted facts that took place in places other than the ones listed in their Submissions, they still characterised as persecution – at paragraph 1421 of the Closing Order – the only facts that took place in the pagodas listed at paragraph 72, and the ones that took place at Wat Tlork, Wat Kirirum and in the Tram Kok cooperatives, in other words, all the places listed in their Introductory Submission.

1512. So in their legal characterisation of the facts, the Co-Investigating Judges demonstrated that they were aware of the contours of their *saisine*. Had they actually deemed themselves seised of facts that took place throughout Cambodia, they would have characterised as persecution facts other than those which occurred in places already listed in the Submissions and in respect of which they had obtained inculpatory evidence, as stated at paragraph 743. This is particularly true in regard to the facts that took place in zones that are not listed at paragraph 72 of the Co-Prosecutors' Introductory Submission, as those facts would have reinforced the Co-Prosecutors' alleged countrywide CPK policy.

1513. Instead, the Co-Investigating Judges threw caution to the wind with regard to Co-Prosecutors' inaccuracies, and proceeded to investigate the three sites: Wat Tlork, Wat Kirirum and Tram Kok, which are all located in places that are listed at paragraph 72 of the Co-Prosecutors' Introductory Submission.[1431] And yet, the facts falling within their *saisine* in relation to each of these three sites are clearly set out in the Co-Prosecutors' Introductory Submission; and, moreover, the facts that

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[1431] Wat Tlork is in East Zone, Wat Kirirum is in the North-West Zone and Tram Kok is in the Southwest Zone.

took place at Wat Kirium were even the subject of a supplementary submission, in which does not s mention the treatment of Buddhists.[1432]

1514. That is further testimony that the Co-Investigating Judges' sought inculpatory evidence in violation of all of the basic procedural rules. In the final analysis, the Co-Investigating Judges attempted to make the most of the crime sites they were requested to investigate despite the limits to their *saisine in rem* in respect to each of those sites.

1515. On that subject, one last example illustrates the Co-Investigating Judges' casual attitude vis-à-vis their *saisine* over the facts that took place at Tram Kok. After having asserted at paragraph 206 of the Closing Order that they were "seized of treatment of the Cham in the Central, East and Northwest Zones", they then went on to conclude at paragraph 320 – which concerns the Tram Kok cooperatives in the Southwest Zone – that "Cham people [...] were treated like everyone else." KHIEU Samphan notes with great interest that for once, an illegal findings is not to his disadvantage, quite the contrary.[1433]

Section III. <u>CO-PROSECUTORS' FAILINGS</u>

1516. In regard to the treatment of Buddhists, on 5 December 2013, the Co-Prosecutors requested that the facts which took place in Tram Kok be included in Case 002/02, to the exclusion of any other crime site.

1517. In their request to the include Tram Kok in Case 002/02, they pointed out that:

> "[...] crimes relating to the treatment of Buddhists [...] would also be included and tried through *Tram Kok Cooperatives* site, as the Crimes Against Humanity charges against the Accused in relation to that site include Religious Persecution of the Buddhists [...] While the Co-Prosecutors do not propose that Buddhist pagodas from other regions of the country be included as crime sites [...] the Co-Prosecutors do request that the general allegations in the Closing Order relating to Treatment of Buddhists (para. 740-743) [...] be included. This would ensure that general evidence can be introduced to prove the CPK policies on these issues, the existence of a Joint Criminal Enterprise and the widespread and systematic nature of the crimes, in support of the charges against the Accused relating to the *Tram Kok Cooperatives* [...]." (*emphasis supplied*)[1434]

[1432] Co-Prosecutors' Introductory Submission, paras. 12-13.
[1433] See also *infra*, para. 1875.
[1434] Co-Prosecutors' Submission, 05.12.2013, **E301/2**, para. 14.

1518. Insofar as the Co-Prosecutors had not previously seised the Co-Investigating Judges of facts concerning Buddhists at Tram Kok, the sole purpose of their request was to endorse the Co-Investigating Judges' blatant overstepping of their *saisine*.

1519. Moreover, it is difficult to fathom why that the Co-Prosecutors requested the inclusion in Case 002/02 of factual allegations that they had not brought to the attention of the Co-Investigating Judges, at the detriment of all of the charges recorded by those same judges regarding all the facts relating to the sites listed at paragraph 72 of the Co-Prosecutors' Introductory Submission.

1520. It may very well be that the Co-Prosecutors confused opportunity with opportunism. KHIEU Samphan must not be made to pay for their failings.

Section IV. TRIAL CHAMBER'S LACK OF *SAISINE*

1521. In light of the foregoing, the Trial Chamber should take note of Co-Investigating Judges' overstepping of their *saisine* and the Co-Prosecutors' lapses, and therefore decline jurisdiction over the facts relating to the treatment of Buddhists at Tram Kok. Any other course of action would impair the fairness of the proceedings against KHIEU Samphan.

Chapter II. ALLEGED POLICY ON THE TREATMENT OF BUDDHISTS

1522. KHIEU Samphan is charged with crimes against Buddhists which were allegedly committed in furtherance of a policy on the "treatment of targeted groups", with "Buddhists" being considered as one such group.[1435]

1523. As observed *supra*, the charges against KHIEU Samphan in regard to Buddhists are based on findings which the Co-Investigating Judges entered in violation of their *saisine*.[1436] Contrary to their claim at paragraph 206 of the Closing Order, the Co-Investigating Judges were never seised of factual allegations pertaining to "Buddhists throughout Democratic Kampuchea", but only in respect of specific parts of the country, which are specified at paragraph 72 of the Co-Prosecutors' Introductory Submission.

[1435] Closing Order, paras. 205-207 and 210; Decision on Additional Severance, 04.04.2014, **E301/9/1**, para. 38; Annex: List of paragraphs and portions of the Closing Order relevant to Case 002/02, **E301/9/1.1**, pp. 1-2.
[1436] See *supra*, paras. 1487-1515.

1524. Yet, some of the Co-Investigating Judges' findings concern Tram Kok District, which they were never mandated to investigate in relation to the treatment of Buddhists. Even though those findings are illegal, they are the only ones in respect of which the Co-Prosecutors requested investigations in Case 002/02. Ever so magnanimous towards the Co-Prosecutors, the Trial Chamber acquiesced to their proposal to include the crimes allegedly committed against Buddhists in Tram Kok District.

1525. Given that the procedure in itself is illegal and could offend fair proceedings principle, the Trial Chamber should definitely decline jurisdiction over matters relating to the crimes allegedly committed against Buddhists in Tram Kok.

1526. Given that KHIEU Samphan is not charged with factual allegations of which the Trial Chamber was not properly seised, he need not address the alleged CPK policy, implementation of which it is alleged – in a bid to impeach him – entailed committing the alleged crimes.

Chapter III. THE CHAM

Section I. CHARGES

1527. As concerns the treatment of members of the Cham group, KHIEU Samphan is charged with the crime of genocide by killing, as well as the crimes against humanity of murder, extermination, imprisonment, torture, religious persecution.[1437]

I. SCOPE OF THE CHARGES IN THE CLOSING ORDER

A. Genocide by killing

1528. As observed many times *supra*, the wording of the Closing Order is many instances not completely limpid as to the exact scope of the charges. The crime of genocide by killing is a case in point (1). That means having to refer to both the Co-Prosecutors' Introductory and Supplementary Submissions, which define the Co-Investigating Judges' *saisine*, in order to have a clear idea as to which factual allegations are included in the charge of genocide by killing (2).

1. Charges in the Closing Order

[1437] Closing Order, paras. 1336-1342, 1373, 1381, 1402, 1408, 1420; Decision on Additional Severance, 04.04.2014, **E301/9/1**, paras. 31 and 43; Annex: List of paragraphs and portions of the Closing Order relevant to Case 002/02, **E301/9/1.1**, pp. 2-5.

1529. Concerning the constitutive elements, paragraph 1336 of the Closing Order reads as follows:

> "As regards the *actus reus*, people who belonged to the Cham group (an ethnic and religious group that distinguishes itself as such, and is identified as such by others) were systematically killed." (*emphasis added*)

1530. As regards the *mens rea*, paragraph 1338 reads as follows:

> "As regards the *mens* rea, the perpetrators intended to destroy, in whole or in part, the Cham group as such. Killings were committed in the context of statements commenting on the objective to physically destroy the group in its entirety; the Cham were systematically and methodically targeted and killed on account of their membership of the Cham group, and other non-Cham people were specifically and expressly excluded from the attacks." (*emphasis added*).

1531. In the segment on the legal characterisation of the factual allegations of genocide by killing, the Co-Investigating Judges do not clearly set forth the geographic and temporal scope of facts they rely on.

a. Geographic scope

1532. Paragraph 1340 of the Closing Order reads as follows:

> "The systematic nature, scale, pattern and repetition and timing of the killings of the Cham group in the East and Central (Old North) Zones clearly indicate that it was decided upon and coordinated by the CPK leaders within the framework of the common purpose. The fact that, in addition to the East Zone and the Central (Old North Zone), the killings occurred across numerous zones during the same temporal period indicate that they were not unauthorized, random crimes committed by local cadres, but were centrally directed by the Party."

1533. That means both that killings on a large scale were committed in the East and Central Zones and also in "numerous zones". Although the zones at issue are not identified, this cannot concern places that are not listed in the Co-Prosecutors' Submissions.

b. Temporal scope

1534. In the segment of the Closing Order concerning factual characterisation at paragraph 212, the Co-Investigating Judges indicate that the policy to destroy the group was adopted after 1977 and widely applied from mid-1978. They therefore hold the view that intent to commit genocide, a constitutive element of the crime of genocide, already existed in 1977.

1535. Here again, it is alleged that large-scale killings of Cham were committed in the Central and East Zones, but the actual locations where such killings occurred are not specified. This therefore

requires referring to the Co-Prosecutors' Submissions in order to find out which locations were covered in the investigation.

2. *Saisine* as defined in the Co-Prosecutors' Submissions

1536. The Co-Prosecutors opened a judicial investigation against KHIEU Samphan in relation to the factual allegations described at paragraphs 40-41 of their Introductory Submission concerning the displacement of the Cham beginning in late 1975, including from Koh Sotin Sub-District, Koh Sotin District, Kampong Cham Province, and Koh Thom Sub-District, Koh Thom District, Kandal Province to the North and Northwest Zones. At paragraph 122, they characterise those factual allegations as crimes against humanity of deportation, religious persecution and genocide, but omit to specify if they amount to genocide by killing.

1537. Two years after opening their investigation, they issued a Supplementary Submission specifically in regard to the genocide of the Cham.[1438] Paragraph 7 their Supplementary Submission states that "in 1977 and 1978, the CPK's general persecution of the Cham became genocide." Those facts allegedly occurred in Kang Meas (Central Zone), Krouch Chhmar (East Zone) and Sector Five (Northwest Zone), the three sites being the only ones falling within the scope of the Co-Investigating Judges' *saisine*.

1538. The facts characterised as genocide by killing are only those which took place in the districts of Kang Meas (Central Zone) and Krouch Chhmar (East Zone).

1539. That means that the Trial Chamber is only seised of factual allegations of genocide by killing members of the Cham group beginning in 1977 in Kang Meas (Central Zone) and Krouch Chhmar (East Zone), but not of facts which were committed at the Krouch Chhmar security centre, since the Trial Chamber expressly excluded them by means of its Severance Decision.

B. Murder

1. Geographic scope

1540. Paragraph 1378 of the Closing Order states that murders were perpetrated "during the ill-treatment of [...] Chams" at the Krouch Chhmar and Wat Au Trakuon security centres. Yet, in its Severance

[1438] Co-Prosecutors' Supplementary Submission, 31.07.2009, **D196**.

Decision, the Trial Chamber expressly excluded the Krouch Chhmar security centre from the scope of Case 002/02. That means that KHIEU Samphan is charged with factual allegations of murder only in respect to the Wat Au Trakuon security centre.

1541. Accordingly, the Trial Chamber is only seised of factual allegations pertaining to the commission of the crime against humanity of murder beginning in 1977, and only in respect to the Wat Au Trakuon security centre.

2. Temporal scope

1542. According to the Closing Order, the killing of Cham as a crime against humanity became widespread beginning in 1977, as described in the characterisation of genocide.

C. Extermination

1543. Paragraph 1386 of the Closing Order reads as follows:

> "Regarding the treatment of […] the **Chams** beginning in 1977, the execution of members of these groups increased progressively until it reached such a scale as to qualify as extermination. The extermination of Chams was perpetrated, notably, in the security centers of Trea Village and Wat Au Trakuon." (*emphasis added*).

1544. Moreover, at paragraph 212 of the Closing Order, the Co-Investigating Judges state in regard to the factual characterisation of JCE that "mass executions occurred in 1977 and 1978 in the Central (Old North) Zone and East Zone."

1545. As observed *supra* in the segment on genocide by killing, the Co-Investigating Judges only investigated facts that occurred in Kang Meas (Central Zone) and Krouch Chhmar (East Zone).

1546. The Trial Chamber is therefore seised of factual allegations of extermination of Cham beginning in 1977, notably in respect of the Trea security centre in the East Zone and the Wat Au Trakuon security centre in the Central Zone, but their *saisine* only covers Kang Meas and Krouch Chhmar districts.

D. Imprisonment

1547. Paragraph 1402 of the Closing Order states that KHIEU Samphan is charged with the crime against humanity of imprisonment "in regard to the treatment of the Cham", but provides no details as to the factual allegations per se or their temporal scope.

1548. Paragraph 1337 of the Closing Order concerning the genocide of the Cham reads as follows:

> "The victims were targeted because of their membership of the Cham group; they were generally not detained for any length of time or made to provide confessions, instead they were killed immediately, often after being asked to confirm that they were Cham." (*emphasis added*)

1549. The lack of details about the facts underpinning the legal characterisation of the crime of imprisonment requires one to verify the factual characterisation of the crimes.

1550. At paragraph 752 of the Closing Order, the Co-Investigating Judges state that "prior to 1975, some Cham were arrested, detained, tortured and killed." Regarding the facts which allegedly occurred after 1975, and are thus within the court's temporal jurisdiction, imprisonment concerns the three security centres located in the Central and East Zones, i.e. Krouch Chhmar, Wat Au Trakuon and Trea.

1551. However, not only was the Krouch Chhmar security centre excluded from the scope of Case 002/02 but also, there is no reference to the detention of Cham in the segment concerning the Wat Au Trakuon security centre. As a matter of fact, according to the Co-Investigating Judges' finding at paragraph 783 of the Closing Order:

> "It appears that, when arrested, Cham people were not detained at all, but killed immediately. One witness states that the site did not have cells to detain prisoners but that they were '*killed right away at night.*'" (*emphasis added*)

1552. Accordingly, KHIEU Samphan is only charged with the imprisonment of Cham at the Trea security centre (East Zone).

E. Torture

1553. According to paragraph 1408 of the Closing Order, KHIEU Samphan is charged with the crime against humanity of torture in respect of the treatment of the Cham.

1554. Here again, the lack of details about the facts underpinning this legal characterisation requires one to verify the factual characterisation of the crimes.

1555. Paragraph 1409 of the Closing Order reads as follows:

> "As regards the *actus* reus, on numerous occasions, CPK cadres through their acts or omissions, deliberately inflicted severe harm and suffering, both physical and mental, during interrogations." (*emphasis added*)

1556. Such acts of torture therefore relate to the interrogation of prisoners.

1557. Paragraph 572 of the Closing Order describes facts "prior to 1975" during which "some Cham were arrested, detained, tortured and killed" (*emphasis added*). However, only post-1975 facts fall within the ECCC's *ratione temporis* jurisdiction and may be charged in relation to the crime of torture "during interrogations". Therefore, the only acts of torture which occurred at the security centres, i.e. the Krouch Chhmar, Wat Au Trakuon and Trea, are listed in the segment on the treatment of the Cham.

1558. However, as observed *supra* regarding the crime of imprisonment, the Co-Investigating Judges did not find that torture occurred at the Wat Au Trakuon security centre; moreover, the Krouch Chhmar security centre was excluded from Case 002/02.

1559. Accordingly, KHIEU Samphan is charged only with the facts which occurred at the Trea centre.

F. Persecution on religious grounds

1560. Paragraph 1420 of the Closing Order reads as follows:

> "The elements of the crime of religious persecution of the Cham have been established (see the section regarding 'Treatment of the Cham', phase 2 of population and the '1st January Dam'.) There was a country-wide suppression of Cham culture, traditions and language. The CPK banned the practice of Islam and forbade the Cham from praying, seized and burned Qurans, closed or destroyed mosques, and forced Cham people to eat pork. Religious leaders and learned Islamic scholars were arrested and killed. Cham women were forced to cut their hair and were prohibited from covering their heads. Cham communities were broken up and Cham people were forcibly moved throughout Cambodia and dispersed among other communities."

1561. It is important to point out that the Closing Order concerns the facts described under "Treatment of the Cham", "Movement of the Population (Phase 2)" and the "1 January Dam Worksite". In the discussion of the evidence, these facts are only briefly addressed in relation to treatment of members of the Cham group. As noted *supra*, the Trial Chamber has no jurisdiction over the treatment of the Cham at the 1st January Dam, because it is illegally seised thereof.[1439]

1562. The factual allegations of religious persecution of the Chams are described at paragraph 1420 of the Closing Order and concern the period of Democratic Kampuchea. Therefore, those factual allegations are discussed in relation the period from 17 April 1975 to 6 January 1979.

[1439] See *supra*, paras.1069-1070.

II. SCOPE OF THE CHARGES RELATING TO THE MOVEMENT OF POPULATION (PHASE 2), PURSUANT TO THE SEVERANCE DECISION

1563. Even though they are mentioned in the Annex on the scope of Case 002/02,the Trial Chamber is not seised of the crimes against humanity of extermination, persecution on political grounds and other inhumane acts (through attacks against human dignity, forced movements and enforced disappearances) during movement of the population (phase 2).

1564. Indeed, concerning the forced movement of the Cham, the Trial Chamber specified in its own Decision on Additional Severance that:

> "In particular, the Chamber notes that movement of the Cham minority forms the basis of religious persecution charges, as well as a means of implementing policies concerning movement of the population (phase two) and treatment of targeted groups. The Chamber excluded the charges based on the policy concerning the treatment of the Cham, including charges of religious persecution, from the scope of Case 002/01. However, treatment of the Cham and charges of religious persecution, including in the course of population movement (phase two), have been included within the scope of Case 002/02. The Chamber has therefore also included within the scope of Case 002/02 the movement of population policy only insofar as the Closing Order alleges that it was implemented through movement of the Cham minority."[1440]

1565. This paragraph therefore clearly reveals that the Trial Chamber views the movement of the Cham population (phase 2) from the angle of the crime of religious persecution.

1566. This is in fact why the Annex on the scope of Case 002/02 specifies as follows under point 3, concerning the factual findings on the alleged crimes: "Movement of the Population (i) Phase Two ([paragraphs] 266. 268 and 281) (limited to the treatment of the Cham)".

1567. The other charges (including those at paragraph 269) are not included. Indeed, the facts underpinning the characterisation of extermination at paragraph 1387 of the Closing Order are not related to any form of treatment specifically directed against the Cham during Movement of the Population (Phase 2), and, moreover, they were already disposed of in Case 002/01. That therefore means that they are excluded from the Trial Chamber's jurisdiction in Case 002/02.

1568. According to paragraph 268 of the Closing Order on the movement of the Cham, "the religious leaders [...] were arrested and killed <u>before</u> the movement of the population occurred." (*emphasis added*). Those are not part of the transfer of the Cham.

[1440] Decision on Additional Severance, 04.04.2014, **E301/9/1**, para 43.

1569. Therefore, pursuant to the Decision on Additional Severance, the Trial Chamber is seised of factual allegations of the Movement of the population (Phase 2) only in respect to the crime of religious persecution of the Cham during the Movement of the Population (Phase 2).

Section II. THE EVIDENCE PRODUCED

1570. A significant portion of the evidence adduced at trial (I) is outside the Trial Chamber's saisine (II). Other evidence suggests that some of the crimes may be established (III).

I. CATALOGUE OF THE EVIDENCE

1571. Between 7 September 2015 and 6 April 2016, fourteen witnesses, one expert and three civil parties testified during the trial segment allocated to the treatment of the Cham. Two additional civil parties testified concerning the impact of the crimes.

1572. Three among the aforementioned witnesses (MUY Vanny, YOU van and SAY Doeun) were not interviewed by the investigators during the Case 002 investigation.

1573. Moreover, a large number of testimonies from Cases 003 and 004 were added to the case-file in the course of the present case. The Defence consistently recalled that it is both unjust and an infringement of KHIEU Samphan's rights to add such large numbers of written records of interview deriving from investigations to which he is not a party.

1574. As concerns the Cham, thirty-two statements concerning their treatment were added to the case file owing to the admission of a large number of Prosecution requests for admission of additional evidence. The Trial Chamber should be mindful that without the in-court testimonies of the witnesses concerned, their statements have very low probative value. It therefore ought to take account of that in its deliberations.

II. OUT-OF-SCOPE EVIDENCE

1575. A large portion of the evidence relating to the Movement of the Population Phase 3 is outside the Trial Chamber's *saisine*.

1576. In their live testimonies, a number of witnesses and civil parties stated that villagers in communes of Krouch Chhmar and Peus were separated upon the arrival of the people from the Central or Southwest Zone in 1978.[1441]

1577. Witness VAN Mat, a Cham from Chumnik Village in Chumnik Commune, Krouch Chhmar District, reported clashes between the Central Zone and East Zones, which triggered the purges of cadres from the East Zone and the ensuing evacuations.[1442] VAN Mat testified that he was among those who were evacuated, adding that the evacuees also included Khmers.[1443]

1578. CHEU Than, a Khmer woman who was among the people evacuated, also confirmed to the investigators that it was necessary to evacuate the population because of the fighting between the North and East Zones.[1444]

1579. BAN Seak, who was the chief of Krouch Chhmar District in 1978, also stated that towards the end of the regime, villagers were transferred from his district to Chamkar Leu in the Central Zone "because the army could no longer keep the situation under their control."[1445]

1580. SAUV Nhit, from Village 4 in Svay Khleang Commune, told to the investigators that Cham were transferred to Krouch Chhmar in 1978, adding: "they forced those of us who were ethnic Khmer to leave our villages too", with the local cadres having finally evacuated everybody.[1446]

1581. SOS Romly also testified that Cham were transferred to the Trea district office following the arrival of cadres from the Central Zone. He told the investigators that this happened in late October 1978.[1447]

[1441] IT Sen: T. 08.09.2015, **E1/343.1**, pp. 64-65, after 13.58.32 (When the water was receding in 1978); MATH Sor: T. 13.01.2016, **E1/375.1**, pp. 53-54, before 13.37.08, NO Sates: T. 28.09.2015, **E1/350.1**, p. 57, around 14.10.30, T. 29.09.2015, **E1/351.1**, p. 19, around 09.48.42.

[1442] VAN Mat: T. 09.03.2016, **E1/398.1**, p. 22, before 10.04.10.

[1443] VAN Mat: T. 09.03.2016, **E1/398.**1, p. 18, before 09.54.38, p. 35, around 10.53.18, pp. 38-39, before 11.01.05.

[1444] WRI, 23.10.2008, **E3/5253**, ERN 00235483. CHEU Than, a former cook at the district commerce office, is cited in the Closing Order by the Co-Investigating Judges in regard to population movement phase 3, in endnotes 1145, 1149 and 1223.

[1445] BAN Seak: T. 05.10.2015, **E1/353.1**, pp. 82-83, after 15.13.21; T. 06.10.2015, **E1/354.1**, p. 64, after 14.22.08.

[1446] WRI of SAUV Nhit, 14.18.2008, **E3/5208**, ERN 00235138-00235139

[1447] SOS Romly: T. 08.01.2016, **E1/372.1**, pp. 11-12, between 09.29.56 and 09.31.57; WRI, 10.07.2008, **E3/5196**, ERN 00223088-00223089.

1582. According to period maps on the case file and the current map of Cambodia, the boundary between Krouch Chhmar and Stueng Trang District is near Trea Village, on the way to Preaek Achi.[1448] Trea is along the way to Stueng Trang by boat.

1583. This evidence clearly demonstrates that the evacuations which took place in 1978 concerned the population as a whole without any discrimination, and came at a time of turmoil which was marked by internal strife and intense fighting against the Vietnamese.[1449] This is particularly true concerning the factual allegations pertaining to the Movement of the Population Phase 3 – as described at paragraphs 166 and 283-298 of the Closing Order – which were excluded from the scope of Case 002/02 pursuant to the Trial Chamber's Severance Decision.[1450] Therefore, KHIEU Samphan need not answer thereto.

III. EVIDENCE CONCERNING THE CRIME OF IMPRISONMENT

1584. Some of the evidence produced may suggest that the constitutive elements of the crime of imprisonment, as alleged at paragraph 1402 of the Closing Order, were established.

Section III. DISCUSSION OF THE RELEVANT EVIDENCE

1585. Before embarking on a discussion of the evidence concerning the factual allegations. (II) it is important to make a number of preliminary remarks about the evidence produced in regard to the treatment of the Cham, as that evidence is crucial to the Trial Chamber's assessment the evidence concerning the latter (I).

I. PRELIMINARY REMARKS

1586. It is noteworthy that the record contains virtually no period CPK document about the Cham. The Defence submits that, that in itself is ample proof that there was no anti-Cham policy as such, as demonstrated *infra*.[1451]

1587. Owing to the lack of virtually any period documents the Co-Investigating Judges mainly relied upon testimonial evidence deriving mainly from YSA Osman's interviews. However, YSA

[1448] Annex B: Road map to Kampong Cham, **E3/8033**, ERN EN-FR 00371266; Annex C: Plan of Trea Village, **E3/8037**, ERN 00364796; https://www.google.com.kh/maps/place/Stueng+Trang+District/@12.2511169,105.5365725,15z.
[1449] NO Sates: T. 28.09.2015, **E1/350.1**, p. 52, after 13.56.53.
[1450] Decision on Additional Severance, 04.04.2014, **E301/9/1.**
[1451] See *infra*, paras. 1840-1877.

Osman's bias seriously undermines both the collection and processing of evidence (A), to say nothing about the issues of reliability regarding the huge number of written records of interview which were added to the case file in the course of the Case 002 investigations (B)

A. <u>Bias in YSA Osman's research studies</u>

1588. The Trial Chamber called YSA Osman as an expert witness. During nearly four days on the witness stand, he did nothing but confirm the reservations that the Defence already had about him, which reservations were exacerbated by his opposition to calling certain individuals for testimony in Case 002/02.[1452] His status as a victim (A) and his lack of proper credentials an expert witness (B) have an impact on his findings and his work in general. (C)

1. <u>"Expert" who is both a victim and an investigator</u>

1589. YSA Osman, a Cham, has described himself many times as a victim of the regime, and also claims that this is what prompted him to engage in research work.[1453] His activist outlook explains the way he approached his interviews, in that he had difficulty evaluating them from a critical perspective. However, when he was confronted with the inconsistencies in the testimony of Civil Party NO Sates, he could not but admit that "[…] a victim would want to see justice being done. And sometimes the words that they use would be a little more than what actually happened."[1454]

1590. Moreover, YSA Osman told the court that all he did was record what the witnesses said and "[did not] add or remove any part of the interview or the statement"[1455]. That, of course, raises the key question of whether accounts and interview records deriving from his research work can be deemed reliable, given that the parties were not afforded the opportunity during the proceedings to test their reliability.

1591. YSA Osman's associative and activist approach poses a challenge in Case 002/02. Indeed, not only did the Co-Investigating Judges' investigation rely mainly on his work in identifying witnesses,

[1452] Opposition of the KHIEU Samphan Defence, 30.05.2014, **E305/9**, paras. 41-42.
[1453] T. 09.02.2016, **E1/388.1**, p. 12, before 09.32.22, "I determined that I needed to conduct research in order to seek the truth and to find the cause or the reasons for the <u>killing of my people</u>," (*emphasis added*).
[1454] <u>YSA Osman</u>: T. 24.03.2016, **E1/408.1**, p. 13, around 09.33.05.
[1455] <u>YSA Osman</u>: T. 24.03.2016, **E1/408.1**, pp. 12-13, before 09.33.05.

but also YSA Osman was the only analyst who attended interviews of Cham witnesses and civil parties in the course of the investigation.[1456]

1592. As a matter of fact, nearly all the Cham witnesses who were interviewed by the OCIJ investigators had earlier been interviewed by him for purposes of the two books he wrote. The OCIJ interviews were mostly aimed at seeking confirmation of segments of those interviews. It will also be noted that in the majority of cases the audio records attest to his interventions in the investigators' interviews or at least to his presence, even though his presence during the interviews is not clearly mentioned on the written records of interview.[1457]

1593. Yet, YSA Osman's bias is beyond dispute. For example, in response to a question by the Defence on potentially exculpatory testimonies of former cadres-cum-witnesses, he said: "[t]hey, they, were witnesses involved in those events [...] and if you relied on their statements, that is your choice. But for me, my preference would go to the accounts told by the victims."[1458] Those words epitomise YSA Osman's position, and prove that he is not neutral, despite claims to the contrary.

1594. Moreover, those words, which he uttered in court, are not the only demonstration of his bias.

2. An 'expert' with no credentials

1595. While the Trial Chamber called YSA Osman as an expert witness, it is noteworthy that he lacks the credentials required for this task. As one would expect, being Cham, he is thoroughly familiar with Cham society; however, his overall academic background in language and his interviewing techniques fall far below the level expected of an expert witness as to forensic analysis and methodology.[1459]

[1456] See for example: WRI of PRAK Yut: 19.06.2013, **E3/9496;** WRI, 30.09.2014, **E3/9499**; WRI, 28.05.2013, **E3/9522;** WRI, 27.10.2013, **E3/9525**; WRI, 21.06.2013, **E3/9539**; WRI of YOU Vann: 11.11.2013, **E3/9500**; WRI, 08.01.2015, **E3/9507**. WRI of NO Sates: 08.07.2008, **E3/5193**. WRI of MATH Sor: 08.07.2008, **E3/5194**. Already during the investigation, the Defence raised the problems relating to YSA Osman's role. See IENG Thirith's Request, 11.02.2010, **D361**.

[1457] See for example, WRI of SOS Min: 16.08.2008, **E3/5210** (audio **D125/105R**). IT Sen: WRI, 09.07.2008, **E3/5195** (audio **D125/78R**). WRI of SOS Kamri: 10.09.2008, **E3/5216** (audio **D125/126R**). WRI of HIM Man: 11.08.2008, **E3/5203** (audio **D125/97R**). WRI of VAN Mat: 15.08.2008, **E3/5209** (audio **D125/104R**). WRI of EL Sam, 07.07.2008, **E3/5192** (audio **D125/73R**). WRI of SMAN At, 12.08.2008, **E3/5204** (audio **D125/99R**). WRI of RES Tort, 19.05.2009, **E3/7766** (audio **D166/160R**). WRI of MAN Sen, 13.08.2008, **E3/5205** (audio **D125/100R**). WRI of TEH Sren, 13.08.2008, **E3/5206** (audio **D125/101R**). WRI of SAUV Nhit, 14.08.2008, **E3/5208** (audio **D125/103R**). WRI of KAE Noh 20.05.2009, **E3/5289**; WRI of CHI Ly, 21.05.2009, **E3/5290**.

[1458] YSA Osman: T. 24.03.2016, **E1/408.1**, p. 92, around 15.20.05.

[1459] YSA Osman: T. 09.02.2016, **E1/388.1**, p. 10, before 09.27.27; T. 23.03.2016, **E1/407.1**, pp. 97-98, before 15.36.52.

1596. In itself, the way he was introduced to the people he interfaced with reveals his community-focused demeanour, which is incompatible with the objective performance of research work.[1460] Moreover, his bias is also manifested in the way he handled the few period documents that he analysed.

1597. For example, the Defence challenged him about his erroneous reading of a Democratic Kampuchea telegram concerning events in Chankar Leu District (Central Zone) as described in his book *The Cham Rebellion*,[1461] whereby the telegram refers to a diverse group of people, including Cham and not "the entire Cham race", contrary to what is stated in his book. Instead of acknowledging his mistake, he refused to answer the question and used the pretext that English is not his "mother tongue", thereby avoiding to explain his biased reading of a document which is clearly at odds with his findings.[1462]

1598. He, however, was forced to admit in another instance that whereas his position – which conforms to that of the Co-Investigating Judges in the Closing Order – is that all of the Cham were assembled and taken away to be killed because they were accused of being "enemies",[1463] there is no CPK document about a countrywide anti-Cham policy as such. Indeed, the research he has been conducting on this subject since 2001 notwithstanding,[1464] he pointed out that:

> "And as I have stated earlier, there was no written document or the instructions, namely, from the Center to the zone, or from the zone to the sector or from the sector to the district that the Cham had to be gathered up and killed."[1465] (*emphasis added*)

1599. It is important to highlight this admission by the "expert" before embarking on a discussion of the evidence, because it demonstrates that the claims of YSA Osman, the Co-Investigating Judges and the Co-Prosecution are based solely on testimonies in a bid to "deduce" the existence of such a

[1460] YSA Osman: T. 24.03.2016, **E1/408.1**, p. 54, at 11.33.29; book by YSA Osman, *The Cham Rebellion*, 2006, **E3/2653**, ERN 00219059; book by YSA Osman, *Oukoubah*, 2002, **E3/1822**, ERN 00078562.
[1461] Book by YSA Osman, *The Cham Rebellion*, 2006, **E3/2653**, ERN 00219176 (According to him, the telegram concerned "the entire cham race", whereas careful reading of the telegram shows that it only concerned Chams along with a few other elements, such as KR cadres Chamkar Leu District, who were accused of committing specific acts against the regime). See also DK telegram, 02.04.1976, **E3/511**, ERN 00182658-00182659
[1462] YSA Osman: T. 24.03.2016, **E1/408.1**, pp. 43-45, between 11.07.26 and 11.12.22.
[1463] YSA Osman: T. 24.03.2016, **E1/408.1**, pp. 59-60, before 13.43.13.
[1464] YSA Osman: T. 09.02.2016, **E1/388.1**, p. 18, before 09.48.20; T. 23.03.2016, **E1/407.1**, pp. 38-39, between 10.50.26 and 10.52.27 ("Once again, I said, I, myself, have not been able to locate the document or documents stating about the purge or cleansing of Cham people all over the country."), p. 39, before 10.52.27.
[1465] YSA Osman: T. 10.02.2016, **E1/389.1**, p. 35, after 10.46.55.

policy, as YSA Osman confirmed in court.[1466] In fact, regarding the research methodology he employed in finding that there was a policy on the genocide of the Cham, he stated as follows:

> "[…] for my research, I limited the locations for my research in particular in relation to Krouch Chhmar and Kang Meas districts. And they were part of the East and Central Zones. And what happened in these two zones, although I could not conduct research and interviews in all sectors within zones, it is my opinion that the accounts are quite similar in nature. And you may ask whether such accounts of people actually refer to what happened in other zones. I did not have the ability of the capability to conduct a research throughout the country. As for my book, the main focus was on the two districts, Krouch Chhmar and Kang Meas, and they were part of the East and Central Zones. As for it being representative of all the Cham people living throughout the country during that regime, I do not have a response for that."[1467]

1600. The Trial Chamber should therefore approach those the testimonies with utmost caution, especially in view of YSA Osman's dubious data.

3. <u>Scientifically unsound and biased use of data</u>

1601. When YSA Osman was asked to state the number of Cham before and after the Democratic Kampuchea period, he answered that the Cham population dropped from 700,000 before 1975 to a mere 200,000 after 1979.[1468] Those figures are to be viewed with due caution, as there is no reliable data on ethnic groups in Cambodia in the 1970s;[1469] Moreover, Ewa TABEAU identified the problems in regard to YSA Osman's methodology by checking it against Ben KIERNAN's work:

> "Ysa claims there were 700,000 Chams in Cambodia in 1974 of which number only some 138,607 to 200,000 survived, resulting in a death toll of about 500,000 to 560,000 under Khmer Rouge. According to Kiernan Ysa's views are unsubstantiated, however, for these views are "ased entirely on retrospective claims advanced in 1999-2000 by interviewees asserting that in the early 1970s they had "seen statistics", or "heard announcements", or on the undocumented "memories of Cham leaders" (Kiernan, p. 589). The death toll of this size would indeed exceed the entire population of Chams in April 1975."[1470]

[1466] <u>YSA Osman</u>: T. 23.03.2016, **E1/407.1**, pp. 33-34, before 10.17.25 where he answers the NUON Chea Defence that his statement that Chams were to be assembled and executed was based on accounts of interviewees who lived in "Kang Meas and Krouch Chhmar" districts.
[1467] <u>YSA Osman</u>: T. 23.03.2016, **E1/407.1**, pp. 32-33, around 10.14.37.
[1468] <u>YSA Osman</u>: T. 09.02.2016, **E1/388.1**, p. 16, after 09.42.11, pp. 22-23, before 09.58.50; T. 23.03.2016, **E1/407.1**, pp. 25-26, around 10.01.16; T.24.03.2016, **E1/408.1**, pp. 65-66, before 13.58.55.
[1469] See *infra*, paras. 1904-1924.
[1470] Report by Ewa TABEAU, 30.09.2009, **E3/2413**, ERN 00385312 (TABEAU mentions that KIERNAN challenges both the lower and higher estimates of the death toll by Michael VICKERY and YSA Osman). See also: book by Ben KIERNAN, *The Pol Pot Regime: Race, Power and Genocide in Cambodia, 1975-79*, 1996, **E3/1593**, p. 309, ERN 01150134, p. 309, ERN 01150204 (footnote 32); excerpt from book by Ben KIERNAN, *Genocide and Resistance in Southeast Asia, Documentation, Denial and Justice in Cambodia and East Timor*, **E3/9686,** ERN 01199612.

1602. In his in-court testimony, YSA Osman stated that he was aware that Ben KIERNAN and Michael VICKERY quoted different figures and that Henri LOCARD had voiced criticism,[1471] but explained that he preferred to rely on witness accounts and materials he found rather than conduct research on the references cited in the work of the various authors and researchers, as he had no access thereto.[1472] This explanation is particularly unpersuasive, especially in light of his admission that he did not know "the exact number of Cham people at all"[1473] and the fact that his findings were based on recollections of members of the Cham community, and hearsay.[1474]

1603. In his testimony, SOS Kamri, described by YSA Osman as an key source for his work, admitted that the figure, 300,000 Chams after 1979, which he quoted in his statement "was [an] estimate", that "[they] did not conduct the actual [...] census at the time and "[...] did not have the exact figure from that period as well."[1475] He added that "[...] [they] did not have any specific basis to rely on" in order to arrive at the figure of 700,000 Chams before 1975 which was provided to YSA Osman.[1476] It is will be recalled that this figure was disputed by Ben KIERNAN, who cited others figures,[1477] which, in turn, were disputed by Michael VICKERY.[1478]

[1471] YSA Osman: T. 24.03.2016, **E1/408.1**, p. 34, after 10.44.17 ("I heard about the criticism not only Henri Locard, but by other researchers as well, the history researchers. Some researchers may have found different figures, and they have criticized that certain figures used by the DC-Cam are not accurate. However, the DC-Cam is still in the position that the research or figures they have found are based what the witness told. If witnesses made mention of a clearly specific figure, we have to follow that figure. We cannot overstate or put in the document the figure which is less than what the witness just told.").

[1472] YSA Osman: T. 24.03.2016, **E1/408.1**, p. 73, after 14.15.38.

[1473] YSA Osman: T. 09.02.2016, **E1/388.1**, p. 16, after 09.42.11 ("I don't have the documentation that recorded the figure or indicate the exact number of Cham people at all. , But I interviewed the people who saw documents, and those statistics document.").

[1474] YSA Osman: T. 24.03.2016, **E1/408.1**, pp. 16-17, at 09.42.11, p. 18, after 09.45.26, YSA Osman stated that Chams he interviewed told him that they had not seen any figures on the number of Chams, and the most reliable source was a person named Sakriya Adam, who was believed to be a friend of RES Loh who [the latter] worked with people with those in charge of all matters relating to the Chams under *Sangkum Reastr Niyum* until the advent of the Lon Nol regime.

[1475] Article by YSA Osman, entitled "How many Cham killed important genocide evidence", 10.03.2006, **E3/9701**, ERN 01199557-58. SOS Kamri: T. 06.04.2016, **E1/415.1**, p. 62, from 13.48.56.

[1476] SOS Kamri: T. 06.04.2016, **E1/415.1**, pp. 64-65, around 13.54.33. SOS Kamri's remark is important in view of the fact this figure was also cited by MAT Ly: DC-Cam Interview of MAT Ly, 27.03.2000, **E3/7821**, ERN 00441576-00441577; Interview of MAT Ly by Steve HEDER, undated, **E3/390**, ERN 00436874-75.

[1477] Excerpt of book by Ben KIERNAN, *Genocide and Resistance in Southeast Asia , Documentation, Denial and Justice in Cambodia and East Timor*, **E3/9686**, ERN 01199615: "In November 1975, secret [DK] reports mentioned 150, 000 Chams in the Eastern Zone [...]. This is not a precise count but seems to be an estimate, comprising round figures of 50,000 and 100,000. We have inadequate pre--1975 Cham population data from those specific provinces to compare fruitfully with this. There is therefore no way to extrapolate deform this 150,000 to any nationwide 1975 figure, certainly not to 700,000." (*emphasis added*).

[1478] Article Michael VICKERY, entitled "Comments on Cham Population Figures",, January-March 1990 (BCAS), **E3/9682**, ERN 01199596 "I feel obliged to undertake the following explanation, for as a reader of this article before

1604. The Co-Prosecutors themselves, at paragraph 22 of their Supplementary Submission, seem to suggest that the number of Cham killed under the Khmer Rouge is lower than that suggested by YSA Osman.[1479] It is therefore unreasonable to lend credence to YSA Osman's "findings" on the number of Cham before 1975 and the number of deaths during the Democratic Kampuchea period. The quality of his methodology falls far below the threshold required for an expert.

1605. The Trial Chamber should therefore be mindful of the bias and guesswork reflected in YSA Osman's investigative and research work when assessing the evidence concerning the Cham in general and his expert testimony in particular.

B. Written records of interview admitted en masse

1606. In the segment of the Closing Order concerning the treatment of the Cham, the Co-Investigating Judges in several instances cite a number of interviews conducted by the Social Science Research Council's Indochina Studies Program. These are mostly interviews of refugees in Thailand conducted by Nate THAYER and his working group in the 1980s.[1480]

1607. Those interviews pose other problems besides the fact that they were conducted in a non-judicial framework and were not subjected to adversarial debate. The issue is that they were recorded on a template in English which was filled out by hand. Some are illegible and also some of the spaces were not filled in.[1481] That further diminishes their probative value.

II. DISCUSSION OF THE EVIDENCE UNDERPINNING THE FACTS

1608. A review of the facts material to the Movement of the Cham people (Phase 2) fails to establish that of the Cham group suffered persecution, (A) or that the Cham in the villages of Krouch Chhmar

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publication, I warned both BCAS *and* Kiernan personally about the dubious nature of the figures included, and I do not wish other readers, who may realize that I was involved, to imagine that I supported the way in which statistics were used. Notwithstanding what follows, a warning I have issued before cannot be overemphasized. *All Cambodian population statistics, of whatever period,* include a large mixture of hypothesis, assumptions, extrapolation, and pure guesswork, and they may not be adequate for the type of calculations undertaken by either Kiernan or myself. "

[1479] Co-Prosecutors' Supplementary Submission, 31.07.2009, **D196**, para. 22: **"**Of the over 158,000 people who were believed to have been killed in Kampong Cham province during the DK period, approximately 74,000 of those people (about 50% of the total deaths) were identified as "ethnic minorities". This is a substantially higher percentage than other provinces. For example, of the over 324,000 people who died in Kampong Thom province, only 1,500 were identified as ethnic minorities, and of the over 470,000 people killed in Banteay Meanchey and Battambang provinces, approximately 92,500 were ethnic minorities". The Co-Prosecutors are relied on DC-Cam data.

[1480] There are at least 182 endnotes in the Closing Order concerning measures against the Cham, which are based on these interviews the fact that such a large body of evidence is unreliable has a real impact on the proceedings.

[1481] See for example Interview of ISMAEL Bin Atam, 07.05.1985, **E3/7582**, ERN 00053112-14. Interview of MUHAMAD Ali by Nate THAYER, August 1985, **E3/7490,** ERN 00667216.

and Kang Meas and in the East and Central Zones suffered persecution owing to the overall living conditions in those villages (B). The circumstances of the alleged killings in the two districts of Kang Meas and Krouch Chhmar also merit a closer look (C).

A. Movement of the Cham population during Movement of the Population (Phase 2)

1609. As recalled *supra*, KHIEU Samphan is charged with crime of religious persecution only in respect of the Movement of the Cham Population (phase 2).[1482] It is therefore necessary to start by recalling the circumstances of the movement of the population movement (Phase 2) by observing that it concerned the population as a whole and not specifically the Cham, even though it was implemented after the Cham rebellion in the East Zone.

1. There was no discrimination against the Cham during the Movement of Population (Phase 2)

1610. The reasons and the economic rationale for the Movement of the Population (Phase 2) were discussed during the Case 002/01 proceedings. Therefore the submissions on that issue are found in our Closing Brief in Case 002/01.[1483] It is, nonetheless necessary to point to a number of period documents which attest to the fact that the Cham suffered no religious discrimination during the Movement of the Population (Phase 2).

a. 1975 Documents concerning the Movement of Population (Phase 2)

1611. The Record of the Standing Committee visit to the Northwest Zone on 20-24 August 1975 states in some areas there was not enough manpower the for the establishment and operation of cooperatives.[1484]

1612. Another document, dated September 1975, by an unknown author, concerning "restoring the economy"[1485] describes the spreading out of the population in general terms. The CPK's stance as

[1482] See *supra*, paras. 1563-1569.
[1483] Closing Brief, 26.09.2013, **E3/295/6/4**, paras. 61-71.
[1484] Record of the Standing Committee visit to the Northwest zone, 20-24.08.1975, **E3/216**.
[1485] Document entitled: "Examination of control and implementation of the policy line on restoring the economy and preparations to build the country in every sector", September 1975, **E3/781**.

described in this document is in line with the precedent, namely implementting the plan to "divide the people" with "sufficient arrangements" throughout the country with an economic objective:

> "We must divide the people according to production requirements. We will make appropriate preparations to adjust to requirements. Sufficient arrangements must be made; do not let it swing back and forth. In the Northwest, we must add an additional force of 500,000 people […]
> In the North, they need people to be given to Kampong Thorn Province. The East also needs forces to be given to Sectors which are short of people. So each Zone must make appropriate preparations and not let things sway back and forth, allocating how many to upper level and moving how many to other locations."[1486]

1613. The plan to move the population was therefore aimed at compensating for the lack of manpower, particularly in the Northwest, North and East Zones. Therefore no particular population group was specifically targeted in the course of its implementation.

b. <u>Supreme Court Chamber findings</u>

1614. It is important to recall that in Case 002/01, the Supreme Court Chamber quashed the Trial Chamber's findings on the alleged persecution of the new people during the Movement of the Population (Phase 2).[1487] At paragraph 701 of the 002/01 Appeal Judgement, the Supreme Court Chamber recalls that in order to establish persecution of New People, it would have had to be established that some people were treated differently in the course of the Phase 2 transfer, which was not the case:

> "Thus, in order to establish persecution of "New People" as covered by the case at hand, it would have had to be established that the population transfers <u>affected exclusively</u> or <u>at least primarily</u> "New People" and was therefore discriminatory, or that, in the course of the transfer, "New People" were treated differently from "Old People." (*emphasis added*)

1615. At paragraph 702 of the Case 002/01 Appeal Judgement, the Supreme Court Chamber notes further that:

> "The Supreme Court Chamber recalls in this regard that it has found that the Trial Chamber was unreasonable in concluding that the "overwhelming majority" of people transferred during Population Movement Phase Two were "New People", given the limited evidence that supported this conclusion. Further, it appears from the Trial Chamber's findings and the evidence upon which they are based that population transfers for <u>economic reasons</u> and <u>away from the Vietnamese border</u> concerned both "Old" and "New People" – a fact acknowledged by the Trial Chamber in its legal conclusions. Thus,

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[1486] September 1975 Document, **E3/781**, ERN 00523590-91.
[1487] Case 002/01 Trial Judgement, paras. 701-706.

since these transfers did not affect only "New People", it cannot be said that they were discriminatory in fact or expressions of discriminatory intent." (*emphasis added*)

1616. Regarding the transfer of members of the Cham group, while the facts in themselves are not in dispute, the arguments enumerated by the Supreme Court Chamber also apply to them. The reason is because those transfers were based on the decisions described in the two aforementioned documents and concerned the population as a whole, including the Cham.

c. Telegram No. 15 dated 30 November 1975

1617. This much talked about Telegram No.15 is cited several times by the Co-Investigating Judges in support their findings on the movement of the Cham people.[1488] For example, at paragraph 281 of the Closing Order, they state as follows:

> "Telegram No.15 specifically refers to a problem raised by the movement of the Cham people from the East Zone and reads '*more than 100,000 more Islamic people remain in the East Zone ... In principle their removal was to break them up, in accordance with your views in your discussions with us already. But if the North refuses to accept them, we will continue to strive to persevere in grasping the Islamic people.'* This happened a few weeks after the rebellion of the Cham people in Koh Phal and Svay Kleang. When read in that context, this document suggests that the underlying reason for the movement and planned separation of the Cham people was to address the security concern they represented, illustration of the CPK policy to 'break up' the Cham."

1618. However, this simply reflects the Co-Investigating Judges' one-sided interpretation. Indeed, whereas the fact that the telegram was written after the Kaoh Phal and Svay Khleang rebellions is not in dispute, those rebellions took place after the evacuations had already been planned. Careful reading of the telegram in its entirety provides a better understanding of its context. For example, the same paragraph, quoted in part by the Co-Investigating Judges, reads as follows:

> "In principle the Zone must hand over fifty thousand [50,000] people to the North Zone. In this regard, the remaining Cham in the East Zone amount to more than one hundred thousand [100,000]. We have deported only the Cham from along the river and the border, but not from Tboung Khmum district. The transfer is in principle designed to disperse the Cham as per our previous discussion. However, if the North Zone does not take the Cham, we are still willing to continue our endeavour to deal with them – no problem. Nevertheless, the population will not reach one hundred and fifty thousand (150,000) if the North Zone does not receive the Cham.[1489] (*emphasis added*)

[1488] Closing Order, endnotes 1026, 1033, 1132 and 1136.
[1489] DK Telegram, 30.11.1975, **E3/154**, ERN 00185064-65.

1619. Therefore, although dispersing the Cham in order to defuse tensions does feature in the telegram, the transfer of 150,000 people in the North Zone concerned both Khmers and Cham. It was therefore in line with the overall plan to move people to less populated areas. Now, this movement of the population only concerns one third of the Cham, since, according to the telegram, 100,000 Chams remained in the same zone.

1620. It is also important to note that some of the people who were to be transferred were living along the border. So in that sense, the transfer had more to do with the armed conflict at the border with Vietnam than with the Cham rebellions. As a matter of fact, the Supreme Court Chamber states the reasons for such localised transfers at paragraph 702 of the Case 002/01 Appeal Judgement.

1621. It cannot be concluded that religious discrimination was the reason for the transfer of the Cham, especially given that Telegram No. 15 describes the transfer of Khmers to other areas. For example, the second paragraph of the telegram states as follows:

> "The sector and district authorities collected all of the people who were to be moved from Sector 21 and ferried them to the other side of the river. The two reception sites are categorically not taking Cambodians of Cham origin, but only those of Cambodian origin. Therefore, the people who are to be moved on 30 [November] are in a state of utter agitation." (*emphasis added*)

1622. Also, the in-court testimonies fail to establish that religious persecution was the reason for the transfers. For example, Witness SOS Romly, a Cham, testified that he lived in Trea II Village before the Khmer Rouge regime. Owing to his lowly background, he was able to hold a number of positions within the Khmer Rouge ranks, and by the end of 1975, he was deputy to several chiefs in his commune, Krouch Chhmar, until he fled with other villagers one month before the demise of regime, after hearing rumours of executions.[1490]

1623. SOS Romly was therefore able to remain in his village, just like 15-20% of its inhabitants, until a relatively late period. However, he explained that the other inhabitants left, because, as he was told, "there [was] lots of rice and we could have enough to eat" in Battambang, whereas there wasn't enough in his village.[1491] According him, after 1979, "60%" of the Cham returned to their village.

[1490] SOS Romly: T. 06.01.2016, **E1/371.1**, pp. 97-100, between 15.41.15 and 15.53.08; T. 08.01.2016, **E1/372.1**, p. 16, around 09.42.50, p. 80, around 14.30.46.

[1491] T. 08.01.2016, **E1/372.1**, p. 17, before 09.45.13, p. 18, around 09.48.28.

He stated that many Cham in Santuk District, Kampong Thom Province, and in Stueng Trang, Kampong Cham Province disappeared.[1492]

d. The different types of population transfers

1624. Cham in the East and Central Zones were transferred to different places within the same zone or the same district, or to Kampong Thom, Kratie, or Battambang, according to September 1975documents , while others remained in the same village.[1493] Moreover, Khmers were also transferred during the same period, and changed villages.[1494]

1625. In her written record of interview, RIEL Neang, a resident of Angkor Ban and former "chairwoman of Commune Women", reports that before 1975, the inhabitants of her commune were "moved from their villages to other villages" but were not told that only Cham were moved.[1495]

1626. Also, TAY Koemhun testified that there were no Cham in his village before the Khmer Rouge regime. Thereafter, he saw Cham families and also Khmers who came from Phnom Penh to settle in Angkor Ban.[1496] In some instances, the idea was to have people with the skills needed by a cooperative. MAT Touloh, a Cham, who was from Kampong Krabey Village in Kampong Siem District, was evacuated from Phnom Penh in 1975, but returned to Kampong Cham. After spending some time in Kampon Siem, he was assigned to Kang Meas because of his skills as a mechanic; he later joined a group of Cham fishermen in 1976.[1497]

1627. The more localised movements also had to do with the way the district or regional mobile units were organised. For example, MUY Vanny, who was from Sour Kong Village, Kang Meas District, testified that he was part of a district mobile unit which included Cham from nearby villages.[1498]

[1492] T. 08.01.2016, **E1/372.1**, pp. 46-47, before 11.14.19.
[1493] NO Sates: T. 28.09.2015, **E1/350.1**, p. 49, around 13.47.28. MATH Sor: T. 13.01.2016, **E1/375.1**, pp. 4-5 after 09.15.34, pp. 35-36, after 10.47.56, p. 45, around 11.13.13. WRI of CHI Ly, 21.05.2009, **E3/5290**, ERN 00340172-00340173. WRI of SMAN At, 12.08.2008, **E3/5204**, ERN 00242082 (his and his family members were sent to Baray for some time, and then to Kampong Thom until the demise of the regime). WRI of MAT Ysa, 14.08.2008, **E3/5207**, ERN 00242078. WRI of KAE Noh, 20.05.2009, **E3/5289**, ERN 00340182. WRI of SMAN At, 12.08.2008, **E3/5204**, ERN 00242082. WRI of TOULOAS Sma El, 10.07.2009, **E3/1678**, ERN 00353493. Amnesty International Document, 14.07.1978, **E3/4198**, ERN 00271510. IT Sen: T. 07.09.2015, **E1/342.1**, p. 72, around 13.58.28. WRI of MAT Ysa, 14.08.2008, **E3/5207**, ERN 00242078.
[1494] MATH Sor: T. 13.01.2016, **E1/375.1**, p. 17, around 09.50.45. WRI of CHEU Thân, 23.10.2008, **E3/5253**, ERN 00255483.
[1495] WRI of RIEL Nang, 21.11.2014, **E3/9652,** Q/A 4 and 31.
[1496] TAY Koemhun: T.16.09.2015, **E1/348.1**, p. 29, around 10.36.12. p. 57, around 13.47.54.
[1497] WRI of MAT Touloh, 07.04.2008, **E3/9360**, Q/A 7-8, 10, 13-14.
[1498] MUY Vanny: T.11.01.2016, **E1/373.1**, p. 17, around 10.20.43, p. 18, around 10.22.02.

MAN Heang, who was Damnak Chrey Village, Peam Chi Kang Commune, Kang Meas District, told the investigators that he was the chief of a mobile unit comprising "Old People, New People and ethnic Cham"[1499]

1628. Also, SENG Kuy, who was from Angkor Ban Commune, Kang Meas District, saw Cham who joined cooperatives to work in the rice fields alongside Khmers.[1500] SAMRETH Muy, a Khmer who was from Peam Chi Kang Commune, testified in that during the period of Democratic Kampuchea, he was living in the Sach Sou village cooperative where Cham were the majority.[1501]

1629. The population transfers therefore concerned the entire population and not only the Cham. The fact that the Movement of the population (Phase 2) took place during the Cham rebellions in the East does not detract from its widespread and indiscriminate nature, as noted in Case 002/01.

2. Cham rebellions in the East Zone during Movement of Population (Phase 2)

a. The rebellion in Svay Khleang

1630. It has been established before the Trial Chamber that a number of Cham rebellions took place in the East Zone, which was then under the control of the military forces of that Zone.[1502] For example, MEAS Soeurn, son of CHAN Seng Hong, the secretary of Sector 21 and later deputy chief of the East Zone, testified about the Cham rebellion in Svay Khleang.[1503] He stated that the Cham were then sent "to live in the jungle in Dambae district" adding that "[g]enerally speaking, regarding the events that took place in the entire Eastern Zone, there were evacuations of people starting immediately after 17 April 1975."[1504]

1631. SOS Min said that he was one of the leaders of the rebellion in Svay Khleang in October 1975 which , according to him, took place fifteen days after the one in Kaoh Phal; the rebellion in Trea took place before November 1975. He said that it took one day and one night to quell the rebellion

[1499] WRI of MAN Heang, 10.12.2009, **E3/5529**, Q/A 4.
[1500] SENG Kuy: T.09.09.2017, **E1/344.1**, p. 75, from 14.06.05.
[1501] SAMRETH Muy: T.15.09.2015, **E1/347.1**, p. 25, around 10.04.20. The witness also testified that there were none in Sambour Meas Village: T.15.09.2015, **E1/347.1**, p. 62, around 13.59.45.
[1502] NO Sates: **E1/351.1**, pp. 10-11, after 09.26.33 (armies of different levels, including district soldiers, commune soldiers and village militiamen). SOS Romly: T. 08.01.2016, **E1/372.1**, p. 68, after 14.02.32 (soldiers from the sector). WRI of SAU Seimech, 12.12.2008, **E3/5261**, ERN 00274335-36 (Battalion 55 l - East Zone). Book by Ben KIERNAN, *The Pol Pot Regime: Race, Power and Ideology -1975-1979*, 1996, **E3/1593**, p. 321, ERN 01150139.
[1503] MEAS Soeurn: T. 29.06.2016, **E1/446.1**, p. 23, before 09.54.20, p. 87, around 15.18.50; WRI, 18.12.2009, **E3/5531**, Q/A 52.
[1504] MEAS Soeurn: T. 30.06.2016, **E1/447.1**, p. 26, at 10.12.30.

in Svay Khleang.[1505] SOS Min testified that he was detained in a school for 29 days and was then ordered to leave the village.[1506]

1632. It is interesting to note that in his heroic account of the rebellion, SOS Min portrays himself as one of its leaders. However, the other testimonies reveal that the leader was LEP Banmat, now deceased.[1507] So SOS Min's testimony about the use of torture during interrogations of men does not sound very credible, given that other testimonies to the contrary.[1508]

1633. In his written statement, MAN Sen, SOS Min's older brother, reports that the purpose of the interrogations was to find "the leaders of the rebellion" and those who had worked in the old society.[1509] The fact that some in his group of seven leaders of the rebellion survived makes it patently clear that there was no such thing as a plan to eliminate the Cham, not even those who took part in the rebellion.[1510] After their release from detention, they were sent to Dambae District, in Kampong Cham Province.[1511] Another Cham by the name of THE Sren, an inhabitant of Village 5, Svay Khleang Commune like SOS Min, told the investigators that he was released after one month in detention and was reunited with his wife and children at Krouch Chhmar pagoda before being sent to Banteay Chey.[1512]

1634. SOS Min testified that only Cham were transferred, but he also said that there were very few Khmers in the three villages in his commune.[1513]

1635. SAUV Nhit, a Khmer from Village 4, next-door to SOS Min's, told the investigators that his family was also evacuated. He also criticised the village cadres for the way they randomly chose people

[1505] SOS Min: T. 08.09.2015, **E1/343.1**, p. 105 around 16.02.53; T. 09.09.2015, **E1/344.1**, p. 25, after 10.03.00, p. 28, around 10.09.26.
[1506] IT Sen: T. 08.09.2015, **E1/343.1**, p. 89, around 15.18.30.
[1507] WRI of MAN Sen, 13.08.2008, **E3/5205**, ERN 00275163. Book by YSA Osman, *The Cham Rebellion*, 2006, **E3/2653**, p. 87, ERN 00219148.
[1508] SOS Min: T. 08.09.2015, **E1/343.1**, pp. 80-81, after 14.42.20. WRI of MAN Sen (Zain), 13.08.2008, **E3/5205**, ERN 00275163 "I was not the victim of any torture"). WRI of TEH Sren, 13.08.2008, **E3/5206**, ERN 002975380; WRI of SMAN At, 12.08.2008, **E3/5204**, ERN 00242082 (Rebellion in Koh Phal: "All the people who survived the attack [...] were we transported by boat to Rokar Khnor for interrogation for two days. They wanted to find the leaders of the rebellion. They did not torture us, and they did not beat anyone.").
[1509] WRI of MAN Sen (Zain), 13.08.2008, **E3/5205**, ERN 00275163-00275164.
[1510] SOS Min: T. 08.09.2015, **E1/343.1**, p. 83, around 14.49.36. WRI of MAN Sen (Zain), 13.08.2008, **E3/5205**, ERN 00275163.
[1511] SOS Min: T. 08.09.2015, **E1/343.1**, p. 69, around 14.12.02, pp. 89-90, around 15.20.35.
[1512] WRI of TEH Sren, 13.08.2008, **E3/5206**, ERN 00275380.
[1513] SOS Min: T. 08.09.2015, **E1/343.1**, p. 90, after 15.20.35; T. 09.09.2015, **E1/344.1**, p. 60, after 11.48.00 ("in Villages 5, and 6 there were only Cham people living there, and in Village 7, the Khmers and Chams lived together, [whereas only Cham lived in the other villages]").

to evacuate.[1514] As stated *supra*, the movements of the population (Phase 2) therefore concerned the entire population.

1636. According to NO Sates, who lived in Svay Khleang, like SOS Min, all the Cham had to "leave"[1515] after the rebellion in her village. She explained that Cham villagers were arrested because on accusations of belonging to the White Khmer movement or to the CIA, which were considered to be behind the Svay Khleang rebellion.[1516]

1637. It is noteworthy that reference is not made to the religion of the "rebels", but rather to their subversive activities. For example, after the rebellion was quelled, those who refused to leave the village were accused by the district or commune chiefs of being enemies or CIA agents.[1517]

1638. Still according to NO Sates, people were arrested and detained for the aim of identifying the enemy and averting rebellion. She specified that the soldiers did not harm them in any way.[1518] Those who were found to have no links to the CIA were allowed to return their families. Here again, religion was not the reason for detention. As for the women whose husbands had been taken away, they were released and sent to live along the river, as was the case for her family; they were sent to Khsach Prachheh Leu Village.[1519]

b. <u>The rebellion in Kaoh Phal</u>

1639. IT Sen, who lived in Saoy Village, near Kaoh Phal Village, testified about the crackdown by soldiers after the rebellion. He said that his brother-in-law told him that opponents of Angkar were smashed and that the Khmer Rouge did not harm the others.[1520] Here again, it is noteworthy that religion was the reason for the crackdown, but rather opposition to the regime.

1640. According to IT Sen, around November 1975, half of the villagers, including him and his family, were sent to Battambang, while others were sent to Stueng Trang and still others still to Kratie. The

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[1514] WRI of SAUV Nhit, 14.08.2008, **E3/5208**, ERN 00235139 ("The decisions to select villagers for evacuation were made in secret. They told us that they were having us go to Saoy Village, but when we had ridden the oxcarts half-way, the company commander at. Village of Svay Kheang sub-district detained us there and has us work at the cooperative until 1978").
[1515] <u>NO Sates</u>: T. 29.09.2015, **E1/351.**1, pp. 10-11, before 09.29.01.
[1516] <u>NO Sates</u>: T. 29.09.2015, **E1/351.**1, pp. 5-6, before 09.15.11.
[1517] <u>NO Sates</u>: T. 28.09.2015, **E1/350.1**, p. 83, before 15.44.27; T. 29.09.2015, **E1/351.**1, pp. 10-11, before 09.27.01, p. 32, around 10.46.47, pp. 32-33, after 10.46.47, pp. 33-34, after 10.50.53.
[1518] <u>NO Sates</u>: T. 28.09.2015, **E1/350.1**, p. 51, around 13.52.08.
[1519] <u>NO Sates</u>: T. 28.09.2015, **E1/350.1**, p. 52, around 13.56.53; T. 29.09.2015, **E1/351.1**, pp. 13-14, after 09.35.13.
[1520] T. 07.09.2015, **E1/342.1**, p. 71, before 13.55.51 (FR transcript incorrect; see KH transcript, pp. 50-51).

other half were able to remain in the village, including the family of his sister Afiah. IT Sen was told by SOS Romly that the villages in the district were overpopulated whereas Battambang had an ample supply of more fertile land.[1521] Here again, the reasons for the Movements of the Population (Phase 2) are crystal clear.

1641. IT Sen testified that only Cham were evacuated, but he did not to specify how many, claiming that there were "around 100 boats" with lots of people on board.[1522] Accordingly, without knowing the identity of the people in each of those many boats, his claim that the transfer only concerned the Cham is pure speculation. Moreover, the reason he was sent to Preaek Achi was because too many people had already been sent to Battambang.[1523] This is further proof that the Movement of the Population (Phase 2) was aimed at a more even distribution of the population around the country.

c. <u>The situation in Chumnik</u>

1642. VAN Mat testified that despite the rebellions, the Khmer Rouge did not harm the villagers in Chumnik Commune, Krouch Chhmar District, where he was living.[1524]He testified further that although some villagers in Chumnik and in Chloung District were sent to Kampong Thom Province in 1976, many others, like him and his family, were not evacuated and remained in the village until the end of the regime.[1525]

1643. YSA Osman is of the view that only Cham were evacuated in November or December 1975 owing to the rebellions. According to him, the Khmer Rouge were keen to ensure that the Cham did not live as a community so to avert further rebellions. Dispersing them was a way to avert further rebellions because it was easier to keep an eye on them.[1526]

1644. However, as observed *supra*, contrary to these biased conclusions, not only did the Movement of Population (Phase 2) occur prior to the rebellions but also, Khmers and Cham alike, were moved to different parts of the country. This Movement of the Population (Phase 2) was conducted in accordance with the decisions for evacuation which were on economically-based and concerned

[1521] <u>IT Sen</u>: T. 07.09.2015, **E1/342.1**, p. 72, around 13.58.28, p. 74, after 14.03.18; T. 08.09.2015, **E1/343.1**, p. 35, around 10.40.10, pp. 39-40, around 10.51.51.
[1522] <u>IT Sen</u>: T. 07.09.2015, **E1/342.1**, pp. 73-74, after 14.00.44.
[1523] <u>IT Sen</u>: T. 07.09.2015, **E1/342.1**, p. 75, before 14.08.22.
[1524] <u>VAN Mat</u>: T. 09.03.2016, **E1/398.1**, pp. 16-17, around 09.50.20.
[1525] <u>VAN Mat</u>: T. 09.03.2016, **E1/398.1**, pp. 16-18, between 09.50.20 and 09.54.38, pp. 19-20, around 09.56.55.
[1526] <u>YSA Osman</u>: T. 24.03.2016, **E1/408.1**, pp. 27-28, before 10.08.26.

the population as a whole. The Khmer Rouge of the East Zone considered this as a way to "defuse" the rebellions, but that was an unintended result and not their main motive.

B. There was no discrimination against the Cham

1645. In the newly reorganised society, Cham and Khmers were living under the same conditions – according to accounts in the East and Central Zones –, both in their daily lives (1) and in dealing with the prohibition of religion. (2)

1646. The aforementioned September 1975 document describes the preparations that were made to receive the people in some areas. The idea was to cater for people's wellbeing, and there was no scheme to discriminate against the Cham or for that matter, any other ethnic group.[1527]

1647. Also, the Record of the Standing Committee's August 1975 visit describes how the New People were received and the new forces "[…] to train and educate them" so as to prevent the enemy from "conducting activities leading to their flight."[1528] (*emphasis added*)

1. Living conditions of the Cham in the East and Central Zones

a. Living conditions in the East Zone in the wake of the rebellions

1648. According to IT Sen's testimony, when the Cham arrived in the new village, they were put in different houses which belonged to Khmers. He stated that in his new village, Preak Achi, the village chief and the local cadres "didn't do anything to [them]". He lived there until the mid-1978 but never heard any accounts of executions.[1529]

[1527] September 1975 Document, **E3/781**, ERN 00523591: "We must set up housing as we go, brick and cement housing, so we must make bricks and tile to construct housing, warehouses, and factories.[…] **Example**: Spray rubber plantations in the forested Zones which have the most malaria. The spraying will begin in 1976. […] Propose that the Zones set up their plans to spray with clear organization. Today there is much malaria, and we must treat it with medications and do mosquito eradication […] Child centers must be set up later on to free the female force so we do not lose their labor. […]" (*emphasis supplied*)

[1528] Report of the Standing Committee visit to the Northwestern Zone, 20-24.08.1975, **E3/216**, ERN 00850978.

[1529] IT Sen: T. 07.09.2015, **E1/342.1**, pp. 74-75, at 14.05.29 ("Each Cham family was put to live mingled with each family of the local Base People who were Khmer there."), p. 75, after 14.08.22 ("[…] if we wanted to remain there we could or if we wanted to move on, we could move on."); T. 08.09.2015, **E1/343.1**, pp. 35-36, around 10.42.16, p. 48, after 11.16.26.

1649. MATH Sor testified that his family was moved from Khsach Prachheh Kandal Village to Krouch Chhmar Kraom, in the same district. His family members all lived together and the young ones worked in a mobile unit.[1530]

1650. SOS Min, who was moved to Svay Kambet, in Dambae District, testified that he lived with Khmers[1531] and was treated in the same as the New People who were in the same situation as his.[1532] He said that while deaths did occur within the Cham community, due to famine and other causes, including malaria, the Cham lived under the same conditions as everyone else. He testified that he never witnessed any executions, but only arrests of Khmers – and not Cham – who were considers as Khmer bodies with Vietnamese minds.[1533]

1651. CHI Ly, who is originally from Kaok Phal, was evacuated to Krabei Kreak Village after the rebellion in 1975. He told the investigators that the Chams who moved to this village lived under the same conditions as other villagers and were mixed with them depending on the size of their families. Communal meals started in 1976 and all the villagers received the same food ration and had the same rights. CHI Ly testified that people in Kaoh Phal died of malaria, adding that malaria affected everyone in the village, irrespective of their ethnic background.[1534]

1652. TEH Sren, who lived in Village 5 in Svay Khleang Commune, testified that after his evacuation, living conditions in Banteay Chey, Dambae District, East Zone were relatively good. However, he pointed out that "[o]nly one person was arrested and he never reappeared, but others died from malaria and from using incorrect medicines."[1535] The living conditions and occupations he described to the investigators were not any different from those of the rest of the population.

b. Living conditions in the Central Zone

[1530] MATH Sor: T. 13.01.2016, **E1/375.1**, p. 45, around 11.13.13.
[1531] SOS Min: T. 08.09.2015, **E1/343.1**, pp. 92-93, before 15.30.30.
[1532] SOS Min: T. 08.09.2015, **E1/343.1**, pp. 93-94, before15.33.05. See also YSA Osman: T. 09.02.2016, **E1/388.1**, p. 70, at14.20.54 "the condition of the Cham people everywhere when they were evacuated was similar to the condition that the Khmer city dwellers , who were evacuated from the cities".
[1533] SOS Min: T. 08.09.2015, **E1/343.1**, p. 94, after 15.33.05; T. 09.09.2015, **E1/344.1**, p. 5, around 09.10.26.
[1534] WRI of CHI Ly, 21.05.2009, **E3/5290**, ERN 00340172-73.
[1535] WRI of TEH Sren, 13.08.2008, **E3/5206**, ERN 00275380.

1653. According to Civil Party HIM Man, who is originally from Sach Sou, Peam Chi Kang Commune, as far as the Khmer Rouge were concerned, "every one of us living in the village was considered the Khmer people."[1536] He described how the Khmer Rouge organised the village, as follows:

> "The Khmer Rouge actually allowed Khmer people to live, mingle with the Cham people in that village. So by that time, from the view, we could say that there was no longer distinction between the Cham people and the Khmer people, and every one of us living in the village was considered the Khmer people."[1537]

1654. In his live testimony, SENG Kuy confirmed that the "Cham were placed under the same condition as those imposed on the Khmer people in terms of the way of living and working."[1538]

1655. SEN Srun testified that in 1976, the Cham, the majority of whom were then living in Sach Sou Village, "were separated and mixed with the Cambodian – with the Khmer people in various villages" and "required to wear the same clothes as Khmer people."[1539] This is how, according to him, some twenty Cham families, who also were originally from Peam Chi Kang Commune, settled in Sambuor Meas village.

1656. MAN Heang, a Cham, who is originally from Damnal Chrey Village, Peam Chi Kang Commune, Kang Meas District, told the investigators that he was the chairman of a mobile unit comprising "Old People, New People and ethnic Cham."[1540] According to him, this shows that everyone worked together at that time.

2. Total ban on religion and traditions

1657. The fact that the practice of religion and traditions was prohibited under the Khmer Rouge is not in dispute; however, that prohibition did not concern only the Cham. It concerned people from all ethnic backgrounds: Khmers, Chinese, Chams, Buddhists, Catholics, even though the extent of the restrictions varied depending on the local officials. The witness all testified to this effect.

a. The situation in the East Zone

[1536] HIM Man: T. 17.09.2015, **E1/349.1**, pp. 42-43, around 11.15.26.
[1537] HIM Man: T. 17.09.2015, **E1/349.1**, pp. 42-43, after 11.15.26
[1538] SENG Kuy: T.09.09.2017, **E1/344.1**, p. 79, around 14.16.56.
[1539] SEN Srun: T. 14.09.2015, **E1/346.1**, p. 10, after 09.27.52.
[1540] WRI of MAN Heang, 10.12.2009, **E3/5529**, Q/A 4.

1658. Indeed, according to BAN Seak, a senior cadre in Sector 42 of the Central Zone, who later became the chief of Krouch Chhmar District, religious practice was prohibited for both Khmers and Cham.[1541] Many a written records of interview attests to this as well.[1542]

1659. SOS Romly, who was the deputy of the many chiefs in Krouch Chhmar, testified that the prohibition of religious practice began in 1975, because "all religions" were considered reactionary.[1543] YSA Osman also recognised that Islam was not the only religion affected by the prohibition.[1544]

1660. MEAS Soeurn, son of CHAN Seng Hong, alias Chan, who was secretary of Sector 21 and later deputy chairman of the East Zone, testified that he never heard of any principles or written documents concerning the intent of the CPK to treat the Chams like Khmers by forbidding religious practice. He said: "Let alone the Islamic Religion, even the majority of the people who were Buddhist, they were not allowed to practice their religious beliefs like what they enjoy now."[1545]

1661. MAT Ysa, a Cham from Peus Commune in Krouch Chhmar District, told the investigators that he was not evacuated until after the demise of the Democratic Kampuchea regime. Regarding a meeting, he stated that "Angkar wanted us to all live the same, have the same freedoms, to be in solidarity, living and eating together" and that "we, the ordinary people, were to strive to work [and] Angkar would only arrest anyone who was the enemy."[1546] So arrests were not carried out based on ethnicity or religion.

1662. Civil Party NO Sates, who lived in Krouch Chhmar Commune, told the investigators that under the Khmer Rouge, Khmers and Chams dressed the same way, had the same haircut and spoke the same language.[1547]

[1541] BAN Seak: T. 05.10.2015, **E1/353.1**, pp. 37-38, before 10.55.21; T. 06.10.2015, **E1/354.1**, p. 35, before 11.01.45; WRI, 06.07.2009, **E3/375**, ERN 00360759-00360760.
[1542] See for example: WRI of MAT Ysa, 14.08.2008, **E3/5207**, ERN 00242078 ("They wanted to eliminate all religions, including Islam and Buddhism."). WRI of CHI Ly, 21.05.2009, **E3/5290**, ERN 00340171, ERN 00340173.
[1543] SOS Romly: T. 06.01.2016, **E1/371.1**, pp. 96-97, around 15.41.15; T. 08.01.2016**, E1/372.1**, p. 80, before 14.30.46, pp. 43-44, after 11.07.04 (the mosque became a hospital after it closed down, but the pagoda in Kdok Dar was used as a base for mobile units). See also DC-Cam Interview of MAT Ly, 27.03.2000, **E3/7821**, ERN 00441581 ("[…] all religions were considered reactionary").
[1544] YSA Osman: T. 10.02.2016, **E1/389.1**, pp. 97-98, around 15.47.54.
[1545] MEAS Soeurn: T. 29.06.2016, **E1/446.1**, p. 23, before 09.54.20, p. 87, around 15.18.50; WRI, 18.12.2009, **E3/5531**, Q/A 52.
[1546] WRI of MAT Ysa, 14.08.2008, **E3/5207**, ERN 00242076, ERN 00242078-79.
[1547] WRI of NO Sates: 08.07.2008, **E3/5193**, ERN 00274705.

1663. VAN Mat, who lived in the same commune as IT Sen, recounted a commune meeting at which it was announced that religious practice was forbidden. He told the Defence that the prohibition did not concern only Islam, but also other religions, including Buddhism.[1548] He said that the meeting was attended by both Khmers and Cham and that even the Khmer women were told to keep their hair short.[1549]

1664. YSA Osman testified that those who refused to eat pork were killed.[1550] However, experiences differed from one person to another, depending on the location. For example, IT Sen testified that when food contained pork at communal meals "some of us could not eat, they were given some grains of salt instead."[1551] MATH Sor testified that the Khmer Rouge ordered her to eat pork in order to test her, but did not mistreat her when she refused to do so. [1552]

b. The situation in the Central Zone

i. Kang Meas District

1665. HIM Man, a civil party from Sach Sou, Peam Chi Kang Commune, recounted a meeting in 1976,[1553] at which the 30 families which had remained in the village, including his, were told that religious practice was forbidden and that they had to eat pork.[1554]

1666. On this subject, Civil Party HIM Man testified that threats were used in some instances, but some people ate pork simply in order to be well regarded.[1555] He testified further that his religion allowed him to eat pork if necessary for survival.[1556] He said that he ate pork at a communal meal during at a wedding.[1557]

[1548] VAN Mat: T. 09.03.2016, **E1/398.1**, pp. 51-52, around 11.30.00, p. 86, around 15.11.04, pp. 87-88, around 15.14.54.
[1549] VAN Mat: T. 09.03.2016, **E1/398.1**, pp. 87-88, around 15.14.54.
[1550] YSA Osman: T. 10.02.2016, **E1/389.1**, pp. 51-52, around11.31.40.
[1551] IT Sen: T. 07.09.2015, **E1/342.1**, p. 109, around 15.55.20.
[1552] MATH Sor: T. 13.01.2016, **E1/375.1,** p. 51, after 11.32.42.
[1553] HIM Man: T. 17.09.2015, **E1/349.1**, pp. 41-42, around 11.12.23.
[1554] HIM Man: T. 17.09.2015, **E1/349.1**, p. 37, around 10.56.51.
[1555] HIM Man: T. 17.09.2015, **E1/349.1**, pp. 40-41, around 11.09.06, p. 73, after 14.29.11; T. 28.09.2015, **E1/350.1**, p. 14 around 09.37.16.
[1556] HIM Man: T. 17.09.2015, **E1/349.1**, pp. 40-41, around 11.09.06.
[1557] HIM Man: T. 28.09.2015, **E1/350.1**, p. 16, around 09.43.33.

1667. By contrast, MAN Heang, a Cham from Peam Chi Kang Commune, testified that when he refused to eat pork, Kan announced at a meeting that he should not be forced to do so.[1558]

1668. MUY Vanny testified that "religion was prohibited, and that applied to the Cham and to the Khmer people."[1559] HOK Hoeun, who lived in Sambuor Meas Village, reported in his written record of interview that ten Cham families in his village were moved from Sach So Village and that all religions were prohibited.[1560]

1669. Like all of the other witnesses, SEN Srun confirmed that religious practice was prohibited for both Chams and Buddhists, and that the places of worship were used as warehouses or security centres.[1561]

1670. As was the case in Krouch Chhmar District, the prohibition of religion concerned everyone and not only Cham.

ii. <u>Kampong Siem District</u>

1671. At the Co-Prosecutors' request, two former Khmer Rouge from Kampong Siem who had been interviewed in Cases 003 and 004 were called for testimony. YOU Van was the chief of a mobile unit and also deputy to PRAK Yut, a senior district official.[1562] Their testimony concerned the treatment of the Cham in Kampong Siem and in particular the orders they allegedly received from their superiors in the sector (e.g. the chief of Kang Meas District) and the arrests that ensued.

1672. In some written records of interview, brief reference is made to the treatment of the Chams in Kampong Siem, but those records have low probative value because they are short on details concerning the witness' accounts and their sources.[1563]

• **<u>Living conditions of the Cham in Kampong Siem</u>**

[1558] WRI of MAT Touloh, 07.04.2008, **E3/9360**, Q/A 38.
[1559] <u>MUY Vanny</u>: T.11.01.2016, **E1/373.1**, p. 20, at 10.28.18.
[1560] WRI of HOK Hoeun, 23.11.2008, **E3/5256**, ERN 00251306-07.
[1561] <u>SEN Srun</u>: T. 14.09.2017, **E1/346.1**, p. 11, around 09.32.11, pp. 12-13, around 09.36.33.
[1562] <u>YOU Van</u>: T.18.01.2016, **E1/377.1 (closed session)**, p. 44, around 11.11.16.
[1563] WRI of VA Limhum, 15.09.2014, **E3/9756**; WRI of POV Sarom, 19.04.2015, **E3/9670**; WRI of SBONG Yann, 0507.05.2014, **E3/9656**.

1673. According to PRAK Yut. at that time, "Cham people were living mingled with Khmer people",[1564] as was confirmed by YOU Vann.[1565] 2PRAK Yut stated that religion was prohibited in the district, but that she received no instructions to prevent the Chams from speaking their language.[1566]

1674. YOU Vann testified that within the mobile unit that she led "it was a mixture" of Khmers and Chams and that they "all worked as a group" without any distinctions.[1567] YOU Vann also testified that Cham couples got married in her mobile unit up until late 1978; that is noteworthy in light of what is to follow.[1568]

• **<u>An order from the sector level</u>**

1675. PRAK Yun recounted a meeting which was attended by all the district chiefs, including the chief of Kang Meas District, at which she received "an order from the sector level [...] to purge the Cham", and she did so without knowing why.[1569] She said that she was then asked to identify the Chams in her district, which she did with YOU Vann's assistance.[1570] YOU Van testified that she was indeed asked to draw up a list of former Khmer Republic soldiers and officials, Chams, Vietnamese and nearly all of the village chiefs, specifying: "I simply knew about their making in total numbers of those people from each commune and village."[1571] Her testimony therefore reveals that the list did not include Cham only but was more broad-based even though YOU Vann did not know all the details since she did not attend the meetings on the matter.[1572]

1676. PRAK You's testimony was sketchy and riddled with inconsistencies during her three days on the witness stand. First she spoke about the "purge of the Cham", saying that the arrests and executions of Cham in her district began after a meeting with the sector chief and that she did not know the details about those executions because she was not the one who organised them.[1573] She stated that

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[1564] <u>PRAK Yut</u>: T. 18.01.2016, **E1/377.1 (closed session)**, p. 98, around 15.37.47. See also <u>Alexander HINTON</u>: T.15.03.2016, **E1/402.1**, p. 83, after 14.00.44. HINTON stated that during his investigation in Kampong Siem District, he recorded interviews of villagers who described haircuts and standardisation with an 'intent to bring equality" while giving women a degree of autonomy.
[1565] YOU Van: T.14.01.2016, **E1/376.1 (closed session)**, p. 63, around 14.57.17.
[1566] <u>PRAK Yut</u>: T. 18.01.2016, **E1/377.1 (closed session)**, p. 99, before 15.41.04.
[1567] <u>YOU Van</u>: T.18.01.2016, **E1/377.1**, p. 44, around 11.11.16.
[1568] See *infra*, paras. 1674 and 1692-1693 (2YOU Van and PRAK Yut also testified about how marriages were conducted).
[1569] <u>YOU Van</u>: T. 18.01.2016, **E1/377.1 (closed session)**, p. 82, around 14.45.30.
[1570] <u>PRAK Yut</u>: T. 18.01.2016, **E1/377.1 (closed session)**, pp. 82-83, around 14.49.42.
[1571] <u>YOU Van</u>: T.18.01.2016, **E1/377.1 (closed session)**, pp.17-18, around 09.49.03 and 09.53.05.
[1572] YOU Van: T.18.01.2016, **E1/377.1 (closed session)**, p. 42, around 11.07.34.
[1573] YOU Van: T. 21.01.2016, **E1/380.1 (closed session)**, pp. 9-10, after 09.27.13, p. 11, after 09.31.12.

the sector meeting was attended by all of the district chiefs, including the chief of Kang Meas.[1574] She then went on to assert that the point was not to arrest all the Cham:

> "[d]espite the order from the upper echelon and upon my examination of the situation, I had to distinguish who were good and who were bad or who opposed and who did not. So before the arrests were carried out, I had to make sure only bad elements were arrested, and not every Cham was arrested."[1575]

1677. PRAK Yut thereby acknowledged that it was her duty to determine who was an opponent or a "bad element" and therefore that the point was not to target any group in particular. Be that as it may, her testimony, sketchy as it may have been, fails to prove that the decision to arrest Chams came from higher up than the sector level. Indeed PRAK Yut herself acknowledged that she was not privy to communications between the sector and the zone.[1576]

1678. In light of the discussion, *supra*, concerning the armed conflict, depending on the timing of the events, Democratic Kampuchea was either dealing with the harsh realities of the conflict or at the brink of defeat. At that critical juncture, the CPK leadership was therefore more involved in dealing with pressing military and foreign relations matters than with districts or the sectors.

iii. Other districts in the Central Zone

1679. The other testimonies relating to the Central Zone are discussed in the segment on the alleged policy to target the Cham.

1680. As discussed in greater detail *infra*, the way in which the militia and local authorities dealt with security in the districts in the East and Central Zones was not in any way based on a CPK policy designed to destroy the Cham group.[1577]

c. The situation in the Northwest Zone

1681. Paragraph 755 of the Closing Order refers to the weekly report from Sector 5 in the Northwest Zone, which was sent to the Zone secretary and to M560 (Northwest Zone office.[1578] The report was about the overall situation in the sector, including security. Regarding this last point, although reference is made to "17 April elements" who were Cham, the point being highlighted is not that

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[1574] YOU Van: T. 19.01.2016, **E1/378.1 (closed session)**, p. 11, around 09.29.22.
[1575] YOU Van: T. 19.01.2016, **E1/378.1 (closed session)**, p. 11, around 09.31.43.
[1576] PRAK Yut: T. 19.01.2016, **E1/378.1 (closed session)**, p. 19, around 09.55.40.
[1577] See *infra*, paras.1840-1877.
[1578] Weekly Report of Sector 5 Committee, 21.05.1977, **E3/178**, ERN 00342709-10.

they were Cham but rather that they "conducted a protest" even though it concerned being able to eat "according to their religion." As a matter of fact, the rest of the report describes a number of incidents which were considered as acts of sedition or misconduct by putting them at the same level as the plan to dismantle the so-called opposition "networks".

C. No policy aimed at destroying the Cham as a group existed

1682. The intent to destroy a group as such is among the main ingredient of genocide. One of the first manifestations of the intent to destroy is preventing families from forming by prohibiting or restricting marriage. However, the evidence on the record shows that throughout the Democratic Kampuchea period, Cham were able to form couples under the same conditions as the rest of the population (1).

1683. The evidence concerning the reasons for the arrests in Krouch Chhmar and Kang Meas also does not support the finding that there was such a thing as policy of destroying the group as such (2), even though some of the evidence may suggest a number of arrests and executions did occur(3).

1. Marriage among the Cham

1684. According to YSA Osman, in late 1975 before the rebellions in Kaoh Phal, five conditions were imposed on the Cham. The last condition was: "[…] Cham men and women [had] to marry other ethnic groups and not with the Cham people"[1579] even though "in practice, it did not actually happen" because of the rebellion in Kaoh Phal. YSA Osman admitted, however, that he did not conduct in-depth research on marriage.[1580]

1685. This admission by the Co-Investigating Judges' analyst is further testament to the shallowness of the findings he recorded in a bid to demonstrate that there was a Khmer Rouge policy to destroy the Cham group as such. The reality is quite different.

1686. In her testimony, SOS Romly did not say that her family was ill-treated under the Democratic Kampuchea regime. He remained in his commune of birth until he fled shortly before the demise

[1579] YSA Osman: T. 09.02.2016, **E1/388.**1, p. 34, before 10.47.12.
[1580] YSA Osman: T. 10.02.2016, **E1/389.1**, pp. 57-59, between 13.44.03 and 13.52.22.

of the regime. One of his five siblings, a brother, disappeared in 1973;[1581] another married a Cham, MATH Sor, in late 1978.[1582]

1687. MATH Sor testified that before she fled, she got married at a ceremony involving 70 couples, but did not specify how many Cham and how many were from other ethnic groups. She explained that it was her husband's family which asked for her consent and "arranged the marriage [for them]". They had met in a mobile unit. Since her husband was living in Trea II Village, the Khmer Rouge cadres knew that they were both Cham.[1583] According to her, it was Ho who arranged the marriage, even though he did not attend the wedding.[1584]

1688. To a question from Judge FENZ, MATH Sor, answered that she never heard about the prohibition of marriage among the Cham, and that, to her knowledge, hers was the only marriage that the village authorities knew about.[1585] Her brother-in-law, SOS Romly, who worked at the commune, gave more details about Cham marriages under the Khmer Rouge.

1689. As a matter of fact, SOS Romly recounted two weddings which took place under the Democratic Kampuchea regime. He testified he himself got married in 1977 at the first group wedding, which involved four couples.[1586] The second wedding took place in 1978, and involved a little more than twenty couples. According to him, marriages were arranged between people from the same ethnic group, and there were no mixed marriages. He testified that some got married of their own volition, others not.[1587]

1690. Civil Party HIM Man who lived in Sach Sou Village in Kang Meas also testified about Cham marriages. He got married in 1977 at Wat Au Trakuon as part of a group wedding involving Khmers and Cham, with the parents of his Cham fiancée in attendance. Unlike SOS Romly, he testified that

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[1581] SOS Romly: T. 08.01.2016, **E1/372.1**, p. 88, after 15.07.52.
[1582] MATH Sor: T. 13.01.2016, **E1/375.1**, pp. 102-103, before 16.05.47. SOS Romly: WRI, 10.07.2008, **E3/5196**, ERN 00223089.
[1583] MATH Sor: T. 13.01.2016, **E1/375.1**, p. 77, around 14.39.19, p. 76, around 14.36.59, p. 97, after 15.47.55, pp. 97-98, around 15.49.35, p. 103, around 16.05.47.
[1584] MATH Sor: T. 13.01.2016, **E1/375.1**, p. 101, around 15.59.38. This is corroborated by BAN Seak who stated that he did not attend the marriages in Krouch Chhmar: T. 06.10.2015, **E1/354.1**, p. 74, at 15.12.48.
[1585] MATH Sor: T. 13.01.2016, **E1/375.1**, pp. 103-104, after 16.05.47.
[1586] SOS Romly: T. 08.01.2016, **E1/372.1**, pp. 46-47, after 11.12.48.
[1587] SOS Romly: T. 08.01.2016, **E1/372.1**, pp. 46-47, after 11.12.48.

he saw "another [Cham] person who was paired up with his or her fiancée at that time"[1588] at the wedding.

1691. SOS Kamri, who is originally from Chamkar Leu District, testified that he got married before the Khmer Rouge came to power, adding that he also attended Cham weddings under the Democratic Kampuchea regime. He added that it was not prohibited for Cham to marry among themselves or to marry from other ethnic groups.[1589]

1692. YOU Vann and PRAK Yut also testified about Cham marriages in Kampong Siem District, Central Zone. YOU Vann, who headed a mobile unit, remembered celebrating the marriage of "four Cham couples and four Khmer couples."[1590]

1693. Even sketchy as it was, PRAK Yut's testimony as to whether marriages between Khmers and Cham were prohibited does not in any way suggest that there was a policy such as the one alleged by YSA Osman. In any event, she remembered marriages among Cham, as recounted by YOU Van.[1591]

1694. Also, HIM Man's testimony in Kang Meas shows that there was no standard practice in the various locations, contrary to the allegation that there was a Khmer Rouge policy preventing Cham from marrying fellow Cham or with Khmers.

2. Evidence concerning events in Krouch Chhmar and Kang Meas

1695. YSA Osman testified that the Cham were transferred over accusations accused of being White Khmer, agents of the CIA, the KGB or the Vietnamese.[1592] Therefore, the reason for their transfer was not their religion or ethnic background. While some evidence seems to point to arrests and executions of Cham, other evidence, such as testimonies concerning Krouch Chhmar (a) and Kang Meas (b) districts, suggests that such arrests and executions were carried out for the same as for the rest of the population.

[1588] HIM Man: T. 28.09.2015, **E1/350.1**, pp. 16-18, between 09.41.11 and 09.47.52.
[1589] SOS Kamri: T. 06.04.2016, **E1/415.1**, p. 51, around 11.21.04, p. 79, around 14.34.13.
[1590] YOU Van: T. 18.01.2016, **E1/377.1 (closed session),** pp. 39-40, around 11.00.44, the marriages took place after the list of Chams requested by the superior had been drawn up: p.57, before 13.47.49.
[1591] 2PRAK Yut: T. 18.01.2016, **E1/377.1 (closed session)**, p. 99, around 15.39.25, p. 99, before 15.41.04; T. 19.01.2016, **E1/378.1 (closed session)**, p. 47, around 11.30.26, p. 48, before 11.33.30, pp. 49-50, after 13.34.51; T. 20.01.2016, **E1/379.1 (closed session)**, pp. 33-34, before 10.42.52; T. 21.01.2016, **E1/380.1 (closed session)**, pp. 12-13, after 09.37.18, p. 14, around 09.41.09.
[1592] YSA Osman: T. 23.03.2016, **E1/407.1**, p. 87, after 14.45.084.

a. <u>Example of Krouch Chhmar District</u>

1696. SOS Romly testified that in 1977, while he was the deputy to Chhean, who was the chief of Trea Commune, he was told by "sector security guard" that "those Cham people would be smashed."[1593] However, SOS Romly did not identify the security guard in question, his superior or the person accompanying him.[1594] Moreover, he did not state the reason for the planned smashing.[1595] His testimony is therefore unpersuasive, and, in any case, not from what qualifies as a reliable source.

1697. SOS Romly testified further that he did not even know who the chief of the district was, thereby implying that he knew nothing about the decisions of the higher echelon.[1596] In the absence further details, even if credence were to be lent to his hearsay evidence from an unnamed source, it cannot not be concluded based thereupon that there was a plan from the higher echelon or for that matter, from the Party Centre.

1698. Another Cham witness, VAN Mat, testified about a meeting which was led by KE Pauk, chairman of the Central Zone, in Kampong Thma (Central Zone) following the purges in the East Zone in 1978. While waiting outside the meeting venue for Hun, the new chief of Chumnik Commune,[1597] he overheard conversations about a policy to smash "the ones who betray Angkar, <u>regardless of their ethnicity</u>, whether Cham or Khmer."[1598] (*emphasis added*) VAN Mat testified further that the reference at the meeting to the percentage of purges carried out by each sector "was not about the Cham."[1599]

1699. When questioned again by Judge LAVERGNE about who was said to be the target at that meeting, he answered that everyone in the East Zone "in principle [...] had to be purged."[1600] And as to the last question from the Judge on that subject:

[1593] <u>SOS Romly</u>: T. 08.01.2016, **E1/372.1**, pp. 16-17, before 09.45.13, pp. 84-85, after 14.40.06.
[1594] <u>SOS Romly</u>: T. 08.01.2016, **E1/372.1**, p. 17, after 09.45.13 around 09.46.08, p. 86, after 15.02.
[1595] <u>SOS Romly</u>: T. 08.01.2016, **E1/372.1**, pp. 17-18, after 09.46.08.
[1596] <u>SOS Romly</u>: T. 08.01.2016, **E1/372.1**, pp. 78-79, before 14.27.31
[1597] <u>VAN Mat</u>: T. 09.03.2016, **E1/398.1**, p. 29, around 10.37.16, p. 30, around 10.39.02.
[1598] <u>VAN Mat</u>: T. 09.03.2016, **E1/398.1**, p. 32, after 10.43.15, p. 55, around 13.31.57; WRI, 15.07.2011, **E3/5209**, ERN FR 00727597.
[1599] <u>VAN Mat</u>: T. 09.03.2016, **E1/398.1**, pp. 79-80, before 14.37.36.
[1600] <u>VAN Mat</u>: T. 09.03.2016, **E1/398.1**, pp. 56-57, after 13.35.14, p. 58, after 13.41.00 ("All, each and every one from the mobile units, had to be purged both Chams and Khmers"). See also his answers to the Defence: p. 78, between 14.32.02 and 14.34.20 not only Cham people were purged but Khmer and Chinese people were also purged"), p. 78, before 14.34.20 ("the target was to purge [...] of bandits").

> "**Q**. So there – no mention was made of a plan that, apparently, was directed specifically at the Cham, directed at Cham more than at other people who were considered traitors; is that what I must understand?
> **A**. Yes, that is correct; all traitors needed to be smashed."[1601] (*emphasis added*)

1700. VAN Mat therefore concluded: "[…] regarding the policy, I stated a long time ago that they did not discriminate between Cham or Khmer, because the policy was to purge the East Zone."[1602] He stated that when he returned from that meeting, he told his fellow mobile unit heads, both Khmers and Cham, about the policy.[1603]

1701. His testimony is corroborated by that of BAN Seak, who testified that he never received from KE Pauk or anyone else at meetings any plan to kill Cham people.[1604] He testified further that:

> "[…] At that time, I just knew that both the Khmer people and the Cham people were in the same situation […] I did not matter whether they were the Cham, the Chinese, or the Khmer, they would be taken away and smashed for allegedly being the CIA or KGB enemies. Not only the Cham people, but many Khmer people lost their lives during the regime."[1605]

1702. The Defence asked BAN Seak about the alleged meeting with KE Pauk in Sandan District to which he travelled on someone's motorcycle, and at which the order was issued to destroy all the Cham. He answered that he never attended any such meeting, and that he personally rode his motorcycle whenever he needed to go somewhere.[1606]

1703. BAN Seak testified that he was not aware of the alleged executions of Cham in Krouch Chhmar, adding:

> "When I attended the study session at the upper level, I did not receive any instruction to purge the Cham people. Not at all, despite the fact that the situation at that time was chaotic. There was no such plan. And Ke Pauk never set a plan to purge the Cham people […] To my knowledge, it was those people involved in the rebellion were purged, and no ordinary Cham people […]" (*emphasis added*)[1607]

[1601] VAN Mat: T. 09.03.2016, **E1/398.1**, p. 58, at 13.41.00.
[1602] T. 09.03.2016, **E1/398.1**, p. 103, between 15.59.47 and 16.02.17; WRI, 15.07.2011, **E3/5209**, 01216675 ("Reference was made to all enemies in general, regardless of whether they were Cham, Khmer or Chinese.").
[1603] VAN Mat: T. 09.03.2016, **E1/398.1**, p. 34, after 10.49.32.
[1604] T. 06.10.2015, **E1/354.1**, p. 31, around 10.48.25, p. 74, around 15.12.48, p. 75-76, at 15.16.55, p. 77, before 15.19.41.
[1605] BAN Seak: T. 05.10.2015, **E1/353.1**, p. 46, before 11.17.55.
[1606] BAN Seak: T. 06.10.2015, **E1/354.1**, p. 75, around 15.16.55.
[1607] BAN Seak: T. 06.10.2015, **E1/354.1**, pp. 75-77, between 15.16.55 and 15.19.41.

1704. It is worth noting that NO Sates stated that she was interrogated in 1978 while in detention in Trea and that the questions tended to focus on her relations with Vietnamese people. She stated that when asked if she was the daughter of Vietnamese parents, she clearly answered that she was Khmer, which is why she was released.[1608] She testified further that:

> "The people who were living in the East Zone were accused of having the Khmer bodies with the Vietnamese heads and that they colluded with the Vietnamese. As for those on the southwest side, they were considered differently from the ones on the east side. And that was the reason why Cham people on that side were rounded up, taken away and they disappeared since. The entire families of mine, including my parents, all younger siblings, aunts and uncles and my immediate and distant relatives, who were taken away during that period of time, disappeared. No one survived. And only I, I survived because of my tongue and the answer. I said that I was a Khmer girl. And that's the only reason why I survive. And I insisted that I was a Khmer girl, and I did it three times before they took it in and believed it. And at that time, my hands were still tied."[1609]

1705. According to her, the issue was not whether one was Cham. SOS Min testified to the same effect, saying: "[the killings were] indiscriminate", given that both Cham and Chinese of the East Zone were accused by the cadres of the Central Zone of having Vietnamese minds.[1610] C

1706. As observed *supra* in the segment on the armed conflict, the year 1978 saw the escalation of the war against Vietnam.[1611] BAN Seak testified that when HENG Samrin and CHEA Sim fled, the higher echelon issued an order to assemble the forces for dispatch to the battlefront to fight the traitors, but did not mention the Cham.[1612] BAN Seak testified that after the rebellion in Krouch Chhmar, he was ordered by his superior to eliminate those who were considered to be KGB agents, regardless of their ethnic origin.[1613] The eliminations therefore occurred in the context of the armed conflict following a rebellion, and had nothing to do with religion or ethnicity.

1707. It is also worth noting that according to VAN Mat, conflicts between the Central and East Zones started in 1977. He testified that he personally witnessed attacks and exchanges of gunfire in Preaek Ta Hok Village, where villagers' houses were burnt. "Angkar's army" was coming in from

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[1608] NO Sates: T. 28.09.2015, **E1/350.1**, p. 59, after 14.16.35 ("then they […] ask[ed] me whether I was a "yuon" or Vietnamese daughter, I protested that "no", and I still insisted that I was a Khmer person and after a few rounds of back and forth, they believe that I was a Khmer girl..").
[1609] NO Sates: T. 29.09.2015, **E1/351.**1, p. 24, around 10.03.02.
[1610] SOS Min: T. 09.09.2015, **E1/344.1**, pp. 9-10, after 09.21.12.
[1611] See *supra*, paras. 801-811.
[1612] T. 05.10.2015, **E1/353.1**, p. 75, around 14.31.45, pp. 90-91, before 15.34.13, p. 102, after 15.59.58.
[1613] T. 06.10.2015, **E1/354.1**, p. 34, before 10.59.38; WRI, 06.07.2009, **E3/375**, ERN 00360754-00360755; WRI, 24.03.2014, **E3/9517**, Q/A 50, Q/A 57; WRI, 26.05.2015, **E3/9649**, Q/A4, Q/A6.

Chhlong and the East Zone was trying to block it at the boundary between Kratie and Kampong Cham. After their defeat, the East Zone soldiers discarded their weapons and fled.[1614]

1708. VAN Mat also testified that mobile units shot at the district chief, the commune chief and two Khmer Rouge soldiers during the evacuation and that nearly all of them died during the attack.[1615] This testimony was corroborated by that of BAN Seak who remembered that his deputy secretary, Au, was shot and killed by militiamen amidst the chaos. This is why he had to be careful.[1616]

1709. BAN Seak testified that he witnessed the arrest of ten to twenty individuals from the mobile unit which was behind the rebellion on Krouch Chhmar Island. He stated that militiamen told him that there was an unknown number of Cham and Khmer rebels. According to him, it was soldiers from the centre and Krouch Chhmar District who carried out executions.[1617] Here again, it was a matter of suppressing a revolt and not of repressing a religious or ethnic group.

1710. Also, MATH Sor, a Cham, testified that her husband and in-laws were still alive and that they all fled after her marriage on hearing rumours that the Khmer Rouge were executing people.[1618] She testified further that both Cham and Khmers fled together.[1619]

1711. For his part, KE Pich Vannak told the investigators that his father, KE Pauk, was ordered by POL Pot to undertake "an immediate investigation" concerning the corpses which he saw floating on the Mekong. At the end of the investigation, he concluded that the corpses were those of Cham who were executed at Krouch Chhmar and dumped into the river by "[t]he Intervention Unit of the Centre led by Pin". KE Pauk reported this to "M-870". Also at that time, people in the Central Zone went into hiding because of the purges in the East Zone. It was against this background that Office "M-870" issued an amnesty circular ordering the release of the prisoners. According to KE Pich Vannak, this happened around mid-1978 during the turmoil.[1620]

1614 VAN Mat: T. 09.03.2016, **E1/398.1**, pp. 105-106, around 16.07.49.
1615 VAN Mat: T. 09.03.2016, **E1/398.1**, pp. 95-96, around 15.40.05.
1616 BAN Seak: T. 05.10.2015, **E1/353.1**, p. 63, after 14.00.15, pp. 92-93, before 15.38.40; T. 06.10.2015, **E1/354.1**, p. 23, around 10.04.50, pp. 58-59, around 14.07.44.
1617 BAN Seak: T. 05.10.2015, **E1/353.1**, pp. 69-72, between 14.15.25 and 14.24.11; T. 06.10.2015, **E1/354.1**, p. 31, around 10.48.25, p. 34, before 10.59.38.
1618 MATH Sor: T. 13.01.2016, **E1/375.1**, pp. 99-100, around 15.54.52. SOS Romly: T. 08.01.2016, **E1/372.1**, p. 16, around 09.42.50.
1619 MATH Sor: T. 13.01.2016, **E1/375.1**, pp. 77-78, after 14.39.19.
1620 WRI of KE Pich Vannak, 04.06.2009, **E3/35**, ERN 00346155-56.

1712. Since the witness is deceased, his testimony can be admitted in lieu of his live testimony. However, his statement clearly reveals that "Brother" POL Pot was not aware of what went on in Krauch Chhmar, which is why he asked KE Pauk to investigate. This supports the Defence's argument that the executions were carried out in that district at the initiative of local authorities without the knowledge of the CPK leadership in Phnom Penh. In fact, according to KE Pich Vannak, POL Por immediately issued a circular to defuse the situation in this area along the border.

1713. It will be recalled that mid-1978 is the period when everything was going badly for Democratic Kampuchea on the military front and when the troops on the ground were overwhelmed, and were engaging in disorderly conduct. This runs counter to the claim that there was plan from the CPK leadership..

1714. For example, witnesses recounted many meetings between KE Pauk and his subordinates; at least two of those meetings were recounted differently by VAN Mat and BAN Seak. However, as observed *supra*, those two witnesses claimed that Cham were not discussed at any of the meetings with KE Pauk. There is no evidence of an order or plan to massacre the Cham in particular. The evidence seems to indicate that there were rebellions against the regime and that both Cham and Khmers suffered as a result of that. It is therefore unreasonable to conclude – as does YSA Osman – that the Cham were the target of mass killings in 1978 or for that matter beginning in 1977.

b. Example of Kang Meas District

i. Arrest orders

1715. According to HIM Man, "there was a rumour which was spread out through the village that the Cham people were the enemy number one and the Khmer people were enemy number two." He testified that he was told by a Khmer "whose name [he could not] recall" that "because based on the historical backgrounds since the birth of Allah, that the Cham people were greedy in engaging in the battles, in wars."[1621]

1716. This odd assertion by an unnamed Khmer person does not in any way reflect what was said by a CPK organ. So it should simply be taken for what it is, i.e. a rumour from a villager, most likely based on his own prejudices.

[1621] HIM Man: T. 17.09.2015, **E1/349.1**, pp. 42-43, before 11.15.26.

1717. HIM Man also testified that one day "in late 1978 or early '79"[1622] at a large gathering of Chams organized by the long sword militia, he "met a person from the sector"[1623] However, he gave no details about the identity of the person in question or on how he came know that that person was from that area.

1718. The rest of the evidence consists of conflicting accounts, an indication that the arrests were arbitrary and targeted the entire population.

1719. According to SEN Srun, Chams who were known to the local cadres were arrested on the basis of "lists" that the unit chiefs were asked to draw up. SEN Srun nonetheless admitted in his live testimony after claiming otherwise in his earlier statements[1624] that he never personally read the letter containing the instructions "for the compilation of the statistics of the Cham people", but learned about its tenor.[1625]

1720. In his court testimony, SEN Srun confirmed a statement he made in 2008, in which he reported having attended a meeting at Peam Chikang stadium for "all the villagers" and "all the unit chiefs"; the meeting was called by the chief of Kan District and was attended by An, the sector chief. SEN Srun testified further that An said that "there [are] enemies among the people", but did not specify who those enemies were; he also testified that arrests were carried out "after that meeting".

1721. Before the arrests, SAMRETH Muy recounted the meeting for the entire cooperative at which An introduced himself as the sector chief. Contrary to SEN Srun's in-court testimony, SAMRETH Muy did not talk about KHOY Thuon, but simply urged the people to "pay respect to Angkar and work hard."[1626] An allegedly spoke about the "infiltrated enemy", but "did not say anything about the Cham people."[1627]

1722. SAY Doeun did not hear about the meeting held in Peam Chikang stadium as recounted by SAMRETH Muy and SEN Srun.[1628] In his testimony, he only said that he was "told by the commune committee that the orders came from the district" and that it was Pheap who signed the

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[1622] HIM Man: T. 28.09.2015, **E1/350.1**, pp. 39-40, around 11.15.00.
[1623] HIM Man: T. 17.09.2015, **E1/349.1**, pp. 44-45, after 11.20.24.
[1624] SEN Srun: T. 14.09.2015, **E1/346.1**, p. 32, around 10.43.55.
[1625] SEN Srun: T. 14.09.2015, **E1/346.1**, p. 55, around 11.47.05, p. 56, around 11.49.12.
[1626] SAMRETH Muy: T.15.09.2015, **E1/347.1**, p. 83, before 15.12. 16.
[1627] SAMRETH Muy: T.15.09.2015, **E1/347.1**, p. 85, around 15.18.41. He stated that only a few cadres were detained "two to three days".
[1628] SAY Doeun: T. 12.10.2016, **E1/374.1**, pp. 35-36, around 10.46.48.

arrest orders.[1629] However, he did not personally hear conversations on this matter between Kan, the district chief and Pheap. He testified further that he did not know who Han received orders from and that he never saw him with sector cadres.[1630]

1723. MUY Vanny did not see the chief of Kan District either and did not know how decisions were taken. He also never attended a public meeting.[1631] He testified that he saw a room at Wat Au Trakuon "filled with people" "the majority" of whom were Cham, who had been brought over by boat, and that he "heard people say there was a plan to round up the Cham people"[1632] but he did not specify how he obtained that information. In his testimony regarding the arrests, he said that he did not know how where the order was made from, adding that if there were any plans, he was "not aware of" them.[1633]

1724. According to RIEL Nang, the arrest orders were conveyed "from the District Secretary to the Commune committee", and the arrests were carried out by the "District Militia" and "other times the Commune Militia also took part in making arrests." However, in her written record of interview, she does not explain where she obtained that information or which specific period she is referring to, as she never received any such order in her capacity as commune chairwoman.[1634]

1725. SOK Meng Ly told the investigators that it was his Long Swords unit which carried out arrests using a list that was sent to the commune committee by the district committee, but did not know anything further.[1635]

1726. MAT Touloh told the investigators that while at a meeting, he heard someone saying that "any squad or unit chief who killed more people than other would be promoted."[1636] Here again, it is unclear who made that statement, and, moreover, the statement does not indicate that Cham in particular were the target.

1727. HOK Hoeun told the investigators that the arrest orders came from the "District Com" and Kan, but that his superiors never spoke to him about a policy concerning the Cham.[1637] He also stated

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[1629] SAY Doeun: T. 12.10.2016, **E1/374.1**, p. 42, around 11.04.48, p. 90, around 15.24.09.
[1630] SAY Doeun: T. 12.10.2016, **E1/374.1**, p. 79, around 14.35.36.
[1631] MUY Vanny: T.11.01.2016, **E1/373.1**, p. 40, around 11.33.40, p. 41, around 13.36.08, p. 79, around 15.18.56.
[1632] MUY Vanny: T.11.01.2016, **E1/373.1**, p. 65, around 14.26.04, pp. 48-49, around 13.53.30.
[1633] MUY Vanny: T.11.01.2016, **E1/373.1**, p. 46, at 13.47.03.
[1634] WRI of RIEL Nang, 21.11.2014, **E3/9652,** Q/A 22 and 31.
[1635] WRI of SOK Meng Ly, 26.08.2015, **E3/9654**, Q/A 12.
[1636] WRI of MAT Touloh, 07.04.2008, **E3/9360**, Q/A 38.
[1637] WRI of HOK Hoeun, 23.11.2008, **E3/5256**, ERN 00251301 and 00251307.

that he did not know how such orders were issued.

ii. Reasons for the arrests

1728. MUY Vanny testified that he "did not know, at that time, what kind of offences made those people sent to Au Trakuon pagoda."[1638] SEN Srun testified that he did not know the reasons for the arrests.[1639] Likewise, SAY Doeun testified that he did not know why the people were arrested, adding: "we were ordered to arrest those people and no reasons were given to us."[1640]

1729. According to SENG Kuy, "[d]uring the time – after Cham people had been arrested, the chief of the commune security scolded Cham people, that they betrayed Angkar. That is why they were purged." Therefore, even though the witnesses asserted that the Cham who were arrested, they "did not do anything wrong";[1641] according to him, the reason given by the commune chief for their arrest was "treason".

1730. SENG Kuy testified further that the Khmer Rouge "wanted to kill the minorities", and that "they did not want any Cham people or other ethnicities", because Run had said: "[w]e will kill all the Cham people and will not spare anyone." However, it will be noted that those words do not reflect those of the village chief[1642] and that were uttered by a torturer who was feared by the commune security forces; they simply reflect his personal opinion.

1731. As a matter of fact. SENG Kuy testified that Run was known as a Run the "butcher", because he arrested many "family members or relatives of villagers"; the villagers took revenge and killed him after 1979.[1643] It can also be inferred from his testimony therefore that the arrests in the village did not target only Chams.

1732. Moreover, SENG Kuy testified that he arrived at a personal conclusion about the alleged existence of a plan to eliminate the Chams. He, however, was forced to admit that he did not know "what the Khmer Rouge did to those Cham people" or "whether they were sent elsewhere or were taken elsewhere and killed."[1644]

[1638] MUY Vanny: T.11.01.2016, **E1/373.1**, pp. 86-87, around 15.40.20 and 15.42.24.
[1639] SEN Srun: T. 14.09.2015, **E1/346.1**, pp. 97-98, around 15.27.15.
[1640] SAY Doeun: T. 12.01.2016, **E1/374.1**, p. 69, around 14.05.48, p. 84, around 15.06.25.
[1641] SENG Kuy: T.09.09.2017, **E1/344.1**, pp. 92-93, around 15.06.41.
[1642] SENG Kuy: T.10.09.2017, **E1/345.1**, p. 29, around 10.17.48.
[1643] SENG Kuy: T.09.09.2017, **E1/344.1**, p. 85, before 14.34.37.
[1644] SENG Kuy: T.10.09.2017, **E1/345.1**, pp. 31-32, around 10.23.02.

1733. TAY Koenhun testified in general that he did not know the reason for the arrests or the origin of the people arrested, but that he saw Khmers going into the pagoda.[1645] He testified further that his relatives, who were Khmers, were also arrested and taken to Wat Au Trakuon, and that it is "very likely that they [were] killed."[1646]

1734. The written records of interview concerning Kang Meas District are quite similar in terms of content. SOK Meng Ly told the investigators that "[t]he arrests of ethnic Cham and people were conducted in the same way as those of Khmer people. The reason for arrests was not given."[1647] MANG Heang said that he did not know why Chams in his group were arrested.[1648]

1735. The MAT Toulok, a Cham, also told the investigators, regarding a purge of the Cham population, that he knew "nothing about [it]". He added that most prisoners at Wat Au Trakuon were 17 April People.[1649] Finally, HOK Hoeun told the investigators that he did not know the reason why Cham were arrested. According to him, Cham "were arrested one after another through the connections who implicated one another, from one to the next."[1650]

3. Alleged killings in Krouch Chhmar and Kang Meas

a. Krouch Chhmar

1736. The arrests and presumed subsequent executions are not attributable to a policy that specifically targeted the Cham.

i. Disappearances owing to purges in the East Zone

1737. In his testimony, SOS Romly, who was deputy chairman of Trea Commune as of late 1975, recounted what happened to YAY Yorb, also a Cham who was a member of the Krouch Chhmar District committee along with two Khmers, Sim and Han. SOS Romly testified that YAY Yorb was taken away with the two Khmer cadres by Central Zone cadres sometime in mid-1978.[1651] SOS Romly's testimony clearly reveals that YAY Yorb was taken away during the purges in the

[1645] TAY Koemhun: T.16.09.2015, **E1/348.1**, p. 12, around 09.31.02.
[1646] TAY Koemhun: T.16.09.2015, **E1/348.1**, p. 49, around 11.29.20.
[1647] WRI of SOK Meng Ly, 26.08.2015, **E3/9654**, Q/A 13.
[1648] WRI of MAN Heang, 10.12.2009, **E3/5529**, Q/A 9.
[1649] WRI of MAT Touloh, 07.04.2008, **E3/9360**, Q/A 22.
[1650] WRI of HOK Hoeun, 23.11.2008, **E3/5256**, ERN 00251304 and 00251306.
[1651] SOS Romly: T. 08.01.2016, **E1/372.1**, p. 10, before 09.26.26, pp. 87-88, after 15.06.13.

East Zone. As such, his arrest, which occurred at the same time as that of the other Khmer cadres, is unrelated to his Cham origin.

ii. <u>Example of Trea Village</u>

1738. Trea Village lies on the bank of the Mekong. As to geographical location, it is in Trea Commune, Krouch Chhmar District, Kampong Cham Province, Sector 21 of the East Zone. Testimony regarding this village does not establish that Cham in particular were targeted.

• <u>IT Sen</u>

1739. IT Sen testified that he was sent to Trea Village with other Cham families.[1652] Shortly before he reached Trea, "those people" told him that "some Cham people [who were] blindfolded" had been "led to the river."[1653]

1740. Regarding his detention in a house in Trea,[1654] he stated that men were tortured if they said that they were Khmers, because the guards knew that all of them were all Cham.[1655] He stated that he knew that the other people were Cham through conversations with the other prisoners who were in the twenty houses close to the one in which he was. He nonetheless admitted that he did not know where those people were from.[1656]

1741. However, in response to a question from the Defence, he said: "[w]e could not communicate with one another in the same house." He said that he could see people in nearby houses through cracks in the wall, but his testimony clearly reveals that he was merely guessing because he could not possibly have communicated with the occupants of 20 houses while in detention.[1657]

1742. The layout of the detention houses, as described by IT Sen, casts further doubt on his alleged conversations. According to him, the houses were two, three or four metres away along the riverbank. Moreover, when asked about the house in which he was detained, he answered: "[…] [

[1652] <u>IT Sen</u>: T. 07.09.2015, **E1/342.1**, p. 86, around 14.38.16.
[1653] <u>IT Sen</u>: T. 07.09.2015, **E1/342.1**, p. 83, after 14.28.36 (see KH transcript, p. 59). The Defence wishes to point out that in his response in Khmer before the Chamber IT Sen did not say that it was "<u>Chams</u> who were blindfold", contrary to what is stated in the French version. The Chamber should take account the Khmer version.
[1654] <u>IT Sen</u>: T. 07.09.2015, **E1/342.1**, pp. 82-83, around 14.28.36.
[1655] <u>IT Sen</u>: T. 07.09.2015, **E1/342.1**, p. 86, after 14.38.16, p. 89, after 15.05.01; Excerpt of book by YSA Osman, *The Cham Rebellion*, 2006, **E3/9334**, ERN 00204441.
[1656] <u>IT Sen</u>: T. 07.09.2015, **E1/342.1**, p. 88, after 15.03.08, p. 90, around 15.09.53.
[1657] <u>IT Sen</u>: T. 08.09.2015, **E1/343.1**, p. 51, after 11.23.30.

doors and windows were locked at the time I was detained there."[1658] MATH Sor, who was also allegedly detained at Trea, testified that the doors and windows of her detention house were all closed.[1659]

1743. Moreover, IT Sen himself testified that it was impossible to tell if a person was Cham unless they wore traditional attire or went to worship at the mosque.[1660] Cham wore black like everyone else at that time. Therefore, he could not possibly have been able to identify Cham from a distance.[1661]

1744. It Therefore, based on his testimony, it cannot be established beyond reasonable doubt that the men who were detained in the nearby houses were all Cham or that the people he saw being killed from a distance were all Cham.

• **NO Sates and MATH Sor**

1745. NO Sates testified that she lived in Khsach Khsach Prachheh Leu Village, Krouch Chhmar Commune until the arrival of the Southwest Zone cadres shortly before the demise of the regime.[1662] She stated that she joined a mobile unit after being separated from her family and sent to an unknown location [1663] MATH Sor also recounted the journey she undertook before she joined the same mobile unit as NO Sates in Krouch Chhmar Commune.[1664]

1746. However, these two Cham women gave different accounts even though they allegedly witnessed the same events. They claimed that they were arrested together, but MATH Sor testified that it took her more than one hour to walk from Khsach Prachheh Kandal to Trea.[1665] For her part, NO Sates said that it took five to six hours to cover that distance on foot.[1666]

[1658] IT Sen: T. 08.09.2015, **E1/343.1**, p. 59, after 13.44.45.
[1659] MATH Sor: T. 13.01.2016, **E1/375.1**, pp. 26-27, between 10.11.16 and 10.14.00 ("[…] the closed the windows and the door […] […] We were not allowed to get out of that house.").
[1660] IT Sen: T. 07.09.2015, **E1/342.1**, p. 58, before 11.28.37 (p. 36, KH transcript).
[1661] IT Sen: T. 07.09.2015, **E1/342.1,** pp. 68-69, after 13.47.56. See also YSA Osman: T. 09.02.2016, **E1/388.1**, p. 104, around 16.03.20; T. 10.02.2016, **E1/389.1**, pp. 33-34, after 10.43.20.
[1662] NO Sates: T. 29.09.2015, **E1/351.1**, p. 23, after 09.58.54 ("and the war came to an end"); WRI, 25.06.2009, **E3/7772**, ERN 00348090 (She said that she was arrested in Trea in July 1978).
[1663] NO Sates: T. 29.09.2015, **E1/351.1**, p. 18, after 09.45.15, p. 37, before 10.59.39.
[1664] MATH Sor: T. 13.01.2016, **E1/375.1**, pp. 17-18, around 09.52.12, p. 25, after 10.09.37, pp. 45-46, after 11.13.13, p. 54, around 13.37.08, p. 81, around 15.05.35.
[1665] MATH Sor: T. 13.01.2016, **E1/375.1**, pp. 47-48, around 11.20.53.
[1666] NO Sates: T. 28.09.2015, **E1/350.1**, pp. 58-59, around 14.14.56; T. 29.09.2015, **E1/351.1**, p. 37, around 10.59.39.

1747. In his book, *Oukoubah*, YSA Osman recounts the detention of 100 Cham people in a house in Trea.[1667] In his live testimony, he recognised that NO Sates, MATH Sor and other women whose accounts he relied upon in describing this episode, provided him with different figures. He therefore chose the random figure of 100 for his book, whereas he knew that some victims tended to exaggerate.[1668] This is yet another example of the problems arising from relying upon accounts that have not been verified or tested in court.

1748. Be that as it may, in their accounts, NO Sates and MATH Sor refer to a number of prisoners, somewhere between 30 and 200 to 300.[1669] Moreover, they reported no torture while in detention in Trea during which period they were allegedly interrogated and tested as to whether they were Khmer or Cham by a person called "Ho"; Chams and mixed-bloods were taken outside. [1670] Here again, the two women gave different accounts. No Sates claimed that the soldiers said that Ho was their new district chief, whereas MATH Sor simply described him as "chief", saying that she did not know if he was still alive at the time of her testimony.[1671]

1749. "Ho['s]" identity is a key issue, because the Prosecution claims that "Ho" is the same person as BAN Seak, whereas latter denied this in court. Indeed, when asked the name he used go by in Krauch Chhmar District, he denied several times that he ever went by the nickname "Ho", stating that he went by the name of "Hem or Hang Hem". He also said that he went by the name of "Phos" after 1979.[1672] When VAN Mat was asked whether the district chief used to call him Ho or Phos, he did not answer.[1673]

[1667] Book by YSA Osman, *Oukoubah*, 2002, **E3/1822**, ERN 00078454.
[1668] YSA Osman: T. 24.03.2016, **E1/408.1**, p. 9, after 09.23.24, pp. 11-13, after 09.28.10. NO Sates: T. 28.09.2015, **E1/350.1**, pp. 58-59, around 14.14.56; T. 29.09.2015, **E1/351.1**, pp. 39-40, after 11.04.11, p. 42, after 11.11.13, p. 66, before 14.15.08. MATH Sor: T. 13.01.2016, **E1/375.1**, pp. 25-26, around 10.11.16, p. 47, after 11.19.35, pp. 94-95, after 15.40.58, p. 84, before 15.13.22; WRI, 25.06.2009, **E3/7772**, ERN 00348090.
[1669] NO Sates: T. 28.09.2015, **E1/350.1**, pp. 58-59, around 14.14.56; T. 29.09.2015, **E1/351.1**, p. 51, around 11.33.22. MATH Sor: T. 13.01.2016, **E1/375.1**, pp. 25-26, around 10.11.16, p. 47, after 11.19.35, pp. 94-95, after 15.40.58, p. 84, before 15.13.22; WRI, 25.06.2009, **E3/7772**, ERN 00348090.
[1670] MATH Sor: T. 13.01.2016, **E1/375.1**, p. 29, around 10.35.22, p. 50, after 11.28.13, pp. 51-52, after 11.32.42, p. 68, around 14.13.50. NO Sates: T. 28.09.2015, **E1/350.1**, pp. 60-61, after 14.21.20, pp. 75-76, after 15.21.54; T. 29.09.2015, **E1/351.**1, pp. 46-47, before 11.22.32.
[1671] NO Sates: T. 28.09.2015, **E1/350.1**, p. 69, around 15.07.13. WRI, 08.07.2008, **E3/5193**, ERN 00274704, She reported that Ho was executed by villagers in 1979; T. 29.09.2015, **E1/351.1**, p. 54, before 13.38.30 she was uncertain if he was killed by villagers in Trea. This about-turn in her live testimony raises questions as to whether she wasn't trying to tweak her testimony to make it sound more coherent. MATH Sor: T. 13.01.2016, **E1/375.1,** p. 73, after 14.28.44.
[1672] BAN Seak: T. 05.10.2015, **E1/353.1**, p. 67, around 14.10.35, p. 69, at 14.15.25; T. 06.10.2015, **E1/354.1**, p. 44, around 11.20.42, p. 45, before 11.22.40, p. 60, around 14.01.01.
[1673] VAN Mat: T. 09.03.2016, **E1/398.1**, p. 95, after 15.37.03.

1750. In any event, when BAN Seak was questioned in regard to NO Sates' testimony, he denied having participated in segregating Chams from Khmers.[1674] In its assessment of the evidence, the Trial Chamber should take account of the fact that these two witnesses gave conflicting accounts, and also noted *supra*, that MATH Sor stated that his marriage was arranged by BAN Seak even while the cadres were well aware that she and her husband were Cham.[1675]

iii. <u>Pits discovered in Trea after 1979</u>

1751. MATH Sor testified that she saw people being executed and thrown into pits. Only she made that claim.[1676] For example, NO Sates finally admitted having lied to YSA Osman regarding what she claimed to have witnessed.[1677] IT Sen stated that he too did not see any pits or witness any executions being carried out in pits.[1678]

1752. SOS Romly reported in his live testimony, as SLEH Toat did in his written record of interview, that human remains were discovered in pits. Both reported that they saw those remains after 1979, but neither was able to say if they were remains of Cham or Khmers.[1679] Moreover, SLEH Toat told the investigators that he was unaware of any detention centre in Trea Village.[1680]

1753. It cannot be established based on that evidence that only Chams were executed in the pits. As noted *supra*, BAN Seak did say that the people executed belonged to the mobile unit forces, which comprised both Cham and Khmers.[1681]

b. <u>Kang Meas</u>

i. <u>Arrests in Kang Meas</u>

1754. Some of the evidence suggests that Chams were arrested in Kang Meas and that Wat Au Trakuon was where executions were carried out, even though most of the evidence is based on hearsay. However, the evidence produced also seems to indicate that it was not only Cham who were

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[1674] <u>BAN Seak</u>: T. 06.10.2015, **E1/354.1**, pp. 75-76, around 15.02.42.
[1675] See *supra*, para. 1687.
[1676] <u>MATH Sor</u>: T. 13.01.2016, **E1/375.1**, p. 34, after 10.45.45, pp. 50-51, after 11.29.44, p. 39, after 10.57.35.
[1677] <u>NO Sates</u>: WRI, 08.07.2008, **E3/5193**, ERN 00276704
[1678] <u>IT Sen</u>: T. 08.09.2015, **E1/343.1**, p. 57, after 13.39.45.
[1679] <u>SOS Romly</u>: T. 08.01.2016, **E1/372.1**, p. 79, around 14.27.31, p. 92, at 15.17.15; WRI of SLEH Toat, 25.06.2009, **E3/7773**, ERN 00348096-97.
[1680] WRI of SLEH Toat, 25.06.2009, **E3/7773**, ERN 00348096-97.
[1681] See *supra*, para. 1709.

arrested in the district and that arrests targeted the entire population without any distinction.

1755. For example, SAY Doeun testified that cadres were arrested in Kang Meas around mid- to late 1977 and early 1978. According to him, they were replaced by Kan at the district level and by his wife Pheap in Peam Chikang commune. He stated that Cham and New People were arrested upon arrival. According to him, the arrests of Cham took place sometime in late 1978, adding that during his stint with the Long Swords Unit, it was mostly Cham who were arrested and "sent to Au Trakuon pagoda". However, he also confirmed his earlier statement that he would arrest "New People, former Khmer Republic personnel and the Cham."[1682]

1756. TAY Koemhun testified that he heard the name of Horn, who was head of Wat Au Trakuon pagoda, but never went into the pagoda because of the security perimeter around it.[1683] Even so, he said that "four to five times" he saw, "sometimes [...] two people being walked into the compound, sometimes [he] only saw one person." He stated that he saw Khmers going into the pagoda.[1684]

1757. The testimony of MAT Touloh, a Cham, is particularly telling in that regard. According his written record of interview, because he knew how to paddle a canoe as a fisherman, he was ordered to "transport detainees" to Au Trakuon. He told the investigators that even as a Cham, "[...] [he] could not distinguish between the Cham and the Khmer." Moreover, he stated that on another day when he transported another group of young people from the mobile units, he was not told "if they were Cham or Khmer". Also, MAT Touloh said that even though all of the Cham families in his village were killed, he "did not know at all about" the purge of the Cham population.[1685]

1758. HOK Hoeun told the investigators that "initially only ethnic Khmer people were arrested but later all of the Cham people were arrested."[1686] He said that the arrests concerned Cham in his village and also in Sach So. He stated that former Khmer Republic soldiers and village officials were also arrested.[1687]

1759. SAMRETH Muy testified that disappearances of Chams began before the arrival of the Southwest

[1682] SAY Doeun: T. 12.10.2016, **E1/374.1**, pp. 31-33, around 10.31.34 and around 10.37.54, p. 34, around 10.41.30, p. 45, around 11.13.09, p. 46, around 11.15.20, p. 92, around 15.28.58.
[1683] TAY Koemhun: T.16.09.2015, **E1/348.1**, p. 13, around 09.36.45, pp. 80-81, around 15.04.14, p. 75, around 14.33.32.
[1684] TAY Koemhun: T.16.09.2015, **E1/348.1**, pp. 10-11, between 09.24.25 and 09.28.30, p. 59, around 13.54.12.
[1685] WRI of MAT Touloh, 07.04.2008, **E3/9360**, Q/A 16, 17, 18, 21, 22 and 33.
[1686] WRI of HOK Hoeun, 23.11.2008, **E3/5256**, ERN 00251306-07.
[1687] WRI of HOK Hoeun, 23.11.2008, **E3/5256**, ERN 00251304-05.

Zone cadres, but he also testified that beginning in 1977, there were more arrests and executions following the creation of the Long Swords Group. However, he said, they concerned "not only the Cham people."[1688]

1760. SENG Kuy testified that it was the "commune" security forces who were responsible for the arrests and that he was told that Run was their leader, and was feared because "[…] he came to arrest people and took them away and killed them without questions being asked." Indeed, SENG Kuy also said that "in 1977, there was intensive killing" and that he heard that "the Khmer Rouge purged the Cham people on a massive scale" and that he also noticed that in his commune families of New People had disappeared.[1689] According to him, those arrests did not target the Cham as such, except on that particular day.

1761. RIEL Nang testified that when the Southwest Zone cadres arrived, "[…] many people in the district were arrested" and that "[t]he targets for arrest were the old cadres and the new people" even though she personally only witnessed one convoy of Chams heading towards Wat Au Trakuon.[1690] She did not give any details as to when that happened, and knew nothing further about the people concerned.

1762. In a written record of interview, SOK Meng Ly, a resident of Angkor Ban, reports he was a member of the Long Swords Unit, which was led by Doeun and under the authority of the commune. According to him, all categories of people were arrested, beginning with "the New People who had made mistakes", Chams and their families and also Base People "[…] when they committed wrongdoings or stole."[1691]

ii. <u>Concerning the pits discovered after 1979</u>

1763. HIM Man, a civil party who survived a mass arrest, testified that he did not see "[t]he pits where the Cham bodies were buried" "during the Khmer Rouge regime", but that he went to a field near Wat Au Trakuon with an NGO after 1979.[1692]

1764. When HIM Man confronted with a statement he had made earlier concerning bones, he answered

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[1688] SAMRETH Muy: T.15.09.2015, **E1/347.1**, pp. 48-49, around 11.30.46, pp. 70-71, around 14.20.12, p. 101, around 15.58.55.
[1689] SENG Kuy: T.09.09.2017, **E1/344.1**, pp. 82-83, around 14.27.50 and 14.30.18, p. 93, before 15.09.49.
[1690] WRI of RIEL Nang, 21.11.2014, **E3/9652,** Q/A 17-18 and 20.
[1691] WRI of SOK Meng Ly, 26.08.2015, **E3/9654**, Q/A 1-6 and 12-13.
[1692] HIM Man: T. 17.09.2015, **E1/349.1**, pp. 68-69, around 14.18.02.

that only the pit he saw just before the arrival of the Vietnamese was empty because as far as he knew, they, they were going to kill all of the Khmers and Cham. He stated that after 1979 "people went to dig up the pits and found some jewellery." He testified further that he assumed that his parents had been killed at that location because "[i]f they had not been killed, they would have returned definitely to our village."[1693]

1765. According to HIM Man, all of the Chams who were arrested were dressed like Khmers, because traditional attire had been banned long before that.[1694] In his written statement, MAT Touloh confirms that he was not allowed "to wear Cham traditional dress."[1695]

1766. SEN Srun testified that after 1979 bones and traditional Cham outfits were unearthed during illegal excavations by people looking for valuables.[1696] Regarding this specific point, his testimony contradicts his own statements and those of other witnesses according to which Khmers and Chams wore same outfits on the day they were executed.[1697] The witness stood by his account despite the outlandish claims going so far as asserting that it was possible to distinguish the bones of Cham and from those of Khmers.[1698]

1767. It is plain that even though several inhabitants of Kang Meas reported that pits were discovered near the Wat Au Trakuon compound after 1979,[1699] those pits only prove that local people were executed there, but not Cham in particular. Everyone except SEN Srun stated that the outfits found in the pits were the kind that everyone wore.

1768. SENG Kuy, who was the chairman of his commune at the time of his testimony, testified that "[…] the total number of Cham people now was not much different from the Cham living under the previous regime" and that an estimated 400 Cham families currently live in his commune, Angkor Ban.[1700]

[1693] HIM Man: T. 17.09.2015, **E1/349.1**, p. 65, around 14.09.06, p. 69, around 14.18.02, p. 70, around 14.21.38.
[1694] HIM Man: T. 28.09.2015, **E1/350.1**, p. 40, around 11.15.00.
[1695] WRI of MAT Touloh, 07.04.2008, **E3/9360**, Q/A 24.
[1696] SEN Srun: T. 14.09.2015, **E1/346.1**, pp. 45-46, around 11.23.30.
[1697] See previous paragraph (1765) and also NO Sates: T. 29.09.2015, **E1/351.1**, pp. 10-11, after 09.26.33, p. 56, around 13.43.13; MATH Sor: T. 13.01.2016, **E1/375.1**, p. 14, around 09.43.08.
[1698] SEN Srun: T. 15.09.2015, **E1/347.1**, p. 11, around 09.28.28, p. 13, around 09.32.55.
[1699] MUY Vanny: T.11.01.2016, **E1/373.1**, pp. 60-61, around 14.16.20, p. 77, around 15.12.33; SENG Kuy: T.09.09.2017, **E1/344.1**, p. 102, around 15.29.31. TAY Koemhun: T.16.09.2015, **E1/348.1**, pp. 20-21, around 09.54.41, p. 23, around 10.03.22. WRI of SOK Meng Ly, 26.08.2015, **E3/9654**, Q/A 23. WRI of HOK Hoeun, 23.11.2008, **E3/5256**, ERN 00251305-06.
[1700] SENG Kuy: T. 09.09.2015, **E1/344.1**, p. 102, at 15.29.31.

Section IV. LEGAL CHARACTERISATION

1769. Unlike the Co-Investigating Judges, who started out by characterising the factual allegations as genocide, the Defence will begin by determining whether the crimes against humanity with which KHIEU Samphan is charged have been established. In fact, the crime of genocide by killing cannot be established unless crime against humanity of murder has been established.

I. MURDER (CRIME AGAINST HUMANITY)

A. Definition

1770. The *actus reus* of murder consists in "an act or omission of the accused, or of one or more persons whose acts or omissions the accused bears criminal responsibility, that caused the death of the victim".[1701] As for *mens rea* requirement, the perpetrator(s) must have acted with the specific intent to kill.[1702]

B. Legal characterisation of the facts

1771. As noted *supra*, the Trial Chamber is seised of crime against humanity of murder in relation to the Wat Au Trakuon security centre.[1703]

1772. There are no eyewitnesses of murders at the Wat Au Trakuon centre. However, given the Supreme Court Chamber's "holistic" approach, part of the evidence adduced seems to suggest that the constitutive elements of the crime of murder may be established. Even so, the Trial Chamber should exercise caution in assessing the evidence, as it mainly consists of hearsay and written records of interview.[1704]

1773. That said, the evidence on record fails to establish that the murders committed during the period under review specifically targeted Cham, having regard to both the reasons for the arrests and the mass graves that were uncovered after 1979.

[1701] Case 002/01 Trial Judgement, para. 412.
[1702] See *supra*, paras. 394-429.
[1703] See *supra*, paras. 1540-1541.
[1704] See *infra* paras. 2151-2157.

II. EXTERMINATION (CRIME AGAINST HUMANITY)

A. Definition

1774. The *actus reus* of extermination is the "act of killing on a large scale."[1705] Regarding the *mens rea*, the perpetrator(s), must have acted with the specific intent to kill on a massive scale or to subject people to conditions of living that would inevitably lead to death.[1706]

B. Legal characterisation of the factual allegations

1775. As recalled *supra*, the Trial Chamber is seised of factual allegations of extermination of the Cham beginning in early 1977, in particular at the Trea security centre in the East Zone, and at the Wat Au Trakuon security centre in the Central Zone, but only in regard to Krauch Chhmar and Kang Meas Districts.[1707]

1776. The evidence concerning both the East and Central Zones fails to prove beyond reasonable doubt that the elements of the crime of extermination have been established, having regard to the living conditions in Krauch Chhmar and Kang Meas districts (1) and to the factual allegations concerning the Trea and Wat Au Trakuon security centres (2).

1. No evidence of living conditions that would inevitably lead to death

1777. The evidence concerning both the East and Central Zones fails to prove beyond reasonable doubt that the constitutive elements of the crime of extermination have been established. Indeed, the testimony relating to the living conditions in Krauch Chhmar and Kang Meas, in particular, runs counter to the claim that the Cham people were subjected to living conditions that would inevitably lead to their death.

1778. Even though witnesses and civil parties described varying degrees of hardship depending on the location, the Cham lived under the same living conditions as the rest of the population, and got married, worked and ate together with Khmers. The fact that there was an organisation charged with housing, feeding and caring for the people does be establish that the authorities in the

[1705] Case 002/01 Appeal Judgement, para. 517.
[1706] Case 002/01 Appeal Judgement, paras. 517-522.
[1707] See *supra*, paras. 1543-1546.

cooperatives or units where Cham worked had the intent to kill them by subjecting them to living conditions that would inevitably lead to death.

2. <u>Insufficient evidence to establish the killing of people on a large scale</u>

1779. The evidence regarding the Trea security centre is insufficient to establish killings on a large scale. The accounts of the various witnesses concerning Trea are not mutually corroborative and fail to establish beyond reasonable doubt that crimes targeting Cham were committed.

1780. IT Sen did not personally witness executions and does not know what happened to his comrades after he fled. Even if the Trial Chamber were to consider that executions were carried out on the day of his alleged detention in Trea, based on the evidence contained in MATH Sor's uncorroborated testimony, it cannot be established that people were killed on a large scale or that the people killed were targeted because of their membership of the Cham ethnic minority.

1781. Likewise, even if the Trial Chamber were to consider that some killings were committed at Krauch Chhmar, for example during the rebellion described by BAN Seak, such isolated incidents, whereby both Cham and Khmers were targeted, cannot establish that people were killed on a large scale or for that matter, that that the victims were all Cham.

1782. Even if the Trial Chamber were to consider after having reviewed all the evidence that the crime of murder may be established in respect of Wat Au Trakuon, that evidence is insufficient to establish that Cham were killed on a large scale. Indeed, as noted *supra*, the evidence concerning the reason for the arrests demonstrates that people from all segments of the population were arrested and taken to Wat Au Trakuon for reasons that in many instances were unknown to the witnesses concerned.

3. <u>Insufficient evidence to establish the existence of a policy to eliminate the Chams as a group</u>

1783. The only evidence available consists in SOS Kamri's unpersuasive and uncorroborated testimony concerning a brochure that purportedly describes a plan to exterminate the Chams; that evidence is contradicted by part of SOS Kamri's own testimony, as well as that of many witnesses from the East Zone and the Central Zone, who stated that the arrests and subsequent executions targeted all segments of the population.

1784. Even Witnesses YOU Vann and PRAK Yut, who testified concerning arrests of Cham people, reported that targeted other segments of the population and that the reasons therefor were alleged misdeeds and dissent in their district, Kampong Siem. It therefore cannot be established that those who carried out the arrests targeted the Cham group as such.

1785. The rest of the testimonies concerning the reasons for the arrests in the East and Central Zones and the targeted segment of the population are quite similar. The witnesses testified that in Kang Meas and Krauch Chhmar districts, arrests and executions targeted all segments of the population, including the Cham.

III. TORTURE (CRIME AGAINST HUMANITY)

A. Definition

1786. The Supreme Court Chamber offered a definition of the crime against humanity of torture in the *Duch* Appeal Judgement after ascertaining that torture was criminalised at the time of the facts under review.[1708] It took account of various instruments and international jurisprudence, including that of the Nuremberg Military Tribunal between 1946 to 1949, under the Control Council Law No.10 , the Commentary to the 1958 Geneva Convention IV, the 1969 *Greek Case* by the European Commission on Human Rights, as well as the process surrounding the adoption of the 1975 Declaration on Torture.[1709] The Defence agreed with the Supreme Court Chamber's analysis, insofar as torture was already recognised under customary international law during the period between 1975 and 1979 and as the 1975 Declaration on Torture was declaratory of customary international law by the time of the ECCC's temporal jurisdiction.[1710]That Declaration defines torture as follows:

> "[…] any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons. […] Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment."[1711]

[1708] *Duch* Appeal Judgement, 03.02.2012, paras. 185-205 and 211-212.
[1709] *Duch* Appeal Judgement, 03.02.2012, paras. 195-204.
[1710] *Duch* Appeal Judgement, 03.02.2012, para. 205.
[1711] Article 1 of the Declaration on the Protection of All Persons From Being Subjected to Torture and, Inhumane or Degrading Treatment, adopted by UN General Assembly resolution 3452 (XXX), 9 December 1975 ("Declaration on Torture").

1787. Pursuant to the principle of legality, the Supreme Court Chamber held that the definition found in the 1984 Convention against Torture such as it is applied by the Trial Chamber and International Criminal Tribunals is not applicable before the ECCC.[1712]

1788. It identified four constitutive elements based on the definition found in the 1975 Declaration on Torture:

> "a) any act causing severe pain or suffering, whether physical or mental (*actus reus*);
> b) that is intentionally inflicted upon a person (*mens rea*);
> c) by or at the instigation of a public official;
> d) for such purposes as obtaining information or a confession; punishment; or intimidation."[1713]

1789. The last element is noteworthy in that it distinguishes torture from cruel, inhuman or degrading treatment. Indeed, the Commentary on the Geneva Convention IV concerning torture highlights the purpose of the pain inflicted in the following terms: "What is important is not so much the pain itself as the purpose behind its infliction."[1714] Also noteworthy in this regard is the 1969 *Greek Case*, which distinguishes inhumane treatment from torture, in that torture "[…] has a purpose, such as the obtaining of information or confessions, or the infliction of punishment."[1715]

1790. Accordingly, the evidence must demonstrate beyond a reasonable doubt that pain was inflicted for a specific purpose. If the evidence does not allow for distinguishing between actions inflicted with a specific purpose and those inflicted for reasons of pure cruelty, then *in dubio pro reo* the constitutive elements of torture cannot be established.[1716]

B. Legal characterisation of the facts

1791. As noted *supra*, the factual allegations of imprisonment of the Cham people concern the Trea detention centre in the East Zone.[1717]

1792. The crime of torture cannot be established beyond a reasonable doubt solely in reliance on IT Sen's uncorroborated testimony.

[1712] *Duch* Appeal Judgement, 03.02.2012, paras. 189-194.
[1713] *Duch* Appeal Judgement, 03.02.2012, para. 195.
[1714] ICRC Commentary on Geneva Convention IV (Jean S. Pictet ed. 1958) concerning Article 2, p. 640; *Duch* Appeal Judgement, 03.02.2012, paras. 200-201.
[1715] *Greek Case*, Yearbook of the European Convention of Human Rights, No. 12, 1969, p. 186; *Duch* Appeal Judgement, 03.02.2012, paras. 202-203.
[1716] *Limaj* Appeal Judgement (ICTY), 27.09.2007, para. 21.
[1717] See *supra*, paras. 1553-1559.

IV. PERSECUTION ON RELIGIOUS GROUNDS (CRIME AGAINST HUMANITY)

A. Definition

1793. The *actus reus* of persecution consists in "an act or omission which [...] discriminates in fact and which denies upon a fundamental right laid down in international customary or treaty law."[1718] As for the *actus reus* requirement of discrimination in fact :

> " 'discrimination in fact' occurs where a victim is targeted because of the victim's membership in a group defined by a perpetrator on specific grounds, namely on a political, racial or religious basis, and the victim belongs to a sufficiently discernible political, racial or religious group, such that requisite persecutory consequences must occur for the group.".[1719]

1794. The *mens rea* requirement of the crime of persecution is the deliberate perpetration of an act or omission with the intent to discriminate on political, racial or religious grounds.[1720]

B. Legal characterisation of the facts

1795. As recalled *supra*, the Trial Chamber is seised of factual allegations of religious persecution against the Cham, as described at paragraph 1420 of the Closing Order, notably during the Movement of the Population (Phase 2).[1721]

1796. A review of the factual allegations pertaining to the Movement of the Population (Phase 2) is inconclusive as to whether the Cham were subjected to religious discrimination. Like the rest of the population, irrespective of ethnic and religious origins, the Cham were displaced pursuant to the decision to reorganise the society.

1797. Moreover, it cannot be concluded based on their treatment that they suffered discrimination owing to their religion. Given that all religions were banned during the Democratic Kampuchea period, the claim that Muslims in particular were treated differently is unsustainable.

1798. Furthermore, as discussed *supra* in regard to the crime of extermination, their living conditions were the same as those of Khmers. As a matter of fact, many witnesses testified that everyone was treated equally; it therefore cannot be concluded that the Cham suffered discrimination or that there

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[1718] Case 002/01 Trial Judgement, para. 427; *Duch* Appeal Judgement, 03.02.2012, para. 226.
[1719] 002/01 Trial Judgement, para. 428; Case 002/01 Appeal Judgement, para. 667.
[1720] Case 002/01 Trial Judgement, para. 427; *Duch* Appeal Judgement, 03.02.2012, para. 226.
[1721] See *supra*, paras. 1543-1546.

was any intent to discriminate against them.

V. KILLING (GENOCIDE)

A. Definition of genocide by killing

1. Introduction

1799. The term genocide was coined in 1944 by a Raphael LEMKIN, a lawyer, in response to the acts committed by the Nazi regime during the Second World War.[1722] However, during the October 1946 Nuremberg Trial, the accused were not charged with crime of genocide since it was not enshrined in any legal or conventional framework at that time. In the Case 002/01 Appeal Judgement, however, the Supreme Court Chamber recalled as follows:

> "in the IMT jurisprudence, the crime against humanity of extermination encompassed what would later be qualified as genocide, especially in the context of the Final Solution [...] In this sense, the crime of extermination was a precursor to genocide."[1723]

1800. On 11 December 1946, two months after the Nuremberg judgement, the UN General Assembly declared "genocide [...] a crime [...] under international law."[1724] It then invited "the Member States to enact the necessary legislation for the prevention and punishment of this crime."[1725]

1801. Thereafter, on 9 December 1948, the Convention on the Prevention and Punishment of the Crime of Genocide ("Genocide Convention") was signed. Article II thereof defines the crime of genocide as follows:

> "In the present Convention, genocide means any of the following acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
> (a) Killing members of the group;
> (b) Causing serious bodily or mental harm to members of the group;
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part
> (d) Imposing measures intended to prevent births within the group;
> (e) Forcibly transferring children of the group to another group." [1726]

[1722] *Axis Rule in Occupied Europe*, Raphael LEMKIN, 1944.
[1723] Case 002/01 Appeal Judgement, para. 517.
[1724] Resolution 96(I), 55th plenary meeting, UN General Assembly, 11.12.1946.
[1725] Resolution 96(I), 55th plenary meeting, UN General Assembly, 11.12.1946.
[1726] Convention on the Prevention and Punishment of the Crime of Genocide, 09.12.1948, Article II.

1802. On 2 September 1998, forty years after the signing of the Genocide Convention, the ICTR in the *Akayesu* Trial Judgement handed down the first conviction for genocide before an international criminal tribunal.[1727] Thereafter, both the ICTR and the ICTY heard many cases of genocide.[1728]

1803. Those introductory remarks are essential to understanding that at the relevant time, the international tribunals had not yet developed a consistent definition of the constitutive elements of the crime of genocide.

1804. Accordingly, should the Trial Chamber decide to rely on any evidence post-dating the facts, it should be mindful of the principles of legality, accessibility and foreseeability of the law.[1729]

1805. To that end, the Trial Chamber is strongly urged to adopt the same rigorous approach as that of the Co-Investigating Judges in the Closing Order, whereby they explained each of the constitutive elements of the crime of genocide through reference solely to the preparatory work for the 1948 Genocide Convention.[1730]

2. Legal elements of the crime of genocide

1806. The definition of genocide found in Article II of the Genocide Convention, a verbatim equivalent of Article 4 of the ECCC Law, reveals the two constitutive elements of the crime.

1807. The *actus reus* consists in committing any of the acts listed in Article II (a) to (e) of the Genocide Convention. KHIEU Samphan is only charged with the crime of genocide by killing (Article II(a)) members of the Cham and Vietnamese groups.[1731] Therefore, he need not address the other *actus rei* of genocide.

1808. The *mens rea* is characterised by the intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such.

a. *Actus reus*

[1727] *Akayesu* Trial Judgement (ICTR), 02.09.1998.
[1728] See for example: *Rutaganda* Trial Judgement (ICTR), 06.12.1999; *Jelisić* Trial Judgement (ICTY), 14.12.1999; *Krstić* Appeal Judgement (ICTY), 19.04.2004; *Seromba* Trial Judgement (ICTR), 13.12.2006; *Karadžić* Trial Judgement (ICTY), 24.03.2016.
[1729] See *supra*, paras. 300-330.
[1730] Closing Order, para. 1312 and endnotes 5167-5181.
[1731] Closing Order, paras. 1336-1337 (Cham) and 1343-1344 (Vietnamese).

1809. Few details emerge from the preparatory work for the Genocide Convention as to the definition of killing members of a group. In the *Akayesu* Trial Judgement, the judges held that "[…] there is murder when death has been caused with the intention to do so."[1732] The ICJ, in the Case Concerning the Application of the 2007 Convention on the Prevention and Punishment of the Crime of Genocide, held that killing must be intentional.[1733]

1810. This encompasses the definitions of both murder as a crime against humanity and wilful killing as a grave breach of the Geneva Conventions. Murder is defined as "any act or omission of the accused or persons for whom the accused bears criminal responsibility, that resulted in the death of the victim. […] [T]he perpetrator(s) must have had the direct intent to kill."[1734]

b. *Mens rea*

1811. For the crime of genocide to be established, it must be demonstrated that the killing of the members of the group was carried out with "the intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such". This *dolus specialis*, an ingredient of the crime of genocide, can be broken down as follows: "the intent to destroy as such (i), in whole or in part (ii), a national, ethnic, racial or religious group (iii)."

1812. In light of that definition, the questions remains as to how the intent to commit genocide can be inferred from the alleged facts (iv).

i. Intent to destroy a group as such

1813. In its resolution of 11 December 1948, the UN General Assembly distinguished the crime of genocide from the crime of homicide by describing genocide as "a denial of the right of existence of entire human groups."[1735] During the preparatory work for the Genocide Convention, it was emphasised that "[t]he victim of the crime of genocide is a human group. It is not a greater or a smaller number of individuals who are affected for a particular reason […] but a group as such."[1736]

[1732] *Akayesu* Trial Judgement (ICTR), 02.09.1998, para. 500.
[1733] Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Serbia and Montenegro), ICJ Judgement, 26.02.2007, para. 186.
[1734] See *supra*, paras. 394-429, 1457 and 1770.
[1735] Resolution 96(I), 55th plenary meeting, UN General Assembly, 11.12.1946.
[1736] UN Doc E/AC25/3, 02.04.1948, p. 6.

1814. In its 1996 Draft Code of Crimes, the International Law Commission observed to the same effect regarding the intent to destroy a group. It also underscored the importance of intending to "destroy a group" "as such", that is, as "a separate and distinct entity and not merely some individuals because of their membership in a particular group."[1737] This element was subsequently reflected in the *Akayesu* Trial Judgement, where it is stated that "[t]he victim of the act is therefore a member of a group, chosen as such, which, hence, means that the victim of the crime of genocide is the group itself and not only the individual."[1738]

1815. The intent to destroy, which is unique to genocide, also distinguishes it from the crime of persecution as a crime against humanity. It is therefore not enough to demonstrate that the acts targeted individuals because of their membership in a group (*mens rea* of persecution).[1739] It still must be demonstrated that the acts were committed with the intent to destroy the group in question.

1816. In other words, unlike persecution, which targets individuals due to their membership in a given community, without necessarily intending to destroy the community as such, [1740] the intent to destroy is required for establishing genocide.

1817. The intent to destroy was the subject of much debate during the preparatory work for the Genocide Convention. The question of cultural genocide arose right from the start of the proceedings given that some delegations had included in the definition of genocide measures and actions that are aimed at prohibiting use of the national language or against a national culture.[1741] This aspect of the definition of genocide was even proposed in the draft of the United Nations Economic and Social Council (ECOSOC). but in the end, it was not included in the definition adopted by the UN General Assembly on 9 December 1948.[1742] Accordingly, only physical and biological destruction can constitute a crime of genocide.

[1737] Draft Code of Crimes against the Peace and Security of Mankind with commentaries, 1996, International Law Commission, p. 47.

[1738] *Akayesu* Trial Judgement (ICTR), 02.09.1998, para. 521 referring to the Summary Records of the meetings of the Sixth Commission of the General Assembly, 21 September – 10 December 1994.

[1739] See *supra*, paras. 1212-1213.

[1740] *Krstić* Trial Judgement (ICTY), 02.08.2001, para. 553. On the intent to destroy, see also *Akayesu* Trial Judgement (ICTR), 02.09.1998, para. 522; *Kayishema and Ruzindana* Trial Judgement (ICTR), 21.05.1999, para. 99.

[1741] UN Doc. E/AC.25/7, 07.04.1948, p. 2; UN Doc. E/AC.25/9, 16.04.1948, p. 1.

[1742] Resolution 260(III), 179th plenary meeting, UN General Assembly, 09.12.1948.

1818. During the preparatory work, Syria's proposal to include in the definition of genocide, ethnic cleansing in the form of deportation or displacement of members of a protected group, was also rejected.[1743]

1819. In the *Stakic* case, the judges confirmed that that "[a] clear distinction must be drawn between physical destruction and mere dissolution of a group."[1744] The International Court of Justice ("ICJ") also ruled out the idea that forced deportation could amount to destruction of a group. Although some acts of ethnic cleansing may occur concurrently with acts of genocide, they cannot in and of themselves constitute genocide.[1745] During its review of the evidence, the ICJ found that while deportation and expulsions of Bosnian Muslims occurred in Bosnia-Herzegovina, the intent was not to destroy the protected group in whole or in part.[1746]

ii. <u>In whole or in part</u>

1820. The phrase "in whole or in part" was discussed during the *travaux préparatoires* for the Genocide Convention and was adopted at the 13 October 1948 meeting.[1747] The delegations agreed that addition of the phrase "in whole or in part" makes it clear that genocide does necessarily mean killing all the members of a group[1748] The International Law Commission nonetheless explained that "the crime of genocide by its very nature requires the intention to destroy at least a substantial part of a particular group."[1749]

1821. The requisite element of destroying a substantial part of a particular group is echoed in the jurisprudence of International Criminal Tribunals. [1750]In the *Krstić* Appeal Judgement, it is specified, for instance, that "the substantiality requirement both captures genocide's defining character as a crime of massive proportions and reflects the Convention's concern with the impact

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[1743] UN Doc. A/C.6/234, 15.10.1948.
[1744] *Stakić* Trial Judgement (ICTY), 31.07.2003, para. 519.
[1745] Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia-Herzegovina v. Serbia and Montenegro*), ICJ Judgement, 26.02.2007, para. 190.
[1746] Case Concerning Application loaf the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia-Herzegovina v. Serbia and Montenegro*), ICJ Judgement, 26.02.2007, paras. 329-334.
[1747] UN Doc. A/C.6/SR.73, 13.10.1948, p. 97.
[1748] UN Doc. A/C.6/SR.73, 13.10.1948, p. 93.
[1749] Draft Code of Crimes against the Peace and Security of Mankind, and with commentaries, 1996, ILC, p. 47.
[1750] *Kayishema and Ruzindana* Trial Judgement (ICTR), 21.05.1999, para. 97; *Bagilishema* Trial Judgement (ICTR), 07.06.2001, para. 64; *Semanza* Trial Judgement (ICTR), 15.05.2003, para. 316; *Krstić* Appeal Judgement (ICTY), 19.04.2004, paras. 8-11.

the destruction of the targeted part will have on the overall survival of the group."[1751] It is further noted that "[i]n addition to the numeric size of the targeted portion, its prominence within the group can be a useful consideration."[1752] Finally, the ICJ has noted that "it is widely accepted that genocide may be found to have been committed where the intent is to destroy the group within a geographically limited area."[1753]

iii. National, ethnic, racial or religious

1822. The Genocide Convention lists four specific groups, namely national, ethnic, racial or religious. Political, economic, social and cultural groups are specifically excluded from the protection under the Convention, because they are not "stable" or constituted in a "permanent fashion".[1754]

1823. There is no specific definition of the four protected groups in the Genocide Convention or in the *travaux préparatoires*.

1824. The first definition of the four groups appears in the *Akayesu* Trial Judgement, as follows:

> "[...] a national; group is defined as a collection of people who are perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties
>
> An ethnic group is generally defined as a group whose members share a common language or culture.
>
> The conventional definition on racial group is based on the hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national or religious factors
>
> The religious group is one whose members share the same religion, denomination or mode of worship."[1755]

1825. Thereafter, the question arose as to whether the term group is to be construed subjectively, i.e. independently of the perpetrator's perception. The *Akayesu* Trial Judgement reflects an objective approach while the *Jelisić* Trial Judgement reflects a subjective approach.[1756] As the ICJ has noted, the jurisprudence of International Criminal Courts is not consistent in regard to this question.[1757]

[1751] *Krstić* Appeal Judgement (ICTY), 19.04.2004, para. 8 citing the *Jelisić* Trial Judgement (ICTY), 14.12.1999, para. 82, and the *Sikirica* Judgement on Motion to Acquit (ICTY), 03.09.2001, para. 77.
[1752] *Krstić* Appeal Judgement (ICTY), 19.04.2004, para. 12.
[1753] Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Serbia and Montenegro), ICJ Judgement, 26.02.2007, para. 199.
[1754] *Akayesu* Trial Judgement (ICTR), 02.09.1998, para. 511, referring to the Summary Records of the Meetings of the Sixth Committee of the General Assembly, 21 September –10 December 1948.
[1755] *Akayesu* Trial Judgement (ICTR), 02.09.1998, paras. 512-515.
[1756] *Akayesu* Trial Judgement (ICTR), 02.09.1998, para.511; *Jelisić* Trial Judgement (ICTY), 14.12.1999, para. 70.
[1757] Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v Serbia and Montenegro), ICJ Judgement, 26.02.2007, para. 191.

1826. The approach of the judges in the *Akayesu* Trial Judgement is especially pertinent in that they relied on the *travaux préparatoires* to the Genocide Convention. For example, the Judgement specifically states that it appears that "the crime of genocide was allegedly perceived as targeting only 'stable' groups, constituted in a permanent fashion and membership of which is determined by birth, with the exclusion of the more 'mobile' groups which one joins through individual voluntary commitment, such as political and economic groups."[1758] By contrast, in the *Jelisic* Trial Judgement, the judges do not cite the intention of the framers of the Convention in adopting a subjective approach.[1759] The only authorities, which came into being much later, are: the *Kayishema* Trial Judgement, which cites no authority,[1760] and a decision in the *Nikolic* case which cites the relevance of the perpetrator's perception in establishing the discriminatory measures that constitute persecution as a crime against humanity but not the crime of genocide.[1761]

1827. The law in the *Akayesu* case is more reflective of the spirit of the 1948 Convention, which was adopted in reaction to the crimes committed by the Nazi regime, crimes that targeted specific groups (e.g. Jews and Roma) based on objective criteria. Interpreting the Convention in light of the *travaux préparatoires* is the most logical approach, one that is line with the principle of legality. Accordingly, the Trial Chamber should adopt that same approach.

1828. Another question concerning the definition of the group which arose before the Criminal Tribunals was whether to adopt a positive or negative definition of the term "group". In the *Stakić* case, the Trial Chamber rejected the negative definition of the group as "non-Serbs" as used in *Jelisić*.[1762] Likewise, the ICJ explained that "[i]t is a matter of who those people are, not who they are not."[1763] After having analysed a number of authorities, such as the IMT judgement, the *travaux préparatoires* of the Genocide Convention, its advisory opinion on the Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, as well as the *Stakić* case-law, the ICJ held chose to adopt a positive definition of group.[1764]

[1758] *Akayesu* Trial Judgement (ICTR), 02.09.1998, para. 511.
[1759] *Jelisić* Trial Judgement (ICTY), 14.12.1999, para. 70.
[1760] *Kayishema and Ruzindana* Trial Judgement (ICTR), 21.05.1999, para. 98.
[1761] *Prosecutor v. Dragan Nikolić*, IT-94-2-R61, Review of Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, 20 October 1995, para. 27.
[1762] *Stakić* Trial Judgement (ICTY), 31.07.2003, para. 512.
[1763] Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Serbia and Montenegro), ICJ Judgement, 26.02.2007, para. 191.
[1764] Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Serbia and Montenegro), ICJ Judgement, 26.02.2007, paras. 193-196.

iv. Inferring intent

1829. The question as to how to deduce the intent to destroy, in whole or in part, a national, ethnic, racial or religious group is addressed in the jurisprudence of International Criminal Tribunals. In the *Akayesu* Trial Judgement, the Trial Chamber proposed the following deduction method:

> "The Chamber considers that it is possible to deduce the genocidal intent inherent in particular act charged from the general context of the perpetration of other culpable acts systematically directed against that same group, whether these acts were committed by the same offender or by others. Other factors, such as the scale of atrocities committed, their general nature, in a region or a country, or furthermore, the fact of deliberately and systematically targeting victims on account of their membership of a particular group, while excluding the members of other groups, can enable the Chamber to infer the genocidal intent of a particular act."[1765]

1830. The question also arose before the ICJ as to whether the specific intent as evidenced by a pattern of actions against the protected group on one territory could be deduced for the same pattern of actions on another territory. In other words, during the appraisal of the evidence on allegations of genocide outside the territory of Bosnia- Herzegovina, the ICJ "[examined] the question whether the specific intent (*dolus specialis*) can be deduced, as contended by the Applicant, from the pattern of actions against the Bosnian Muslims taken as a whole."[1766]

1831. In line with ICTY jurisprudence, according to which the crime of genocide was established only with respect to the Srebrenica events, the ICJ was not satisfied that genocide was committed outside the territory of Bosnia-Herzegovina, as genocidal intent was not proven.[1767] Indeed, it emphasised that such intent had to be convincingly shown to exist "in relation to each specific incident".[1768]

1832. The ICJ thereby answered the question by rejecting the Applicant's contention that the very pattern of the atrocities committed over many communities, over a lengthy period focused on Muslims and also Bosnian Croats demonstrated the necessary intent.[1769]

> "The *dolus specialis*, the specific intent to destroy the group in whole or in part, has to be convincingly shown by reference to particular circumstances, unless a general plan to that end can be

[1765] *Akayesu* Trial Judgement (ICTR), 02.09.1998, para. 523.
[1766] Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Serbia and Montenegro), ICJ Judgement, 26.02.2007, para. 369.
[1767] Case Concerning Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Serbia and Montenegro), ICJ Judgement, 26.02.2007, paras. 245-277, 369.
[1768] Case Concerning the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia-Herzegovina v. Serbia and Montenegro*), ICJ, Judgement of 26.02.2007, §370.
[1769] Case Concerning the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia-Herzegovina v. Serbia and Montenegro*), ICJ, Judgement of 26.02.2007, para. 373.

convincingly demonstrated to exist; and for a pattern of conduct to be accepted as evidence of its existence, it would have to be such that it could only point to the existence of such intent."[1770]

1833. It is noteworthy that pursuant to its rigorous approach in the *Krstić* case in finding that the crime of genocide was committed in Srebrenica, the Trial Chamber only relied on evidence concerning the Srebrenica enclave in inferring genocidal intent.[1771] The acts committed against Bosnian Muslims outside of this enclave were not cited. In the *Krajišnik* case, the Trial Chamber reviewed the evidence on the charges of genocide in respect of 35 other locations in Bosnia-Herzegovina, but could make no conclusive finding of genocidal intent. Concerning its review, it noted that it focused: "[…] on the acts themselves, [and] consider[ing] the surrounding circumstances, including words uttered by the perpetrators and other persons at the scene of the crime and official reports on the crimes […]"[1772]

1834. In conclusion, the Trial Chamber should exercise utmost caution in assessing any evidence that could imply genocidal intent. In line with the ICJ decision and by adopting the same rigorous approach as the ICTY judges, the Trial Chamber should assess the evidence concerning the territory at issue in determining whether genocidal intent existed.

B. Legal characterisation of the facts

1835. As noted *supra*, the Trial Chamber is seised of the crime of genocide by killing committed against members of the Cham group beginning in 1977 in Kang Meas District (Central Zone) and Krauch Chhmar District (East Zone), with the exception of the crimes committed at the Krauch Chhmar Centre which the Trial Chamber expressly excluded in its Severance Decision.[1773]

1836. While the Defence does not dispute the fact that some evidence suggests that Cham were killed in the districts within the scope of the case, the evidence does not establish that those killings were committed with the intent to destroy, in whole or in part, the Cham group as such.

1837. As discussed in regard to the circumstances of the alleged killings, the evidence fails to prove beyond reasonable doubt that the destruction of the Cham religious or ethnic group, in whole or in

[1770] Case Concerning the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia-Herzegovina v. Serbia and Montenegro*), ICJ, Judgement of 26.02.2007, para. 373.
[1771] *Krstić* Trial Judgement (ICTY), 02.08.2001,paras. 594-599.
[1772] *Krajišnik* Trial Judgement (ICTY), 27.09.2006, para. 869.
[1773] See *supra*, paras. 1543-1546.

part, was the intent of the alleged arrests and executions.

1838. Rather, the entire body of evidence concerning both districts shows that the arrests and subsequent executions targeted the population as a whole irrespective of ethnic or religious origin. It therefore cannot be contended that non-Cham in those two districts were specifically and clearly spared from arrest and execution. The fact that Cham were the majority in some villages does not detract from the general thrust of the testimonies.

1839. Accordingly, even if the Trial Chamber were to find that Cham were killed in both districts, it could not reasonably find that the constitutive elements of genocide have been established.

Chapter IV. ALLEGED POLICY SPECIFICALLY TARGETING THE CHAM

1840. The alleged CPK policy specifically targeting the Cham people is only a fabrication of the Co-Investigating Judges, since no such CPK ideology existed. As recalled in the discussion of the evidence concerning the treatment of the Cham during the Democratic Kampuchea period, the OCIJ's investigation mainly revolves around the work of its analyst YSA Osman, whose bias has been amply demonstrated.[1774]

1841. In analysing the evidence, both the Co-Investigating Judges and the Co-Prosecutors focused on the East and Central Zones in inferring the existence of a "policy of destroying the Cham as a group."[1775] However, by adopting this retrospective approach, they were unable to resolve the inconsistencies in the evidence, and therefore could not determine whether an anti-Cham CPK policy existed based on period documents (Section I) or on the testimonies (Section II).

Section I. NO POLICY AGAINST THE CHAM IS REVEALED IN PERIOD DOCUMENTS

1842. The few CPK documents relating to the Cham do not support the claim that there was a policy to target them as such, be it be in regard to general speeches about Democratic Kampuchea (I) or where they are mentioned in regard to unrest, for example in communication between KE Pauk and the Centre concerning the armed conflict (II).

[1774] See *supra*, paras. 1588-1605.
[1775] Closing Order, para. 212.

I. Documents describing the Cham as forming an integral part of Democratic Kampuchea

1843. Already in 1975, the Cham, who were also known as "Khmers Islam" during the Sihanouk regime, were described as being an integral part of the Cambodia as a nation and were exalted for their participation in the revolution.[1776] Therefore, like the other components of the population, they were fully involved in rebuilding the country during the reorganisation of the society. For example, the documents about mobilisation for rebuilding up the country do not refer to ethnic segregation. They only refer to class, in consonance with Marxist rhetoric.[1777]

1844. Contrary to what is stated at paragraphs 753 and 754 of the Closing Order, the rhetoric about membership in the Khmer nation never ceased. For example a 1976 issue of the magazine *Revolutionary Flag* refers to a Democratic Kampuchea nation "that included both ethnic Khmer and other nationalities living in various base areas throughout our country."[1778] A 1977 Democratic Kampuchea publication describes the people as comprising Khmers "and numerous national minorities <u>living all together</u> in the same and great family, closely united for defending and edifying the country." (*emphasis added*)[1779]

1845. Also, even though the Constitution of Democratic Kampuchea was only symbolic, it did emphasise that "all live harmoniously in great national solidarity" to build up the country.[1780] Here again, the Cham are not portrayed as enemies. At paragraph 1192 of the Closing Order, the remarks allegedly made by KHIEU Samphan about the Constitution are distorted, in that they refer to the intention of the "[…] CPK […] to abolish all national minorities and groups." However, absent the original speech in Khmer, the FBIS report is the only usable document in this instance, and it makes no reference to abolishing minorities.[1781]

[1776] Moslems Guaranteed Full Democratic Liberties, 14.10.1975 (FBIS), **E3/272**, ERN 00167520.

[1777] See for example Document "Concerning the grasp and implementation of the political line in mobilizing the National Democratic Forces of the Party, 22.09.1975, **E3/99,** ERN 0024477 "Previously, we mobilized the national and democratic forces to fight the enemy and liberate the country. Now we are mobilizing the forces to defend and rebuild the country. (*emphasis added*)

[1778] Revolutionary Flag, 04.1976, **E3/759**, ERN 00517854.

[1779] Democratic Kampuchea Is Moving Forward, 08.1977, **E3/1388,** ERN S 00050248.

[1780] Constitution of Democratic Kampuchea, 05.01.1976, **E2/259**, ERN 00184834.

[1781] KHIEU Samphân's summary, 05.01.1976 (FBIS), **E3/273**, ERN 00167816: Also, as stated in our Constitution, <u>our stand is</u> <u>not to allow</u> any foreign <u>imperialists</u> to use <u>religion</u> to subvert us. We are prepared to fight them no matter what disguises they use. The imperialists continue to look means to attack us, among which is the use of a religious cloak to infiltrate our country." (*emphasis added*). This segment makes no reference to a domestic religious movement.

II. CORRESPONDENCE BETWEEN KE PAUK AND THE CENTRE

A. April 1976 telegram to POL Pot

1846. KE Pauk's April 1976 telegram to POL Pot and YSA Osman's misreading thereof are discussed *supra*.[1782] Contrary to YSA Osman's claims, the telegram does not demonstrate that the Khmer Rouge were calling for the destruction of "the entire Cham race".[1783] It simply refers to "some activity" in Chamkar Leu District and the fact that a group comprising "[…] former soldiers in combination with the Cham and former cooperative team chairmen" carried out some hostile activities. The latter allegedly showed photographs and a LON Nol communiqué, and also set fire to forests and crops. This allegedly prompted the arrest of "some elements who were former cooperative team chairmen." The telegram is not specifically about the Cham people and, moreover, the actions it describes were carried out by a subversive group.

B. Other correspondence

1847. At paragraph 764 of the Closing Order, the Co-Investigating Judges cite the increased frequency of correspondence between KE Pauk and Phnom Penh throughout 1978 to support the allegation that the wave of killings of Cham in the Central and East Zones in 1977 and 1978 was coordinated by the Centre.

1848. However, the truth of the matter is that, early 1977 was the period when the purge in the Central Zone occurred after KOY Thuon's arrest. Also, the year 1978 was mainly marked by the escalation of the armed conflict. According to BAN Seak, KE Pauk was the secretary of the Central Zone and the person in charge of the military in the East Zone, together with SON Sen.[1784] As a matter of fact, this was confirmed by witnesses who testified about the armed conflict. The increased frequency of correspondence with the higher echelons regarding the combat situation was therefore to be expected, especially toward the end of the regime.[1785]

1849. The Centre found itself overwhelmed by the conflict and was clearly not in a position to control what went on the ground. A good illustration of that is MEAS Voeun's testimony concerning the

[1782] DK Telegram, 02.04.1976, **E3/511**, ERN 00182658.
[1783] Book by YSA Osman, *The Cham Rebellion*, 2006, **E3/2653**, p. 115, ERN 00219176.
[1784] BAN Seak: T. 05.10.2015, **E1/353.1**, pp. 80-81, after 15.08.49.
[1785] See *supra*, para. 750.

investigation that POL Pot ordered on the situation in Preah Vihear in late 1978.[1786] Another illustration is KE Pich Vannak's statement concerning the investigation that his father was requested to undertake.[1787]

Section II. THE TESTIMONIES DEMONSTRATE THAT NO SUCH POLICY EXISTED

1850. It is noteworthy that it was a Cham witness, someone who was reluctant to appear before the Trial Chamber, who provided the only testimony concerning a document about an alleged policy of exterminating the Cham people. This sole testimony which, moreover, is riddled with inconsistencies (I), runs counter to scores of other testimonies concerning the alleged existence of a CPK-sponsored anti-Cham policy(II).

I. INCONSISTENCIES IN SOS KAMRI'S TESTIMONY

1851. SOS Kamri's live testimony was peculiar in many respects. First both the Trial Chamber and the parties could not but remark the uncooperative demeanour of this witness, whom Chamber had had trouble convincing to appear before it. He was unwilling to attend for testimony, claiming that he had health problems.[1788] Currently a religious leader, he also refused to take an oath by invoking obscure religious reasons whose fundament in the Quran he failed to explain.[1789] Upon careful analysis, the key points of his testimony do not sound credible.

A. Living conditions of the Cham in Chamkar Leu

1852. SOS Kamri, who is originally from Spueu Village in Chamkar Leu District, Kampong Cham [Province], corrected the errors in his interview with YSA Osman. For example, he pointed out that he was not evacuated under the Democratic Kampuchea regime, but requested to be transferred to Chheyyou village,[1790] and that he changed names, not because he was afraid, but "after [he] started teaching" long before that.[1791]

[1786] MEAS Voeun: T. 04.10.2012, **E1/130.1**, pp. 71-72, around 14.07.34.
[1787] WRI of KE Pich Vannak, 04.06.2009, **E3/35**, ERN 00346155-57. See *supra*, paras. 1711-1712.
[1788] SOS Kamri: T. 06.04.2016, **E1/415.1**, p. 53 after 11.29.48, p. 59, after 13.41.17. See also email of Legal Officer, Trial Chamber, entitled "2-TCW-827 and scheduling", 05.02.2016, at 14.43.
[1789] SOS Kamri: T. 06.04.2016, **E1/415.1**, pp. 14-15, around 09.34.58.
[1790] SOS Kamri: T. 06.04.2016, **E1/415.1**, p. 91, around 15.22.28.
[1791] SOS Kamri: T. 06.04.2016, **E1/415.1**, p. 94, around 15.30.45.

1853. SOS Kamri testified that there were Cham living in Spueu throughout the Democratic Kampuchea period, and that this is where he was reunited with his family when he returned from Chheyyou in 1978.[1792] He confirmed the testimony of all the witnesses in regard to the prohibition of religion and traditional clothing, but pointed out that he was allowed to "continue teaching Khmer literature."[1793] Moreover, he testified that although pork was served at communal meals, the people ate whatever there was.[1794]

1854. SOS Kamri also testified that village chiefs were always Cham. Even though some were executed, the "new people were Cham".[1795]

1855. BAN Seak, who was sent to Chamkar Leu for some time, testified that he did not know where Cham were living in the district and that at his worksite he "was not told whether they were the Cham people, the Khmer people, or the Chinese people", since everyone worked together.[1796] He confirmed that religion was prohibited for both Cham and Buddhists.[1797]

B. Meeting in Bos Khnaor Village

1856. SOS Kamri testified that while he was in Cheyyou in 1977, he attended a meeting in Bos Khnaor Village during which "many types of the enemies" were defined, among whom "the reactionaries, the religious leaders, all those former officials of the previous regimes. And Cham people were also one type of enemies", specifying, however that "[t]hey did not specifically refer to the Cham, but they referred to those religious followers."[1798]

1857. When the Prosecution asked him about YSA Osman's book, he changed his story and said: "regarding the Cham people, that was at a later stage of the meeting". However, he did not say who uttered those words or whether it was a man or woman: "And I did not know that person."[1799] Moreover, he stated that he did not know anyone in the district or the zone.[1800]

[1792] SOS Kamri: T. 06.04.2016, **E1/415.1**, p. 94, around 15.30.45.
[1793] SOS Kamri: T. 06.04.2016, **E1/415.1**, p. 10, around 09.24.30, p. 11, around 09.26.26, pp. 82-83, around 15.02.25 concerning religion and traditions, and p. 35, around 10.40.13, pp. 47-48, around 11.11.45, p. 52, around 11.25.05 concerning teaching in his village.
[1794] SOS Kamri: T. 06.04.2016, **E1/415.1**, pp. 46-47, around 11.09.53.
[1795] SOS Kamri: T. 06.04.2016, **E1/415.1**, p. 81, around 14.41.19.
[1796] BAN Seak: T. 05.10.2015, **E1/353.1**, p. 37, before 10.54.10.
[1797] BAN Seak: T. 06.10.2015, **E1/354.1**, pp. 39-40, around 10.55.52.
[1798] SOS Kamri: T. 06.04.2016, **E1/415.1**, p. 27, around 10.07.54.
[1799] SOS Kamri: T. 06.04.2016**, E1/415.1,** p. 30, around 10.12.50.
[1800] SOS Kamri: T. 06.04.2016, **E1/415.1,** p. 30, around 10.14.15, p. 32, around 10.33.06.

1858. Whichever version of SOS Kamri's testimony one chooses to believe, the fact of the matter is that it refers to only one local meeting at the village level and, moreover, it is based on the account of an unnamed person. Further, he admitted to having "made [his] personal conclusions in relation to the killing of the Cham and the Khmer people", adding that "more Cham people had been killed."[1801] SOS Kamri's testimony does not amount to proof of a policy against the Cham existed, especially considering that during the same hearing, he testified that anyone could be killed:

> "No one knows the reason for the killings, including the New and the Old People. Because of that, everyone was afraid to be killed. So those people were waiting to be called, they were hoping that their lives would be spared. We lived very fearfully. " [1802]

C. Mystery "yellow document" concerning alleged extermination of the Chams

1859. The main reason why SOS Kamri was called to testify was because he had allegedly read a document he happened upon when he asked "a messenger" for some reading material. The document has "a light yellow cover" and is entitled "The Plan for Progressive Cooperatives"; it purportedly contains "a section about the enemy situation concerning the Cham people" where, according to his interview with YSA Osman, it is stated that "Cham is the biggest enemy who must be totally smashed before 1980".[1803]

1860. It is quite amazing that SOS Kamri somehow ended up alone in a communal office reading – "to pass the time" – a working document from "his superior", which was given to him by "a messenger", and concerned an alleged plan to exterminate his people.[1804] His testimony also contains other equally far-fetched claims.

1861. For example, he told YSA Osman that he saw the document the day after the meeting in Bos Khnaor, but in his live testimony, he said that he read the brochure one year after the meeting "in about October 1978".[1805] Also, in answer to a question from the Prosecution, first he said that he

[1801] SOS Kamri: T. 06.04.2016**, E1/415.1**, p. 74, around 14.21.12.
[1802] SOS Kamri: T. 06.04.2016, **E1/415.1**, p. 81, around 14.39.41.
[1803] SOS Kamri: T. 06.04.2016, **E1/415.1**, pp. 69-70, around 14.09.36 and 14.11.05.
[1804] SOS Kamri: T. 06.04.2016, **E1/415.1**, p. 70, after 14.11.05 ("He did not hand me the book. He actually gave me a whole bunch of books.").
[1805] SOS Kamri: T. 06.04.2016, **E1/415.1**, p. 74, around 14.21.12, pp. 97-98, around 15.38.37.

could not remember the title of the document or its content,[1806] and then later he said that could not remember the colour or the year 1980, even though it appeared in the document.[1807]

1862. Further, according to his own words, during the Democratic Kampuchea period, he never discussed the book with either MAT Ly, a prominent Cham leader after 1979, or any of his relatives not even to warn them![1808] This must be why he refused to take an oath and was reluctant to give testimony.

1863. SOS Kamri is an eminent member of his community and among YSA Osman's key sources. Yet, his testimony, which he refused to give under oath, is neither reliable nor credible. In view of that, the Trial Chamber ought to take account of those discrepancies in its deliberations, especially considering that the document at issue was never mentioned by either former CPK cadres or other witnesses.

1864. Although YSA Osman insists that it was the Cham people who took the brunt of the persecution under the Khmer Rouge, he was forced to recognise that the Cham "like Khmer people" were living together in November 1975, no longer owned private property and were usually separated from their children for work.[1809] So although their living conditions were harsh, that was the case for everyone, Khmers and Cham alike. There was no discrimination. The rest of the evidence does not support the conclusion that there was a plan to destroy the Cham group as such.

II. THE REST OF THE TESTIMONIES REVEAL NO SUCH POLICY

A. CPK cadres

1865. TEP Poch testified that he was made a member of Baray District, Kampong Thom [Province] in 1978.[1810] He confirmed in his testimony that he attended a meeting in Chamkar Leu at which he was given a document, which he believes was an issue of *Revolutionary Flag*, in which it was recommended "to treat the 17 April People with consideration" and not to segregate between New People and the Base People.[1811] He did not mention receiving any instructions about treatment of

[1806] SOS Kamri: T. 06.04.2016, **E1/415.1**, p. 40, around 10.52.48.
[1807] SOS Kamri: T. 06.04.2016, **E1/415.1**, p. 70, around 14.11.05, p. 71, around 14.13.52.
[1808] SOS Kamri: T. 06.04.2016, **E1/415.1**, p. 71, around 14.13.52, pp. 101-102, from around 15.49.49.
[1809] YSA Osman: T. 10.02.2016, **E1/389**, pp. 48-49, around 11.20.58, p. 50, around 11.26.57.
[1810] TEP Poch: T. 22.08.2015, **E1/461.1**, p. 19, around 09.47.02.
[1811] TEP Poch: T. 22.08.2015, **E1/461.1**, p. 81, around 15.02.55; WRI, 04.07.2009, **E3/5293**, ERN 00351703

the Cham; his testimony therefore runs counter to that of SOS Kamri, who was in the same district as him.

1866. Experiences varied from one zones or locality to another. The testimonies demonstrate that there was no such thing as a CPK policy against the Cham.

1867. PECH Chim, a former Tram Kok district chief who later became an official at a rubber plantation in the Central Zone, testified that he was in charge of food-related matters for the Cham "based on the middle path" and that he provided an alternative to pork at communal meals; he testified further no one was obliged to eat pork.[1812] PHHAN Chhen, a former Tram Kok cadre who followed PECH Chim in the Central Zone, stated that many cadres worked in the Central Zone and that houses "were built for them."[1813] He stated that never heard of any policy specifically directed against Cham people.[1814]

1868. As discussed *supra*, even PRAK Yut's testimony fails to prove that there was a policy against the Cham which was imposed by Phnom Penh. Indeed, not only is her testimony about the orders from the sector level riddled with inconsistencies, but also she admitted that she was not privy to the exchanges between the sector and the zone and that she was free to decide who to arrest.[1815]

1869. At a higher level, despite his tendency to speculate about documents he only discovered at trial, Duch himself testified that neither SON Sen nor NUON Chea ever "instructed [him] about Cham people".[1816] He testified further that he "never noticed any arrests of a member of the Cham group" and that "there was no policy to exterminate the Cham people". He in fact "never saw any document from the Party on this matter."[1817] That is a crucial piece of evidence, especially because it comes from the head of S-21, the biggest security centre in the country, which, moreover, had Chams on its staff.[1818]

1870. During the key document hearings, the Prosecution cited Ben KIERNAN's notes of his interview with CHEA Sim in which the latter says that all minorities were executed.[1819] The Trial Chamber

[1812] PECH Chim: T. 24.04.2015, **E1/292.1**, pp. 25-26, before 10.08.15.
[1813] PHHAN Chhen: T. 25.02.2015, **E1/269.1**, pp. 71-72 around 14.41.03.
[1814] PHHAN Chhen: T. 25.02.2015, **E1/269.1**, p. 93, at 15.33.18.
[1815] See *supra*, paras. 1676-1677.
[1816] Duch: T. 15.06.2016, **E1/438.1**, pp. 28-29, around 10.34.58 and on the speculation, p. 30 around 10.40.15.
[1817] Duch: T. 23.06.2016, **E1/443.1**, p. 105, after 15.37.20, pp. 109-110, around 15.46.27.
[1818] Duch: T. 22.06.2016, **E1/442.1**, p. 50, after 11.26.54. Duch testified that SIM Mel, a Cham member of S-21, was punished because he committed several misdeeds, and not because he was Cham.
[1819] Ben KIERNAN's notes of his interview with CHEA Sim, 03.12.1991, **E3/5593**, ERN 00651868.

should not afford any weight to those interview notes given that it refused to call CHEA Sim for testimony, despite NUON Chea's[1820] insistent requests to that effect, and that KIERNAN refused to appear for testimony. More importantly, the statements contained in the interview notes do not indicate the reason why these minorities were executed, and therefore do not amount to proof that there was a policy.

1871. The statements of MAT Ly, a Cham, who was close to the CPK senior leadership, demonstrate that there was no such thing as a policy to target the Cham as such.[1821] MAT Ly stated that POL Pot did not hate the Cham and that the reason why his [MAT Ly's] relatives were arrested is because they were accused of being CIA or KGB agents, or allies of the Vietnamese.[1822] He even spoke of repression of all the Cambodian people.

1872. It therefore cannot be argued that there was a uniform practice or for that matter that CPK leadership gave instructions to specifically target the Cham people.

B. <u>Other witnesses</u>

1873. Philip SHORT testified that although there had been "savage repression of their rebellions", it would not be accurate to speak of a "conscious attempt to exterminate a racial group" with respect to the Cham.[1823] François PONCHAUD testified to the same effect, stating that "there was no genocide committed based on religious grounds." According to François PONCHAUD, things took a turn for the worse in 1978 "because of the conflict between Cambodia and Vietnam", but he pointed out that "the accounts are not sufficiently clear to support the claim that there was a genocide against the Cham; at least from the information I have."[1824]

1874. Steve HEDER also emphasised in his live testimony that the initial policies described as anti-Cham "were actually carried out by cadre who were themselves Cham."[1825] Even Henri LOCARD, who is not known to be particularly fond of the Accused, admitted that while collecting slogans relating

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[1820] NUON Chea's List of Witnesses, 08.05.2014, **E305/4.1**, ERN 00986101; Decision, 07.08.2014, **E312,** para. 69.

[1821] Book by Ben KIERNAN, *Genocide in Cambodia 1975-1979: Race, Ideology and Power*, 1996, **E3/1593**, p. 356, ERN 01150185. MAT Ly was a member of the CPK committee for Tbaung Khmum; Interview of MAT Ly by Steve HEDER, undated, **E3/390**, ERN 00436868, 00436875.

[1822] DC-Cam Interview of Mat Ly, 27.03.2000, **E3/7821**, ERN 00441579-80.

[1823] <u>Philip SHORT</u>: T. 09.05.2013, **E1/192.1**, p. 19, around 09.41.44.

[1824] <u>François PONCHAUD</u>: T. 10.04.2013, **E1/179.1**, p. 73, at 13.44.06; T. 11.04.2013, **E1/180.1**, p. 39, around 10.22.53.

[1825] <u>Steve HEDER</u>: T. 15.07.2013, **E1/223.1**, p. 102, around 15.14.57.

to the Democratic Kampuchea period, he never came across "any [slogans] against the Cham", adding that it was not because they "were hated by the regime for being an ethnic minority."[1826]

1875. The divergences between the accounts of cadres differed and those of local leaders and also in experiences from one locality to another therefore demonstrate that there was no such thing as a CPK policy but simply a scheme of local governance for both Khmers and Cham.[1827]

1876. As noted *supra*, the fact-based evidence concerning the East and Central Zones, as well as Krauch Chhmar and Kang Meas districts does not establish that the Cham were targeted owing to their religion or as part of a scheme to destroy them on ethnic grounds. In consonance with its Marxist stance, the CPK considered religion as the opium of the people, hence why it banned Islam along with all others religions, but Islam was not targeted as such. Also, decisions to arrest and/or kill Cham under the Democratic Kampuchea regime were taken at the local level for the same reasons as for the rest of the population.

1877. Therefore, should the Trial Chamber find that there is evidence to prove that arrests and executions were carried out locally on ethnic or religious grounds, it cannot but note that such arrests and executions were not in pursuance of a policy established by the CPK leadership. The evidence on the record certainly does not establish this beyond reasonable doubt.

Chapter V. VIETNAMESE

Section I. CHARGES

I. CHARGES

1878. In regard to Vietnamese, KHIEU Samphan is charged with the crimes against humanity of murder, extermination and persecutions on racial grounds.[1828] He is also charged with the crime of genocide

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[1826] Henri LOCARD: T. 28.07.2016, **E1/450.1**, pp. 98-99, after 15.25.03; T. 02.07.2016, **E1/453.1**, pp. 19-20, after 09.33.29.

[1827] It is to be noted that this disparity was noted *de facto* by the Co-Investigating Judges even though they did not draw the logical consequences therefrom. At paragraph 320 of the Closing Order, the Judges were forced to point out that witnesses recall that "Chams in Tram Kok District were treated like everyone else." Also, at paragraph 500, the Judges note as follows concerning Kraing Ta Chan security centre:"However, "base people", former Khmer Republic soldiers, CPK cadres , Chinese, Vietnamese and Cham also contributed to the population. With regard to the Chams, witnesses who lived in Tram Kok District said that Chams were treated like everyone else.".

[1828] Closing Order, paras. 1373, 1374, 1378, 1379, 1380 (murder), 1381-1383, 1386, 1388, 1390 (extermination), 1415, 1422-1423 (persecution on racial grounds); Annex: List of paragraphs and portions of the Closing Order relevant to Case 002/02, **E301/9/1.1**, pp. 3-4.

by killing of members of the Vietnamese group.[1829]

1879. Whereas the Co-Investigating Judges sent the Accused before the Trial Chamber to answer to factual allegations of deportation of ethnic Vietnamese in Prey Veng and Svay Rieng,[1830] the Trial Chamber was not properly seised of those allegations, and therefore cannot adjudicate them.[1831]

II. SCOPE OF THE TRIAL CHAMBER'S *SAISINE*

A. Murder

1880. According to the Closing Order, in the beginning the Vietnamese killed were those who resisted deportation in 1975-1976; killings then increased progressively beginning in 1977.[1832] As the Trial Chamber was not properly seised of factual allegations of deportation of Vietnamese people, it pronounce on the crime of murder of Vietnamese people during deportation. Assessment of the evidence must therefore only concern killings which increased progressively beginning in 1977.

1881. The Closing Order does not specify a geographic scope of the crimes in the segment on their legal characterisation. However, in reference to the factual characterisation of the JCE, the Co-Investigating Judges correctly recall that they "are seized of treatment [...] of the Vietnamese in Prey Veng and Svay Rieng Provinces in the East Zone and during incursions into Vietnam."[1833]

1882. Indeed, according to the Introductory and Supplementary Submissions, the Co-Prosecutors decided to launch a judicial investigation against KHIEU Samphan in respect of facts relating to the treatment of Vietnamese people in Prey Veng and Svay Rieng Provinces, as well as during incursions into Vietnam.[1834] The Co-Investigating Judges are therefore seised only of those facts, as stated in their Combined Order of 13 January 2010.[1835]

1883. In its Severance Decision, the Trial Chamber subsequently curtailed its *saisine* in regard to the treatment of Vietnamese in Prey Veng and Svay Rieng Provinces by excluding from the scope of

[1829] Closing Order, paras. 1343-1349; Annex: List of paragraphs and portions of the Closing Order relevant to Case 002/02, **E301/9/1.1**, p. 3.
[1830] Closing Order, paras. 1397-1401; Annex: List of paragraphs and portions of the Closing Order relevant to Case 002/02, **E301/9/1.1**, p. 3.
[1831] See *supra*, paras. 219-276.
[1832] Closing Order, para. 1378.
[1833] Closing Order, para. 206.
[1834] Co-Prosecutors' Introductory Submission, paras. 69-70.
[1835] Co-Co-Investigating Judges' Combined Order, 13.01.2010, **D250/3/3**, paras. 7-9.

Case 002/02 any crimes committed in Vietnam by the Revolutionary Army of Kampuchea.[1836]

1884. As a matter of fact, the Co-Prosecutors are well aware of the scope of the Co-Investigating Judges' *saisine*, since in their request to call additional witnesses regarding the treatment of Vietnamese, they indicated as follows:

> "The Co-Investigating Judges ('CIJs') considered themselves seised of the treatment of the Vietnamese in prey Veng and Svay Rieng provinces in the East Zones and during incursions into Vietnam. When the Chamber severed Case 002, it excluded crimes committed during incursions in Vietnam from the scope of Case 002/02. As such, the charges of genocide of the Vietnamese concern only the crimes committed in Prey Veng and Svay Rieng Provinces. The crimes against humanity charges laid by the CIJs relating specifically to the treatment of the Vietnamese also focus primarily on these two regions."[1837]

1885. Accordingly, KHIEU Samphan is charged with the crime of murder of Vietnamese in Prey Veng and Svay Rieng Provinces beginning in 1977.

B. <u>Extermination</u>

1886. As for the crime of extermination of Vietnamese, the Co-Investigating Judges note as follows:

> "Regarding the treatment of Vietnamese beginning in April 1977 [...] the execution of members of these groups increased progressively until it reached such a scale as to qualify as extermination."[1838]

1887. The Trial Chamber is therefore competent to hear the facts relating to the extermination of Vietnamese beginning in April 1977. Moreover, as explained concerning the killing of Vietnamese, the Trial Chamber is seised of the facts relating to the treatment of Vietnamese people in Prey Veng and Svay Rieng only.[1839]

1888. Therefore, KHIEU Samphan is held accountable for the crime of extermination of Vietnamese in Prey Veng and Svay Rieng Provinces starting in April 1977.

C. <u>Persecution on racial grounds</u>

1889. As to the facts relating to the racial persecution of the Vietnamese, the Co-Investigating Judges noted as follows:

[1836] Annex: List of paragraphs and portions of the Closing Order relevant to Case 002/02, **E301/9/1.1**, p. 2; see *supra*, paras. 204-212.
[1837] Co-Prosecutors' Request, 15.09.2015, **E381**, para. 9.
[1838] Closing Order, para. 1386.
[1839] See *supra*, paras. 1880-1885.

> "Vietnamese people were persecuted on the basis that the CPK considered the Vietnamese to be racially distinct from Cambodian people, based on biological and particularly matrilineal descent. Racial persecution has been established in Prey Veng and Svay Rieng as well as at the security centers Kraing Ta Chan, Kok Kduoch, Au Kanseng, S-21 and at the Tram Kok Cooperative. Vietnamese people were deliberately and systematically identified and targeted due to their perceived race."[1840]

1890. The Koh Kduoch security centre was excluded from the scope of Case 002/02 pursuant to the severance.[1841] The charges of persecution on racial grounds in the other security centres and in the Tram Kok cooperatives are discussed in the section relating thereto.[1842] It remains is to consider the factual allegations of racial persecution on racial grounds of Vietnamese in Prey Veng and Svay Rieng Provinces.

1891. It will be recalled that as part of the factual allegations racial persecution, the Closing Order states that Vietnamese people were expelled from Cambodian territory and sent back to Vietnam.[1843] However, as noted *supra*, the Co-Investigating Judges were not requested to investigate factual allegations pertaining to the deportation of Vietnamese people.[1844] Therefore, the Trial Chamber has no jurisdiction thereupon.

1892. As no time frame is specified, the factual allegations of racial persecution of Vietnamese people should to be considered for the entire duration of the ECCC's temporal jurisdiction, i.e.. 17 April 1975 to 6 January 1979.

1893. Therefore, KHIEU Samphan is to answer to the crime of racial persecution committed against the Vietnamese in Prey Veng and Svay Rieng Provinces during the period from 17 April 1975 to 6 January 1979.

D. Genocide by killing

1894. According to the Closing Order, genocide by killing entailed systematically killing members of the Vietnamese group. The Closing Order states that Vietnamese were members of a specific ethnic and national group, who may also have been considered as a racial group by the CPK.[1845]

1895. No temporal or geographic framework is specified. As discussed regarding murder and

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[1840] Closing Order, para.1422.
[1841] Annex: List of paragraphs and portions of the Closing Order relevant to Case 002/02, **E301/9/1.1**, p. 2.
[1842] See *supra*, paras. 879-882.
[1843] Closing Order, para. 1422.
[1844] See *supra*, paras. 219-276.
[1845] Closing Order, para. 1343.

extermination, the Trial Chamber is seised of factual allegations of the treatment of Vietnamese people only in respect of Prey Veng and Svay Rieng,[1846] as well as of factual allegations of the killing of Vietnamese people beginning in 1977.[1847] Given that the crime of genocide was allegedly committed only through the killing of members of the Vietnamese group, it cannot be established in relation to an earlier time frame. Moreover, in their factual characterisation of JCE in the Closing Order, the Co-Investigating Judges indicate that "[f]rom April 1977, the CPK intended to further this policy by destroying in whole or in part the Vietnamese group as such."[1848] They therefore consider April 1977 as marking the onset of the specific intent, an ingredient of the crime of genocide.

1896. Accordingly, KHIEU Samphan is charged only with the crime of genocide by killing of members of the Vietnamese group in Prey Veng and Svay Rieng Provinces starting in April 1977.

SECTION II. THE EVIDENCE PRODUCED

I. TESTIMONIAL EVIDENCE

1897. During the substantive hearings concerning the treatment of Vietnamese people, the Trial Chamber heard 13 witnesses,[1849] seven civil parties[1850] and one expert.[1851] Moreover, some witnesses who were called for other trial segments testified concerning factual allegations relating to the treatment of Vietnamese people.

1898. Only five of those witnesses (SAO Sak, UNG Sam Ean, SIN Chhem, THANG Phal and IN Yoeung) and two civil parties (LACH Kry and DONG Oeurn) testified concerning factual allegations of which the Trial Chamber is seised, i.e. the treatment of Vietnamese people in Prey Veng and Svay Rieng Provinces. So only those testimonies form part of the evidence to be considered.

II. DOCUMENTARY EVIDENCE

1899. As for documentary evidence, the case file contains a number of written records of interview. That

[1846] See *supra*, paras. 1880-1885 and 1886-1888.
[1847] See *supra*, paras. 1880; Closing Order, para. 1378.
[1848] Closing Order, para. 214.
[1849] SEAN Song, SAO Sak, PRUM Sarun, UM Suonn, UNG Sam Ean, SIN Chhem, Y Vun, PAK Sok, THANG Phal, PRUM Sarat, IN Yoeung, SANN Lorn, MEAS Voeun.
[1850] PRAK Doeun, CHOEUNG Yaing Chaet, LACH Kry, DOUNG Oeurn. Three civil parties testified specifically in regard to the commission of the crimes: SIENG Chanthy, KHUOY Muoy et UCH Sunlay.
[1851] Alexander HINTON.

includes at least thirty-seven from Case 002, sixty-eight from Cases 003 and 004, as well as a number of transcripts from Case 002/01 and DC-Cam interviews.

1900. Aside from the earlier statements of witnesses who testified, the Closing Order mentions at least 15 written statements relating to factual allegations concerning Vietnamese people in Prey Veng,[1852] and only five relating to factual allegations concerning Vietnamese people in Svay Rieng.[1853]The rest of the written records and the 68 written records of interview from Cases 003 and 004 relate to factual allegations outside those provinces and are therefore extraneous to the case against the Accused.

1901. Moreover, the Trial Chamber must exercise caution in regard to the source of the evidence cited in the Closing Order concerning the alleged killing of Vietnamese civilians in Prey Veng and Svay Rieng Provinces. The fact of the matter is that some written records concern facts that occurred outside these provinces and are extraneous the case at hand.[1854]

1902. As for other documentary evidence, a very small portion of it relates to the treatment of Vietnamese people in Prey Veng and Svay Rieng Provinces. As for documents of more general nature, it is important to take a closer look at the various demographic reports concerning number of Vietnamese in Cambodia (A) and the thesis cited by the Prosecution (B).

A. <u>Evidence on demographic data</u>

1903. In regard the demographic data on the case file, it is necessary to begin by taking a closer look at Ewa TABEAU's report, Document Number E3/2413 (1), before turning to other demographic data (2).

1. <u>Ewa TABEAU's report</u>

1904. In the Closing Order, the Co-Investigating Judges refer to a Demographic Expertise Report by Ewa TABEAU and THEY Kheam.[1855] The truth of the matter is that the Report is simply a compilation of statistical and demographic data from other authors. The Co-Investigating Judges relied upon the Report for their conclusions on the changes in the number of Vietnamese people in Cambodia

[1852] Closing Order, paras. 797-800.
[1853] Closing Order, paras. 797, 801.
[1854] For example: Closing Order, para. 797, endnote 3398; para. 798, endnotes 3399-3401.
[1855] Closing Order, para. 792.

during the Democratic Kampuchea period. They notably rephrased the conclusion of the report in these words:

> "The report states that around 20,000 Vietnamese were still living in Cambodia in April 1975 and 'all 20,000 of them died from the hands of the Khmer Rouge during the years from April 1975 to January 1979'."[1856]

1905. During the investigation, the report came under a great deal of criticism, notably in relation to Ewa TABEAU's methodology and credentials.

1906. It was the NUON Chea Defence which requested the Co-Investigating Judges to appoint demographic experts to assist in determining the number of deaths attributable to the crimes committed by the Khmer Rouge.[1857] It requested that the parties be consulted prior to such appointment.[1858] The Co-Investigating Judges granted the request, and appointed Ewa TABEAU and THEY Kheam to undertake the task, without, however, consulting with the parties.[1859] The expertise report was filed on 30 September 2009.

1907. After filing the request, the NUON Chea and IENG Sary defence teams pointed to several flaws in regard to methodology. Among other things, they pointed to Ewa TABEAU's incompetence in the light of her previous performance at the ICTY, as well as her bias. They therefore requested a counter-expertise and also raised the issue of failure to consult with the parties prior to the appointment of the experts.[1860] The Co-Investigating Judges rejected all of their requests were rejected[1861] and the Pre-Trial Chamber did likewise thereafter.[1862]

1908. During Case 002/01 proceedings, the IENG Sary Defence opposed the Co- Prosecutors' request to call Ewa TABEAU as an expert witness.[1863]

1909. Following the severance of the charges, the Co-Prosecutors and the NUON Chea Defence proposed to call Ewa TABEAU as a witness in Case 002/02, notably for the trial segment concerning the

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[1856] Closing Order, para. 792.
[1857] Nuon Chea, Sixth Request for Investigative Action, 13.10.2008, **D113**.
[1858] Nuon Chea, Sixth Request for Investigative Action, 13.10.2008, **D113**, para. 10.
[1859] Co-Investigating Judges' Demographic Expertise Order, 10.03.2009, **D140**.
[1860] Twenty-Sixth Request for Investigative Action, 12.02.2010, **D356**. IENG Sary's Request for Additional Demographic Expert, 22.02.2009, **D140/2**, paras.11-23; IENG Sary's Request for an Additional Expert to Re-examine the Expert Report by Ms. TABEAU and Mr. THEY Kheam, 06.01.2010, **D140/7**, paras. 14-38.
[1861] Co-Investigating Judges' Orders, 01.04.2010, **D356/1**, 18.08.2009, **D140/3**, and 23.02.2010, **D140/8**.
[1862] Pre-Trial Chamber Decision, 14.12.2009, **D140/4/5**, 10.06.2010, **D140/9/4** and 01.07.2010, **D356/2/9**.
[1863] IENG Sary's Objection, 24.02.2011, **E9/4/8**.

Vietnamese.[1864] For its part, the [Khieu Samphan] Defence voiced opposition to calling Ewa TABEAU as a witness, for reasons relating to her methodology, bias, incompetence, as well as her limited not to say non-existent knowledge of Cambodia.[1865]

1910. On 24 December 2015, the Trial Chamber notified the parties for the first time of its intention to call Ewa TABEAU as a witness, by including her in a list of witnesses to be called regarding specific groups.[1866]

1911. It was not until 29 August 2016, five months after having heard all of the witnesses regarding specific groups, that the Trial Chamber notified the parties that it had reached out to Ewa TABEAU to determine whether she would be available "should the Chamber decide to call her."[1867] Ewa TABEAU replied that she needed to conduct more research, which required several months and travel to Cambodia in order to "update" her report.[1868]

1912. The Trial Chamber then asked the parties concerned if they wished to maintain their requests to hear Ewa TABEAU in light of the "apparent uncertainty surrounding the figures in the report".[1869]

1913. The Co-Prosecutors and the NUON Chea Defence withdrew their request for Ewa TABEAU's testimony during the 1 September 2016 hearing.[1870] Contending that updating the report would cause undue delay to the proceedings, the Co-Prosecutors also reiterated the Trial Chamber's observation that "demographic analysis, by nature has a range of uncertainty." The Co-Prosecutors noted further that the report was not the product of statistical study per se, but rather a compilation of analyses of the work of other authors, as everyone realised from the moment it was filed.[1871]

1914. After voicing concern about the time spent on reaching out to Ewa TABEAU,[1872] the NUON Chea Defence reiterated its criticism of both the report and the expert, whose testimony it requested only to criticize methodology she employed.[1873] Stressing that it was important to determine the death

[1864] Co-Prosecutors' Witness List, 09.05.2014, **E305/6.4**, p. 57; NUON Chea's Summaries, 08.05.2014, **E305/4.2**, p. 21.
[1865]KHIEU Samphan's Objection, 30.05.2014, **E305/9**, paras. 45-48.
[1866] Email from the Senior Trial Attorney, Trial Chamber, entitled: "Further scheduling – Treatment of Targeting Groups", 24.12.2016 at 10.05.
[1867] Memorandum, 29.08.2016, **E371/2**, para. 6.
[1868] Memorandum, 29.08.2016, **E371/2**, para. 6.
[1869] Memorandum, 29.08.2016, **E371/2**, para. 8.
[1870] T. 01.09.2016, **E1/468.1**, pp. 22-31, between 09.50.48 and 10.09.55.
[1871] T. 01.09.2016, **E1/468.1**, pp. 22-24, between 09.50.48 and 09.54.32.
[1872] T. 01.09.2016, **E1/468.1**, pp. 24-27, between 09.54.32 and 10.03.13; NUON Chea's Request, 05.10.2015, **E371**.
[1873] T. 01.09.2016, **E1/468.1**, pp. 24-25, between 09.55.50and 09.57.33.

toll before, during and after the Democratic Kampuchea period, the NUON Chea Defence requested that Patrick HEUVELINE be called instead of Ewa TABEAU.[1874]

1915. For its part, the [Khieu Samphan] Defence reiterated its opposition to Ewa TABEAU's testimony,[1875] contending that the need to update her report only cast further doubt on her methodology, not to mention the reservations expressed by both the Trial Chamber and the Co-Prosecutors about the demographic data used.[1876] The [Khieu Samphan] Defence's conclusion, which it reasserts in the present Brief, was that in the absence of Ewa TABEAU's expert testimony, the Trial Chamber should afford her report very low probative value(E3/2413).[1877]

1916. In an email dated 13 September 2016, the Trial Chamber notified the parties that Ewa TABEAU would not be called as an expert.[1878] The Prosecution argued that the report should be used because "it put this all together for the Chamber and explained it,"[1879] but that is far from the truth. It will be noted that the parties were not afforded the opportunity to question Ewa TABEAU regarding her methodology or her sources or, for that matter, why she needed to conduct further research lasting several months. That alone is testimony that, as she herself admitted, her report has shortcomings and therefore cannot be deemed as a reliable source of evidence.

1917. For example, the Trial Chamber cannot rely on report for purposes of ascertaining the data supplied in the Closing Order concerning the number of ethnic Vietnamese remained in Cambodia in 1975 or the claim that virtually none were left by the time the regime ended.

2. No other reliable demographic data is available

1918. In spite of the paucity of demographic data on Cambodia before, during and after the Democratic Kampuchea period, a number of authors took keen interest in the issue by undertaking research work on the Khmer Rouge. One such example is Patrick HEUVELINE, who has written a number of articles on the estimated death toll of the Democratic Kampuchea period, the latest of which was published in 2015 (E3/10764); two others were published in 1998 (E3/1798 and E3/1799).

[1874] T. 01.09.2016, **E1/468.1**, pp. 27-29, between 10.03.13 and 10.08.07.
[1875] T. 01.09.2016, **E1/468.1**, pp. 42-43, between 10.34.25 and 10.35.19.
[1876] Dale LYSAK: T. 01.09.2016, **E1/468.1**, pp. 22-24, between 09.50.48 and 09.54.32; Trial Chamber Memorandum, 29.08.2016, **E371/2**, para. 8.
[1877] T. 01.09.2016, **E1/468.1**, pp. 43-49, at 10.35.19.
[1878] Email by Senior Trial Attorney: "Hearing Schedule Upon Resumption from the Pchum Ben Recess", 13.09.2016 at 14.06.
[1879] T. 01.09.2016, **E1/468.1**, p. 53, before 10.52.58.

1919. By rejecting NUON Chea's request to call Patrick HEUVELINE as an expert witness,[1880] the Trial Chamber relegated his articles to the very low probative value category, for the same reasons as for Ewa TABEAU's report.

1920. As a matter of fact, the reasons for this decision expressly point in that direction, in that the Trial Chamber stipulated that a demographics expert "would not be conducive to proving legally relevant facts in this case nor assist the Trial Chamber in assessing a precise number of deaths attributable to the DK regime",[1881] and also underscored that determining the number of deaths was not necessary to determining the criminal liability of the Accused.[1882] This decision echoes Judge FENZ's arguments during the hearing on1 September 2016 concerning Ewa TABEAU's expert testimony,[1883] as well as those of the Prosecution[1884] and the Civil Parties.[1885] Based on those arguments, the Trial Chamber's position seems to be consonant with that of the Defence, namely that a report based on incomplete research and questionable data has only low probative value.

1921. It is, however, worth noting that the Trial Chamber's position is far from clear. For instance, in response to requests that she claimed were from the Trial Chamber, Ewa TABEAU stated that the Trial Chamber was seeking to prove "the excess deaths of Vietnamese and Cham victims of [the] Khmer Rouge regime" and wanted to:

> "specifically hear whether new statistical information became available for the period between the censuses of 1962 and 1998, which would allow the establishment of the number of excess deaths of Vietnamese and Cham with a higher degree of certainty than in my initial report."[1886]

1922. This answer shows that contrary to its assertions in Decision E444/1, the Trial Chamber took keen interest in the number of Vietnamese and Cham victims. And this was to be expected, because, even while the number of victims is not required for determining whether genocide was committed, it is required for demonstrating the intent to destroy at least a substantial part of the targeted group.[1887] Therefore, availability of demographic data on the number of Vietnamese genocide victims, for example in Prey Veng and Svay Rieng provinces, would have been conducive to the

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[1880] Decision, 06.12.2016, **E444/1**.
[1881] Decision, 06.12.2016, **E444/1**, para. 24.
[1882] Decision, 06.12.2016, **E444/1**, para. 21.
[1883] T. 01.09.2016, **E1/468.1**, pp. 29-30, after 10.08.07, pp. 29-31, after 10.13.01.
[1884] T. 01.09.2016, **E1/468.1**, p. 38, after 10.26.25.
[1885] T. 01.09.2016, **E1/468.1**, p. 41-42, between 10.31.22and 10.34.25.
[1886] Memorandum, 29.08.2016, **E371/2**, para. 6 (citing Ewa TABEAU).
[1887] See *supra*, paras. 1820-1821.

conduct of the proceedings.

1923. However, the Trial Chamber could not but to note "the absence of relevant and reliable statistical data for purposes of deterring the exact number of deaths attributable to the Democratic Kampuchea regime."[1888] It must take account of that. Having recognised that "[t]he demographic data available on targeted groups also suffers from similar uncertainty as the overall demographic data",[1889] the Trial Chamber must afford it low probative value, especially given that none of the authors concerned testified.

1924. Therefore, the Trial Chamber may only draw conclusions on the number of Vietnamese deaths through a case-by-case assessment of the evidence.

B. Thesis

1925. It is worth taking a closer look at the thesis, given that it was cited by the Prosecution during the key documents hearing concerning specific groups.[1890] Elizabeth DO wrote a sociology thesis of some 70 pages while she was a student at Stanford University. Her aim was to undertake a comparative study on the treatment of Khmers and Vietnamese during the Democratic Kampuchea period.[1891] As regards her methodology, she explained that she undertook fieldwork mainly in the East Zone where, with the assistance of DC-Cam she interviewed many people mostly in Pou Chentam Village. She also analysed period documents and the work of other authors concerning the DK regime.[1892]

1926. There are questions about the probative value and reliability of the information she collected. Indeed, although some annexes contain details on the number of people she interviewed and questions she asked, the thesis mainly consists of summaries of her interviews and books by various authors.[1893] So when she refers to the extermination of Vietnamese people, it is impossible to verify the source of that claim, because she cites no specific interview or any other source. She simply employs the generic term "informants".[1894] So apart from her bibliography, there is no other way

[1888] Decision, 06.12.2016, **E444/1**, para. 22.
[1889] Decision, 06.12.2016, **E444/1**, para. 24.
[1890] T. 23.02.2016, **E1/390.1**, pp. 67-75, between 14.12.03 and 14.28.04.
[1891] Thesis by Elizabeth DO, *Treatment of the Vietnamese Minority in Democratic Kampuchea From a Comparative Perspective*, **E3/4524** ("Elizabeth DO's thesis, **E3/4524**"), ERN 00548811.
[1892] Thesis by Elizabeth DO, **E3/4524**, ERN 00548827.
[1893] Thesis by Elizabeth DO, **E3/4524**, ERN 00548870-78.
[1894] Thesis by Thesis of Elizabeth DO, **E3/4524**, ERN 00548859-60.

to check her core sources.

1927. Furthermore, Elizabeth DO's thesis does not amount to proof of discrimination or intent to commit genocide of Vietnamese people, because a reading of her findings, unreliable as they are, reveal that her interpretation of the data runs counter to those findings. For example, after having noted that 67% of her informants did not believe that Khmers and Vietnamese people were treated differently in their village,[1895] she then goes on to assert that "[t]he data suggests that there weren't overt differences between the Khmer Rouge's general, day-to-day treatment of Vietnamese and Khmer people", and then that there was "some evidence of disparate treatment" using a long-winded, complicated argument and citing books, without always specifying which ones.[1896]

1928. Be that as it may, since Elisabeth DO did not appear before the Trial Chamber, the parties were not afforded the opportunity to ask her precise questions about both her methodology and sources. More importantly, as the Defence pointed out in court, the quality of her research work falls below the standard required for a thesis, hence why the Trial Chamber cannot afford it any probative value, or, for that matter, any forensic merit to her findings.[1897]

III. OUT-OF-SCOPE FACTS

1929. Before embarking on a detailed discussion of the facts, it is important to recall the facts the Trial Chamber was not requested to investigate but which were heard during the substantive hearings: other inhumane acts through enforced disappearances (A), facts that occurred outside of the Prey Veng and Svay Rieng provinces (B) and facts relating to crimes committed on Vietnamese territory by the Revolutionary Army of Kampuchea (C).

A. Other inhumane acts (through of enforced disappearances)

1930. The Trial Chamber heard testimony concerning factual allegations that may constitute other inhumane acts through forced disappearances, but it was not seised thereof. Indeed, whereas according to the Closing Order the accused persons were sent for trial in respect of the crime of other inhumane acts (through enforced disappearances),[1898] the Severance Decision, as summarised in the Annex on the scope of Case 002/02, does not include the factual allegations concerning

[1895] Thesis by Elizabeth DO, **E3/4524**, ERN 00548860-61 (incorrect figure in the FR transcript, ERN 00751022).
[1896] Thesis by Elizabeth DO, **E3/4524**, ERN 00548829-30.
[1897] T. 26.02.216, **E1/392.1**, pp. 44-45, around 10.49.48.
[1898] Closing Order, paras. 1470-1478.

Vietnamese people.[1899]

1931. Therefore, its deliberations the Trial Chamber should omit from any evidence it obtained or heard concerning crimes that are not charged against KHIEU Samphan.

B. Facts outside the territory of Prey Veng and Svay Rieng Provinces

1932. The Trial Chamber decided to hear evidence on factual allegations relating to the treatment of Vietnamese people outside the territory of Prey Veng and Svay Rieng Provinces. That evidence concerns events that occurred in various provinces of Democratic Kampuchea, including Siem Reap, Kampong Chhnang, Battambang and Takeo.[1900] Moreover, the Trial Chamber decided to call witnesses concerning the treatment of Vietnamese at sea; nearly all their statements derive from Cases 003 and 004.[1901]

1933. In the factual segment of the Closing Order contains, a whole section is devoted to the killing of Vietnamese civilians outside the territory of Prey Veng and Svay Rieng Provinces, [1902] but that is because the Co-Investigating Judges impermissibly exceeded their *saisine*.[1903]

1934. The Trial Chamber is not seised of factual allegations pertaining to the treatment of Vietnamese at sea. As a matter of fact, those factual allegations do not appear in the Co-Prosecutors' Introductory Submission or in any of the Supplementary Submissions, and were not part of the investigation. Contrary the Trial Chamber's holding in its decision to call witnesses on this matter,[1904] mere mention of an item of evidence in an endnote cannot suffice to extend the Trial Chamber's *saisine* to factual allegations that are not expressly set out under the legal characterisations in the Closing Order,[1905] especially given that such factual allegations are not part of the Co-Investigating Judges' *saisine*.[1906]

1935. The Trial Chamber also decided to call the expert testimony of anthropologist Alexander HINTON,

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[1899] Annex: List of paragraphs and portions of the Closing Order relevant to Case 002/02, **E301/9/1.1**, pp. 4-5.
[1900] Siem Reap: SEAN Song, UM Suonn and Y Vun; Kampong Chhnang: PRAK Doeun and CHOEUNG Yaing Chaet; Battambang: PRUM Sarun; Takeo: SANN Lorn.
[1901] PAK Sok, PRUM Sarat and MEAS Voeun; Co-Prosecutors' Request, 24.12.2015, **E382**, paras. 6-12; NUON Chea's Request of 22.12.2015, **E380**, paras. 8-15.
[1902] Closing Order, paras. 802-804.
[1903] See *supra*, paras. 1881-1885.
[1904] Decision, 25.05.2016, **E380/2**, para. 21, referring in footnote 37 to endnote 3487, paragraph 816 of the Closing Order (telegram).
[1905] See *supra*, paras. 82-85.
[1906] See *supra*, paras. 110-113.

author of the book *Why Did They Kill?*.[1907] However, HINTON provided no expert testimony on the treatment of Vietnamese in Prey Veng and Svay Rieng. As a matter of fact, the so-called "expert" on genocide conducted no anthropological survey in either one of the two provinces. He explained in court that he had travelled to Cambodia many times, but it was mainly during the 11-month period between 1994 and 1995 that he conducted research for his book in a village close to Phnom Pros, Phnom Srei, Kampong Siem District, Kampong Cham Province.[1908] He later conducted some research on archives in Phnom Penh for one month.[1909]

1936. He explained further that his work focused on why Khmers killed fellow Khmers.[1910] In his in-court testimony, he only spoke briefly about the small number of Cham and Vietnamese who, he said, lived in the area he studied, i.e. Kampong Cham.[1911]

1937. His testimony is not addressed in the segment on the treatment of Vietnamese people, since it does not concern Prey Veng Province or Svay Rieng Province. However, his assessment of Democratic Kampuchea period speeches and the books on Democratic Kampuchea is discussed in the relevant segments of the present Brief.[1912]

C. <u>Factual allegations pertaining to crimes committed on Vietnamese territory by the Revolutionary Army of Kampuchea</u>

1938. Despite numerous objections from the Defence,[1913] the Trial Chamber accepted to hear evidence on the crimes committed by the Revolutionary Army of Kampuchea on Vietnamese territory. Yet, it had been recalled that these crimes are outside the scope of Case 002/02 and hence outside the Trial Chamber's *saisine*.[1914]

[1907] Book by Alexander HINTON, *Why Did They Kill?*, 2005, **E3/3446**.
[1908] T. 14.03.2016, **E1/401.1**, pp. 11-12, between 09.39.18 and 09.40.22; T. 16.03.2016, **E1/403.1**, pp. 120-121, between 15.17.27and 15.18.49, pp. 125-127, between 15.26.30 and 15.30.50.
[1909] T. 14.03.2016, **E1/401.1**, p. 12, around 09.40.22].
[1910] T. 14.03.2016, **E1/401.1**, p. 6, before 09.29.15; T. 16.03.2016, **E1/403.1**, pp. 119-120, between 15.16.26 and 15.17.27.
[1911] T. 15.03.2016, **E1/402.1**, pp. 26-32, between 09.53.16 and 10.06.07.
[1912] See *infra*, paras. 2226-2233.
[1913] T. 19.10.2016, **E1/486.1**, pp. 78-79, between 13.54.10 and 13.56.48, p. 97 after 14.37.12; T. 26.10.2016, **E1/490.1**, p. 43, after [11.04.09, p. 49, around 11.17.37; T. 27.10.2016, **E1/491.1**, p. 29, after 10.39.40; T. 31.10.2016, **E1/492.1**, p. 30, before 10.40.02; T. 02.11.2016, **E1/494.1**, p. 11, after 09.30.15.
[1914] See *supra*, paras. 204-212.

SECTION III. DISCUSSION OF THE RELEVANT EVIDENCE

1939. In the Closing Order, the Co-Investigating Judges do not clearly set out the crimes which were committed in Prey Veng and Svay Rieng Provinces. For the sake of clarity, we will begin by discussing the evidence relating to Prey Veng Province before turning to that relating to Svay Rieng Province.

I. TREATMENT OF ETHNIC VIETNAMESE IN PREY VENG PROVINCE

1940. With respect to Prey Veng Province, the Closing Order refers to crimes which were in three districts, citing written records of interviews in which witnesses name various locations. Those locations are: the districts of Peam Ro (which is home to Anlung Trea Village, in Preaek Chrey Commune, and Angkor Yous Village in Preak Anteah Commune),[1915] Prey Veng (which is home to the villages of Pou Chentam[1916] and Svay Antor),[1917] and lastly, Pea Reang District.[1918]

A. Peam Ro District

1. Alleged killings of ethnic Vietnamese

a. Preaek Chrey Commune

1941. According to the demarcation of administrative boundaries, Anlung Trea Village is located in Preaek Chrey Commune, in then Peam Ro District (now Kampong Leav District), Prey Veng Province, in Sector 24 of the East Zone.[1919]

1942. SAO Sak is the sole witness who testified concerning the treatment of ethnic Vietnamese in Anlung Trea Village. She stated that after 1975, there were only a few Vietnamese families in the village, including her family and the two families of NEANG Nat and VAN Mao.[1920] The other evidence on the disappearance of Vietnamese husbands and children of mixed Khmer-Vietnamese parentage

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[1915] WRI of SAO Sak, 14.10.2008, **E3/7780**; WRI of EM Bunnim, 04.04.2009, **E3/7760**; WRI of MOM Chheuy, 15.01.2009, **E3/7813;** WRI of NEANG Nat, 14.10.2008, **E3/7779**; WRI of VAN Mao, 25.09.2008, **E3/7761**; WRI of LANG Hel, 14.10.2008, **E3/525**; WRI of BUN Reun, 15.01.2009, **E3/7811**; WRI of SAOM Ruos, 25.09.2008, **E3/5246.**

[1916] WRI of IENG On, 16.09.2008, **E3/9352**; WRI of CHUY Kimva, 15.09.2008, **E3/7793**; KOL Lim, 17.09.2008, **E3/5243**; WRI of THENG Huy, 17.09.2008, **E3/5244**; WRI of SIN Sun, 23.09.2008, **E3/9339**; WRI of LENG Samet, 14.01.2009, **E3/7810**; WRI of LACH Kry, 24.09.2008, **E3/9340**; WRI of CHHUON Ri, 03.12.2009, **E3/7891**.

[1917] WRI of KHUN Mon, 16.09.2008, **E3/7806**.

[1918] WRI of YIM Muoy, 07.11.2008, **E3/7783**.

[1919] SAO Sak: T. 03.12.2015, **E1/362.1**, p. 78; T. 07.12.2015; **E1/363.1**, p. 25.

[1920] T. 03.12.2015, **E1/362.1**, p. 81.

which concerns three other families in the village is found in the written records of interview of SAOM Ruos, BUN Reun, MOM Chheuy, LANG Hel, and EM Bunnim. Those records are not mutually corroborative. The evidence on the treatment of ethnic Vietnamese in the village will be discussed on a case-by-case basis.

i. SAO Sak's mother

1943. SAO Sak was living in Anlung Trea Village in the pre-Democratic Kampuchea period. She still lives there.[1921] She reported that she had no access to a radio or any news source between 1975 and 1979 and that she was unaware of the policies of Democratic Kampuchea or the CPK vis-à-vis ethnic Vietnamese.[1922] She was not in position to speak about what happened beyond her place of residence.[1923]

1944. SAO Sak testified that her mother was Vietnamese of mixed origin, and that the latter suffered no ill- or improper treatment under the Democratic Kampuchea regime. She worked in a cooperative alongside Cambodians, caring for children and infants.[1924] One day, "during the SAO Phim event", SAO Sak was told by a Khmer Rouge militiaman called "Khon" that her mother had been to a meeting in Krasar Phaerl Village to the south-east of Trea Village, and that she was detained there in a hut along with others. SAO Sak was able to visit her briefly and was allowed to go home with her daughter, who had been with the grandmother.[1925] That was the last time she saw her mother, and she has not heard from her since then.[1926] SAO Sak also said that she did not witness any killings first hand.[1927]

1945. NEANG Nat told the Co-Investigating Judges that she learned that her mother, who was of Vietnamese origin, was "taken away" at the same time as SAO Sak's mother.[1928] She did not witness any arrests or killings.[1929] BUN Reun, who was a messenger for the Anlung Trea village chief under the Khmer Rouge only confirmed that SAO Sak, who is still alive, is of Vietnamese

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1921 T. 03.12.2015, **E1/362.1**, pp. 78, 80; T. 07.12.2015; **E1/363.1**, p. 20.
1922 T. 07.12.2015, **E1/363.1**, p. 24.
1923 T. 07.12.2015, **E1/363.1**, p. 19.
1924 T. 03.12.2015, **E1/362.1**, p. 81.
1925 T. 03.12.2015, **E1/362.1**, pp. 82, 83-85.
1926 T. 03.12.2015, **E1/362.1**, p. 85.
1927 T. 07.12.2015, **E1/363.1**, p. 26. In answer to a question from the NUON Chea Defence: Q: (...) is my understanding correct that you yourself have never witnessed in front of your eyes anyone being killed, you never saw any actual killing of anybody, is that correct? **A**: Yes, that is correct, since I never saw it."
1928 WRI, 15.01.2009, **E3/7779**, ERN 00235504.
1929 WRI, 15.01.2009, **E3/7779**, ERN 00235504.

descent but reported nothing about what happened to SAO Sak's mother.[1930] No other written statement sheds any light to what happened to SAO Sak's mother.

1946. The other witnesses who were interviewed by the OCIJ investigators claimed that arrests and killings occurred. They gave no details whatsoever and did not indicate the exact source of their knowledge, which is merely based on hearsay.[1931] There are no eye-witness accounts of killings of ethnic Vietnamese in Anlung Trea village. Moreover, no one reported seeing any corpses.

ii. Concerning NEANG Nat's mother (alias Yeun)

1947. NEANG Nat told the Co-Investigating Judges that her mother, an ethnic Vietnamese named Yeun, was taken away at the same time as SAO Sak's mother, and detained.[1932] NEANG Nat and her brother EM Bunnim survived the regime even though their mother was Vietnamese.[1933] Both were interviewed by the OCIJ, but neither appeared before the Chamber. Neither personally witnessed any incidents involving their mother.

• Uncorroborated hearsay account of a meeting for "registering" ethnic Vietnamese

1948. NEANG Nat reported that the owners of the house, Ta Chea and Yeay Hang, and also by her grandmother told her that her mother Yeun was taken away by village cadres Chhun and Sautr for a short meeting, along with SAO Sak's mother.[1934]

1949. Her brother EM Bunnim, a Khmer Rouge soldier who was then on combat duty against the Vietnamese at the border, also reported when he returned to the village, he was told by his grandmother that their mother had been arrested. According to the grandmother's account, the village chief called his mother to a meeting at which ethnic Vietnamese were to be registered.[1935] This hearsay account is the only evidence about a meeting to register ethnic Vietnamese in Anlung Trea Village.

1950. Not only does EM Bunnim's account contain no details about the grandmother's sources – making

[1930] WRI, 14.10.2008, **E3/7811**, ERN 00282554.
[1931] WRI of SAOM Ruos, 25.09.2008, **E3/5246**, ERN 00234111-12; WRI of LANG Hel, 14.10.2008, **E3/5251**, ERN 00235495-96; WRI of NEANG Nat, 14.10.2008, **E3/7779**, ERN 00235504; WRI of MOM Chheuy, 15.01.2009, **E3/7813**, ERN 00282335-36; DC-Cam Interview of KHUN Mon, 08.03.2000, **E3/7597**, ERN 00231741.
[1932] WRI of NEANG Nat, 14.10.2008, **E3/7779**, ERN 00235504. See also SAO Sak: T. 03.12.2015, **E1/362.1**, p. 85.
[1933] WRI of NEANG Nat, 14.10.2008, **E3/7779**; WRI of EM Bunnim, 04.04.2009, **E3/7760**.
[1934] WRI, 14.10.2008, **E3/7779**, ERN 00235504.
[1935] WRI, 04.04.2009, **E3/7760**, ERN 00322931.

it double hearsay – but it is also not corroborated by SAO Sak, the only one who testified before the Trial Chamber, or by any other written record, or even by the account of his sister, NEANG Nat. Moreover, according to a person who was living in SAOM Ruos Village, "There were no meetings to tell us the reasons for the arrests of the Vietnamese families".[1936] EM Bunnim's uncorroborated account therefore has very low probative value.

1951. VAN Mao's written record contains no reliable evidence, given that he told the OCIJ investigators that NEANG Nat was his only source of knowledge about the arrest of NEANG Nat's mother.[1937] He was not even able to say where NEANG Nat's family lived during the Khmer Rouge regime.[1938] Therefore the Trial Chamber can in no way deem his account corroborative.

• **<u>Inconstancies with respect to the timing of Yeun's arrest</u>**

1952. There is lingering uncertainty about the date of Yeun's arrest. SAO Sak testified that her mother and Yeun were arrested at the same time during the "SAO Phim event". However, NEANG Nat cited no date, but EM Bunnim reported that the facts took place in the months preceding the SAO Phim event.[1939]

1953. NEANG Nat's written record of interview in which she claims: "[a]ccording to what I saw and heard the villagers say, the ethnic Yuon were taken away and killed; <u>they were not kept</u>" (*emphasis added*)[1940] should be approached with utmost caution. While it may be that she was describing what she saw, a careful reading of her evidence reveals that she did not personally witness any killings.

1954. As for SAOM Ruos, he claimed that the alleged killings were linked with the armed conflict. According to him, it was those with affiliations to Vietnam and SAO Phim who were targeted.[1941] His account, like the others, is sketchy as regards the killings and is more than likely based on hearsay, since its source is not specified. It therefore has low probative value.

1955. All the aforementioned accounts do not amount to cohesive body of evidence, fail to establish the claim that Yeun, NEANG Nat's mother, was killed, and are short on details as to the circumstances

[1936] WRI, 25.09.2008, **E3/5246**, ERN 00234112.
[1937] WRI, 25.09.2008, **E3/7761**, ERN 00234120.
[1938] WRI, 25.09.2008, **E3/7761**, ERN 00234120.
[1939] <u>SAO Sak</u>: T. 03.12.2015, **E1/362.1**, pp. 84, 82; WRI of EM Bunnim, 04.04.2009, **E3/7760**, ERN 00322931 (he testified that he was transferred to the mobile unit about two months before SAO Phim was arrested, and that he saw his grandmother three days after he reached the mobile unit).
[1940] WRI, 14.10.2008, **E3/7779**, ERN 00235504.
[1941] WRI, 25.09.2008, **E3/5246**, ERN 00234111.

of the alleged killing. It could at best be considered that there is some evidence that she disappeared after her arrest.

iii. Concerning VAN Mao's family

1956. VAN Mao's father, SENG Vann, was ethnic Vietnamese.[1942] When SAO Sak was questioned in court about what happened to her family, she answered that she did not know the father or the date on which the facts relating to him happened, adding that she learned that "later on" that he had been taken away with his children.[1943]

1957. In his interview with the investigators, VAN Mao reported that he personally witnessed his father's arrest, but could not remember the actual timing, how many KR cadres came to pick him up or where they came from. The father was allegedly taken away by motorboat for an education session which was supposed to last a few days, but he was never seen again thereafter.[1944] However, VAN Mao reported that he was not present when his brothers and sisters were taken away one month after their father's arrest.[1945] According to him, several attempts were made to arrest him after that, but he would somehow manage to hide each time.[1946]

1958. SAOM Ruos's written record of interview confirms the arrest of VAN Mao's family members. He reported that the arrest took place "around the 1978 dry season", i.e. either before May or after November that year.[1947] According to his account, "security people from above" came to arrest them and took them by boat to an unknown location.[1948] His account reveals that he neither witnessed any killings nor knew where those individuals were taken. Moreover, he provided no details about the source of his knowledge and also did not explain his claim that those family members had been killed. SAOM Ruos did confirm that he hid VAN Mao "so they could not arrest him".[1949]

1959. BUN Reun, a messenger for the village chief, Man, reported that Man ordered him to call up VAN

[1942] WRI of VAN Mao, 25.09.2008, **E3/7761**, ERN 002234119.
[1943] T. 03.12.2015, **E1/362.1**, p. 96.
[1944] WRI, 25.09.2008, **E3/7761**, ERN 00234120.
[1945] WRI, 25.09.2008, **E3/7761**, ERN 00234120.
[1946] WRI, 25.09.2008, **E3/7761**, ERN 00234120.
[1947] WRI, 25.09.2008, **E3/5246**, ERN 00234112.
[1948] WRI, 25.09.2008, **E3/5246**, ERN 00234112.
[1949] WRI, 25.09.2008, **E3/5246**, ERN 00234112.

Mao without telling him why, but he did not do so because of the boy cried.[1950] His statement contradicts VAN Mao's. The latter claimed that a militiaman named HANG Saren tried to arrest the child but the child's mother hid it.[1951] Neither SAOM Ruos nor BUN Reun knew or stated the reason for calling him up.

1960. It was only KHUN Mon, brother-in-law of SENG Vann (his sister's husband), who reported – in his DC-Cam Interview – that SENG Vann and his children were all killed, apart from VAN Mao.[1952] He was not asked about the source of his information and neither did he offer any details thereupon. Unlike SAOM Ruos, KHUN Mon reported that the facts took place in 1977.[1953] Since his interview was recorded in a non-judicial framework, it has very low probative value, especially given that during the Khmer Rouge period he was living in another commune, Svay Antor, located in Svay Antor Village.[1954] It is safe to say that his account is based on post-Democratic Kampuchea hearsay. In any case, his DC-Cam interview contains nothing conducive to ascertaining the facts.

1961. In conclusion, it cannot be established that members of VAN Mao's family were killed, given that the aforementioned accounts have low probative value especially in the absence any concrete, corroborative evidence.

iv. <u>Concerning Thav and his family</u>

1962. Thav's father is of Chinese-Vietnamese origin. In her testimony, SAO Sak stated she was uncertain if Thav was taken away and killed, but only knew that he was sent to work in another location, and disappeared.[1955] VAN Mao, who claimed that he witnessed the arrests first hand, told the investigators that Thav was taken away "one month before they arrested my father" and that his "siblings" were taken away about one month thereafter.[1956] They were allegedly "arrested and [them]" in a rowboat, except for Thav's son Nak – who is still alive – who was removed from the boat, because he was crying.[1957]

1963. VAN Mao's statements about those facts should be approached with caution, given that he was of

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[1950] WRI, 15.01.2009, **E3/7811**, ERN 00282553.
[1951] WRI of VAN Mao, 25.09.2008, **E3/7761**, ERN FR 00234120.
[1952] DC-Cam Interview, 08.03.2000, **E3/7597**, ERN 00231739.
[1953] DC-Cam Interview, 08.03.2000, **E3/7597**, ERN 00231739.
[1954] DC-Cam Interview of KHUN Mon, 08.03.2000, **E3/7597**, ERN 00231751.
[1955] T. 03.12.2015, **E1/362.1**, p. 99.
[1956] WRI of VAN Mao, 25.09.2008, **E3/7761**, ERN 00234120.
[1957] WRI, 25.09.2008, **E3/7761**, ERN 00234119.

tender age at the relevant time (about 7 years old) and that so much time has since elapsed.[1958] The claim that he witnessed the facts, while – by to his account – he himself was being sought, is hardly credible. Since he did not testify in court, there was no opportunity to question him about this inconsistency.

1964. The written record of interview of SAOM Ruos concerning the arrest and killing of Thav's family members is just as nebulous as is his account on VAN Mao's family as regards sources.[1959] Since did not testify in court, no further details are available.

1965. The facts concerning Thav's family members are far from established, especially given that BUN Reun's accounts contradict earlier testimonies. The latter, a former messenger of the village chief, reported that Thav fled back to Vietnam after the liberation in 1975 at the time when Vietnamese were returning to their country of origin in droves, which was why he was never seen again.[1960] He reported further that another ethnic Vietnamese man named Vat also left for Vietnam at that time and returned to the village after 1979.[1961]

1966. SAO Sak testified that there were several waves of repatriations of Vietnamese to Vietnam in the period between 1975 and 1978.[1962] Moreover, MOM Chheuy told the investigators that he personally saw Vietnamese returning to their native villages. He added that he did not witness any instances of them being mistreated.[1963]

1967. There is therefore serious doubt as to what happened to Thav and as to whether he was actually arrested. As for the rest of his family members, a careful reading of all of the accounts reveals that at the very most, they were arrested and taken to another location, but the account provide no evidence to establish that any of them were killed.

v. <u>Concerning KEM Neou, LANG Hel's wife</u>

1968. LANG Hel had been called to testify, but he died before giving testimony.[1964] In his interview with

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[1958] DC-Cam Interview of KHUN Mon, 08.03.2000, **E3/7597**, ERN 00231741 in which he notes that VAN Mao was still young.
[1959] WRI, 25.09.2008, **E3/5246**, ERN 00234112.
[1960] WRI, 15.01.2009, **E3/7811**, ERN 00282554.
[1961] WRI, 15.01.2009, **E3/7811**, ERN 00282554.
[1962] T. 03.12.2015, **E1/362.1**, pp. 98-99; T. 07.12.2015, **E1/363.1**, pp. 16-17, 30-31.
[1963] WRI, 15.01.2009, **E3/7813**, ERN 00282335.
[1964] Email from Senior Legal Officer, Trial Chamber, entitled "List of Witnesses/Civil Parties for Treatment of the Vietnamese", 18.09.2015 at 10.39 (Summons); email from the Senior Legal Officer entitled *Scheduling and*

the investigators, he reported concerning his wife KEM Neou that "[her] father was pure ethnic Khmer. Her mother was mixed-race Vietnamese" and that she and their children were taken away in 1978 shortly before the Vietnamese troops entered Cambodia.[1965] He was not present when that happened. He later saw the family near Krasar Phaerl for a final reunion. A few months thereafter, they arranged for him marry a new wife, a Cambodian, with the agreement of both marriage partners and with the parents in attendance.[1966]

1969. SAO Sak testified that all she "heard" regarding to LANG Hel's family was that they were taken away. She testified further that she did not know the origins of the wife.[1967] No other evidence was produced concerning this family.

vi. Concerning Yeay Doek

1970. Yeay Doek, a midwife, was ethnic Vietnamese. SAO Sak testified that Yeay Doek was "taken away and killed", but just moments after, she said that "nobody knew that she was taken away and killed. Only later we learned that her house was empty and nobody was there".[1968]

1971. MOM Chheuy told the investigators that Yeay Doek disappeared, but gave no further details.[1969] This is the only account about this ethnic Vietnamese midwife, and it contains no further details save for the fact that she may have disappeared from the village in unknown circumstances.

1972. Such accounts have very low evidentiary weight; they cannot establish that Yeay Doek was killed.

1973. The entire body of evidence before the court concerning Anlung Trea Village fails to establish beyond a reasonable doubt that killings occurred.

b. Angkor Yuos Commune

1974. In his DC-Cam Interview, IER Pov described what happened to his wife, an ethnic Vietnamese. His statement is not cited in the Closing Order. He had been called to testify, but he passed away before giving testimony.[1970] His family was not discussed in court. It is only mentioned in written

pseudonyms, 02.10.2015 at 15.08 (Notification of death); death certificate, 23.01.2015, **E29/507**.

[1965] WRI, 14.10.2008, **E3/5251**, ERN 00235495.

[1966] WRI, 14.10.2008, **E3/5251**, ERN 00235496.

[1967] T. 03.12.2015, **E1/362.1**, pp. 101-102.

[1968] T. 07.12.2015, **E1/363.1**, p. 8.

[1969] WRI, 15.01.2009, **E3/7813**, ERN 00282336.

[1970] Email from Senior Legal Officer Trial Chamber: "List of Witnesses/Civil Parties for Treatment of the Vietnamese", 18.09.2015 at 10.39 (Summons); email by the Senior Legal Officer entitled "Scheduling and

records of interview.

1975. IER Pov reported that his wife was taken away in March 1977 for an education session at the brick -oven to the east of Pearm. He reported further that their children were taken away with her, except one who ran away and was later taken by IER Pov to live in Pou Chentam.[1971] He is believed to be still alive. IER Pov's wife's family members were taken away on the same day. He asked the Khmer Rouge cadres to allow him to go to the education session with his family, but they refused, because this would have amounted to "a mistake".[1972]

1976. The surviving child, POV Hong, also recorded a DC-Cam interview. He reported that he was arrested with his mother and brothers sometime in January or February 1977. They were herded together in a pagoda. His mother then told him to go back to his father, IER Pov. That was the last he heard of them.[1973]

c. Facts relating to places that were not clearly identified

1977. During SAO Sak's her live testimony, the Prosecution asked her about the villagers from Baray who are mentioned in LANG Hel's written statement.[1974] She answered that she knew nothing about what happened in that village, as it was far away from hers.[1975]

1978. The Prosecution also unsuccessfully tried to get answers from SAO Sak about the families of Lang (ethnic Vietnamese) and Eurl (Khmer) which is mentioned in NEANG Nat's written record. She answered that she knew nothing about them.[1976] There is also no indication as to where exactly the village is located, or, for that matter, whether it is located in Prey Veng Province.

1979. Be that as it may, the uncorroborated evidence of LANG Hel and NEANG Nat fails to establish the elements of the crime of murder.

2. Orders to kill ethnic Vietnamese and related procedures

1980. At paragraph 798 of the Closing Order, the Co-Investigating Judges also cite MOM Chheuy's

pseudonyms", 02.10.2015 at 15.08 (Notification of death);
[1971] DC-Cam Interview, 07.03.2000, **E3/7954**, ERN 00834605-07.
[1972] DC-Cam Interview, 07.03.2000, **E3/7954**, ERN 00834613.
[1973] DC-Cam Interview, 23.03.2001, **E3/7165a**, ERN 00824524-25.
[1974] WRI of LANG Hel, 14.10.2008, **E3/5251**, ERN 00235495.
[1975] T. 03.12.2015, **E1/362.1**, pp. 105, 106 (at the International Co-Prosecutor's further attempt to get a response about the inhabitants of Baray village, the witness insisted: "I do not know about the point you mentioned").
[1976] SAO Sak: T. 03.12.2015, **E1/362.1**, p. 194; WRI of NEANG Nat, 14.10.2008, **E3/7779**, ERN 00235504.

written record of interview and DOUNG Oeurn CD-Cam interview in concluding that pre-prepared lists of Vietnamese were used when conducting arrests.[1977] DOUNG Oeurn's account will be discussed *infra* in relation to Pou Chentam Village, Svay Antor Commune.

1981. MOM Chheuy claims that he heard "from nearby villagers that district-level cadres had come down and recorded names".[1978] So "when they came to make arrests, those cadres had lists which had been made in advance listing the Yuon and the wives of soldiers."[1979] According to this statement, it appears that other people besides ethnic Vietnamese were arrested at that time. However, the statement is unreliable since it derives from rumours and is unsourced.

1982. Moreover, according her testimony, SAO Sak never witnessed anything of the sort. While at first she indicated that lists were compiled with details about ethnic origin, she was merely speculating.[1980] Later, when she was questioned by the Defence, she acknowledged that she never saw any such reports and did not know if Man, the village chief, actually sent any to his superiors. She clearly stated that as an ordinary inhabitant of the village, she was not privy to such information, and that she was simply making assumptions.[1981]

1983. SAOM Ruos, another inhabitant of Anlung Trea Village, told the investigators that Vietnamese families were arrested by "the security people from above" and subsequently killed. He did not know if "the lower level had reported them".[1982] Moreover, he was unable identify the source of that information, and no further details are available since he did not give testimony.

1984. LANG Hel's account was also based on assumptions. He claims that there was "certainly an order from upper level" to arrest and kill ethnic Vietnamese people, because all that "people at low level" knew was to obey.[1983] However, did not explain how he obtained that information or whether anything he witnessed led him to that conclusion. It will be noted that, judging from his account, he did not witness his wife's arrest or any killings.[1984]

3. Meetings about ethnic Vietnamese

[1977] Closing Order, endnote 3400.
[1978] WRI, 15.01.2009, **E3/7813**, ERN 00282336.
[1979] WRI, 15.01.2009, **E3/7813**, ERN 00282336.
[1980] T. 07.12.2015, **E1/363.1**, p. 13.
[1981] T. 07.12.2015, **E1/363.1**, pp. 30-31.
[1982] WRI, 25.09.2008, **E3/5246**, ERN 00234112.
[1983] WRI, 14.10.2008, **E3/5251**, ERN 00235496.
[1984] WRI, 14.10.2008, **E3/5251**, ERN 00235496.

1985. According to SAO Sak, at the meetings only matters relating to rice production were discussed, and not ethnic Vietnamese.[1985] SAOM Ruos and LANG Hel corroborated SAO Sak's account in their respective written records of interview, saying that there were no briefings about the reasons for arresting Vietnamese families.[1986]

4. Treatment of Cambodian people with with Vietnamese spouses and children with one Vietnamese parent

a. Treatment of Cambodian people with Vietnamese pouses

1986. As observed *supra*, no evidence supports the claim that killings occurred in Anlung Trea village or in any other locations.

1987. Moreover, the Trial Chamber should find that it cannot be established that the wives of Vietnamese men were killed or mistreated.

1988. The Co-Investigating Judges relied, *inter alia*, on POV Hong's account in finding that it was the village chief who supplied the information that those "with Vietnamese ancestry and/or Vietnamese origin" received special treatment.[1987] However, both his interview and the others which are cited in the Closing Order were obtained in a non-judicial setting, i.e., the result of unsubstantiated presumptions, and also they were not corroborated in court.[1988]

b. Theory of matrilineal descent

1989. According to paragraphs 215 and 807-808 of the Closing Order, the CPK adopted this theory was adopted as part of its policy to destroy the Vietnamese group. In practice, this meant that children of Vietnamese mothers were also killed. However, children of Vietnamese fathers were spared. As regards Anlung Trea, the Co-Investigating Judges cited several witnesses in support of this theory, including NEANG Nat, SAOM Ruos, VAN Mao LANG Hel and SAO Sak, the only one who

[1985] SAO Sak: T. 03.12.2015, **E1/362.1**, p. 89.
[1986] WRI of SAOM Ruos, 25.09.2008, **E3/5246**, ERN 00234112; WRI of LANG Hel, 14.10.2008, **E3/5251**, ERN 00235496.
[1987] Closing Order, para. 813.
[1988] Closing Order, endnote 3477. DC-Cam Interview of POV Hong, 23.03.2001, **E3/7165a**, ERN 00824532.

testified in court[1989]

1990. Paragraph 809 of the Closing Order states: "the children of Cambodian mothers and Vietnamese fathers were not always spared." Here again, the Co-Investigating Judges cite those same witnesses, except LANG Hel.

1991. As observed *supra*, not only are the constituent elements of the crimes alleged in the accounts of the aforementioned witnesses far from being established beyond reasonable doubt, but also a case-by-case examination of the alleged matrilineal theory shows that it was never actually applied.

1992. About five months after her mother's arrest, SAO Sak was also called by the village chief, Man, to attend a meeting in Anlung Trea pagoda along with a Cham woman and two men from the 17 April group.[1990] She and the two men were detained in Angkor Angk for ten days while the Cham woman was released. SAO Sak claims that while in detention, she was asked if her father was Khmer and also what his occupation was. After that, she was assigned to work for a few days in the kitchen at the temporary detention centre before being released.[1991] A reading of her account reveals that she was not asked about her Vietnamese mother.

1993. In his statement, EM Bunnim also reported that ethnic Vietnamese children were rounded up by the village chief and militiamen after the "Sao Phim event".[1992] However, he does not explain why they were rounded or how he obtained that information. EM Bunnim also stated that he was moved from his military position on the battlefield and assigned to a mobile unit. His grandmother claimed that this was because his mother was of ethnic Vietnamese, but she did not explain the basis of her claim.[1993]

1994. Those claims are surprising, especially given that EM Bunning's sister, NEANG Nat, never made reported any facts. On the contrary, NEANG Nat's written record shows that she was never ill-treated, that she "kept on studying" and that she transplanted rice in the fields from time to time; she stated that because of her father's Khmer origins she was safe from being killed.[1994] As a matter of fact, no evidence was produced on the alleged arrest and/or ill-treatment of Yeun's children.

[1989] Closing Order, endnote 3460.
[1990] T. 07.12.2015, **E1/363.1**, pp. 28-29. WRI, 14.10.2008, **E3/7780**, ERN 00235512.
[1991] T. 03.12.2015, **E1/362.1**, p. 88; T. 07.12.2015, **E1/363.1**, pp. 27-28.
[1992] WRI of EM Bunnim, 04.04.2009, **E3/7760**, ERN 00322931.
[1993] WRI, 04.04.2009, **E3/7760**, ERN 00322931. The Chamber cannot base its findings on NEANG Nat's account, because she said that her source was EM Bunnim himself: WRI of NEANG Nat, 14.10.2008, **E3/7779**, ERN 00235504.
[1994] WRI of NEANG Nat, 14.10.2008, **E3/7779**, ERN 00235503-04.

Indeed, the only round-ups that SAO Sak reports in her testimony are in relation to the return of ethnic Vietnamese to Vietnam.[1995]

1995. In the absence further details, it is plain that those accounts are not mutually corroborative and that, in any event, they cannot establish that children were treated differently on account of their mothers' Vietnamese origins.

1996. At paragraph 799 of the Closing Order, the Co-Investigating Judges cite another example of woman whose Vietnamese mother was arrested, and conclude that: "the only reason she survived is that the villagers told the CPK cadre that she had "Khmer blood". Here again, the Co-Investigating Judges rely on EM Bunnim written record of interview.[1996] However, not only does that record – based solely on hearsay – have very low probative value, but also, and more importantly, the quote in the Closing Order does not match EM's account. What he actually said is: "I had been saved by the villagers who explained that I had Khmer blood. My father is a pure Khmer."[1997] It therefore emerges that, like his sister,[1998] and despite the arrest of his mother whose Vietnamese origins were common knowledge among the villagers, he had no need to conceal his identity.

1997. That casts more doubt on SAOM Ruos' account. In his interview with the investigators, he claimed that when one of the parents was Vietnamese, the children were arrested as well. He gave the example of Yeun (mother of NEANG Nat and EM Bunnim), saying that his children were arrested but they managed to escape.[1999] In fact, as just mentioned, neither of the two children was arrested. Moreover, SAOM Ruos' inaccurate account is contradictory in that it runs counter to the matrilineal theory, because he gave the example of Thav, a father of Chinese-Vietnamese origin, claiming that nearly all of his children were arrested along with him.

1998. The same is true for VAN Mao family, where the father was ethnic Vietnamese. The claim that his children were arrested after him further undermines the matrilineal theory.

1999. Careful analysis of the evidence shows that the theory of matrilineal descent did not apply in

[1995] T. 07.12.2015, **E1/363.1**, p. 17 (she only heard the villagers, not the militiamen, saying that people had been sent to Vietnam, because they were not allowed to live in Cambodia; p. 30, "([we] thought that the Vietnamese were arrested and sent back to Vietnam." She cannot give the names of the Vietnamese because there are only rumours. It was between 1975 and 1978).
[1996] Closing Order, endnote 3406.
[1997] WRI, 04.04.2009, **E3/7760**, ERN 00322931 (*emphasis added*)
[1998] WRI of NEANG Nat, 14.10.2008, **E3/7779**, ERN 00235504.
[1999] WRI, 25.09.2008, **E3/5246**, ERN 00234112.

Anlung Trea Village, with the exception of LANG Hel's family, regarding which the facts are far from established, as discussed *supra*.

2000. If one is to follow the Co-Investigating Judges' logic, according to which the theory was part and parcel of CPK policy, then one would have take it to its logical end, i.e., any alleged arrests and killings that are not in line with the Co-Investigating Judges' logic cannot be imputed to the CPK leadership because that would be contrary to the alleged policy.

B. Prey Veng District of (Pou Chentam Village and Svay Antor Village)

2001. According to the demarcation of administrative boundaries, the two villages, Pou Chentam and Svay Antor, are located in Svay Antor Commune, Prey Veng District, Prey Veng Province, in Sector 20 of the East Zone.[2000]

2002. According to the evidence produced before the Trial Chamber, Khmer Rouge troops took control of Pou Chentam Village around 1972-1973; one characteristic of those troops is that the majority of them were Vietnamese (70% Vietnamese and 30% Khmer). Because of that, it was the Vietnamese who administered the area up until 1975.[2001] Moreover, other witnesses reported that Vietnamese troops and "Khmer Liberation troops" occupied the commune for about two years after the demise of the Sihanouk regime.[2002]

1. Alleged killings of ethnic Vietnamese

a. Pou Chentam

2003. There were only three ethnic Vietnamese families in Pou Chentam village after 1975, they were: the family of VAN Ngang (husband of LENG Samet alias Tech), the family of Chuy (husband of DOUNG Oeurn), and the family of San (wife of LACH Ny).[2003] DOUNG Oeurn testified that she only knew of those three families in that village. She did not know the situation other villages.[2004]

[2000] THANG Phal: T. 05.01.2016, **E1/370.1**, p 83; T. 06.01.2016, **E1/371.1**, p. 75, before 14.18.39; WRI of KOL Lim, 17.09.2008, **E3/5243**, ERN 00225491); WRI of IENG On, 16.09.2008, **E3/9352**, ERN 00231658; WRI of SIN Sun, 23.09.2008, **E3/9339**, ERN 00234114.
[2001] THANG Phal: T. 05.01.2016, **E1/370.1**, pp. 83-84; WRI of IENG On, 16.09.2008, **E3/9352**, ERN 00231661.
[2002] WRI of KOL Lim, 17.09.2008, **E3/5243**, ERN 00225490; DC-Cam Interview of CHHUON Ri, 10.03.2000, **E3/7559**, ERN 00890526 ("Vietnamese started coming to our country in 1970").
[2003] THANG Phal: T. 05.01.2016, **E1/370.1**, p. 89; DOUNG Oeurn: T. 25.01.2016, **E1/381.1**, pp. 39-40; LACH Kry: T. 20.01.2016, **E1/379.1**, pp. 99-100; p. 83; WRI of SIN Sun, 23.09.2008, **E3/9339** ERN 00234115.
[2004] DOUNG Oeurn: T. 25.01.2016, **E1/381.1**, pp. 40, 41.

i. Concerning Ngang (husband of LENG Samet *alias* Tech)

2004. Ngang was among the ethnic Vietnamese who settled in Pou Chentam village. He married LENG Samet before 1975. They had two children, Ngoy (son) and NGANG Tob (daughter).[2005]

2005. In his testimony, THANG Phal stated that in 1976-1977, his group – which included Ngang – was initially sent to cut rattan vine for one month but was recalled after six days by Seng, the deputy village chief. While on their way back to the village, Seng's bicycle chain broke and he asked Ngang to repair it. THANG Phal and the others continued on their way to the village. He testified further that he never saw Ngang again thereafter.[2006]

2006. THANG Phal reported that he was separated from Ngang at Chas pagoda in O Kandaol village, which was used as a security centre, but that he did not know if that is where they took him. He did not witness what happened to him.[2007] It was not until he arrived home that he heard villagers saying that ethnic Vietnamese in the village "had been transferred by a horse cart toward the east direction to be killed"; he thus became concerned about Ngang.[2008]

2007. In her DC-Cam interview, LENG Samet *alias* Tech, Ngang's wife, reported that THANG Phal told her that he was separated from her husband, whom she has not seen since then.[2009] This happened at the end of 1978, one month before she was deported to Pursat and Battambang.[2010] NGANG Tob, one of Ngang's two children, who stayed in the village after their father's departure, told DC-Cam that she too heard about her father's disappearance from her mother and rattan-cutters.[2011] Therefore, her statement, which was made outside a judicial framework, is simply based on what she was told by her mother.

2008. THANG Phal's account is short on details as to what happened to Ngang. All that he witnessed was the incident where Seng asked Ngang to repair his bicycle. The rest is speculation. The

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[2005] THANG Phal: T. 06.01.2016, **E1/371.1**, p. 47; DC-Cam Interview of NGANG Tob, 13.03.2000, **E3/7491**, ERN 00891899.
[2006] THANG Phal: T. 06.01.2016, **E1/371.1**, pp. 41-45, 88.
[2007] T. 06.01.2016, **E1/371.1**, pp. 41-44, 188.
[2008] T. 06.01.2016, **E1/371.1**, p. 44.
[2009] WRI of LENG Samet, 14.01.2009, **E3/7810,** ERN 00282332; DC-Cam Interview of LENG Samet, 24.02.2000, **E3/7594**, ERN 00324473. In her DC-Cam Interview, LENG Samet reported that this happened at end 1977: DC-Cam Interview, 24.02.2000, **E3/7594,** ERN 00324490.
[2010] WRI of LENG Samet, 14.01.2009, **E3/7810**, ERN 00282333.
[2011] DC-Cam Interview of NGANG Tob, 13.03.2000, **E3/7491**, ERN 00891901-02. Furthermore, LENG Samet confirmed that she spoke to the children about what happened to their father and that he had died: 24.02.2000, **E3/7594**, ERN 00324496.

proposition that Seng, who was a local official, would have needed an elaborate ploy in order to isolate Ngang and then kill him, sounds far-fetched, and is just one scenario. Based on this account, neither the elements of a crime nor the intent to commit murder can be established a beyond reasonable doubt.

2009. DOUNG Oeurn's testimony sheds no new light on the circumstances of Ngang's disappearance. Because she was the wife of Chuy, an ethnic Vietnamese, and lived in that village, she heard that Ngang was sent to cut rattan and never returned. She nonetheless did not explain to the Trial Chamber how she learned of Ngang's disappearance. She claimed that he was the first person in the village to be taken away, but did not say when this happened.[2012] It should be noted that DOUNG Oeurn's account is was unclear with regard to dates.[2013] Yet, in her narrative of the events she claimed: "Ngang was the first one to be taken away, and then LACH Ny. And my husband was the last one who was taken away".[2014]

2010. In his testimony, LACH Kry, LACH Ny's brother, confirmed that sequence of events, since, according to him, his brother's wife was "arrested in 1977", Ngang in "late 1975, perhaps in December or November in 1975" and Chuy "was arrested in 1976, almost one month after Ngan".[2015]

2011. Moreover, the accounts of these two Civil Parties contradict THANG Phal's testimony, and therefore undermine it. It is worth recalling that THANG Phal told the court that he was concerned about Ngang following the rumours about what had happened to Chuy.[2016] Not only is there no evidence to prove that Chuy was killed, but also THANG Phal's explanations are incoherent and specious if one is to believe Ngang was the first to disappear, as reported by Civil Parties DOUNG Oeurn and LACH Kry.[2017]

[2012] DOUNG Oeurn: T. 25.01.2016, **E1/381.1**, pp. 14-15, 31.
[2013] Regarding her husband, DOUNG Oeurn testified that he was taken away in 1977 during the harvest season, one month before the Khmer Rouge reached her village (T. 25.01.2016, **E1/381** pp. 12, 28, 29, 48, 49, 59-60). When she was questioned about this surprising claim, she twice maintained that1977 was the year in which the Khmer Rouge arrived in her village (T. 25.01.2016, **E1/381.1**, pp. 19-20). On this point, DOUNG Oeurn's account contradicts that of THANG Huy and LACH Kry who testified that Khmer Rouge arrived in 1970 or 1972 (THANG Huy: T. 05.01.2016, **E1/370.1**, p. 83, (1970), p. 84, (1972); LACH Kry: T. 20.01.2016, **E1/379.1**, pp. 8, 10. DOUNG Oeurn's testimony is in fact at odds with all of the entire body evidence, according to which the KR reached all parts of the country in 1975 at the latest. It is therefore safe to conclude that she cited the wrong date.
[2014] DOUNG Oeurn: T. 25.01.2016, **E1/381.1**, p. 16.
[2015] LACH Kry: T. 20.01.2016, **E1/379.1**, pp. 38, 44.
[2016] THANG Phal: T. 06.01.2016, **E1/371.1**, p. 44.
[2017] DOUNG Oeurn: T. 25.01.2016, **E1/381.1**, p. 37; LACH Kry: T. 20.01.2016, **E1/379.1**, p. 38.

2012. Another inhabitant of the village, IENG On, gave the investigators different account, namely that ethnic Vietnamese were killed in Pou Chentam Village in 1977-1978. Unlike DOUNG Oeurn and LACH Kry, he reported in his written record of interview that Chuy's family was the first to be "arrested and killed", after Ngang's family.[2018] The phrase "arrested and killed" is in inverted commas here to show that the investigators asked leading questions. They are the ones who used that phrase in their questions, whereas the witness had not used it previously in his answers.[2019]

2013. The Defence listened to the audio record of the interview. As it turns out, those controversial, but crucial segments are missing, and so is much of the relevant part of the interview.[2020] That means that there were procedural irregularities in IENG On's interview, which prevent the Defence from verifying its exact content. Given the investigators' impermissible leading questions, this account must be approached with caution, as its reliability is questionable. The Trial Chamber therefore cannot but afford it very low probative value.

2014. SIN Sun, another inhabitant of Pou Chentam Village, told the investigators that he heard villagers saying that "Ngak [Ngang]" and Chuy were taken away purportedly for "peeling rattan vine", but in fact they were quite simply taken O Kandaol pagoda to be killed. He reported that these facts occurred in late 1977 or early 1978.[2021] He gave no details about the timeline.

2015. He specified that he did not know why the Khmer Rouge killed them or whether the pagoda was used as a security centre under the Khmer Rouge. That shows that SIN Sun's account, which does not tally with the accounts of Civil Parties DOUNG Oeurn and LACH Ny, or even with THANG Phal's, quite simply derives from rumours that were circulating in the village and is therefore based on hearsay. The truth is that he did not witness any arrests or killings of ethnic Vietnamese. The exact source of his knowledge remains unclear, and his statement has quite low probative value.

ii. <u>Concerning Chuy (DOUNG Oeurn's husband)</u>

2016. Chuy, an ethnic Vietnamese, and DOUNG Oeurn, whose statement is discussed *supra*, were

[2018] WRI of IENG On, 16.09.2008, **E3/9352**, ERN 00231660.
[2019] WRI of IENG On, 16.09.2008, **E3/9352**, ERN 00231660 ("During what years were they arrested and killed ? Can you describe that? […]".
[2020] WRI of IENG On, 16.09.2008, **E3/9352**, ERN 00231660 (the last two questions and answers on this page, which are the most relevant, are inaudible on the recording). Audio recording of interview, 16.09.2008, **D166/6R** (23 minutes).
[2021] WRI of SIN Sun, 23.09.2008, **E3/9339**, ERN 00234117.

married during LON Nol regime and had one daughter, Kimva.[2022] In her testimony, Civil Party DOUNG Oeurn stated that she was not present on the day when her husband was taken away. According to her, her mother, who was present at the material time, told her that her husband had been taken away by a militiaman to an unknown location, alone and on foot, to cut rumpeak vines.[2023] DOUNG Oeurn testified further that she has not seen her husband since then. She said that he disappeared in 1997 during the harvest season.[2024]

2017. It is noteworthy, moreover, that DOUNG Oeurn testified that her ethnic Vietnamese husband suffered no ill-treatment or discrimination before he disappeared. She did not hear the Khmer Rouge in her village refer to ethnic Vietnamese as enemies owing to their race, and neither did she hear any insults or derogatory remarks about her husband.[2025]

2018. THANG Phal testified that when he returned to the village after cutting rattan with Ngang for a number of days, he learned that Chuy had been "transferred by a horse cart [...] to be killed."[2026] In actual fact, he knew very little about the circumstances of the arrest, because he in the end, he said "Concerning the arrest of Chuy, [...] I did not know of the details as to how and when he had been arrested. After I got back home, [...]. I heard that the Vietnamese including Chuy [...] had been taken away for a study session. This is all I know."[2027] (*emphasis added*) He was only able to testify that that rumour had it around the village that Chuy had been taken away, but otherwise he knew very little about the actual circumstances.

2019. LACH Kry, also a Civil Party and cousin of DOUNG Oeurn, testified that DOUNG told him about Chuy's disappearance, once again saying he had been sent to cut trees. As observed *supra*, according to him Chuy disappeared in 1976, one month after Ngang, whom he claims disappeared "maybe in November or December 1975". Later in his testimony, LACH Kry cited a different date, suggesting that Chuy's disappeared nearly one year after VANN Ngang's arrest, i.e., after cultivating rice for one season or one year.[2028] Here again, the account is based on double hearsay,

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[2022] DOUNG Oeurn: T. 25.01.2016, **E1/381.1**, pp. 5, 9; WRI of CHUY Kimva, 15.09.2008, **E3/7793**.
[2023] T. 25.01.2016, **E1/381.1**, pp. 12-13, 0, 34.
[2024] T. 25.01.2016, **E1/381.1**, pp. 12-13, 28-29, 47-48, 49, 59-60.
[2025] T. 25.01.2016, **E1/381.1**, pp. 36-37.
[2026] T. 06.01.2016, **E1/371.1**, p. 44 (the first name is incorrect in French. See KH transcription, p. 31).
[2027] T. 06.01.2016, **E1/371.1**, p. 62, after 13.40.46.
[2028] T. 20.01.2016, **E1/379.1**, p. 29, (DOUNG Oeurn is his cousin), pp. 17, 20-21, (Chuy was taken away one month after Ngang), p. 38, (in the Khmer transcript, p. 34, Chuy was taken away after Ngang, i.e. almost a year later, after farming the rice for one season or one year. He was told to go and cut trees at Preak Krabao about 30 or 40 kilometres from his home. The request for correction was submitted on 20.03.2017).

since the witness had no knowledge about the alleged killing.

2020. As also observed *supra*, THANG Phal incorrectly stated that Chuy was arrested in late 1976 or early 1977.[2029] However, DOUNG Oeurn said that her husband was taken to an unknown location in 1977. [2030]

2021. The case file contains two written records by people claiming to have witnessed Chuy's arrest. IENG On told the investigators that the arrest took place in 1977-1978. He claimed that he "personally" saw "Chuy who lived in a house nearby" being arrested one afternoon.[2031] "Chuy's family" was "the first family to be arrested and taken away" to an unknown location; "they were taken east", but IENG On did not personally witness the killing and neither did he explain the basis of his claim.[2032]

2022. Therefore this written record of interview has very low probative value. The same goes for the written record of interview of CHHUON Ri, cousin of DOUNG Oeurn, who told DC-Cam that, contrary to what DOUNG Oeurn's mother told her daughter about the arrest, Chuy did not leave alone with a militiaman, but rather with a group comprising only ethnic Vietnamese.[2033] CHHUON Ri's statement also contradicts IENG On's in regard to the timing of the arrest.[2034]

iii. Concerning San (LACH Ny's wife)

2023. San, who is of Chinese-Vietnamese origin and lived in Anlung Trea Village, moved to Pou Chentam with her husband LACH Ny and their three children in 1968.[2035]

2024. THANG Phal testified that although he was not present at the time of LACH Ny's wife's arrest, it took place while he was in the forest cutting rattan with Ngang. He testified further that when he returned to the village, he overheard people saying that she had been taken away for re-education, along with her children. That was the extent of his knowledge, given that the facts took place before he returned.[2036] He only heard that ethnic Vietnamese had been taken away for re-education and

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[2029] T. 06.01.2016, **E1/371.1**, p. 69; WRI,17.09.2008, **E3/5244**, ERN 00233300. See also above, §2011.
[2030] DOUNG Oeurn: T. 25.01.2016, **E1/381.1**, pp. 16, 21-22. See *supra*, para. 2009.
[2031] WRI of IENG On, 16.09.2008, **E3/9352**, EN ERN 00231660.
[2032] WRI of IENG On, 16.09.2008, **E3/9352**, ERN 00231660. See *supra*, para. 2013.
[2033] DC-Cam Interview of CHHUON Ri, 10.03.2000, **E3/7559**, ERN 00890534-36.
[2034] DC-Cam Interview of CHHUON Ri, 10.03.2000, **E3/7559**, ERN 00890535.
[2035] LACH Kry: T. 20.01.2016, **E1/379.1**, p. 6; T. 21.01.2016, **E1/380.1**, p. 22; DC-Cam Interview, 24.02.2000, **E3/9319**, ERN 00593621-22.
[2036] THANG Phal: T. 05.01.2016, **E1/370.1**, p. 94; T. 06.01.2016, **E1/371.1**, pp. 48, 79.

had disappeared, but he did not know the reason why.[2037]

2025. DOUNG Oeurn testified that she did not witness LACH Ny's wife departure and did not know when the latter and her children were taken away, because they lived in Pou Chentam, which was far from her home. It was simply that she lost sight of them. [2038]

2026. Civil Party LACH Kry testified that nothing bad happened to his sister-in-law before she was arrested with her children in November 1997.[2039] He never saw them thereafter.[2040] LACH Kry testified that that he witnessed the facts, saying that while cultivating rice with a group which included his brother LACH Ny, the latter fainted when he saw his family being arrested.[2041] This contradicts the DC-Cam interview of LACH Ny – who died before giving testimony – in which he stated that he was not present when his wife was arrested.[2042]

2027. As a matter of fact, in his DC-Cam interview, LACH Ny stated that his wife and children were taken away in July 1977.[2043] He himself was absent at the time of their arrest, and was told by his brothers and sisters that they were taken away in a horse cart.[2044] After five months, he concluded that his wife and children must have been taken away to be killed.[2045]

2028. According to LACH Kry, the cart driver named Tri told him that two security guards had picked up LACH Ny's wife and children in Trapeang Pring forest, but did not know where they went after that. Tri himself was allegedly killed one month thereafter.[2046]

2029. IENG On, who allegedly witnessed the incident, told the investigators that Tri came to fetch LACH Ny's family in a horse cart and took them towards the east. He reported that this happened around 1977-1978, but did not know whether/where those family members were killed.[2047]

2030. In any event, no one knows exactly what happened to this family after they left the village.

[2037] T. 06.01.2016, **E1/371.1**, pp. 49-50, 52, 56.
[2038] T. 25.01.2016, **E1/381.1**, pp. 13, 38, 39.
[2039] T. 20.01.2016, **E1/379.**1, pp. 10-11.
[2040] T. 20.01.2016, **E1/379.**1, pp. 13, 16.
[2041] T. 20.01.2016, **E1/379.1**, pp. 12, 13.
[2042] DC-Cam Interview of LACH Ny, 24.02.2000, **E3/9319**, ERN 00593623 , ERN 00593629.
[2043] LACH Kry: T. 20.01.2016, **E1/379.1,** p. 4, (LACH Ny passed away); DC-Cam Interview of LACH Ny, 24.02.2000, **E3/9319**, ERN 00593623.
[2044] DC-Cam Interview of LACH Ny, 24.02.2000, **E3/9319**, ERN 00593624 and 00593630.
[2045] T. 20.01.2016, **E1/379.1**, pp. 17-18.
[2046] T. 20.01.2016, **E1/379.1**, p. 16. THANG Phal stated that the man called Tri was quite old and had died. He was not killed, but died of old age: T. 20.01.2016, **E1/379.1**, p. 40.
[2047] WRI of IENG On, 16.09.2008, **E3/9352**, ERN 00231660. See also above, para. 2013 (audio problem).

b. Svay Antor (concerning SENG Huor and her family)

2031. KHUN Mon's wife, SENG Huor, from Anlung Trea Village, is SENG Vann's sister. After she got married, she and her family, i.e. her mother Hai, her brother Tieng and her sister Rok, moved to Pou Chentam village with her husband.[2048]

2032. In her testimony, Only SAO Sak mentioned this family, saying that she did not know what became of them after they left Anlung Trea. In fact, when questioned by the Prosecution about what happened to the wife, children and in-laws, SAO Sak answered: "I do not know about that since we were separated at that time. Some people went to live in Chrey Krohuem, others in Svay Antor […] and we parted each other".[2049] She never saw them again thereafter, and at insistence of the International Co-Prosecutor, she explained that Anlung Trea was quite far from Svay Antor and Krahoem and that it was not possible to travel from one village to another in those days.[2050] It is therefore not surprising that she did not know what became of them.

2033. Under the Khmer Rouge, YIM Muoy, SENG Huor's sister, lived with her husband in Chrey Krahoem Village, Pear Reang District, Prey Veng province. She told the investigators that her sister and mother lived in Svay Antor Village, Svay Antor Commune, Prey Veng District, Prey Veng province.[2051] Around 1977, one An, who lived in Po Reang village, allegedly told her husband that her brother Tieng and sister Ke had been taken away and killed, and that her mother Hai, sister Huor and children were killed a few days thereafter.[2052] No details are provided as to where and how An obtained the information contained in her statement. When SAO Sak was questioned about the statement in court, she simply replied that she had no comment, because she lived far away from where YIM Muoy lived.[2053]

2034. Civil Party KHUN Mon was called as a witness, but died before giving testimony.[2054] In his DC-Cam interview, he explained that he was not present when his family was taken away. His father

[2048] T. 03.02.2015, **E1/362.1**, p. 107; WRI of YIM Muoy, 07.11.2008, **E3/7783,** ERN 00242215; DC-Cam Interview of KHUN Mon, 08.03.2000, **E3/7597**, ERN 00231739-40.
[2049] T. 03.02.2015, **E1/362.1**, p. 107; T. 07.12.2015, **E1/363.1**, p. 4.
[2050] T. 07.12.2015, **E1/363.1**, p. 7.
[2051] WRI of YIM Muoy, 07.11.2008, **E3/7783**, ERN 00242215.
[2052] WRI, 07.11.2008, **E3/7783**, ERN 00242216.
[2053] T. 07.12.2015, **E1/363.1**, p. 7.
[2054] Email from the Senior Legal Office, Trial Chamber entitled "List of Witnesses/Civil Parties for Treatment of the Vietnamese", 18.09.2015 at 10.39 (Summons); email by Senior Legal Officer: entitled "Scheduling and pseudonyms", 02.10.2015 at 15.08 (Notification of death);

told him that his wife was taken away for re-education in October 1977 by three or four district guards, but he did not know their names.[2055] As happens all too often with DC-Cam interviews, two other people besides KHUN Mon, including his sister Samit, joined in on the interview.[2056] Be that as it may, since the statement was made in a non-judicial framework, its reliability is questionable, and the evidence is contains is unsafe especially because it is tainted by the intervention of outside parties.[2057]

2035. Also in that statement, KHUN Mon recounts his meeting with the group of village chiefs, i.e. grandpa Lim and grandpa Chheun. He claims that they told him that his wife was taken away for re-education.[2058]

2036. Therefore no reliable information about who arrested KHUN Mon's wife and in-laws. According to KHUN Mon himself, or rather according to his sister Samit who was with him during the DC-Cam interview, it was Lim who the arrested his wife and children and took them away to be killed on orders from the district and commune committee. KHUN Mon reported that he did not speak to Lim about the arrest of family members, so it is unclear why he claims that the order came from the district committee.[2059]

2037. It is therefore worth taking closer look at the statements by Lim – whose full name is KOL Lim – who was then a unit chief, according to KHUN Mon and his sister. KOL Lim told the investigators that KHUN Mon's wife left with the children and in-laws in late 1976 or early 1977. He reported further that he personally saw Mon's children being taken away in a horse cart "to be killed", but said nothing about the wife and in-laws.[2060] He gathered from the cart driver that the children from KHUN Mon's family were taken away to be killed at Veal Tauch or Prey Ta Poeu, to the south of the O Kandaol pagoda, in Angkor Tret Commune, Prey Veng District. He said that it was commune militiamen, under Ngoy, who arrested them on orders from the upper echelon.[2061]

2038. Not being able to question witnesses on such crucial matters is problematic, especially in regard to

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[2055] DC-Cam Interview, 08.03.2000, **E3/7597**, ERN 00231755.
[2056] DC-Cam Interview, 08.03.2000, **E3/7597,** ERN 00231755-56 (these people are identified as Samit, her sister, and a neighbour. Samit was the one who said that it was Lim who came to fetch KHUN Mon's wife).
[2057] Trial Judgement 002/01, para. 965.
[2058] DC-Cam Interview, 08.03.2000, **E3/7597**, ERN 00231761.
[2059] DC-Cam Interview, 08.03.2000, **E3/7597**, ERN 00231764 (Lim is still alive and currently lives to the north of his village, Svay Antor).
[2060] WRI, 17.09.2008, **E3/5243**, ERN 00225491.
[2061] WRI, 17.09.2008, **E3/5243**, ERN 00225491.

such claims as "being "told" by a lowly horse cart driver in that an order came from the upper echelon. It is, nonetheless, noteworthy that KOL Lim claims that this conversation happened before the alleged killings, which he did not witness first hand, and that he provides no details about what happened after the cart drove off.

2039. Since the Defence did not get an opportunity to question the witness regarding that claim, it cannot but observe that as the person who allegedly carried out the arrest (according to KHUN Mon's sister), he was bound to be untruthful so as to mitigate his responsibility. For that reason, his written record should be approached with utmost caution.

2. Orders to arrest and kill ethnic Vietnamese and procedures relating thereto

2040. With regard to the pre-compiled lists of ethnic Vietnamese, which according to paragraph 798 of the Closing Order, were used for carrying out arrests, the Co-Investigating Judges cited DOUNG Oeurn's DC-Cam interview. Yet, when DOUNG Oeurn was questioned about that interview by the Prosecution, she answered: "I was not aware of that issue. I don't understand [...] I can – I have forgotten since that time until now."[2062] She was thus unable to confirm the statement, and also stated that no instructions were given to identify ethnic Vietnamese. In other words, where she lived, nobody came asking the villagers to identify the ethnic Vietnamese in their midst.[2063]

2041. At paragraph 800 of the Closing Order, the Co-Investigating Judges assert that the arrests were carried out on orders from the Sector 20 Committee or the upper echelon.[2064] The Defence will discuss the available evidence, *infra*, but only in regard to testimonies relating to Svay Antor Commune.

2042. IENG On told the investigators that arrests were carried out on orders from the Sector 20 Committee.[2065] The Trial Chamber should find his statement unreliable both because the circumstances surrounding it are dubious, and also because he himself acknowledged that "the Prey Veng District Committee and the Sector 20 Committee [were people] whom I did not know", given that he had no duties that would have made him privy to what went on at the upper echelon. Moreover, it clearly emerges from his statement that he simply assumed that "there were orders

[2062] T. 25.01.2016, **E1/381.1**, pp. 25-26.
[2063] T. 25.01.2016, **E1/381.1**, p. 25.
[2064] Closing Order, endnotes 3412-3413.
[2065] WRI, 16.09.2008, **E3/9352**, ERN 00231660.

from the top downward" because he noticed that "there were meetings in the morning and in the afternoons the arrests occurred", and "all the people in the village knew the same thing". Moreover, no other witness testified to the same effect.

2043. So while though THANG Phal told the Co-Investigating Judges that all the villagers knew that the orders [to kill] came from the upper echelon, he acknowledged that no meetings were held to discuss a plan to put the orders into effect.[2066] Moreover, neither his statement nor IENG On's was corroborated by testimony from Civil Parties; they mentioned no such meeting or plan.

2044. As an alleged perpetrator, KOL Lim had nothing to gain in being untruthful, claiming that ethnic Vietnamese were arrested on orders from the upper echelon; moreover, the source his knowledge is uncertain.[2067]

2045. CHHUON Ri's claim that higher authorities who spoke "with a patois" settled in the village and gleaned information from the village chief in order to track down ethnic Vietnamese and send them to their deaths is not from any known or identifiable source.[2068] Her written record of interview is all the more unreliable given that she claimed that she did not know whether the district, regional or central authorities were aware of the killings. IENG On also stated that no meeting were held before ethnic Vietnamese were arrested, thereby contradicting IENG On's account.[2069]

2046. Given their low evidentiary value and the inconsistencies they contain, the Trial Chamber cannot rely on those accounts to conclude that arrests and killings were carried out on orders from the upper echelon or the Sector 20 Committee.

3. Meetings about ethnic Vietnamese and reasons for arrests

2047. On the witness stand, THANG Phal was specifically asked about a meeting that took place before LACH Ny's wife was taken away. He answered that he was unaware of any such meeting, because he had gone to the forest.[2070] He also said that as an ordinary villager, he was not allowed to attend such meetings, and that in any case, he never attended any meetings following the arrest of

[2066] WRI, 17.09.2008, **E3/5244**, ERN 00233301.
[2067] WRI, 17.09.2008, **E3/5243,** ERN 00225491. On KOL Lim's interest in being untruthful, see *supra*, paras. 2037-2039.
[2068] WRI, 03.12.2009, **E3/7891**, ERN 00422335.
[2069] WRI, 03.12.2009, **E3/7891**, ERN 00422334.
[2070] T. 06.01.2016, **E1/371.1**, p. 56.

Vietnamese.[2071]

2048. DOUNG Oeurn testified that she never heard Khmer Rouge cadres discussing ethnic Vietnamese at meetings about rice production.[2072] Several other witnesses also testified no meetings were held to discuss ethnic Vietnamese in that locality.[2073]

2049. LACH Kry also testified that no announcements at any meetings were made about arresting ethnic Vietnamese.[2074] To a question by the Defence, he clearly answered that no meeting was held before LACH Ny's wife and children were taken away, contrary what is stated in the supplementary statement that was prepared by the Civil Parties.[2075] The meeting, which was held later, was about rice production. Further, LACH Kry disowned the segment of his DC-interview Cam where he reports that his family was called up by Angkar after his sister-in-law had left. He emphatically stated this: "I was not aware of such a meeting. I did not attend such a meeting".[2076] He also testified that he was unaware of a plan to arrest ethnic Vietnamese and the reasons for such a plan.[2077]

2050. So it was only IENG ON who claimed that meetings were held to discuss ethnic Vietnamese.[2078] In addition to other the issues which have been highlighted, it is also to be noted that, according to many witnesses, no such meetings took place; IENG ON's account is therefore unreliable.

4. Killings in Veal Tauch

2051. According to paragraph 799 of the Closing Order, the Co-Investigating Judges found that killings occurred in Veal Tauch, Chamkar Kuoy Village, Prey Veng District. They cite the testimony of three witnesses: KOL Lim, KHUN Mon and CHHUON Ri.[2079]

2052. THANG Phal testified that Veal Tauch is one kilometre away from Wat Chas, in O Kandaol. Rumour had it that people were taken to Veal Tauch "for a study session", but THANG Phal did

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2071 T. 06.01.2016, **E1/371.1**, p. 64; WRI,17.09.2008, **E3/5244**, ERN 00233301.
2072 T. 25.01.2016, **E1/381.1**, pp. 41, p. 49.
2073 WRI of LENG Samet, 14.01.2009, **E3/7810**; DC-Cam Interview of EK Ban, 14.03.2000, **E3/7959.** ERN 00725138 (FR); DC-Cam Interview of CHHUON Ri, 10.03.2000, **E3/7559**, ERN 00890520-51.
2074 T. 20.01.2016, **E1/379.1**, pp. 13, 14, 48.
2075 Supplementary Statement of Lyma NGUYEN and BUT Mao, 21.12.2010, **E3/5630**, ERN 00678289 (a village meeting where Chhem ordered Ngoy to take LACH Ny's wife and children for re-education); T. 20.01.2016, **E1/379.1**, p. 46.
2076 DC-Cam Interview, 11.06.2000, **E3/5640**, ERN 00645404; T. 20.01.2016, **E1/379.1**, p. 48.
2077 T. 06.01.2016, **E1/371.1**, pp. 52-53.
2078 WRI of IENG On, 16.09.2008, **E3/9352**, ERN 00231660.
2079 Closing Order, endnote 3408.

not know "where [ethnic Vietnamese] had been taken exactly".[2080]

2053. DOUNG Oeurn did not mention Veal Tauch in her testimony, but she knew the name Wat O Kandaol pagoda although she did not know what it was used for during the Democratic Kampuchea period, because she was living far away from there.[2081] In fact, the O Kandaol site is not mentioned the Closing Order.

2054. In his written record of interview, KHUN Mon's reports that he assumed that his wife was killed in Veal Tauch because he was told by "other people like [him]" after 1979 that it [Veal Tauch] was a district site for killing those who were accused of being traitors or Vietnamese.[2082] His statement clearly reveals that not only did he not witness any killing but also, he in fact did not even know that during the Democratic Kampuchea period. His account is therefore based on mere speculation.

2055. KOL Lim, a witness and also the person who allegedly arrested KHUN Mon's family members, reported being told by the cart driver that they were to be killed in Veal Tauch or Prey Ta Poeu, to the south of O Kandaol pagoda, Angkor Tret Commune, Prey Veng District.[2083] As stated *supra*, not only is his a second-hand account, but also it contains no allegations about any killings of ethnic Vietnamese at that location.

2056. CHHUON Ri told the investigators that 17 April people she worked with told her that killings of ethnic Vietnamese took place in Veal Tauch. The unidentified people who allegedly told him so claimed that they personally witnessed those killings. According to CHHUON Ri, after 1979, everyone in Veal Tauch village would have known of killings of ethnic Vietnamese.[2084]

2057. Her other source was the man called Tri, the cart driver. She claimed that he told her that he took ethnic Vietnamese to the Veal Tauch site, but did not actually witness any killings.[2085] In 2000, she told DC-Cam a different story, saying that "people whispered [to her]" that this was where ethnic Vietnamese were killed.[2086]

[2080] THANG Pal: T. 06.01.2016, **E1/371.1**, pp. 65-66.
[2081] T. 25.01.2016, **E1/381.1**, p. 42.
[2082] WRI, 16.09.2008, **E3/7806**, ERN 00225487.
[2083] WRI, 17.09.2008, **E3/5243**, ERN 00225491.
[2084] WRI of CHHUON Ri, 03.12.2009, **E3/7891**, ERN 00422334.
[2085] WRI of CHHUON Ri, 03.12.2009, **E3/7891**, ERN 00422334.
[2086] DC-Cam Interview, 10.03.2000, **E3/7559,** ERN 00890529.

2058. Moreover, it is noteworthy that it wasn't until 2009, nine years on, that she suddenly remembered having seen ethnic Vietnamese being brought to that location.[2087] The timing of her claim notwithstanding, it is still uncertain how she was able to tell from a distance that individuals she did not know from before were ethnic Vietnamese. Here again, doubt still persists, since there was no opportunity to question her in court.

2059. The accused ought to be given the benefit of the doubt given the large number of written records of interview from unknown sources which contain unverifiable information and which, moreover, are not corroborated by in-court testimony. The Trial Chamber must not assume that the ethnic Vietnamese referred to in this instance were killed at that site, given that the evidence before it does not link to them to that location.

5. Treatment of Cambodian people with Vietnamese spouses and children with one Vietnamese parent

a. Treatment of Cambodian people with Vietnamese spouses

2060. According to paragraph 809 of the Closing Order, "[o]n some occasions [...] the Cambodian spouse of a Vietnamese woman was also arrested or killed". The Co-Investigating Judges based this finding solely on DC-Cam interviews, including that of KHUN Mon, and in particular, his alleged arrest.[2088]

2061. KHUN Mon reported that a few days after his family disappeared, he was called to meet an individual by the name of Tho, who was the district security chief, and that he was held by that individual until 1979.[2089]

2062. KHUN Mon's statement totally contradicts the DC-Cam interviews of his two sisters. His sisters did not report any such detention; moreover, they reported that KHUN got married again a year later during the Democratic Kampuchea period.[2090] Such contradictions are further proof that those statements have low probative value, hence why the Trial Chamber must not rely on them for its

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[2087] WRI, 03.12.2009, **E3/7891**, ERN 00422335 (while also claiming: "I do not know from which villages, communes they were transported").
[2088] DC-Cam Interview, 08.03.2000, **E3/7597,** ERN 00231755-56.
[2089] DC-Cam Interview, 08.03.2000, **E3/7597**, ERN 00231555-56 (FR).
[2090] DC-Cam interview of KHUN Mut, 09.03.2000, **E3/7585**, ERN 00321985-86; DC-Cam Interview of KHUN Samit, 09.03.2000, **E3/7586**, ERN 00324465.

decision.

2063. In his testimony, LACH Kry explained how, as happened with KHUN Mon, a new marriage partner was found for his brother LACH Ny after the arrest of his wife. He explained the marriage by saying: "[t]he commune chief felt pity on him."[2091]

2064. The Co-Investigating Judges relied, *inter alia*, on a statement by LENG Samet, an inhabitant of Svay Antor, according to which that the treatment of the spouses of ethnic Vietnamese and their children was based on a decision of the upper echelon.[2092] According to the Co-Investigating Judges, LENG Samet was informed of this whilst attending "a self-criticism meeting".[2093] The meeting was led by a person named Seng, who was the chief of Pursat Village, but aside from asserting that he was under the responsibility of the sub-district, LENG Samet provided no details about what the district chief actually said.[2094]

2065. It is also noteworthy that an unidentified individual joined in on the interview and that it was that individual who stated that the order came from the district chief, without giving the actual source of that claim.[2095] The Trial Chamber cannot base its decision on a statement that was recorded in such dubious circumstances.

2066. In conclusion, in light of the evidence on record, killings and arrests of Cambodians with Vietnamese spouses Svay Antor Commune cannot be established beyond a reasonable doubt.

b. <u>Theory of matrilineal descent</u>

2067. According to paragraph 807 of the Closing Order, "if a Vietnamese man was married to a Cambodian woman, only the man would be killed, and the woman and any children would be spared". This is was the case for Ngang (husband of LENG Samet) and Chuy (husband of DOUNG Oeurn). It was not the case if the mother was ethnic Vietnamese.

2068. The Defence does not dispute the fact that, based on the evidence relating to Svay Antor Commune, children were taken away as along with their Vietnamese mothers, as was the case for San (wife of LACH Ny), SENG Huor (wife of KHUN Mon) and IER Pov's wife. The issue here is the evidence

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[2091] T. 21.01.2016, **E1/380.1**, after 15.28.30.
[2092] Closing Order, para. 813.
[2093] Closing Order, endnote 3478.
[2094] DC-Cam Interview, 24.02.2000, **E3/7594**, ERN 00324485.
[2095] DC-Cam Interview, 24.02.2000, **E3/7594**, where answers of a "another person" are recorded.

required to establish the crime of murder.

2069. It will, however, be noted that the evidence relating to Anlung Trea village fails to establish the existence of a theory that was allegedly an integral part of CPK policy. As a matter of fact, as stated *supra* in relation to SAO Sak and NEANG Nat, children with Vietnamese fathers were taken away whereas those with Vietnamese mothers were not.

2070. It is also noteworthy that the evidence on record is too diverse and divergent to establish the existence of an alleged theory which was part of CPK policy, as described by the Co-Investigating Judges at paragraph 808 of the Closing Order, and less still, its widespread implementation.

2071. In his testimony THANG Phal asserted that he did not know much about the policy regarding children with one Vietnamese parent, and also that his understanding was that if the mother was Vietnamese, the children were as well.[2096]

2072. DOUNG Oeurn testified that children with Khmer mothers were also Khmers while explaining why LACH Ny's children, whose mother was ethnic Vietnamese, were taken away along with her,[2097] but he did say where this rule originated.[2098]

2073. DOUNG Oeurn testified further that she feared for her own daughter and that she even changed her name for that reason, even though it was the father who was ethnic Vietnamese.[2099] In a small village where everybody knew her husband, is not immediately clear why she felt the need to change her name, but that aside, DOUNG Oeurn concluded by saying that her daughter was not taken away, mistreated or discriminated against by the Khmer Rouge and that she did not face the danger of being killed.[2100]

2074. LACH Kry testified that nothing unusual happened before his sister-in-law disappeared, even though he claimed that he knew that children with Vietnamese mothers were taken away along with their mothers, but he also indicated that he did not hear this from Khmer Rouge cadres.[2101] It is noteworthy moreover that he testified that he never heard the village authorities discussing ethnic

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[2096] T. 06.01.2016, **E1/371.1**, p. 56.
[2097] T. 25.01.2016, **E1/381.1**, p. 39.
[2098] T. 25.01.2016, **E1/381.1**, pp. 32, 63.
[2099] T. 25.01.2016, **E1/381.1**, pp. 10, 31.
[2100] T. 25.01.2016, **E1/381.1**, p. 31; WRI, 15.09.2008, **E3/7793**, ERN 00231649-52.
[2101] T. 20.01.2016, **E1/379.1**, p. 21.

Vietnamese,[2102] thereby discounting the claim about a widespread theory.

2075. The Co-Investigating Judges also relied on the DC-Cam interviews of LACH Ny, CHHUON Ri and CHEN Phê in regard to the alleged rationale behind the "policy" whereby children with Vietnamese mothers were killed, because "the umbilical or the blood comes from the mother and not from the father".[2103]

2076. According to LACH Ny's DC-Cam interview, it was Chhem, the commune chief, who uttered those words, but he did not say whether they echoed instructions from a higher echelon.[2104] CHHUON Ri, LACH Ny's cousin, reported that she had come to the conclusion that children with Vietnamese mothers would be killed with their mother, but that only fathers were killed if they were ethnic Vietnamese, as was the case for LACH Ny.[2105] CHEN Phe, IER Pov's second wife, said that she assumed that the Khmer Rouge thought that the mother's blood was stronger than that of the father. This was a personal opinion and not something she had heard from official quarters.[2106] In any event, all of these statements cannot be ascertained, and they generally reflect personal opinions which do not qualify as evidence.

2077. The other statements in the Closing Order about the policy advocating "killing the Vietnamese genes or the Vietnamese blood line", and "the Vietnamese race should neither exist anymore, nor should it be allowed to reproduce", derive from the DC-Cam interviews of KHUN Samit, KHUN Mut, SIN Chhorn and HORN Han, which are equally unreliable.[2107]

2078. On the basis of those written records, which are unsourced, and/or cite one another, unverifiable and were recorded in non-judicial framework, it cannot be concluded in concerning Prey Veng Province_that a CPK theory of matrilineal descent or that such a theory was implemented uniformly countrywide.

C. Pea Reang District

2079. On the current map of Cambodia, the Pea Reang District borders with Prey Veng District (home to

[2102] T. 20.01.2016, **E1/379.1**, p. 34.
[2103] Closing Order, para. 808.
[2104] DC-Cam Interview, 24.02.2000, **E3/9312**, ERN 00657212 (FR). *Translator's note: E3/9312 appears to be a 1976 magazine*
[2105] WRI, 03.12.2009, **E3/7891**, ERN 00422334; DC-Cam Interview, 10.03.2000, **E3/7559**, ERN 00890528 (a Khmer mother would raise Khmer children; and a Vietnamese mother would raise Vietnamese children).
[2106] DC-Cam Interview, 10.03.2000, **E3/7544**, ERN 000321971.
[2107] Closing Order, endnotes 3463-3464.

Svay Antor Commune) and Kampong Leav District (home to Preaek Chrey Commune (Anlung Trea Village) and Preaek Anteah Commune).

2080. YIM Muoy is KHUN Mon's wife's sister and is ethnic Vietnamese like her; she was born in Anlung Trea. After her marriage, she and her husband moved to Chrey Krahoem Village, Pea Reang District, also located in the same province, Prey Veng. According to her statement, "there were no Vietnamese families"[2108] in Pea Reang District.

2081. IER Pov recounted what happened to his in-laws, who lived in Kampong Russei Village Kampong Russei Commune, Pea Reang District, not far from his commune, Preaek Anteah. They did not encounter any problems under the Khmer Rouge. They are all still alive.[2109]

2082. In light of these two statements concerning Peam Ro District, the Trial Chamber cannot but find that ethnic Vietnamese were not subjected to any specific treatment across the entire province of Prey Veng.

2083. As for evidence underpinning facts relating to Pou Chentam and Svay Antor, these two witnesses offer only hearsay accounts, since they were not present in either location. The Trial Chamber therefore cannot rely on their accounts for its findings, but only for purposes of eventual corroboration.

II. Treatment of ethnic Vietnamese in Svay Rieng

2084. With respect to Svay Rieng Province, the Co-Investigating Judges set out facts relating to alleged "killings" of ethnic Vietnamese civilians between 1977 and 1979 (A). They also laid out evidence on what they call the "theory of matrilineal descent" (B).

A. Alleged mass killings of Vietnamese in Svay Rieng Province

2085. According to the Closing Order, "waves of killings of Vietnamese civilians occurred [...] in Svay Rieng Province in 1977, 1978 and 1979".[2110] That assertion is based on five written records of witness interview and three DC-Cam interviews obtained from seven different individuals.[2111] The

[2108] WRI, 07.11.2008, **E3/7783**, ERN 00242216.
[2109] DC-Cam Interview, 07.03.2000, **E3/7954**, ERN 00834624-25.
[2110] Closing Order, paras. 797, 801.
[2111] Closing Order, paras. 797, 801; endnotes 3397 and 3416, referring to the WRIs of KHOEM Samon, SIN Chhem, UNG Ien, PRUM Yan, CHAN Roeun, and to the DC-Cam Interviews of BOU Van, CHAN Kea and SIN Chhem.

Trial Chamber heard four of them: UNG Sam Ean, SIN Chhem, IN Yoeung and SIENG Chanthy. It will be noted that IN Yoeung did not record a statement earlier, but did participate in one DC-Cam interview with CHAN Kea as a "neighbour".[2112]

2086. Under the Khmer Rouge regime, these three individuals were living in different villages and communes. Their accounts should therefore be examined separately. (1) UNG Sam Ean reported facts that allegedly took place in Krahâm Kâ Village, Chantrei Commune, Romeas Hêk District (2) SIN Chhem reported facts that allegedly took place in Svay Yea Village, Svay Yea Commune, Svay Chrum District. (3) IN Yoeung was living in Romeas Hek District, like UNG Sam Ean, but in Kampong Trach Commune(4) SIENG Chanthy reported facts that allegedly took place near Russei Prey Village, Kampong Chamlang Commune, Svay Chrum District. (5) Lastly, it is worth examining a number of written records which are unrelated to the accounts of witnesses who appeared in court (5).

1. UNG Sam Ean's account

a. Presence of mixed Khmer-Vietnamese families

2087. According to UNG Sam Ean's testimony, there were mixed Khmer-Vietnamese families living in another village, about one kilometre away from hers.[2113] She testified that she knew that they were Vietnamese, because they used to come and sell items in her village, but that she did not know them well enough to identify them.[2114]

2088. UNG Sam Ean's testimony suggests that there were about three mixed-race families.[2115] She explained that the three original couples had offspring, and then other marriages ensued thereby resulting in more families.[2116] However, in the absence of details about the alleged added, it is uncertain how many mixed-race families there were, aside from the three couples and their offspring.

2089. When the Prosecution asked for details about the physical and cultural differences between those

[2112] DC-Cam Interview, 30.08.2005, **E3/7525**, ERN 00885016.
[2113] T. 11.12.2015, **E1/366.1**, p. 38.
[2114] T. 11.12.2015, **E1/366.1**, pp. 37-40, 52.
[2115] T. 11.12.2015, **E1/366.1**, pp. 38, 45, 47-48, 51-52.
[2116] T. 11.12.2015, **E1/366.1**, pp. 52-53.

families and Khmers, UNG Sam Ean answered that there were none.[2117] As a matter of fact, according to her, Khmers and Vietnamese are of the same skin colour. Moreover, again according to him, those families spoke fluent Khmer, with no accent.

b. Arrest of some members of the aforementioned families

2090. UNG Sam Ean's testimony was short on details about the treatment of those mixed-race families during the period under review. First, she said that the family members went missing and that they were sent back to their country.[2118] Then, when the Prosecution confronted her with her earlier statement, she remembered [that]:"they were arrested and taken away".[2119].

2091. UNG Sam Ean testified further that she witnessed the "arrest", saying that it took place in the afternoon and was carried out by two unarmed individuals who were wearing black outfits, like the other villagers.[2120] The two individuals told the children of the families that they were going to join mobile units. According UNG Sam Ean , those children were aged between ten and fifteen years, which means that they were old enough to join mobile units.[2121]

2092. UNG Sam Ean then went on to stay that:"they went to mobile units to build embankments, dig ponds and work in the rice field. All of them had to work in the field during the rainy season."[2122] However, she did not make it clear whether by "they" she meant the children or their entire families.

2093. As for the parents, in the beginning UNG Sam Ean said that nothing happened to them, "because every ethnicity were instructed to join the mobile units [...]. I refer to all the Khmer, the Chinese, and the Vietnamese."[2123] They were able to continue living in their house. Thereafter, she said that in fact did not know what happened to them[2124] and explained later that the reason was because she had been sent to dig a canal somewhere far away from the village.[2125] As for the children and their

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2117 T. 11.12.2015, **E1/366.1**, p. 49.
2118 T. 11.12.2015, **E1/366.1**, p. 39.
2119 T. 11.12.2015, **E1/366.1**, p. 40, WRI, 11.12.2008, **E3/7796**, ERN 00268645. It will be noted regarding the witness' testimony that there is a noticeable discrepancy the French and English versions of her earlier statement. In the French version states: "*quatre ou cinq métisses vietnamiens [...] ont été arrêtés et emmenés pour de bon*" (ERN FR 00282908) while the English states: "*four to five mixed-race Vietnamese [...] were arrested and taken away.*" and (ERN EN 00268645. This shows that the witness' testimony matches to the English version, not the French.
2120 UNG Sam Ean: T. 11.12.2015, **E1/366.1**, pp. 40-41.
2121 T. 11.12.2015, **E1/366.1**, p. 53.
2122 T. 11.12.2015, **E1/366.1**, p. 53.
2123 T. 11.12.2015, **E1/366.1**, p. 42.
2124 T. 11.12.2015, **E1/366.1**, pp. 43, 56.
2125 T. 11.12.2015, **E1/366.1**, p. 43.

parents, she asserted that she never saw them again thereafter.[2126]

2094. Not only did UNG SAM Ean give inaccurate and sketchy testimony regarding what actually happened to the mixed-race families, but she was also unable to cite any dates. In her earlier statement she claimed that the "arrests" took place in 1977,[2127] but in her live testimony she said that she could not remember the date.[2128]

2095. Finally, she testified that no meeting took place in her village with district or commune cadres.[2129]

2. SIN Chhem's testimony

a. Presence of mixed Khmer-Vietnamese families

2096. SIN Chhem testified that in her village, Svay Yea, located in Svay Yea Commune, Svay Chrum District, there were about 100 families, including three or four of mixed Khmer-Vietnamese origin.[2130] However, she was actually referring to the number of Vietnamese families in Svay Yea Commune at that time. Indeed, in her earlier statement, she mentioned these families in relation to three different villages, Toul Vihear, Sy Ka and Kean Ta Seav, which are all located in Svay Yea Commune.[2131] This was confirmed in her live testimony.[2132]

2097. She testified further that Toul Vihear Village was close to hers, on the other side of the stream, and that it took about one and a half hours to get there. The villages of Sy Ka and Kean Ta Seav were about one kilometre away from hers.[2133] She explained that she often travelled to those villages to barter rice for other foodstuffs.[2134]

2098. She testified that she did not know how the Khmer Rouge were able to tell Khmers and Vietnamese apart.[2135] Also, she did know the names of the mixed Khmer-Vietnamese families living in her commune,[2136] but only knew the of two Khmer men who were married to Vietnamese women.

[2126] T. 11.12.2015, **E1/366.1**, pp. 56-57.
[2127] WRI, 11.12.2008, **E3/7796**, ERN 00268645.
[2128] SIN Chhem: T. 11.12.2015, **E1/366.1**, p. 39.
[2129] T. 11.12.2015, **E1/366.1**, p. 51.
[2130] T. 14.12.2015, **E1/367.1**, p. 9.
[2131] WRI, 05.12.2008, **E3/7794**, ERN 00251407.
[2132] T. 14.12.2015, **E1/367.1**, pp. 30-31, 93.
[2133] T. 14.12.2015, **E1/367.1**, p. 93.
[2134] T. 14.12.2015, **E1/367.1**, p. 94.
[2135] T. 14.12.2015, **E1/367.1**, p. 31.
[2136] T. 14.12.2015, **E1/367.1**, p. 31.

They were Ta Chhaom, whose first (Cambodian) wife was from her [SIN Chhem's] mother's side of the family, and Ta Chhin.[2137] She testified that the Khmers and ethnic Vietnamese worked together.[2138]

b. Arrest of some members of those families

2099. Concerning the treatment of the mixed Khmer-Vietnamese families, SIN Chhem – wife of a former cadre – testified that the women were killed along with their children and that she never saw them again.[2139] However, she later testified that all the family members were killed at night.[2140]

2100. SIN Chhem claimed that those family members were arrested by was cadres who replaced her husband, even though she did not attend any meeting with the cadres in question.[2141] She claimed having been told by one Savinthat a meeting was held concerning the treatment of mixed Khmer-Vietnamese couples, and that the committee participated in killing the family members.[2142]

2101. The fact of the matter is that SIN Chhem was not in a position to know what happened. This is because, at the material time, she was working and did not even witness the arrest of the individuals concerned,[2143] but learned about it from others.[2144] Moreover, she gave inconsistent accounts as to whether or not she had heard about the killing of those people. First, she explained that people told her that the family members in question were killed at Meun Say.[2145] Then, towards the end of her testimony, she said that those who had witnessed the killings told her that the mixed-race family members were arrested and taken away.[2146]

2102. Moreover, she cited different dates: in her DC-Cam interview she reported that the arrests took place in 1977,[2147] the transcript of her testimony refers to 1977 or early 1978,[2148] while in her live testimony she stated that the arrest of the mixed Khmer-Vietnamese families took place after that

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2137 T. 14.12.2015, **E1/367.1**, p. 77. WRI, 05.12.2008, **E3/7794**, ERN 00251407.
2138 T. 14.12.2015, **E1/367.1**, p. 71.
2139 T. 14.12.2015, **E1/367.1**, pp. 26, 39.
2140 T. 14.12.2015, **E1/367.1**, p. 27.
2141 T. 14.12.2015, **E1/367.1**, pp. 27-28.
2142 T. 14.12.2015, **E1/367.1**, pp. 29-30.
2143 T. 14.12.2015, **E1/367.1**, pp. 89, 95.
2144 T. 14.12.2015, **E1/367.1**, pp. 31, 97.
2145 T. 14.12.2015, **E1/367.1**, pp. 26, 29, 96.
2146 T. 14.12.2015, **E1/367.1**, p. 97.
2147 DC-Cam Interview, 28.08.2005, **E3/7526**, ERN 00332167.
2148 WRI, 05.12.2008, **E3/7794**, ERN 00251406.

of her husband,[2149] in late 1977.[2150]

2103. It is also worth noting that during questioning by Defence Counsel KOPPE, the witness was confused about facts that happened to Khmers and facts that happened to mixed Khmer-Vietnamese families.[2151] For example, to a question about mixed-race families, she answered that she did not witness the killings but saw human remains. The people in question were forced to run in front of bicycles, because they were accused of treachery or immoral conduct.[2152] Yet, in her earlier statement, she associates such episodes to Khmers.[2153] Towards the end of her testimony, she confirmed to Defence Counsel GUISSÉ that she was actually referring to Khmer victims.[2154]

3. IN Yoeung's account

2104. IN Yoeung was called to testify at the request of the Prosecution regarding the treatment of Vietnamese in Svay Rieng based on her husband, CHAN Kea's DC-Cam interview.[2155] At first when DC-Cam staff recorded the interview, they thought she was a "neighbour". She wasn't named until later in the interview.[2156] A third person, identified as "the neighbour [male]", also took part in the interview. According to IN Yoeung, several people took part in the interview besides CHAN Kea.[2157] The third person was PRUM Yan.[2158]

2105. In court, the Prosecution asked IN Yoeung whether there were ethnic Vietnamese in the village and the commune. Her answers do not tally with the ones she gave in her DC-Cam interview.[2159] Despite being asked the question several times by the Prosecution, she said that she could not recall whether there were ethnic Vietnamese in her village, Kampong Trach, or for that matter in nearby villages, or even farther in Kampong Trach Commune (Romeas Hêk District).[2160]

2106. As a consequence, this raises doubt as to whether IN Yoeung was the same person as the interviewee; moreover, the President of the Trial Chamber forbade the parties from using the DC-

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2149 T. 14.12.2015, **E1/367.1**, p. 27
2150 T. 14.12.2015, **E1/367.1**, pp. 18-19.
2151 T. 14.12.2015, **E1/367.1**, p. 79.
2152 T. 14.12.2015, **E1/367.1**, pp. 80-85.
2153 WRI, 05.12.2008, **E3/7794**, ERN 00251406.
2154 T. 14.12.2015, **E1/367.1**, pp. 90-91.
2155 DC-Cam Interview of CHAN Kea, 30.08.2005, **E3/7525**.
2156 DC-Cam Interview of CHAN Kea, 30.08.2005, **E3/7525**, ERN 08885016.
2157 T. 03.02.2016, **E1/387.1**, pp. 70-71.
2158 T. 03.02.2016, **E1/387.1**, p. 88.
2159 T. 03.02.2016, **E1/387.1**, pp. 63-67, 77-80.
2160 T. 03.02.2016, **E1/387.1**, pp. 62-67, 77-79.

Cam interview for any further questioning.[2161] The other parties were thus denied the opportunity to question the witness about her claim. This is a perfect illustration of the problems arising from the loosely structured way in which DC-Cam interviews are recorded. The fact that several people were allowed to join in without necessarily being identified makes it difficult to know who actually answered the questions, who remembered what and who witnessed what. That puts the reliability of those interviews in doubt.

2107. Coming back to IN Young testimony, she said that in 1975 she was living in Kampong Trach Village, Kampong Trach Commune, Romeas Hêk District.[2162] Since the Co-Prosecutors were unable to rely on her DC-Cam interview, they made one final attempt to obtain answers about the treatment of Vietnamese, but to no avail. She said that she knew nothing about the matter.[2163]

2108. The Civil Parties also tried to question IN Yoeung about ethnic Vietnamese by showing her the written record of interview of PRUM Yan, who is presumed to be the third person who intervened in the DC-Cam interview. He used to live in her village.[2164] In his written record of interview, PRUM Yan reports that in 1977, he saw district soldiers arresting the mixed-origin Vietnamese wife of a man named Tep with her child and forcibly leading them away to Romeas Hek district office.[2165] While IN Yoeung remembered hearing PRUM Yan recount this, she said that the woman she remembered was mixed-origin Chinese, and not Vietnamese.[2166]

2109. As regards the child, IN Yoeung said that according to PRUM Yan, it was mixed-origin Vietnamese.[2167] She stated that – still according to PRUM Yan – the child's mother was killed at Prey Chor and that the child was taken away thereafter.[2168] Yet, in his written record of interview, PRUM Yan did not say that the individual in question was killed but rather that she was arrested.[2169]

2110. It Therefore, IN Yoeung's testimony reveals that she neither saw nor knew anything about the mixed-origin woman and her child. Not only does her testimony contradict IN Yoeung's, but it also consisted in the alleged account of PRUM Yan which is actually at variance with hers. This is

[2161] T. 03.02.2016, **E1/387.1**, p. 82.
[2162] T. 27.01.2016, **E1/383.1**, p. 99.
[2163] T. 03.02.2016, **E1/387.1**, p. 82.
[2164] T. 03.02.2016, **E1/387.1**, pp. 83-85.
[2165] WRI, 29.01.2009, **E3/7816**, EN ERN 00292838.
[2166] T. 03.02.2016, **E1/387.1**, pp. 85-87, 98.
[2167] T. 03.02.2016, **E1/387.1**, p. 87.
[2168] T. 03.02.2016, **E1/387.1**, pp. 86-88.
[2169] WRI, 29.01.2009, **E3/7816**, ERN 00292838.

good illustration of how hearsay can distort and misrepresent an account.

4. SIENG Chanthy's testimony

2111. As for Civil Party SIENG Chanthy's testimony concerning the suffering she endured during the Khmer Rouge period, it is worth taking a closer look at what she said about (a) ethnic Vietnamese in her locality and (b) how they were treated. It is also worth taking a closer look at (c) her account of the alleged killing of family members and (members of other Vietnamese families that she heard about.

a. Ethnic Vietnamese in her locality

2112. There are inconsistencies and even contradictions between her in-court testimony, her Civil Party Application and her supplementary statement. Regarding the origins of her family, she said that her grandparents on the father's side were of Vietnamese descent, and that her Vietnamese father married a Khmer and had eight Khmer-Vietnamese children.[2170] However, when she was shown the Supplementary Statement to her Civil Party Application, she explained: "[I] have read it and I saw some errors in it […] It was not correct to put it that my grandfather came to Cambodia and married a Khmer woman."[2171]

2113. She said that only her father spoke Vietnamese, but that he also spoke fluent Khmer. She also said that her father was fair-skinned and had the appearance of an ethnic Vietnamese, and also that the Khmer Rouge were well aware that her family was part Vietnamese.[2172]

2114. SIENG Chanthy also testified that there were two other Vietnamese families in Russei Prey Village, Kampong Chamlang Commune, Svay Chrum District, namely Major [*Commandant*] Thon's family of six and Onn's family.[2173]

b. Treatment of ethnic Vietnamese

2115. Prior to 17 April 1975, Civil Party SIENG Chanthy and her family were living in Chong Prek Village, Chek Commune, Svay Rieng District, Svay Rieng Province.[2174] After 17 April 1975, the

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[2170] T. 01.03.2016, **E1/394.1**, pp. 14, 36.
[2171] Supplementary Statement, 16.09.2010, **D409/5/1.2.1**, ERN 00621377.
[2172] T. 01.03.2016, **E1/394.1**, pp. 14-15.
[2173] T. 01.03.2016, **E1/394.1**, pp. 15, 19. Supplementary Statement, 16.09.2010, **D409/5/1.2.1**, ERN 00621377.
[2174] Civil Party Application, **D22/366**, ERN 01192659.

inhabitants of her village were transferred to Chhuk Sa Village, Chheu Teal Commune, Svay Chrum District for a few days and were then sent to work in Russei Prey, in Chamlang Commune, Svay Chrum District.[2175]

2116. SIENG Chanthy testified that at Chhuk Sa, the Base People used to call them 17 April People, feudalist-capitalists and half-blooded Vietnamese.[2176] In her Civil Party statement, she reported that at Svay Chrum, in Chhuk Sa village, they were fed, unlike the other villagers, and that in Russei Prey they were given smaller food rations than the other villagers.[2177]

2117. However, she gave a different account in her in-court testimony, saying: "we had the same food [rations] as the villagers, so we received the same amount of rice and porridge that other villagers received".[2178] When she was confronted with her Civil Party statement, she explained: "At the beginning […] that kind of condition happened. But later on, it was better for all of us. At the beginning, we received very minimal amount of rice or porridge to eat. However, later on, after the harvest, the food ration was […] better."[2179] Therefore the claim that her family received different food rations than other villagers is false.

2118. Civil Party SIENG Chanthy testified further that after attack by the Vietnamese in 1977, they were sent to cooperatives, but could return to the village in the evening to spend the night. Her father, it appears, was sent to cultivate vegetables, but he could not spend the night in the same place as the rest of his family.[2180] Civil Party SIENG Chanthy then contradicted herself, saying: "When I returned home, I asked my father and mother and I was told that my elder brother was sent to carry belongings of the militiamen."[2181] It would appear that her father was allowed to go home and spend time with the family after all.

2119. Finally, to the question as to when the treatment of the Vietnamese became worse, she answered: "It is my understanding that it was the time when by the Vietnamese troop [sic] happened", and they accused us of having linked [sic] to the Vietnamese and that we had Khmer body and

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[2175] T. 29.02.2016, **E1/393.1**, pp. 90-91; T. 01.03.2016, **E1/394.1**, pp. 13-14; Civil Party application, **D22/366**, ERN 01192659.
[2176] T. 29.02.2016, **E1/393.1**, p. 90.
[2177] Civil Party Application, **D22/366**, ERN 01192660.
[2178] T. 01.03.2016, **E1/394.1**, p. 16.
[2179] T. 01.03.2016, **E1/394.1**, p. 17.
[2180] T. 29.02.2016, **E1/393.1**, p. 93.
[2181] T. 29.02.2016, **E1/393.1**, p. 93.

Vietnamese head.[...] so this is the word or accusation that cooperative chiefs used all the time against all of us."[2182]

c. Alleged killing of ethnic Vietnamese

2120. SIENG Chanthy testified that she suffered mental harm as a result of the killing of members of her family and of other Vietnamese families. Those allegations are discussed in chronological order, i.e., starting with: (i) the alleged killing of her two elder brothers, Chanthon Chantha (i), then (ii) the alleged killing of members of two Vietnamese families , and lastly, (iii) the father's suicide.

i. <u>Alleged killing of her two elder brothers</u>

2121. Civil Party SIENG Chanthy testified that both of her elder brothers had worked for the Lon Nol regime: Chanthon, her oldest brother, was a policeman while Chantha was a soldier.[2183] She testified further that those two brothers lived in Phnom Penh during the Lon Nol regime,[2184] and also explained: "my first elder brother Chrouk Chantan was a policeman in Phnom Penh. And my second brother Chanta was a soldier in Svay Rieng."[2185]

2122. According to her the Civil Party application and supplementary statement, Chanthon was moved from Phnom Penh to Svay Rieng in June 1976 along with his wife.[2186] Biographies were allegedly prepared and Chantan was sent for training. As for Chanta, he went away briefly for training before being sent to Basak to join his wife.[2187]

2123. Concerning Chanthan, Civil Party SIENG Chanthy explained that he suffered from a numbing illness, which prevented him from working water, meaning that he could work in rice fields during the wet season.[2188] She explained: "One evening when I was working in the kitchen -- I overheard the unit chief talking about my elder brother Chantan. saying that he always had this numbness illness during the rainy season, so keeping him was no gain and losing him would not be a loss."[2189]

[2182] T. 01.03.2016, **E1/394.1**, p. 18, after 09.42.40.
[2183] T. 29.02.2016, **E1/393.1**, p. 91; T. 01.03.2016, **E1/394.1**, pp. 8, 21.
[2184] T. 29.02.2016, **E1/393.1**, p. 91; T. 01.03.2016, **E1/394.1**, p. 20; Supplementary Statement, 16.09.2010, **D409/5/1.2.1**, ERN 00621377.
[2185] T. 01.03.2016, **E1/394.1**, p. 20.
[2186] Civil Party Application, **D22/366**, ERN 01192660; Supplementary Statement, 16.09.2010, **D409/5/1.2.1**, ERN 00621377.
[2187] T. 01.03.2016, **E1/394.1**, pp. 20, 26.
[2188] T. 01.03.2016, **E1/394.1**, p. 8.
[2189] T. 01.03.2016, **E1/394.1**, p. 9, before 09.22.14.

During the 1977 harvest season, SIENG Chanthy noticed that he had disappeared.[2190] She said that her mother told her that militiamen had told her brother to carry some items.[2191]

2124. SIENG Chanthy testified that four men came to arrest her brother and took him away to kill him. She testified:

> "And people overheard them spoke -- speaking about my elder brother that he had passed out even before he was killed. [...] They brought back the clothes to the kitchen, and they also sharpened their knives in the kitchen. I saw those clothes stained with blood soaked in the water [...] at the kitchen.They killed my elder brother, and they spoke about it."[2192]

2125. So SIENG Chanthy did not witness her brother's arrest or the killing. She later reported that she was told about her brother's death by other people who said that they had witnessed it.[2193] In fact, in her civil party application, she stated: "One week later my family found out that my elder brother had been killed. We knew this because *Ta* Oem told my parents personally."[2194] Ta Oem was allegedly among the people who took her brother away. However, she did not mention this in her live testimony.

2126. In her civil party application, SIENG Chanthy reported that the arrest took place in December 1976, whereas in her live testimony, she said: "To my recollection, it was during the harvest season in late 1977. He was killed at Tuol Snuon (phonetic), to the east of Chey pagoda."[2195]

2127. Regarding her brother Chantha, SIENG Chanthy testified: "He was arrested in Basac Commune, and in Sala Boeng Rien, or Bayab village, in Svay Chrum district. He was tied and he was accused of cutting fig trees to make a trellis for gourds, and he didn't know how to plough the field because he was a soldier. So, he didn't know how to plough the field, and by accident, it wounded a cow's leg. And he was accused of destroying Angkar's property. Then they arrested him. They walked him behind a bicycle while whipping him. [...] I did not know who it was, but then I could identify that he was my elder brother. [...] he was being taken to the district office [...] There was blood everywhere on his body and I could hardly identify him. When I heard his voice I knew that he

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2190 T. 01.03.2016, **E1/394.1**, p. 10.
2191 T. 01.03.2016, **E1/394.1**, p. 11.
2192 T. 01.03.2016, **E1/394.1**, pp. 11-12.
2193 T. 01.03.2016, **E1/394.1**, p. 26.
2194 Civil Party Application, **D22/366**, ERN 01192660.
2195 T. 01.03.2016, **E1/394.1**, p. 27. Civil Party Application, **D22/366**, ERN 01192660; Supplementary Statement, 16.09.2010, **D409/5/1.2.1**, ERN 00621377.

was my elder brother."[2196]

2128. That account also appears in her Civil Party application. She said she and her family members witnessed the incident.[2197] According to this written record, SIENG Chanthy saw her brother again while he was harvesting rice at Russey Prey. She reported further: "I could only ask about how he was. The Khmer Rouge then had him harvest rice at another place. One week later, a person, whose name I do not remember, told me that my brother had died during the harvesting season in 1977. The Khmer Rouge had him dig his own grave to bury himself in Ta Chey village."[2198]

2129. Civil Party SIENG Chanthy believes that the two brothers were taken away together because they had worked for the Lon Nol regime and committed misdeeds. She stated: "Of course it is related because they knew my brother had been a policeman and that the other brother had been a soldier. And if someone made a mistake, then they would combine that with their past occupations. People who were taken away and killed with Chanthan were all former solders."[2199] Therefore, their Vietnamese origin was allegedly not a factor.

ii. Alleged killing of members of the other two Vietnamese families

2130. SIENG Chanthy testified that a few days after her second brother disappeared, members of the other two Vietnamese families were taken away.[2200] This included Thon family of six and a family of three.[2201] It is noteworthy that in her Civil Party Application, SIENG Chanthy omitted to mention of these Vietnamese families. They are only mentioned in her Supplementary Statement, as follows: "In late 1977, two neighbouring families were arrested and killed because they had some Vietnamese blood (part Vietnamese). My father saw with his own eyes that the Khmer Rouge took one of the daughters from one family and raped her. My father told my mother and me about this later that night. In total, the Khmer Rouge killed nine people from these two families."[2202]

2131. In her live testimony, SIENG Chanthy stated that two of the ethnic Vietnamese girls worked in the same unit, and that she had noticed that they had disappeared from their workplace. This is when

[2196] T. 01.03.2016, **E1/394.1**, pp. 7-8.
[2197] Civil Party Application, **D22/366**, ERN 01192660.
[2198] Civil Party Application, **D22/366**, ERN 01192661.
[2199] T. 01.03.2016, **E1/394.1**, p. 28.
[2200] T. 29.02.2016, **E1/393.1**, p. 93.
[2201] T. 01.03.2016, **E1/394.1**, p. 20.
[2202] Supplementary Statement, 16.09.2010, **D409/5/1.2.1**, ERN 00621377.

two other workers, Sra Ay and Sra Touy, told her that the girls had been taken away and killed.[2203] After that, she testified, her father told her that the Bun Thon family members had been taken away and killed.[2204] Yet, shortly after saying that, she claimed that her father did not know the Thon family.[2205] She herself said that she only knew the wife.[2206]

2132. With respect to the second family, she said: "I heard that about ten days later, the wife of brother Sa Onn (phonetic) was taken away"[2207] Onn's family was allegedly taken away at the same time as her brother Chanthan.[2208]

2133. The reason why Civil Party SIENG Chanthy's account concerning what happened to these two families is sounds like guesswork is because in her live testimony, she stated: "and as to what happened to his sons and wife, I heard from the villagers that they had been taken away and killed. And it -- people knew about that through whispering from one person to another. And that was how the news spread in the village."[2209] Along the same lines, she said: "Every time people were taken away and killed, villagers would whisper one to another about the incident. They did not speak loudly [...] about the taking away of those people."[2210]

iii. <u>Her father's suicide</u>

2134. SIENG Chanthy testified that she was terrified in the wake of those events and feared for her own life. Her father felt the same way, and he decided to take his own life, [2211] as she later found out.[2212]

5. <u>Other accounts</u>

2135. In addition to the foregoing accounts of witnesses who gave live testimony, the Closing Order cites a number of written records of interview relating to Vietnamese in Svay Rieng who were allegedly arrested and taken away.[2213] PRUM Yan's written record was shown to witness IN Yoeung, who

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[2203] T. 01.03.2016, **E1/394.1**, p. 5.
[2204] T. 01.03.2016, **E1/394.1**, p. 5.
[2205] T. 01.03.2016, **E1/394.1**, p. 19.
[2206] T. 01.03.2016, **E1/394.1**, p. 34.
[2207] T. 01.03.2016, **E1/394.1**, p. 20.
[2208] T. 01.03.2016, **E1/394.1**, p. 34.
[2209] T. 01.03.2016, **E1/394.1**, p. 35. (See KH transcript (p. 24) where she says that people whispered the news to her).
[2210] T. 01.03.2016, **E1/394.1**, p. 21.
[2211] T. 29.02.2016, **E1/393.1**, p. 93; T. 01.03.2016, **E1/394.1**, p. 19.
[2212] T. 29.02.2016, **E1/393.1**, pp. 94-95.
[2213] Closing Order, para.797, endnote 3396, which refers to KHOEM Samon's written record of interview, 12.12.2008, **E3/7797**, WRI of CHAN Roeun, 29.01.2009, **E3/7815**, and the DC-Cam Interview of BOU Van, 29.08.2005, **E3/7498**.

was not only was unable to confirm its contents but also contradicted it in regard the origins of the mixed-race woman.[2214]

2136. The written records of BOU Van, KHOEM Samon and CHAN Roeun were not shown to any of the witnesses who gave live testimony. Those records described facts that occurred in different communes and districts and concerned other ethnic Vietnamese.

2137. In his DC-Cam Interview, BOU Van asserts that the wives of Leng and Chhorng were of Vietnamese origin and that they were taken away with their children. BOU Van does not say where they were taken since he was not present on the day this happened. He also could not remember the timing of the incident, possibly 1976 or 1977. He claimed that those "affiliated with Yuon" were killed.[2215]

2138. In her interview with the investigators, KHOEM Samon reported that any Vietnamese who refused to return to Vietnam would be arrested and killed. According to him, there were some ethnic Vietnamese living near Chak Market in her commune, but she could not remember their names.[2216] Not only does her written statement have low probative value, but also it fails to prove that she witnessed any killings; moreover, it is unsourced.

2139. CHAN Roeun told the investigators that she saw a mixed-race Vietnamese woman and her six-year-old daughter being arrested by the commune chief and led away in Trakeap Kdam Village, Trapeang Sdao Commune, Romeas Hek District. According to "the villagers", they were killed at Prey Chak. The arrest took place about three months after evacuation of population to Pursat.[2217] There are no details about the source of her knowledge regarding the alleged killing or its circumstances.

B. Alleged theory of matrilineal descent

2140. As stated *supra*, at paragraph 807 of the Closing Order the Co-Investigating Judges posit a "theory of matrilineal descent".[2218] As to how the theory played out in Svay Rieng, they cite the written statements of CHAN Roeun, PRUM Yan, BOU Van and CHAN Kea[2219] and earlier statements by

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[2214] See *supra*, paras. 2108-2110.
[2215] DC-Cam Interview of BOU Van of 29.08.2005, **E3/7498**, ERN 00884966.
[2216] WRI,11.12.2008, **E3/5260**, ERN 00327160.
[2217] WRI of CHAN Roeun, 29.01.2009, **E3/7815,** ERN 00284772-73.
[2218] See *supra*, para. 2067.
[2219] WRI of CHAN Roeun, 29.01.2009, **E3/7815**; WRI of PRUM Yan, 29.01.2009, **E3/7816**; DC-Cam Interview of

SIN Chhem.[2220]

2141. In her interview with the investigators, SIN Chhem reported, *inter alia*, that the reason why children of Vietnamese women were taken away was because children were breastfed by their mothers, a statement she confirmed in her live testimony. Yet in her live testimony, she claimed she was told so by people who had attended meetings.[2221] Therefore, hers was only a hearsay account.

2142. PRUM Yan's written record of interview only mentions that a mixed-race Vietnamese woman and her child were taken away. As noted *supra*, IN Yoeung told the court that the woman in question was actually mixed-race Chinese.[2222]

2143. In his DC-Cam Interview, BOU Van reported that ethnic Vietnamese women who were married to Khmers were taken away with their children.[2223]

2144. CHAN Roeun told the investigators that a mixed-race Vietnamese woman was taken away with her daughter.[2224]

2145. CHAN Kea is the presumed "neighbour" who answered questions about ethnic Vietnamese in her DC-Cam interview.[2225] In her live testimony, IN Yoeung did not confirm the tenor of the interview in regard to ethnic Vietnamese.[2226]

2146. In any event, none of the written records of interview or live testimonies corroborate SIN Chhem's hearsay account that the reason why children of ethnic Vietnamese women were also taken away was because they were being breastfed or even that this was in accordance with a theory advocated by the CPK.

SECTION IV. LEGAL CHARACTERISATION

2147. Unlike the Co-Investigating Judges who began their legal characterisations of the facts with the crime of genocide,[2227] one should to begin by determining whether the charges against KHIEU

BOU Van, 29.08.2005, **E3/7498;** DC-Cam Interview of CHAN Kea, 30.08.2005, **E3/7525**.

[2220] WRI, 05.12.2008, **E3/7794**; DC-Cam Interview, 28.08.2005, **E3/7526**.

[2221] T. 14.12.2015, **E1/367.1**, p. 29.

[2222] See *supra*, paras. 2108-2110.

[2223] DC-Cam Interview, 29.08.2005, **E3/7498**, ERN 00884966-67.

[2224] WRI, 29.01.2009, **E3/7815**, ERN 00284772.

[2225] DC-Cam Interview, 30.08.2005, **E3/7525**, ERN 00885013-16.

[2226] See *supra*, para. 2105.

[2227] Closing Order, Part Three: Legal Findings, II. Genocide, III. Crimes against Humanity.

Samphan in regard to the crime against humanity have been established. To determine whether genocide by killing occurred in Prey Veng and Svay Rieng provinces, one should to begin by ascertaining whether any killings were committed in the first place.

I. MURDER (CRIME AGAINST HUMANITY)

A. Definition

2148. The element of the crime of murder consists in an act or omission of the accused, or of one or more persons for whom the accused bears criminal responsibility, that caused the death of the victim.[2228] Concerning *mens rea*, the perpetrator must have had the specific intent of causing death.[2229]

B. Legal characterisation of the facts

2149. The evidence produced is many removes away from what the Co-Investigating Judges characterise as "waves of killings of Vietnamese civilians".[2230] In fact, the evidence reveals that a very small number of ethnic Vietnamese were living in Prey Veng and Svay Rieng provinces in 1975. While the Defence does not dispute that some ethnic Vietnamese may have disappeared, the fact still remains that most of the killings alleged in the Closing Order cannot be established a beyond reasonable doubt in most of the instances presented in the evidence.

2150. It is important to begin by recalling the process for establishing facts beyond reasonable doubt in order to arrive at a legal characterisation of murder (1) before turning to the conclusions to be drawn from the evidence analysed (2).

1. Establishing killings beyond a reasonable doubt

2151. As observed *supra*, the process for establishing facts beyond a reasonable doubt has been recalled by the Supreme Court Chamber and jurisprudence at the international level.[2231]

2152. Specifically in regard to killing, the Supreme Court Chamber held that "in order to sustain an overall finding that killings occurred beyond reasonable doubt, specific instances of killing must

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[2228] Case 002/01Trial Judgement, para. 412.
[2229] Case 002/01Trial Judgement, paras. 394-429.
[2230] Closing Order, paras. 797-798, 801.
[2231] See above, paras. 640-649.

be proved beyond reasonable doubt, irrespective of whether a specific conviction for murder for each instance has been entered."[2232]

2153. In its analysis of specific instances of killings in the Case 002/01 Appeal Judgement, the Supreme Court Chamber began by explaining that there was no general rule that a finding beyond reasonable doubt cannot reasonably be entered unless there is more than one item of evidence to support it. Rather, the reasonableness of a finding is determined in light of the relevance and reliability of the evidence.[2233] Based thereupon, it is therefore possible to enter a conviction in reliance on a single item of evidence, but such evidence must be assessed with due caution and the decision should be reasoned.[2234]

2154. The Supreme Court Chamber then went on to set out a set of guidelines. For example, testimony that is of hearsay character is an insufficient basis for a finding beyond reasonable doubt. It may, however serve as corroboration of another person's account if the killing occurred under similar circumstances.[2235]

2155. Further, out-of-court evidence has intrinsically low probative value, and even if it forms big body evidence, it cannot holistically sustain a finding beyond reasonable doubt.[2236] The Supreme Court Chamber therefore held the view that whereas three written accounts contain specific, first-hand evidence, they are incapable of proving murder in the absence of live testimony.[2237]

2156. The same applies to hearsay, and out-of-court evidence.[2238] It is also unsafe to enter a finding on killing in reliance upon anonymous, out-of court evidence, which may be double hearsay.[2239] Hearsay evidence with only limited detail as to its source cannot serve as a basis for corroboration.[2240] By contrast, laconic accounts of killings, likely to derive from common narrative, may provide general corroboration, although they are incapable of constituting proof of killings.[2241]

2157. As for the number of killings, whereas the written evidence indicates a probability that the killings

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2232 Case 002/01 Appeal Judgement, para. 420.
2233 Case 002/01 Appeal Judgement, para. 424.
2234 Case 002/01 Appeal Judgement, para. 496.
2235 Case 002/01 Appeal Judgement, para. 428.
2236 Case 002/01 Appeal Judgement, paras. 430-431.
2237 Case 002/01 Appeal Judgement, para. 471.
2238 Case 002/01 Appeal Judgement, para. 441.
2239 Case 002/01 Appeal Judgement, para. 442.
2240 Case 002/01 Appeal Judgement, para. 434.
2241 Case 002/01 Appeal Judgement, para. 433.

were more widespread than the ones which were proven, that is not a reasonable basis to extrapolate conclusions about the number of victims, a pattern or a massive scale of the killings.[2242]

2. Findings on killings of ethnic Vietnamese

2158. It is now appropriate to draw the legal conclusions deriving from the assessment of the evidence on case-by-case basis, given that no overall conclusion on killing of Vietnamese can be reached without establishing beyond reasonable doubt any specific instance of killing.

a. Killings in Prey Veng Province

i. Anlung Trea

2159. With respect to Anlung Trea Village, whereas there are reasonable grounds to believe that both SAO Sak's mother and Yeun were arrested and detained, and that they were never seen thereafter, this could be an instance of enforced disappearance; the Trial Chamber is not seised of enforced disappearance.

2160. However, no one witnessed those killings. The only evidence about the killing of SAO Sak's mother is found in NEANG Nat's written record of interview, which is based on hearsay – and perhaps even double hearsay – with only sketchy details about its source. Yeun's killing is not recounted in any of the evidence produced. There is therefore not enough evidence to establish the elements of the murder in regard to SAO Sak and Yeun.

2161. With respect to SENG Vann (VAN Mao's father), the evidence on record does not support a finding that he was killed. There are no eye-witness accounts of the killing. Only one written record of interview by KHUN Mon indicates that he was killed along with [all] his children, except VAN Mao. The statement has low probative value, is short on details and is unsourced, and, therefore, it cannot support a finding that SENG Van was killed. The remainder of the evidence is inadequate to support a finding that SENG Vann was killed.

2162. The case of Thav is not any different. The evidence adduced cannot adequately support a finding that he was killed. SAO Sakonly mentioned a disappearance in his testimony. The written records of interview concerning Thav are mutually contradictory and, moreover, none of them describes

[2242] Case 002/01 Appeal Judgement, para, 448.

any killings. That evidence cannot adequately establish the elements of killing.

2163. There is no evidence about the killing of KEM Neou, LANG Hel's wife. According to one item of oral testimony and one written record of interview, she was taken away, but this is hearsay or perhaps even double hearsay. In the absence of sound evidence, it is not possible to enter any findings regarding what happened to her.

2164. There is no evidence about the killing of Yeay Doek. Only one item of live testimony and one written record of interview mention her disappearance, with no details whatsoever about the circumstances thereof.

2165. IER Pov's wife was not discussed during the proceedings. The two written record of interview about her were obtained outside a judicial context, and, moreover, in and of themselves, they cannot support a finding beyond a reasonable doubt. The same is true regarding SENG Huor (KHUN Mon's), who was only mentioned in written records of interview.

2166. Two written record of interview, by NEANG Nat and SAOM Ruos, refer in general terms to the killing of ethnic Vietnamese, but they amount to out-of-court evidence which has low probative value. Moreover, they are short on details as to what actually happened, and contain no first-hand information that can serve as a basis for entering findings or serve as corroboration. Also, no evidence was led about any corpses or mass graves.

2167. In conclusion, none of these instances that can be characterised as killing, because the evidence is insufficient. It is therefore not possible to enter an overall finding about the killing of ethnic Vietnamese in Anlung Trea.

ii. Po Chendam

2168. As for Ngang– given the evidence on record – his could be an instance of enforced disappearance, of which the Trial Chamber is not seised. Moreover, there are no eyewitness accounts of any killing.

2169. The testimony about killings is either based on mere speculation (THANG Phal) or on unreliable written accounts (IENG On). Another written record of interview (SIN Sun's) is based on rumour only. When added to the inconsistencies in the various testimonies and statements, this can only lead to the conclusion that the evidence is insufficient to establish killings beyond reasonable doubt.

2170. As for Chuy, his could be an instance of enforced disappearance. However, the evidence on record

is insufficient to prove the alleged killing beyond a reasonable doubt.

2171. The fact of matter is that nobody witnessed any killings or knew where Chuy was actually taken. In their written record of interview, IENG On and CHHUON Ri claim that they witnessed Chuy's arrest. However, they did not witness any killing. Only IENG On's written record mentions that Chuy was killed, but it is based on assumptions and hearsay. Besides, in addition to the inconsistencies in the various statements, IENG On's account is also unreliable, as noted earlier.

2172. With respect to San, his could be an instance of enforced disappearance. However, there are no eyewitness accounts of killing. A number of statements suggest that she was killed, but one is based on hearsay with scant details about its source, while the other two are unsourced written records of interview, perhaps even based on double hearsay, and thus have low probative value. Such evidence cannot adequately establish the constitutive elements of killing.

iii. Svay Antor

2173. No information about SENG Huor was discussed in court. Only a handful of written records of interview of low probative value refer to her disappearance. That information derives from hearsay accounts, and owing to the many inconsistencies in various statements, it is not possible to enter any findings about what happened to SENG Huor. Accordingly, the evidence is insufficient to establish the constitutive elements of murder.

b. Killings in Svay Rieng Province

2174. There is insufficient evidence on record to prove that killings of ethnic Vietnamese occurred in Svay Rieng Province.

2175. Regarding the Vietnamese families to which UNG Sam Ean refers, the evidence on record does not indicate that they were killed, but rather that they disappeared; however, the Trial Chamber is not seised of disappearance.

2176. As for the women and children to whom SIN Chhem refers, she did not personally witness their arrest or killing. Her knowledge about their being taken away derives from villagers, a source that is not precise enough to sustain a finding beyond reasonable doubt. As for the killing, once again the knowledge is based on hearsay. Although the source is known, there is insufficient detail as to how the information was obtained. This happens to be the only evidence about the killing of these

ethnic Vietnamese women and children, but it is indirect evidence which cannot sustain a finding of killing beyond reasonable doubt.

2177. IN Yoeung was unable to speak about ethnic Vietnamese in her village. Owing to the inconsistencies in PRUM Yan's statement it is impossible to determine the nationality of the alleged victim or the circumstances of her disappearance. Accordingly, no killings can be proven beyond reasonable doubt.

2178. Finally, SIENG Chanthy did not witness any killings first hand. Her two brothers were allegedly arrested for having served in the Lon Nol army in the past, and for committing misdeeds. As for the two Vietnamese families, their killing was only a rumour. SIENG Chanthy's testimony alone does not amount to proof of the elements of murder.

2179. Such killings are alleged in some written records of interview. Such interview records not only have low probative value, but they are also sketchy and short on details as to their sources. They cannot be a source of evidence of killings, and neither can they corroborate other evidence.

II. EXTERMINATION (CRIME AGAINST HUMANITY)

A. Definition

2180. The material element of extermination consists in the act of killing on a large scale.[2243] As for *mens rea*, the perpetrator(s) must have had the specific intent to kill a large number of people or to subject them to conditions of living that will inevitably lead to death.[2244]

B. Legal Findings

2181. On the basis of the evidence on record, no single instance of killing of ethnic Vietnamese can be established beyond a reasonable doubt. Even if by some quirk, the Trial Chamber were to find that some killings did take place, such isolated instances could not sustain a finding that a very large number of killings took place. Extermination is a crime of mass murder, targeting groups rather than individuals.

2182. The evidence on record demonstrates that the handful Vietnamese who were named before the Trial Chamber were not taken away at the same time as a group, but rather separately and over a

[2243] Case 002/01 Appeal Judgement, para. 517.
[2244] Case 002/01 Appeal Judgement, paras. 517-522.

long period of time, usually without knowing the reason why they were being taken away or for reasons relating to their past misdeeds or links with the former regime. Moreover, no evidence was led about any mass grave or corpses of ethnic Vietnamese. It is therefore not possible to speak of mass killings or mass destruction of ethnic Vietnamese. There is no proof of specific intent to kill on a large scale.

2183. The evidence on record fails to prove extermination of ethnic Vietnamese beyond a reasonable doubt.

III. PERSECUTION ON RACIAL GROUNDS (CRIME AGAINST HUMANITY)

A. Definition

2184. The *actus Reus* of persecution consists in an act or omission which discriminates in fact and which denies or infringes upon a fundamental right laid down in international customary or treaty law.[2245] With regard to the discriminatory element of the *actus reus*:

> "discrimination in fact occurs where a victim is targeted because of the victim's membership in a group defined by the perpetrator on specific grounds, namely on a political, racial or religious basis, and the victim belongs to a sufficiently discernible political, racial or religious group, such that requisite persecutory consequences must occur for the group.".[2246]

2185. As to the *mens rea* requirement of the crime of persecution, it must be established that the act or omission was perpetrated deliberately with the intent to discriminate on political, racial or religious grounds.[2247]

B. Legal characterisation of the facts

2186. Upon analysis, there is no evidence upon which to conclude that Vietnamese people were victims of racial persecution in Prey Veng and Svay Rieng.

2187. As for the *actus reus*, no discriminatory act or omission was established beyond a reasonable doubt. In fact, nothing indicates that the small number of Vietnamese people who were "taken away" were targeted because of their membership of the Vietnamese group, on racial grounds.

2188. The Vietnamese who remained in Prey Veng and Svay Rieng suffered no discrimination. In fact,

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[2245] Case 002/01 Trial Judgement, para. 427; *Duch* Appeal Judgment, 03.02.2012, para. 226.
[2246] Case 002/01 Trial Judgement, para. 428; Case 002/01 Appeal Judgment, para. 667.
[2247] Case 002/01 Trial Judgment, para. 427; *Duch* Appeal Judgment, 03.02.2012, para. 226.

many witnesses testified that, like everyone else, Vietnamese worked with Khmers. One such example is SAO Sak's mother who worked alongside Cambodians as a childminder in a cooperative. UNG Sam Ean and SIN Chhem also testified to that effect regarding Vietnamese who were in their village or its vicinity.

2189. More generally, DOUNG Oeurn testified that her Vietnamese husband never encountered mistreatment, insults or foul language. She testified she never heard the Khmer Rouge in her village calling Vietnamese people enemies. Only SIENG Chanthy testified that insults were hurled at her family in a village where she was transferred for about a fortnight; however, such insults were commonly hurled at everyone by base people and not only at Vietnamese people owing to their origins, given that they too were referred to as capitalists, 17 April people and feudalists.

2190. While a small number Vietnamese were arrested, should the Trial Chamber consider that some of them were killed, the evidence does not demonstrate that they were targeted due to their membership of the Vietnamese group. The mother of SAO Sak mother and Yeun was ethnic Vietnamese, but the reason for their arrest is not specified. It may therefore very well be that the two women were arrested for reasons other than their origin. This is all the more plausible given that the daughter, SAO Sak, was subsequently arrested, along with a Cham woman and two 17 April men, before being released.

2191. The same also happened to Pou Ngang, Chuy and San at Pou Chentam. Based on the evidence, it cannot be concluded that they were arrested because of their Vietnamese origins. THENG Phal and LACH Kry testified they did not know why they were taken away. Moreover, DOUNG Oeurn confirmed that her husband, a former Vietnamese soldier, was engaged business activities, including smuggling, which involved travel to Vietnam.[2248] His arrest may be related to his past activities, given that it coincided with the intensification of the armed conflict.

2192. Lastly, in regard to Svay Rieng, it is clear that SIENG Chanthy's two brothers were arrested not

[2248] DOUG Oeurn: T. 25.01.2016, **E1/381.1**, pp. 57-58, from 13.37.41 to 13.41.57, p. 59, before 13.43.13, p. 60, around 13.45.57. DC-Cam Interview, 23.02.2000, **E3/7562**, ERN 01170682-83 (She explained that he did not have a specific job. He simply sold opium. He did this clandestinely, otherwise he would have been imprisoned.). See also: LACH Kry: DC-Cam Interview, 10.03.2000, **E3/7559**, ERN 00850921-22, 00890526-27 (came to Cambodia in 1970 after LON Nol's coup d'état. He travelled between Vietnam and Cambodia because of his trading activities. His living standard at the time was decent.); DC-Cam Interview of NEOU Sam, 10.03.2000, **D230/1.1.49b**, ERN 00822159-60 (Chuy was a soldier before moving to the village in 1971; he later he sold anything tradable. No E3 classification was assigned, but he was introduced during the testimony of Civil Party LACH Kry: T. 21.01.2016, **E1/380.1**, pp. 84-91, from 14.43.20 to 14.58.32.

because of their Vietnamese origins but rather because they had worked in the Lon Nol police and army and had committed misdeeds at that time. The reasons for the disappearance of other ethnic Vietnamese families are only assumptions on the part of the civil party; she testified that they were arrested because of what they did in the past.

2193. No evidence was led as to whether lists and/or other means were used to identify Vietnamese for arrest. SAO Sak confirmed that he was unaware of the existence of reports at Svay Antor, just like DOUNG Oeurn at Pou Chentam. Only MOM Chheuy's written record of interview mentions lists, but those lists featured both ethnic Vietnamese and wives of Khmer soldiers. In this instance too, the claim that they were arrested on racial grounds is unsustainable.

2194. In their live testimony, none of the witnesses confirmed that meetings concerning ethnic Vietnamese were held. All the witnesses from Prey Veng testified that no so such meetings were held or at least that the question of ethnic Vietnamese was not broached at the meetings that actually took place. This is confirmed by a number of written records of interview.

2195. Regarding Svay Rieng, only SIN Chhem testified that the issue of mixed Khmero-Vietnamese couples was discussed at one meeting, but this information is only based on what he was allegedly told by someone named Savin. It is based on hearsay with no details as to the circumstances in which Savin told him so. As this is the only evidence on the alleged meetings in Svay Rieng, the claim that Vietnamese were persecuted due to their matrilineal origin cannot be established in regard to Svay Rieng.

2196. In regard to Prey Veng, discrimination against ethnic Vietnamese on account of their matrilineal origin cannot be established beyond a reasonable doubt. In fact, analysis of the evidence clearly reveals that that no such meetings were held in Svay Antor Village. The claim that children of Vietnamese mothers within mixed couples in Pou Chentam were also arrested whereas those of Cambodian mothers were not seems to be based an off-the-cuff statement in the live testimony of witnesses who did not how they obtained that information. Accordingly, it has not been established beyond a reasonable doubt that Vietnamese in Prey Veng and Svay Rieng were targeted on matrilineal grounds.

2197. Even though this information is contained in a simple written record of interview, the Co-Investigating Judges interviewed an ethnic Vietnamese witness, a resident of Chrey Krahoem Village in Pea Reang District, who stated that she and her children were never targeted.

2198. As to the *mens rea*, the foregoing submissions prove that the Vietnamese group suffered no discrimination in fact. Therefore, the intent to discriminate on racial grounds cannot be established.

IV. MURDER (GENOCIDE)

A. Definition

2199. Genocide by killing is committed with the intent to destroy, in whole or in part, a national, ethnic, racial or religious group as such.[2249]

B. Legal characterisation of the facts

2200. Killings of Vietnamese cannot be established beyond a reasonable doubt in reliance on the evidence concerning Prey Veng and Svay Rieng provinces. Even if the Trial Chamber were to consider some isolated killings established, it would still be necessary to establish that such killings were committed with the intent to destroy, in whole, or in part, a national, ethnic, racial or religious group as such.

2201. First, it is important to determine whether the Vietnamese who were killed under the Khmer Rouge regime actually belonged to at least one of those four groups. In the entire body of evidence that was produced, people – with the exception of IN Yoeung – were referred to in terms of their Vietnamese origins, i.e. at least one of their parents was Vietnamese. The various witnesses, with the exception of SIENG Chanthy, were unable to establish that Vietnamese and Khmers could be told apart based on physical traits. Accordingly, Vietnamese cannot be characterised as a racial group. In many instances, witnesses tended to identify them in terms of their country of origin, i.e. Vietnam. Based thereupon, Vietnamese cannot be characterised as a national or ethnical group.

2202. Analysis of the evidence does not establish that such individuals, all be it Vietnamese, were targeted with the intent to destroy the Vietnamese as a group. It has been proven in the legal characterisation of the crime of racial persecution that no discrimination in fact occurred against Vietnamese people. Nothing suggests that those alleged killings were committed on the basis of the victims' origin. In their in-court testimony, witnesses did not say whether they knew the reasons why such people were killed.

2203. It should be noted that some people, such as Chuy, were targeted as individuals. Other examples

[2249] See *supra*, paras. 1799-1834.

are: the mother of SAO Sak and Yeun; her children were not targeted by the regime owing to their origins. The reason why SIENG Chanthy's brothers were arrested was not because of their Vietnamese origins but rather because of their past activities and misdeeds. The other siblings were not targeted. Those examples are testimony that Vietnamese people were not targeted because they were Vietnamese. Therefore, it has not been established beyond a reasonable doubt that they were targeted owing to their membership of a group.

2204. The lack of evidence concerning the intent to destroy a group is even more manifest. No evidence was produced concerning drawing up lists ethnic Vietnamese or holding meetings about them. Some witnesses testified that all the Vietnamese who were taken away were killed, but their testimony was only based on rumour and therefore cannot establish intent to destroy the Vietnamese group as such. Moreover, the theory of matrilineal descent, as propounded by the Co-Investigating Judges, was not implemented everywhere. For example, it appears that it was not implemented at all in Svay Antor Village.

2205. Lastly, even assuming that some Vietnamese were killed, that is still a far cry from satisfying the destroying a substantial part of a group requirement. No reliable demographic data is available as to the number of Vietnamese who were living in Prey Veng and Svay Rieng provinces in 1977. However, according to some testimonies, only a very small number, if any, remained in each village. It therefore cannot be argued that the small number of killings of Vietnamese that the Trial Chamber could consider to have been committed, in disregard of the rules of evidence, amounts to a substantial part of the Vietnamese group in Prey Veng. Be that as it may, while numbers per se are not factor, the few Vietnamese people mentioned does amount to the substantial part required for the crime of genocide.

2206. So even if the Trial Chamber were to consider that the killings of Vietnamese to be established beyond reasonable doubt, it could not be established based on the evidence on record that such killings were committed with the intent to destroy in whole, or in part, the Vietnamese group as such.

Chapter VI. ALLEGED POLICY TO TARGET VIETNAMESE AS SUCH

2207. After making a few necessary preliminary remarks (I), the Defence will take a closer look at the term "yuon", which has been misinterpreted in many instances as having a negative or racist

undertones (II). An objective reading of official Democratic Kampuchea statements reveals that there was no such thing as a CPK policy to target Vietnamese civilians in Cambodia. Rather, the CPK senior leadership considered Vietnam, the State, against which there was an ongoing armed conflict, as the enemy of Democratic Kampuchea (III).

Section I. PRELIMINARY REMARKS

2208. The Co-Investigating Judges considered that the policy directed against Vietnamese people came into existence before 1975 and continued to escalate at least until 6 January 1979.[2250] In fact, already in 1973, the CPK began expelling Vietnamese from Cambodian territory and this continued in 1976. The Defence has submitted that the Trial Chamber was not been properly seised of the factual allegations of deportation of Vietnamese and therefore is not competent to hear those facts.[2251]

2209. It is alleged that the policy directed against Vietnamese people escalated sharply from April 1977. According to the Co-Investigating Judges, "the CPK intended to further this policy by destroying in whole or in part the Vietnamese group as such".[2252]

2210. The Co-Investigating Judges exceeded their *saisine* in their bid to demonstrate the existence of the policy. The Defence recalls that the Co-Investigating Judges were seised only of facts relating to Prey Veng and Svay Rieng the provinces.[2253] Despite that, they relied on evidence relating to facts which took place outside the territory of those provinces.

2211. Such is the case, for instance, for two documents which were used in the Closing Order in support of "implementation of the policy [...] in communications from the zone level to the centre".[2254] The documents at issue are: a July 1978 report from the West Zone by M 401 [2255] and a record of a telephone conversation between MEAS Muth of Division 164 and top officials regarding armed Vietnamese vessels.[2256] Another such example is the evidence cited in support of the findings on

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[2250] Closing Order, para. 213.
[2251] See *supra*, paras. 219-276.
[2252] Closing Order, para. 214.
[2253] See *supra*, paras. 1880-1885.
[2254] Closing Order, para. 214.
[2255] Respectfully sent to the Respected, Beloved and Missed Angkar from M 401, 04.08.1978, **E3/1094**.
[2256] Division 164, Political Sector, Secret telephone Conversation dated 1 April 1978, Report, signed by Mut, 01.04.1978, **E3/928**.

the alleged killings of Vietnamese in the Northeast and North Zones.[2257]

2212. In the final analysis, where the Co-Investigating Judges focused solely on documentary evidence within their *saisine*, they could permissibly only rely on the April 1977 issue of *Revolutionary Flag*.[2258]

2213. Moreover, KHUN Kim's record of interview does not contain the remarks used in the Closing Order to support the argument that "[f]ormer cadres also confirm the policy: wherever there were Vietnamese, "everyone had to be careful and to find them and to "sweep them up".".[2259] In fact, KHUN Kim is the only cadre named – hence the plural form is puzzling – and also, and more importantly, he did not say that Vietnamese but rather "Viet-Cong" had infiltrated everywhere.[2260]

2214. Also, the Co-Investigating Judges' reliance on the treatment of Vietnamese people in Prey Veng and Svay Rieng to support an alleged theory of matrilineal descent and to deduce in reliance thereupon that a policy targeting Vietnamese existed, does not stand up to scrutiny.[2261]

2215. The Co-Prosecutors also submitted a large number of documents, especially during key documents hearings concerning specific groups in regard to out-of-scope facts, including the deportation of Vietnamese, Vietnamese at sea, crimes committed on Vietnamese territory; not to mention the use of telegrams and reports prepared by cadres concerning Tram Kok or other parts of Cambodia which lie outside the territory of Prey Veng and Svay Rieng provinces. That evidence ought be struck from the record.

2216. In assessing the relevant evidence concerning the alleged policy against Vietnamese, account must taken of the armed conflict with Vietnam throughout the Democratic Kampuchea period, starting from May 1975.[2262]

2217. As the Defence has emphasised many times, the Prosecution completely misrepresented the CPK's statements on this matter by repeatedly suggesting that the speeches and statements that

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[2257] Closing Order, para. 214.
[2258] *Revolutionary Flag*, Special Issue, April 1977, **E3/742**.
[2259] Closing Order, para. 214, footnote. 748.
[2260] WRI of KHUN Kim *alias* NUON Paet, 30.04.2008, **E3/360**, ERN 00268860. The Defence has noted a mistranslation in the English version of the transcript. Here, reference is made only to "*Vietnamese*" and not to Viet-Cong: ERN 00268860. However, the Khmer original confirms that the witness was actually referring to Viet-Cong: ERN KH 00186345.
[2261] Closing Order, para. 214; see *supra*, paras. 2195-2196 and 2204.
[2262] See *supra*, paras. 671-844.

Democratic Kampuchea officials made within the context of the ongoing war were calls for violence against the civilian population.

Section II. INTERPRETATION OF THE TERM "YUON"

I. USAGE OF THE TERM "YUON" IN CAMBODIA

2218. A lot has been said about the term "yuon", but the Trial Chamber has not heard much evidence about its usage.

2219. For Khmer speakers, the claim that the term "yuon" has racist undertones does not reflect how its usage has evolved over time in Cambodia. Samdech CHUON Nath's Dictionary of Khmer, which was published by the Buddhist Institute, defines the term as follows:

> "[Yuon (n.) inhabitants of the territory of Tonkin, Annam, Cochinchine. *The Yuon of Tonkin, the Yuon of Annam, the Yuon of Cochinchine.* Quite often, the Yuon of Tonkin are called "the Yuon of Hanoi", those of Annam "the Yuon of Hue" and those of Cochinchine "the Yuon of Prey Nokor".]".[2263]

2220. That shows that according to its etymology, the word "yuon" does not imply any discrimination or contempt, but simply refers to membership of to a different geographical area.[2264] It was after French Indo-China gained independence that Vietnamese revolutionaries started to use the term Vietnam, but it was not used in the Khmer language.

2221. Some linguistic elements which will mainly resonate with native Khmer speakers are conducive to a discussion of the pejorative undertones of the term "yuon". In fact, the term is commonly used in Khmer to form compound nouns of Vietnamese origin or roots. The following are some examples: machu-yuon (ម្ជូរយួន) is the name of a soup that Cambodians relish; *sramaoch yuon* (ស្រមោចយួន) is a red ant that is considered combative because it can take on large predators; the

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[2263] CHUON Nath, *Khmer Dictionary*, 1968, published by the Buddhist Institute, p. 955. The dictionary has been recognized by the Royal Government of Cambodia as an official working document.

[2264] See on this subject Bora TOUCH's letter to the editor entitled: Objectors to yuon have been hypnotised by foreign 'experts', *The Phnom Penh Post*, 4 February 2010 http://www.phnompenhpost.com/national/objectors-yuon-have-been-hypnotised-foreign-'experts'. In the article, the author undertakes a historical analysis of the use of the term "yuon" and explains how its meaning has evolved with time and political trends. It is important to draw attention to the recent controversy in 2013involving OU Virak and Sam Rainsy. See also http://www.phnompenhpost.com/national/meaning-yuon-1 and http://www.phnompenhpost.com/national/dont-impoverish-our-language.

term *kaun yuon* (កូនយួន) which literally means "yuon child", is used to refer to a light-skinned child, therefore implies handsome or beautiful in Khmer society; *Srey Yuon* (ស្រីយួន) simply means Vietnamese women, and has no pejorative undertones. For Khmers, mere use of the term "yuon" does not indicate anything negative, especially considering that there are indisputably pejorative terms used to refer to Vietnamese, which, moreover, are clearly insulting and in many instances, racist.[2265]

2222. In their testimony, witnesses mostly used the term "yuon". While the term could be interpreted negatively when used by former combatants, such is not the case for ordinary Cambodians from the countryside.

2223. By way of illustration, the term was used [on the witness stand] in Khmer by former spouses or relatives of Vietnamese, and even ordinary villagers living close to the Vietnamese border, for instance in Prey Veng and Svay Rieng provinces. Unfortunately, in most cases, it was not interpreted into French during hearings of witnesses and civil parties. Yet, the latter used it frequently when referring to Vietnamese people or to Vietnam, for example, "yuon country" for Vietnam, "Yuon" to refer to Vietnamese people, and the "yuon" language to refer to the Vietnamese language.[2266]

2224. For instance, Witness SAO Sak, whose was in Prey Veng of a Vietnamese mother, used the term "yuon" many times when referring to: families which were sent back to Vietnam; SENG Huor, a former resident of Anlung Trea, and spouse of KHUN Mon; and to other villagers.[2267] DOUNG

[2265] Some examples of this type of insults: *A Srakey* (អាស្រកី) [coconut husk], *A Kantorp* (អាកន្ទប) [a loincloth], *A Seung* (អាសឹង). These words are often used in xenophobic discourse.

[2266] See for example: CHOEUNG Yaing Chaet: T.07.12.15, **E1/363.1**, p. 45, at 11.08.39 (mistranslation, see KH transcript, p. 32), p. 64, at 13.55.04 (KH, p. 45), p. 65, after 13.58.00 (KH p. 46), pp. 70-71, around 14.09.35 (KH pp. 50-51), pp. 83-84, before 14.39.52 (KH, p. 60), p. 103, at 15.42.31 (KH, p. 74); T.08.12.15, **E1/364.1**, p. 7, after before 09.14.20 (KH, p. 5) – child of Vietnamese parents; KHOUNG Moy: T. 01.03.2016, **E1/394.1**, p. 59, at 13.39.47 (KH, p. 40), p. 79, before 14.53.51 (KH p. 53), p. 80, at 14.56.19 (KH p. 54) – child of Vietnamese mother with close relatives currently living in Vietnam; PRAK Doeun: T.02.12.15, **E1/361.1**, pp. 68-69, after 13.56.14 (KH, p. 45) – husband of Vietnamese woman; UNG Sam Ean: T.11.12.15, **E1/366.1**, p. 61, at 13.46.46 (KH, p. 42), pp. 99-100, after 15.26.07 (KH, p. 68), pp. 103-104, after 15.36.33 (KH, p. 71); SIN Chhem: T. 14.12.15, **E1/367.1**, pp. 28-29, after 10.39.59 (KH, p. 21).

[2267] See for example: T.03.12.15, **E1/362.1**, p. 98 before 15.20.15 ("[…] those who were from mixed families (…) were actually gathered continuously and they were sent by boats", (KH pp. 70-71); T.03.12.15, **E1/362.1**, p. 116 after 15.55.46 ("[...] and those were from mixed families", KH pp. 83-84), pp. 12-13, around 09.35.07 (KH p. 9), p. 14, at

Oeurn, whose husband was Vietnamese, also used the term "yuon" when referring to Vietnamese people in general.[2268]

2225. Alexander HINTON's explanation that the term has violent and racist undertones is therefore unpersuasive from an objective standpoint. In light of the foregoing, contrary to what the "expert" suggested in his testimony, by using the term "yuon", Democratic Kampuchea officials were not calling for violence against ethnic Vietnamese civilians.[2269]

II. LIMITATIONS OF ALEXANDER HINTON'S TESTIMONY

2226. It is therefore important to take a closers look at HINTON's statements and his interpretation of the term "yuon", especially in speeches made by the CPK leaders, including POL Pot's speech of 17 April 1978, as well his outlandish views on the matter.[2270] Indeed, his views show that he is disconnected from the reality of Cambodian society, as recalled *supra.*

2227. This disconnect and the fact that he viewed the evidence presented to him through the prism of "genocide "prism clearly impaired his ability to undertake a critically objective study about the meaning of a speech on military combat, even though it is crystal clear. In fact, in there is no subliminal message in the speech that POL Pot made in April 1978 following the late 1977 invasion of Cambodia by Vietnamese troops.[2271] POL Pot spoke in clear terms and in detail about the armed conflict and the enemy, namely the Vietnamese armed forces.[2272]

2228. HINTON's depositions on the subject shows the limitations of some expert testimonies. Use of prism of genocide – mentioned *supra* – within the framework of anthropological (as opposed to historical or military) research is a hindrance, and cannot offer any guidance to the deliberations of an impartial tribunal. In fact, the portrayal in his book of the Khmer as being naturally "savage" and inherently brutal could be considered offensive for a variety of reasons.[2273]

09.37.24 (KH p. 10).

[2268] T. 25.01.16, **E1/381.1**, p.43, at 11.04.34 (KH p. 30).

[2269] T. 15.03.2016, **E1/402.1**, p. 8, from 09.16.08 to 09.17.18; T. 16.03.2016, **E1/403.1**, p. 33, before 10.03.32.

[2270] POL Pot's speech, *Revolutionary Flag*, April 1978, **E3/4604**, ERN 00520342; Alexander HINTON: T. 15.03.2016, **E1/402.1**, p. 8, from 09.16.08 to 09.17.18, p. 48, before 10.58.21, p. 49, at 11.00.07, p. 125, after 15.54.36, pp. 128-129, around 16.01.28; T. 16.03.2016, **E1/403.1**, p. 33, before 10.03.32, p. 58, before 11.13.01; T. 17.03.2016, **E1/404.1**, pp. 27-28, around 09.52.37, pp. 29-30, around 09.57.17, p. 32, around 10.00.50, pp. 36-38, from 10.09.07 to 10.12.39, pp. 67-73, from 11.26.50 to 11.39.21.

[2271] See *supra,* paras. 802-811.

[2272] See *supra,* paras. 734-740.

[2273] Alexander HINTON, *Why Did They Kill? Cambodia in the Shadow of Genocide,* **E3/3346**, ERN 00431658-59.

2229. Moreover, he is not qualified to make such categorical statements given that he was unfamiliar with the evidence on file, and was forced to acknowledge in court that he had attended only a handful of hearings and read only a few of the documents on the ECCC website.[2274] For instance, the Trial Chamber will recall his views about SIHANOUK's post-1979 speeches, which reveal that he is more idealistically than forensically oriented in his political "analysis".[2275]

2230. His expertise has its limits, especially in view of the fact that the research he relied on for his book *Why Did They Kill* is limited in time and space.[2276] The parties are unable to verify the primary sources he used because of the confidentiality restrictions imposed by his "research protocol".[2277]

2231. As the Supreme Court Chamber has emphasised, "Where the sources are not fully accessible and verifiable, a diminished weight must be attributed to expert evidence derived from them, given the restricted possibility for the Parties and the court to test the experts' conclusions".[2278] Even though HINTON's anthropological research is appreciated by his fellow researchers, it is still important to recognise that it has objective limitations within the context of Case 002/02. Moreover, HINTON himself acknowledged that Ben KIERNAN was a key source for his book.[2279] Now, Ben KIERNAN's work has only low probative value given that he did not testify.[2280]

2232. Returning to CPK speeches, it is also important to view them within the context of the armed conflict with Vietnam, which is indeed the focus of all the official statements. While there may be some truth to the claim that the speeches sounded harsh, one would be hard pressed to find any instances where a country at war speaks about its enemy in glowing terms. As a matter of fact, it would have been interesting to analyse the speeches made by Vietnamese officials concerning Democratic Kampuchea at the height of the conflict; it is more than likely the tone would be similar.

2233. The Prosecution tried to portray Democratic Kampuchea as racist regime in a bid to prove that it advocated a policy to target Vietnamese civilians.[2281] However, objective analysis of period

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[2274] T. 16.03.2016, **E1/403.1**, p. 134, at 15.51.32.
[2275] T. 15.03.2016, **E1/402.1**, pp. 128-129, at 16.00.28; T. 16.03.2016, **E1/403.1**, pp. 31-32, around 10.00.08.
[2276] T. 17.03.2016, **E1/404.1**, pp. 21-22, at 09.43.14: "So again, as I've said before, my focus for this book project, which everyone said we should focus on, was predominantly the lived experience of people linked to this village, Banyan, the people living in Kampong Siem district.". See also *supra,* paras 1935-1937.
[2277] T. 14.03.2016, **E1/401.1**, p. 13, around 09.40.51; T. 15.03.2016, **E1/402.1**, pp. 24-25, from 09.50.48 to 09.53.48; T. 16.03.2016, **E1/403.1**, p. 7, after 09.15.49, p. 135, around 15.52.35.
[2278] Case 002/01 Trial Judgement, para. 329.
[2279] T. 15.03.2016, **E1/402.1**, p. 107, after 15.05.57.
[2280] 002/01 Trial Judgement, paras. 334, 1015.
[2281] T. 23.02.2016, **E1/390.1**, pp. 90-91, from 14.32.07 to 14.34.50.

speeches and documents only reveals that there was an ongoing war between Democratic Kampuchea and the Socialist Republic of Vietnam at that time, but no discrimination against the Vietnamese people. Also, Steve HEDER dismissed the claim that the Democratic Kampuchea regime was racist.[2282]

Section III. WAR AGAINST A STATE AND NOT AGAINST A CIVILIAN POPULATION

2234. It is important to take a closer look at some of the CPK speeches from the 1977-78 period, which were discussed at length during the proceedings (A), as well as contemporaneous documents concerning Vietnamese people within the context of the armed conflict (B) in order to highlight the distinction between Vietnam, the enemy State, and the Vietnamese civilian population. Logically speaking, since there is no evidence on the Case 002/02 case file concerning killings of Vietnamese civilians in Prey Veng and Svay Rieng, there was no such policy against them (C).

I. WAR TIME SPEECHES

2235. Before discussing Democratic Kampuchea speeches, it is important to recall that the Co-Investigating Judges relied upon some of KHIEU Samphan's speeches to support the claim that he participated in the development and implementation of a policy to target the Vietnamese.[2283]

2236. In fact, according to them, KHIEU Samphan's speeches concerning the Vietnamese were aimed at inciting hatred and fear, and therefore led the people to act against them.[2284] They also allege that those speeches were made while Vietnamese were being killed in Prey Veng and Svay Rieng.[2285] It is therefore important to analyse both the content and context of three speeches that KHIEU

[2282] Steve HEDER, "Racism, Marxism, cataloguing and genocide" in *The Pol Pot Regime* by Ben Kiernan, **E3/3995**. This article was mainly cited by the Defence during a key documents hearing during the trial segment concerning Vietnamese: "In his attempt to argue otherwise, Kiernan highlights the fact that many of the East Zone victims were stigmatized with the epithet "Kloun Khmer Kbal Yuon", which he translates as "Khmer bodies with Vietnamese minds", and which he suggests racialized those killed. This phrase, which can also be translated as "Khmer body with a Vietnamese head", has also been used historically to conjure up images of Khmer political structures under Vietnamese leadership. "Kiernan's argument that the phrase was used to suppress 'the Khmer majority on the racial grounds that they were not really Khmer' is at best incomplete. Instead, the phrase suggests that political leadership and political orientation were considered more important than any biologically determined physical characteristics. Being physically or racially Khmer was no protection: treason to the class and national cause was political and could not be committed by anyone, regardless of skin colour, eye-shape or hair texture, who was suspected of refusal to accept and be loyal to the correct political line of the 'proletarian vanguard' leadership.". See also T. 24.02.2016, **E1/391.1**, pp. 65-66, from 11.25.14 to 11.28.17.

[2283] Closing Order, paras. 1196-1198.

[2284] Closing Order, para. 1196.

[2285] Closing Order, para. 1197.

Samphan made between 1977 and 1978, which are cited in the Closing Order.[2286]

2237. It is important to begin by highlighting the discrepancy in the Co-Investigating Judges' interpretation of the speeches. For instance, further on in the Closing Order, they rely on the same speeches to support the claim that KHIEU Samphan was aware that an armed conflict existed.[2287] That amounts to recognising that the context of the armed conflict with Vietnam is crucial to understanding the speeches at issue, without drawing the pertaining legal consequences therefrom.

2238. The Co-Prosecutors also took a similar course of action in many instances by citing speeches of CPK leaders out of context in order to support the claim that Vietnamese civilians were targeted under the Democratic Kampuchea regime. However, a closer look at the content of period speeches in chronological order clearly shows that only Vietnam, which was the enemy state of Democratic Kampuchea, was targeted.

A. KHIEU Samphan's 15 April 1977 Speech

2239. On 15 April 1977 at a mass gathering in Phnom Penh, KHIEU Samphan gave a speech to mark the 17 April victory.[2288] That speech was mainly aimed at commending the people of Democratic Kampuchea for the achievements in rebuilding the country. National defence is mentioned only briefly, as follows:

> "However, we must carry out the task of defending our Democratic Cambodia, protecting our worker-peasant administration and preserving the fruits of our Cambodian revolution by resolutely suppressing all categories of enemies, preventing them from committing aggression, interference or subversion against us. We must wipe out the enemy in our capacity as masters of the situation, following the lines of domestic policy, foreign policy and military policy of our revolutionary organisation. Everything must be done neatly and thoroughly. We must not become absent-minded, careless or forgetful because of past victories. On the contrary, we must further steel ourselves, remain alert, constantly maintain the spirit of revolutionary vigilance and continue to fight and surprise all stripes of enemy at all times".[2289]

2240. While Vietnam is not named in the speech, KHIEU Samphan's reference to preventing the enemy

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[2286] KHIEU Samphân's Speech at Anniversary Meeting, Phnom Penh, National Radio, 15.04.1977, **E3/201** (also classified as **E3/200**); Cambodia's Temporary Severance of Relations with Vietnam, KHIEU Samphân's declaration, 30.12.1977, **E3/267**; Speech by Comrade KHIEU Samphân, President of the State Presidium of Democratic Kampuchea during the mass rally organised on the occasion of the third anniversary of the Glorious 17 April and the founding of Democratic Kampuchea, 17.04.1978, **E3/202** (also classified as **E3/562**).

[2287] Closing Order, para. 1200, concerning KHIEU Samphân's role.

[2288] KHIEU Samphân's Speech at Anniversary Meeting, Phnom Penh, National Radio, 15.04.1977, **E3/201**.

[2289] KHIEU Samphân's Speech at Anniversary Meeting, 15.04.1977, **E3/201**, ERN 00419512-13.

from committing aggression concerns the skirmishes at the Vietnamese border which had by then become more frequent and more intense. His speech echoes IENG Sary's at the United Nations, which is discussed *supra*.[2290] For instance, in his remarks, KHIEU Samphan encouraged the Democratic Kampuchea forces to defend the country against enemies which were committing acts of aggression. The Co-Investigating Judges' assertion that he appealed to "the people to fight the Vietnamese" is an extrapolation.[2291] Far from demonstrating a policy to target the Vietnamese group as such, as alleged by the Prosecution,[2292] those remarks only concern defending national territory at a time when the CPK did not openly discuss the then ongoing conflict.

B. KHIEU Samphan's statement of 31 December 1977 on the severance of relations with Vietnam

2241. KHIEU Samphan's statement of 31 December 1977 was also used by the Co-Investigating Judges to support the allegation that he participated in the preparation and implementation of a policy to target the Vietnamese by appealing to "the people to fight the Vietnamese".[2293] Once again, use of this generic phrase does not take account of the war context, whereas 31 December 1977 was a crucial milestone in the conflict.

2242. In fact, it was on 31 December 1977, in the wake of the massive invasion by Vietnamese forces of Cambodian territory that the Democratic Kampuchea leadership decided to officially sever diplomatic relations with Vietnam.[2294] This declaration is the essence of a speech made in the context of an armed conflict, condemning military aggression while at the same time encouraging the armed forces and the Cambodian people to maintain their revolutionary vigilance against the Vietnamese aggressor.[2295]

2243. KHIEU Samphan's message is clearly an appeal to fight the Vietnamese military enemy with military force, and an encouragement to support the war effort. It leaves no shadow of a doubt that the enemy in question is Vietnam as a State: "The Cambodian revolutionary army and the entire Cambodian collective people, under the leadership of the CPK, will certainly totally repulse the

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[2290] See *supra*, paras. 728-729.
[2291] Closing Order, para. 1196, endnote. 4864.
[2292] T. 23.02.2016, **E1/390.1**, p. 50, after 11.14.45.
[2293] Closing Order, para. 1196.
[2294] See *supra*, para. 810.
[2295] Cambodia's Temporary Severance of Relations with Vietnam, 31 December 1977, 03.01.1978, **E3/267**.

aggressive expansionist and annexationist Vietnamese enemy from Cambodian territory."[2296]

2244. In the wake of the 31 December 1977 message, the Democratic Kampuchea armed forces prepared a document in response in which it described the attacks and incidents involving with Vietnamese forces at the border and cites KHIEU Samphan's speech.[2297]

C. POL Pot's April 1978 speech

2245. The Prosecution cited POL Pot's April 1978 speech many times, for example during the key documents hearing concerning the Vietnamese.[2298] Contrary to the Prosecution's contention, it has been explained in the segment on the armed conflict that the speech cannot be construed as an incitement to target the Vietnamese civilian population.[2299] This was clearly a speech which was aimed at encouraging the Democratic Kampuchea forces in future battles against Vietnam, at a time when enemy forces had penetrated deep into Democratic Kampuchea territory.[2300] This sole aim of the speech was to garner support for the war effort, as confirmed by a many a witness from the military.[2301]

D. KHIEU Samphan's speech of 16 April 1978

2246. KHIEU Samphan's third speech, delivered in his capacity as symbolic President of the State Presidium, was in the same context as Pol Pot's.[2302] According to the Co-Investigating Judges, the speech describes "the Vietnamese as "enemy aggressors, annexationists and swallowers of territories" who were "consumed with sinister ambition of swallowing the Kampuchea's territory in conformity with its plan of 'Indochina Federation'".[2303] Also, at paragraph 1197 of the Closing Order, Co-Investigating Judges assert that KHIEU Samphan ordered that:

[2296] Cambodia's Temporary Severance of Relations with Vietnam, 31 December 1977, 03.01.1978, **E3/267**, ERN S 00008724.
[2297] The Revolutionary Army Adopts Resolutions on SRV Dispute, 04.01.1978, **E3/1285**, ERN 00169538.
[2298] T. 23.02.2016, **E1/390.1**, pp. 73-75, from 14.00.01 to 14.04.34.
[2299] See *supra*, paras. 734-740.
[2300] *Revolutionary Flag*, "The Presentation of the Comrade Secretary of the Communist Party of Kampuchea on the Occasion of the 3rd Anniversary of the Great Victory of 17 April (…)"], 17.04.1978, **E3/4604**, ERN 00519832-33.
[2301] PRUM Sarat: T. 26.01.16, **E1/382.1**, pp. 79-81, from 15.36.42 to 15.41.47; CHUON Thy: T. 25.10.2016, **E1/489.1**, p. 99, around 15.16.41; CHUON Thy: T. 25.10.2016, **E1/489.1**, p. 102, around 15.23.13.
[2302] Speech by Comrade KHIEU Samphân, President of the Presidium of State of Democratic Kampuchea at the mass meeting held on the occasion of the Third Anniversary of Glorious 17 April and the Founding of Democratic Kampuchea, 17.04.1978, **E3/202**, the speech is also covered in International Media Report "Phnom Penh Rally Marks 17th April Anniversary", 16.04.1978, **E3/562**.
[2303] Closing Order, para. 1196.

"the first task of the people was to defend the country against the Vietnamese, who were "spying and setting up cells" in Cambodia by "carrying out well the line of the Party both in internal and external defence". He stated that "our daily activities to radically and forever eliminate from the Kampuchea's territory the enemy aggressors of all kinds, especially the Vietnamese enemy aggressors, annexationists and swallowers of territories"".

2247. The excerpts does not demonstrate incitement to hatred against the Vietnamese people, but rather an appeal to defend the country against the Vietnamese military enemy which was still occupying Democratic Kampuchea territory just months earlier. The words "aggressors, annexationists and swallowers of territories" are often used to reflect the tumultuous past of the two countries[2304] and also, and more importantly, to denounce the irrefutable large-scale military aggression which had occurred shortly earlier.

2248. Viewed in their proper context, those statements reveal both that the Co-Investigating Judges and the Co-Prosecutors misrepresented the message of the speech by linking it to the killing of Vietnamese civilians in Prey Veng and Svay Rieng. Even if – despite the lack of evidence – the Trial Chamber were to find that some killings took place in those provinces, it would still have to recognise that the message of the speech is far removed from such facts.

2249. The Co-Prosecutors further misrepresented the speech by quoting it out of context and concluding "that there is evidence of intent, obviously, to kill combatants and non-combatants alike by the use of terms "enemies of all stripes and all agents of the Vietnamese".[2305] That is a quite clearly a misrepresentation, since the passages cited only refer to the Vietnamese armed forces which had recently entered Democratic Kampuchea territory.[2306]

E. <u>Democratic Kampuchea's declaration of 2 January 1979</u>

2250. The Democratic Kampuchea government made the declaration just days before the regime collapsed. It strongly condemned Vietnam's repeated incursions into Cambodian territory and asserted that Cambodia's independence was under threat due to the recent attack. It is quite absurd for the Prosecution to rely on this declaration in claiming that "Vietnamese were targeted because of race, rather than simply because they were – some of them were combatants".[2307] The truth of

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[2304] See *supra*, paras. 674-676.
[2305] T. 23.02.2016, **E1/390.1**, pp. 72-73, from 13.58.49 to 14.01.49.
[2306] International Media Report, "Phnom Penh Rally Marks 17th April Anniversary", 16.04.1978, **E3/562**, ERN S 0000010563-64.
[2307] T. 23.02.2016, **E1/390.1**, p. 78, after 14.10.27.

the matter is that the declaration only concerns the military and political forces involved in what it denounces as an ongoing Vietnamese military aggression.[2308]

2251. All the speeches at issue were made during a large-scale armed conflict with Vietnam, and in regard thereto. Their content can only be interpreted in reference to Cambodia's enemy: the Vietnamese State. The Trial Chamber must guard against committing the same misinterpretation. In the same vein, it will recall that it was censured for its reliance – to support the existence of a CPK policy to target Khmer Republic soldiers and officials – on the speech that KHIEU Samphan made in North Korea concerning the fall of Oudong.[2309] The reason for the censure was because the Supreme Court Chamber considered that the speech could be interpreted as referring to killings in combat on account of the conflict.[2310]

2252. Moreover, in reference to the term "enemy", which was commonly used in such speeches in relation to Vietnam or Vietnamese troops, if the Trial Chamber were to consider that this term refers to anything other than military targets, it would have to explain its reasoning.[2311] The Supreme Court Chamber also emphasised the tendency for propaganda discourse to exaggerate and inflate figures, which diminishes its reliability.[2312]

II. OTHER CONTEMPORANEOUS MATERIAL CONCERNING THE VIETNAMESE

2253. Like the speeches, many contemporaneous materials concern the armed conflict with Vietnam and the instability at the border. Examples include post-April 1977 issues of the magazines *Revolutionary Flag* and *Revolutionary Youth*.[2313] Most publications referred to Vietnam in similar terms. For example, an April 1977 issue of the *Revolutionary Flag*, which was quoted by both the Co-Investigating Judges and the Co-Prosecutors,[2314] refers to the Vietnamese State as "enemy" and to "agents of the Vietnamese" that must be fought in order to protect the territory.[2315] It is important

[2308] T. 26.02.2016, **E1/392.1**, p. 47, after 10.45.14.
[2309] Case 002/01 Trial Judgement, para. 125.
[2310] Case 002/01 Appeal Judgment, para. 883.
[2311] Case 002/01 Appeal Judgement, para. 930.
[2312] Case 002/01 Appeal Judgement, paras. 883, 890.
[2313] *Revolutionary Flag,* Special Issue, April 1977, **E3/742**; *Revolutionary Flag*, Special Issue, December 1977-January 1978, **E3/725**; *Revolutionary Youth,* No 1-2, January and February 1978, **E3/726**; *Revolutionary Flag*, Special Issue, May-June 1978, **E3/727**; *Revolutionary Flag,* Vol. 7, July 1978, **E3/746**; *Revolutionary Youth,* Vol. 10, October 1978, **E3/765**.
[2314] Closing Order, para. 1197; T. 14.03.2016, **E1/401.1**, pp. 84-85, from 14.18.14 to 14.22.49; T. 23.02.2016, **E1/390.1**, pp. 51-55, from 11.17.39 to 11.24.40.
[2315] *Revolutionary Flag* April 1977, **E3/742**, ERN 00499754, 00499757-758.

to recall that many dissident cadres fled Democratic Kampuchea and sought asylum in Vietnam, and that they were trained by the Vietnamese to fight the CPK.[2316] It is therefore likely that the phrase "agents of the Vietnamese" refers to such dissident cadres, who were considered to be affiliated with Vietnam. However, such discourse is not directed against Vietnamese civilians in Prey Veng and Svay Reng provinces.

2254. A January-February1978 issue of the *Revolutionary Flag* again refers to the Vietnamese State as an invader and swallower of territories.[2317] According to the Co-Prosecutors, the term "yuon" was also used as a call to kill Vietnamese civilians.[2318] On this subject, the Defence refers to foregoing submissions.[2319] Moreover, that particular issue of the *Revolutionary Flag* makes no reference to civilians, but rather to measures to be taken against the Vietnamese State in order to defend the Cambodian territory.

2255. In addition to the *Revolutionary Flag* and the *Revolutionary* Youth, some other documents concern either relate to the armed conflict or consist in propaganda to galvanise the soldiers and garner support for the war effort [2320] As a matter of fact, a November 1977 telegram from Chhon refers to incidents with the Vietnamese close to the border in Sector 23.[2321] None of those documents refers to Vietnamese civilians in Prey Veng and Svay Rieng as targets. Those documents cannot support the claim that there was a policy to target the Vietnamese. Therefore, no evidence has been shown that crimes were committed against the Vietnamese in those provinces.

III. NO EVIDENCE CONCERNING KILLINGS OF VIETNAMESE CIVILIANS

2256. According to the Co-Investigating Judges, killings Vietnamese civilians in Prey Veng and Svay Rieng were an integral part of the policy to target the Vietnamese. Moreover, the theory of matrilineal descent was allegedly proof of the CPK's policy of destruction.[2322] However, not only are the speeches and other contemporaneous CPK documents insufficient to establish that Vietnamese civilians in Prey Veng and Svay Rieng were targeted but also, and more importantly,

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[2316] See *supra*, paras. 818-823.
[2317] *Revolutionary Flag*, January-February 1978, **E3/726**, ERN 00524420-21.
[2318] T. 23.02.2016, **E1/390.1**, pp. 70-71, between 13.54.49 and 13.56.12.
[2319] See *supra*, paras. 2218-2225.
[2320] Instructions of 870, 03.01.1978, **E3/741**; The Revolutionary Army Adopts Resolutions on SRV Dispute, 04.01.1978, **E3/1285**; Yuon enemy aggressors and expansionist land-grabbers, 01.01.1979, **E3/722**.
[2321] Telegram 82, *To beloved and Missed Brother Pol about situation of battle field in Region 23*, 18.11.1977, **E3/386**.
[2322] Closing Order, paras. 214-215.

the evidence produced in Case 002/02 fails to show that Vietnamese civilians were killed.[2323]

2257. Apart from the small number of Vietnamese in some villages in Prey Veng and Svay Rieng,[2324] no killings of any Vietnamese could be established beyond reasonable doubt.[2325] The same applies to the policy of matrilineal descent.[2326] The Trial Chamber must therefore find that a policy advocating the destruction of the Vietnamese in whole or in part, has not been established.

Chapter VII. FORMER-KHMER REPUBLIC SOLDIERS AND OFFICIALS

Section I. CHARGES

2258. Amongst the charges under "Legal Characterization" in the Closing Order, only the crime of political persecution as a crime against humanity relates to the facts described as having been committed against former Khmer Republic officials.[2327]

2259. As stated *supra*, according to paragraph 1417 of the Closing Order, former Khmer Republic officials, along with New People and Cambodians returning from abroad, were among the only three groups identified by the CPK, who suffered the discrimination that is characterised as political persecution.[2328]

2260. Among the crime sites listed in paragraph 1416 of the Closing Order, the chapeau paragraph on the charge of political persecution, the sites where the crime was allegedly committed against former Khmer Republic officials are not distinguished from those where it was allegedly committed against one of the other groups listed in paragraph 1417.

2261. Careful analysis of the facts in the Closing Order shows that facts concerning former Khmer Rouge officials are alleged to have taken place at the Tram Kok cooperatives (I), the 1st January Dam worksite (II), S-21 (III) and at Kraing Ta Chan (IV). Those sites are listed in paragraph 1416 of the Closing Order. It will therefore be assumed that the Co-Investigating Judges characterised the facts that took place there as political persecution.

2323 See *supra*, paras. 2158-2179 and 2181-2183.
2324 See *supra*, para. 2205.
2325 See *supra*, paras. 2158-2179.
2326 See *supra*, paras. 2195-2197.
2327 Closing Order, paras. 1416-1417; Severance Decision, para. 44; Annex: List of paragraphs and portions of the Closing Order relevant to Case 002/02, **E301/9/1.1**, pp. 2-3.
2328 See *supra*, para. 2204.

2262. As a matter of fact, those are facts that the Trial Chamber considered as demonstrating the implementation of a policy against the former Khmer Republic officials in the Annex to the Decision on Severance; they are discussed in the next segment.[2329]

I. THE TRAM KOK COOPERATIVES

2263. In the Closing Order, facts concerning former Khmer Republic officials are set forth in three sentences at paragraph 319 (under "Tram Kok Cooperatives") and expounded in paragraph 498 (under "Kraing Ta Chan Security Centre").

2264. According to paragraph 319:

> "Former members of the Khmer Republic armed forces and the police of the Khmer Republic, especially those who had held the rank of officer, were closely monitored. Lists of former Lon Nol officers who arrived in the subdistricts were drawn-up and sent to the district. For example, a District 105 document from Nheng Nhang Subdistrict records the names of 11 former Lon Nol officers who had been placed in the subdistrict.".

2265. On the one hand, the ill-explained "close monitoring" to which former Khmer Republic soldiers were allegedly subjected cannot in and of itself amount to proof of discrimination, considering the status of the persons monitored. For this to be considered anything more than just the wariness one would expect of a victor of a fratricidal war vis-à-vis the vanquished, it would have been necessary, at the very least, to explain the consequences of such monitoring on the lives of those concerned. However, that is far from being the case.

2266. On the other hand, none of the facts stated at paragraph 319 is restated at paragraphs 1417 and 1418 concerning legal characterisation whereby the crime of persecution is based solely on the following facts: identifying groups as "enemies", excluding them from "the common purpose of building socialism", subjecting them to harsher living conditions and arresting them en masse for re-education and elimination. None of those facts bears any relation to the findings at paragraph 319.

2267. Based on a reading of paragraph 319 of the Closing Order, it is impossible to tell whether the Co-Investigating Judges sent KHIEU Samphan to trial for facts of political persecution against former Khmer Republic officials. Should Trial Chamber consider otherwise, it would still have to recognise the lack of sufficient charges against him.

[2329] Annex: List of paragraphs and portions of the Closing Order relevant to Case 002/02, **E301/9/1.1**, p. 2.

2268. Paragraph 498 states in essence that after the liberation of Phnom Penh, the evacuees arriving in Tram Kok District were made to write their biographies and that former Khmer Republic officials would subsequently disappear. The paragraph is also states that "the Kraing Ta Chan prisoner lists and the increase in the number of prisoners at Kraing Ta Chan after April 1975 suggests many of those who disappeared were sent to Kraing Ta Chan".

2269. It would therefore appear that former Khmer Republic officials were discriminated against simply owing to their membership of a targeted group. Unlike the facts set forth at paragraph 399 of the Closing Order, those facts form the basis of the charge of political persecution at paragraph 1416. Therefore, KHIEU Samphan must answer thereto.

II. THE 1ST JANUARY DAM

2270. As discussed *supra* concerning the crimes allegedly committed at the 1st January Dam worksite, the Co-Investigating Judges concluded at paragraph 1418 of the Closing Order that at the worksites the targeted groups described at paragraph 1417:

> "were subjected to harsher treatment and living conditions than the rest of the population. Also, they were arrested *en masse* for re-education and elimination at **security centres** and **execution sites**."[2330] (*emphasis supplied*)

2271. Regarding former Khmer Republic officials, the charge is based on paragraph 366, according to which they disappeared from the worksite.

2272. However, as noted *supra* regarding New People, the Co-Investigating Judges do not demonstrate any discrimination at paragraph 366 of the Closing Order, since workers at the worksite could be arrested irrespective of their group.[2331]

III. S-21

2273. At paragraph 1417 of the Closing Order, the Co-Investigating Judges list the crimes committed against former Khmer Rouge officials at S-21:

> "As for junior officials of the former regime, some were arrested immediately after the CPK took power, because of their allegiance to the previous government, and many were executed at security centres such as **S-21** […]" (*emphasis supplied*).

[2330] See *supra*, paras. 1063-1068.
[2331] See *supra*, paras. 1063-1068.

2274. This charge is based on paragraph 432 of the Closing Order, which states: "appeared in the lists [ofS-21 prisoners], in particular former soldiers and cadres of the Khmer Republic".

2275. Paragraph 1417 states that former Khmer Republic officials were targeted because of their allegiance to the previous government of Cambodia. However, paragraph 432 – which ostensibly underpins that charge – does not mention any reason for arresting former Khmer Republic officials. It only states that the prisoners included former Khmer Republic officials. That does not in any way substantiate the charge recorded against KHIEU Samphan at paragraph 1417.

2276. Accordingly, the conclusion in paragraph 1417 of the Closing Order is simply an arbitrary inference by the Co-Investigating Judges. There is no place for that in an international case, and KHIEU Samphan need not answer to unsubstantiated charges.

IV. KRAING TA CHAN

2277. As noted *supra*, in reliance on the facts regarding Kraing Ta Chan at paragraph 498 of the Closing Order, the Co-Investigating Judges recorded a finding on the treatment of former Khmer Republic officials at Tram Kok.[2332]

2278. In this instance, only the facts which took place at Kraing Ta Chan are discussed.

2279. In the discussion on the Kraing Ta Chan security centre, only former Khmer Rouge officials are mentioned at paragraph 500, which states, for example, that "'base people', former Khmer Republic soldiers, CPK cadre, Chinese, Vietnamese and Cham also contributed to the population.".

2280. The findings in this paragraph are discussed *supra* in the segment on the alleged persecution of New People at Kraing Ta Chan.[2333] The Defence has explained that the Co-Investigating Judges did not demonstrate discrimination against New People at the Kraing Ta Chan security centre. Such is also the case for former Khmer Republic officials.

2281. Accordingly, KHIEU Samphan cannot be charged with facts characterised as persecution of former Khmer Republic officials at Kraing Ta Chan. He need not answer to such charges.

[2332] See *supra*, paras. 1261-1262.
[2333] See *supra*, paras. 1264-1265.

Section II. EVIDENCE UNDERPINNING THE FINDINGS IN THE CLOSING ORDER

2282. Analysis of the evidence underpinning the Closing Order helps discern whether or not the charges upon which the Accused were sent to trial are sufficiently substantiated. Against expectation, it also reveals that the Co-Investigating Judges violated the rules governing their *saisine* more than it appeared at first in light of the information underpinning the crimes charged, as discussed *supra*.

I. ALLEGED MONITORING OF FORMER KHMER REPUBLIC OFFICIALS AT TRAM KOK: PARAGRAPH 319

2283. As noted *supra*, the Judges did not demonstrate any discrimination against former Khmer Republic officials.

2284. The evidence underpinning the findings contained in three sentences at paragraph 319 on the treatment of former Khmer Republic officials[2334] again raises serious doubts about the thoroughness of the Co-Investigating Judges' three-year-long investigation.

2285. First, no evidence supports the allegation that former Khmer Republic officials were monitored. As for the finding that lists of former LON Nol officers in the communes were prepared and sent to the districts, it is supported by a single item of evidence which was presented as an example of the practice. However, while the referenced report contains the names of officers and their commune of residence, there can be little doubt as to whom the information was sent.

2286. Therefore, since the Co-Investigating Judges did not offer a single shred of evidence in support of their finding, they alone know what they are talking about.

2287. Such being the case, should the Trial Chamber decide that the Co-Investigating Judges were properly seised it of the facts committed against former Khmer Republic officials at Tram Kok, KHIEU Samphan would be uncertain which charges he is to answer to.

II. ALLEGED DISAPPEARANCES OF FORMER KHMER REPUBLIC OFFICIALS AT TRAM KOK: PARAGRAPH 398 [=> 498]

2288. As noted *supra*, KHIEU Samphan is charged with facts relating to the disappearances alleged at paragraph 398 [= 498] of the Closing Order. The evidence in support of that charge contains many

[2334] See *supra*, paras. 2264-2267.

irregularities. It is cited *infra* in order to demonstrate that yet again the Co-Investigating Judges were oblivious to the rules of procedure and the rights of the Accused.

2289. The first two sentences of paragraph 398 [=498] read as follows:

> "A Tram Kok District resident recalls that before evacuees from Phnom Penh arrived in the area, the secretaries of the districts and subdistricts attended a meeting at which they were advised that there would be a purge of the evacuees. Anyone who had been a soldier holding the rank of Corporal Sergeant or above in the Khmer Republic regime, and anyone from the Khmer Republic administration who had been a first deputy chief or higher, would be purged.".

2290. Those are very serious charges, but no evidence supports them. It is uncertain how the Co-Investigating Judges obtained that information. KHIEU Samphan need not answer to unfounded charges.

2291. The Co-Investigating Judges go on to assert as follows:

> "This is confirmed by three witnesses, including the former district youth chairman who recalls that when *new people* arrived at Tram Kok they were made to write biographies. He also states that anyone who admitted to being a soldier would subsequently disappear.".

2292. That finding is based on the written record of interview of IEP Duch, who was interviewed by the investigators during the judicial investigation. He did not say that those people disappeared, but rather that they were supposed to disappear[*"ils devaient disparaître"*], which does not mean the same thing, since no action was taken in that instance.[2335] Words do carry a meaning, and the Co-Investigating Judges were expected to be mindful of that.

2293. Shortly after that, after entering findings in the absence of any allegation of discrimination,[2336] they go on to assert:

> "A committee member of a sub-district in Tram Kok recalls the commune secretary being ordered to gather together all the evacuees who held the rank of Second Lieutenant or higher. Once assembled, the upper echelon would send a truck to take them away. These people disappeared forever.".

2294. This finding is based on what BUN Thien told the investigators during the judicial investigation. Yet, as stated *supra*, BUN Thien did not live in Tram Kok District, but rather in Traing District.[2337]

[2335] WRI of IEP Duch, 30.10.2007, **E3/4627**, ERN 00223477.

[2336] Closing Order, para. 498: "One witness recalls arriving in Tram Kok in April 1975 and being ordered to write his biography. He was told specifically to speak the truth about whether he was a soldier or government official.".

[2337] See *supra*, para. 936; WRI of BUN Thien, 17.08.2009, **E3/5498**, ERN 00384397, 00384398, 00384399 and 00384403.

The Co-Investigating Judges entered that finding in breach of their *saisine*; it cannot be recorded against KHIEU Samphan.

2295. The Co-Investigating Judges state further that:

> "The Kraing Ta Chan prisoner lists and the increase in the number of prisoners at Kraing Ta Chan after April 1975 suggests many of those who disappeared were sent to Kraing Ta Chan"

2296. It is worth noting that his finding is not based on any prisoner list, but rather on the statements of PECH Chim and PHAN Chhen which bear no relation to the claims of the Co-Investigating Judges who are oblivious to being rigorous.[2338]

2297. Lastly, the assert that:

> "Several reports from the subdistrict to the district in 1977 reveal that the purge of former Khmer Republic soldiers and officials continued after 1975.".

2298. Only this finding seems to be founded on evidence that is consistent with the Co-Investigating Judges' claim. However, as is often the case, much of the evidence is clearly out-of-scope, as it relates in large part to events that took place in Tram Kok, which events the Co-Investigating Judges were not mandated to investigate.[2339]

Section III. <u>EVIDENCE PRODUCED AT TRIAL</u>

2299. A large portion of the evidence produced at trial (I) is outside the Trial Chamber's jurisdiction (II). Some evidence seems to indicate that certain crimes may be established (III).

I. <u>THE EVIDENCE PRODUCED</u>

2300. Only one witness testified concerning the treatment of former Khmer Republic officials as a targeted group on 1 and 2 February 2016.[2340] The following segment explains why the Trial Chamber's decision to dedicate an entire trial segment to this matter makes no sense.[2341]

[2338] Closing Order, para. 498, footnote. 2159.
[2339] See *supra*, paras. 848-852; Closing Order, para. 498, footnote 2160. See for example, **E3/2048** (RI18.33), ERN 01454944 (Report from Popel commune); ERN 01454945 (Report from Cheang Torng commune); ERN 01454946 (Report from Popel commune).
[2340] <u>SAO Van</u>: T. 01.02.2016, **E1/385.1;** T. 02.02.2016, **E1/386.1**.
[2341] See *infra*, paras. 2306-2318.

2301. A great deal of evidence concerning former Khmer Republic officials was produced throughout the Case 002/02 proceedings. Witnesses were questioned about former Khmer Republic officials in all the trial segments created by the Trial Chamber.

2302. Also, in addition to the written records of interview from Case File 002, many from Case Files 003 and 004 which were admitted en masse into Case File 002, relate to former Khmer Republic officials.

II. OUT-OF-SCOPE EVIDENCE

2303. It is virtually impossible to list all the out-of-scope evidence that the Trial Chamber admitted throughout the proceedings. The Trial Chamber is only seised of facts of persecution against former Khmer Republic officials at the Tram Kok cooperatives.

2304. Any other information obtained concerning the treatment of former Khmer Republic officials is outside the jurisdiction of the Trial Chamber, either because it was not properly seised thereof by the Co-Investigating Judges or such information was out-of-scope since the issuance of the Co-Prosecutors' Introductory Submission.

III. EVIDENCE CONCERNING THE CRIME OF POLITICAL PERSECUTION AT TRAM KOK

2305. Part of the evidence tendered may suggest that the constitutive elements of the crime of political persecution as alleged at paragraph 1416 of the Closing Order could be established. Be that as it may, the Defence recalls that the crime of political persecution cannot be established in this instance unless it was committed in one of the eight communes under review.[2342]

Chapter VIII. ALLEGED POLICY TO TARGET FORMER KHMER REPUBLIC OFFICIALS

2306. KHIEU Samphan is charged with the crimes committed against former Khmer Republic officials at the Tram Kok cooperatives, the 1st January Dam Worksite, S-21 Security Centre and Kraing Ta Chan Security Centre. As noted in the previous segment, KHIEU Samphan was charged only with the facts which took place within the Tram Kok cooperatives, since the charges recorded against

[2342] See *supra*, para. 848.

him by the Co-Investigating Judges were insufficient to warrant sending him for trial before the Trial Chamber to answer to the other alleged crimes.[2343]

2307. According to the Severance Decision, former Khmer Rouge officials are a target group against which a policy was allegedly implemented, as demonstrated by the crime sites recorded in Case 002/02. Therefore, according to the Trial Chamber:

> "Factual allegations relevant to each of these crime sites are relevant to the policy of targeting of former Khmer Republic officials.".[2344]

2308. In support of that assertion, the Trial Chamber states in a footnote that:

> "The Closing Order alleges that there was a pattern of targeting former Khmer Republic officials. Factual allegations relevant to this pattern are included within the sections of the Closing Order concerning Tram Kok Cooperatives (Closing Order, para. 319), 1st January Dam Worksite (Closing Order, para. 366), S-21 Security Centre Closing Order, para. 432), Kraing Ta Chan Security Centre (paras. 498, 500)".[2345]

2309. The Trial Chamber's assertion is incorrect and misleading. Neither of the paragraphs cited above refers to a "pattern" – a term that is vague that it already skews the Trial Chamber's analysis – of targeting former Khmer Republic officials. It could hardly be otherwise since, as observed in the previous segment, none of the paragraphs cited in the footnote, apart from 498, refers to a pattern of targeting former Khmer Republic officials.

2310. The Trial Chamber's analysis is based on its biased reading of the Closing Order. According to paragraph 206 of the Closing Order, under "Treatment of targeted groups":

> "The Co-Investigating Judges are seized of treatment of the Cham in the Central, East and Northwest Zones; of the Vietnamese in Prey Veng and Svay Rieng Provinces in the East Zone and during incursions into Vietnam; of Buddhists throughout Democratic Kampuchea; <u>and of former officials of the Khmer Republic during the movement of the population from Phnom Penh</u>. This last incident constitutes only one of several occurrences of a pattern of targeting former officials of the Khmer Republic." (*emphasis added*)

2311. Therefore what is at issue here is note policy to target former Khmer Republic officials throughout Cambodia, but rather two types of facts: those concerning the evacuation of Phnom Penh of which the Co-Investigating Judges claim to be seised in regard to a policy to target former Khmer

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[2343] See *infra*, paras. 2282-2305.
[2344] Decision on Additional Severance, 04.04.2014, **E301/9/1**, para. 44.
[2345] Decision on Additional Severance, 04.04.2014, **E301/9/1**, footnote 95.

Republic officials, and those concerning other events of which they were not seised in regard to that aspect.

2312. Therefore, regarding the sites relevant to Case 002/02, the Co-Investigating Judges were not seised of an alleged policy underpinning the commission of the crimes. This explains why former Khmer Republic officials are not defined as a targeted group, unlike Buddhists, the Cham and the Vietnamese under Part "D. Treatment of targeted groups" of Title "VII. Factual findings of crimes" of the Closing Order.[2346] This also suggests that the Trial Chamber has no jurisdiction to try KHIEU Samphan based upon an alleged CPK policy to target former Khmer Republic officials.

2313. Accordingly, KHIEU Samphan need not answer to the implementation of a policy which was randomly fabricated by the Trial Chamber in its Severance Decision.

2314. Therefore, the Trial Chamber had no grounds to continuously admit evidence concerning former Khmer Republic officials in respect of all the crime sites.

2315. On 26 August 2015, at the request of the Defence, the Trial Chamber explained its course of action, and in an email to the parties, it stated the reasons for the decision it had rendered during the proceedings, namely that the Co-Prosecutors' questions about former Khmer Republic officials at Trapeang Thma Dam (in relation to which they are not mentioned in the Closing Order) were relevant, despite the objection of the Nuon Chea Defence.

2316. Even while no policy to target former Khmer Republic officials is alleged in the Closing Order in relation to facts under review in Case 002/02, the Trial Chamber justified its erroneous reasoning as follows:

> "The Chamber considers that the Co-Prosecutor's question is relevant to the *existence* of the alleged policy to target former Khmer Republic officials, in addition to internal purges (*sic*)." (*emphasis supplied*).[2347]

2317. The position that the Trial Chamber adopted in breach of the scope of its *saisine in rem* led to a considerable waste of time in that witnesses testified concerning former Khmer Republic officials in relation to all the crime sites at issue in Case 002/02, and also that Co-Prosecutors were allowed

[2346] Closing Order, summary, p. 4 and paras. 740.-840.
[2347] Email, 26.08.2015, **E362**.

additional time to file material concerning former Khmer Republic officials during the key documents hearing on the treatment of targeted groups.[2348]

2318. The Trial Chamber's unconscionable position is further testament that the Judges lack a full understanding of the reasoning behind the Closing Order. That is also illustrated by its analysis of the issue of "internal purges", as evidenced by the email of 26 August 2015. KHIEU Samphan must not be the victim of the Trial Chamber's trial and error approach or of manifestations of its bias against him.

Part IV. REGULATION OF MARRIAGE

Chapter I. MARRIAGES

Section I. CHARGES

2319. The charges against KHIEU Samphan relate to facts which took place countrywide, and are characterised by the Co-Investigating Judges as crimes against humanity of "other inhumane acts" through forced marriages and rape in the context of forced marriage.[2349]

2320. The Co-Investigating Judges set forth their factual findings regarding the regulation of marriage under the Democratic Kampuchea regime at paragraph. 843 to 860 of the Closing Order. They found, *inter alia*, that throughout that period, men and women countrywide were forced to marry during "mass ceremonies ranging from two couples to over 100 couples", ceremonies that were organised by the upper echelon (paragraph 844). They add that the consummation of marriage was monitored by militias (paragraph 858).

[2348] T. 24.02.2016, **E1/391.1**, p. 7, around 09.17.50.

[2349] Closing Order, paras.1430-1433; 1442-1447; Annex: List of paragraphs and portions of the Closing Order relevant to Case 002/02, **E301/9/1.1**, pp. 4-5 (footnote 15 of the Annex; the Chamber recalled that the Pre-Trial Chamber had struck the charge of the Co-Investigating Judges of rape as a stand-alone crime against humanity, since the crime did not exist as such between 1975 and 1979).

Section II. THE EVIDENCE PRODUCED

I. PRELIMINARY REMARKS

2321. Regulation of marriage was the most discussed subject in Case 002/02 in that most of the witnesses who testified were questioned thereupon (A). Moreover, an overwhelmingly large number of written records of interview were added to the case file (B).

A. Characteristics of the testimonial evidence

1. A large body of testimonial evidence

2322. In addition to the many persons called in regard to other matters who discussed marriage, sixteen individuals specifically testified during the trial segment on marriage; these included two experts, two witnesses and twelve civil parties (including three who testified on the impact of the crimes). Two of the two witnesses and twelve civil parties had not been interviewed by the Co-Investigating Judges in Case 002.[2350]

2. Characteristics of civil parties' testimonies

2323. By definition, civil parties are persons who consider themselves victims of the crimes charged. Having joined the case as civil parties with or without the assistance of an NGO, the twelve civil parties who testified therefore clearly have a vested interest in the case. This of course does not necessarily mean that civil party testimony is untruthful; but rather, as should be recognised, that that there is bias involved and therefore a greater need to ascertain whether such testimony is reliable and credible.

2324. The fact that civil parties do not testify under oath and also that they are collectively represented may affect the content of their testimony. For example, attending civil party meetings or group gatherings may colour their testimony wittingly or unwittingly on their part.

2325. The reliability of their testimony is a crucial element, especially as for some, their accounts evolved over time and as the proceedings progressed with material being added, which – not fortuitously – always meant more incriminating material. A case in point is without a doubt CHEA Deap, who

[2350] Civil Parties: OM Yoeurn, CHEA Deap, PHAN Him, MOM Vun, PEN Sochan, PREAP Sokhoeurn; Witness: NOP Ngim (PREAP Sokhoeurn and NOP Ngim were called only on the basis of their statements in Cases 003 and 004).

submitted two documents on 14 October 2009 and 29 June 2013 in relation to her civil party application, but did not mention her alleged meeting with KHIEU Samphan until 28 May 2014, in a supplementary statement. The patently unpersuasive explanation as to why KHIEU Samphan is mentioned so belatedly in her statements raises questions.[2351]

2326. This example raises broader issues about the reliability of civil parties' testimonies. Comparison of the overall experience of those witnesses whose testimony touched on marriage with that of civil parties reveals that experiences and perceptions varied greatly for witnesses who testified about marriage and civil parties who were called specifically in regard the trial segment on marriage.

2327. The obvious explanation is that the civil parties who gave testimony were selected by their counsel, the Prosecution or the Trial Chamber based on a particularly painful experience which could even reinforce the Prosecution case. Nonetheless, it should also be recognised that in light of the experience of Cambodians countrywide, such accounts do not necessarily reflect what most people experienced during the Democratic Kampuchea period.

2328. The foregoing arguments are reasserted *infra* in relation to the alleged policy of regulation of marriage, but it was necessary to make the foregoing preliminary observations. The Trial Chamber ought to take them into account when assessing the probative value of the testimonies.

3. Significance of expert testimonies

2329. Two experts also testified concerning their research findings on marriage under the Democratic Kampuchea regime. Kasumi NAKAGAWA testified concerning her research specifically in regard to forced marriages, while Peg LEVINE testified concerning research of a more general nature concerning marriage under the Democratic Kampuchea regime. Even though their testimonies were inevitably circumscribed by their research samples, they provided interesting insight, notably into the cultural context in Cambodia before, during and after the Democratic Kampuchea period.

[2351] Civil Party Application of CHEA Deap, 14.10.2009, **E319/45.4.8**, ERN KH 01049379, ERN 01139644; Supplementary Information Form of CHEA Deap, 29.06.2013, **E319/45.4.8**, ERN KH 01049384, ERN 01139647 (or **E3/5010b**, ERN FR 01323100); Supplementary Information of CHEA Deap, 28.05.2014, **E3/5010a**, ERN 01137888; T. 31.08.2016, **E1/467.1**, pp. 56-60, 11.19.29. On changes in statements, see also: OM Yoeurn: T. 23.08.2016, **E1/462.1**, pp. 6-7, 09.12.36, p. 15, after 09.35.28. MOM Vun: T. 16.09.2016,**E1/475.1**, p. 48, after 11.18.38, pp. 85-89, 15.14.03-15.22.49. The civil party's account of her married life differed from her previous statements; the aim was to play down the consequences of her pre-DK arranged marriage.

B. Written records of interview admitted en masse

2330. The segment of the Closing Order concerning the regulation of marriage refers to 119 written records of interview or transcripts of hearing of 116 witnesses and civil parties.

2331. Paragraph 861 of the Closing Order states: "664 civil parties were declared admissible with regards to the policy of the regulation of marriage". Six of the witnesses and civil parties who were admitted in Case 002 were also admitted in Cases 003 and 004, and they submitted additional documents (e.g. supplementary information to their civil party applications), which were prepared within the framework of those cases.[2352]

2332. The problems relating to the reliability of written statements in general and the circumstances in which civil parties written records of interview were recorded in particular are discussed *supra*.[2353] In the same vein, the Trial Chamber must proceed with utmost caution in assessing the nearly 80 written records of interview which were admitted en masse concerning matters arising from Cases 003 and 004.

II. OUT-OF-SCOPE EVIDENCE

2333. The Trial Chamber is seised of all the facts relating to marriage, but as recalled *supra*, it is seised of rape only in the context of marriage.[2354] In spite of its own decisions and the objections of the Defence, it allowed several witnesses and civil parties to discuss rape outside the context of marriage in their testimony.

2334. Four civil parties, Lay HENG Heang, NGET Cat, OM Yoeurn and MOM Vun,[2355] recounted alleged episodes of rape of other people and/or outside the context of marriage. Therefore, those segments of their testimonies ought to be stricken from the record, because they relate to facts that are not charged against KHIEU Samphan.

[2352] YOS Phal, SENG Soeun, CHEA Deap, NOP Ngim, PEN Sochan and PREAP Sokhoeurn.
[2353] See *supra*, paras. 525-551.
[2354] See I, paras. 171-203.
[2355] HENG Lai Heang: T. 19.09.2016, **E1/476.1**, p. 64, 14.13.56. NGET Cat: T. 25.10.2016, **E1/489.1**, pp. 10-11, 09.23.07. OM Yoeurn: T. 23.08.2016, **E1/462.1**, pp. 6-7, after 09.14.42; OM Yoeurn: T. 23.08.2016, **E1/462.1**, pp. 6-7, after 09.12.36, p. 14, around 09.37.21: "I did not include that point, because it just came to my mind now, and so I would like to add that point in." p. 14, 09.35.28; MOM Vun: T. 16.09.2016, **E1/475.1**, pp. 48-49, 11.18.38, pp. 85-89, between 15.14.03 and 15.22.49.

III. EVIDENCE NOT IN DISPUTE

2335. Before discussing the evidence, the Defence wishes to point out that it does not dispute the fact that mass marriage ceremonies were organised under the supervision of local cadres in communes, cooperatives and units during the Democratic Kampuchea period. It also does not dispute that generally speaking such ceremonies conformed to the rites and customs of traditional Khmer marriage.

Section III. DISCUSSION OF THE RELEVANT EVIDENCE

2336. The sheer number of testimonies, written records of interview and civil party applications precludes any in-depth discussion. Also, the fact that the Trial Chamber is seised of facts which took place all across the country makes that task all the more impracticable. Therefore, the evidence relating to marriage under the Democratic Kampuchea regime is discussed by subject matter, following the order in the Closing Order and in light of the in-court evidence (II). It is important to take a closer look at the evidence relating to traditional Khmer marriage in order to gain a proper understanding of the regulation of marriage under the Democratic Kampuchea regime requires A.

I. TRADITIONAL KHMER MARRIAGE

A. Decision beyond the control of the prospective bride and groom

2337. Experts Kasumi NAKAGAWA and Peg LEVINE have the same views about the nature of Khmer arranged marriages. Expert NAKAGAWA described pre-Democratic Kampuchea traditional Khmer marriages as a purely communal rather than individual matter. In her view, "[…] it's not a personal matter. It's a family matter between the two parties, two families". She stated further: "and also, it's a communal matters, that the people in the village were invited to authorize such a marriage."[2356] When invited to comment on this, Expert LEVINE said: "yes, it's a family affair, but not one family; families' affairs, community affairs. So, that it's not just about families; it's about families and community usually."[2357]

[2356] T. 13.09.2016, **E1/472.1**, p. 40, 10.43.46.
[2357] T. 10.10.2016, **E1/480.1**, p. 53, 14.25.00.

2338. Thus, in Cambodian tradition, marriage – consisting of a contract between two families whereby the consent of the prospective bride and groom is largely brushed aside or even ignored – does not fit the Western model of a love match, in itself a relatively recent trend.

1. Love in traditional Khmer marriage

2339. In Khmer culture, marriage is both a union of two individuals and an arrangement and a contract between two families. According to Expert NAKAGAWA, before 1975, and to this day, the contract is the subject of negotiations, and tradition requires the groom's family to pay a bride price to the bride's family. Since the contract has far-reaching implications in terms of property, the families of the betrothed will tend to seek a mutually beneficial deal. This is why such marriages are usually arranged between families from the same social background and with equal estate.[2358]

2340. In Khmer culture, spousal "love" does not have the same meaning as "love and romance". For instance, according to Expert NAKAGAWA:

> "The term "love" is very difficult term to speak or to identify under the Cambodian culture. Women took it granted that [...] they have to love their husband, but love could mean very complex issues. And my understanding is that if, before the Khmer Rouge, if a woman could have genuine love to her husband, it was a good luck for her life because love is not automatically coming from the marriage. And many women were oppressed to show such direct affections to the man."[2359]

2341. Expert LEVINE shared that view. She stated that, according to her respondents, love was seldom or never at issue. She added nonetheless that "the term 'bond 'more aptly reflects the cultural dimension than 'love'". From an "emic" perspective, Expert LEVINE noted that the idea of love was virtually unheard of in Cambodian marriages.[2360] Therefore, pre- and post-Democratic Kampuchea marriages must be viewed from the angle of tradition. It is important to bear in mind when analysing Democratic Kampuchea-period marriages that the "Western" model does not apply, even though that is by no means easy for researchers and members of civil society, who were promoting the worthy cause of mentality change far beyond the Khmer Rouge. As a matter

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[2358] Kasumi NAKAGAWA: T. 14.09.2016, **E1/473.1**, pp. 38, 10.52.46: "Yes, and I am aware that this system still be practised now in Cambodian society."; T. 13.09.2016, **E1/472.1**, p. 49, after 11.06.55: "the wedding process, starting from initiation from mostly male side and approval from the female side, it takes months and there are a lot of negotiations between the two families"; T. 14.09.2016, **E1/473.1**, p. 38, 10.52.46. T. 14.09.2016, **E1/473.1**, p. 20, 09.52.15;T. 13.09.2016, **E1/472.1**, pp. 50-51, 11.09.14.
[2359] Kasumi NAKAGAWA: T. 14.09.2016, **E1/473.1**, pp. 33-34, 10.40.07.
[2360] Peg LEVINE: T. 10.10.2016, **E1/480.1**, p. 67, 15.14.53.

of fact, Expert LEVINE recounted the problems she encountered when her research findings ran counter to majority views on Democratic Kampuchea-period marriages.[2361]

2342. Both experts noted that love is non-factor in traditional Khmer marriages, but Expert NAKAGAWA went further, adding that in her view, women who married during that period "were not required [to] love [their husbands] because there had been no parental consent to the marriage." However love was a requirement in instances where the parents consented to the marriage. In Expert NAKAGAWA's opinion, love matches were "extremely rare" before 1975. [2362] Having affection for one's spouse was a way of honouring the parents' choice in the marriage, since the consent of the spouses was not a premise for marriage.

2. Nature of consent in traditional Khmer marriage

2343. In traditional Khmer marriage, children are kept on the side-lines when it comes to negotiations. Expert NAKAGAWA recorded accounts of traditional marriages which took place in the period from 1950 or 1960 to 1975. Her findings are clear and unequivocal:

> "In regard to the women's decision-making power, there was almost zero, so a daughter was given the <u>instruction or order</u> to marry with somebody by her parents."[2363] (*emphasis added*)

2344. Expert NAKAGAWA stated further that this was "decided upon her" and that even though boys enjoyed more freedom, they still needed the consent of their parents.[2364] Expert LEVINE shares that opinion.[2365] It was confirmed in court by, among others, OUM Sophany,[2366] and by MEAS Laihuor, whose marriage had been arranged by her parents "quite a long time ago".[2367] OM Yoeurn

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[2361] <u>Peg LEVINE</u>: T. 10.10.2016, **E1/480.1**, p. 49, after 14.04.37: "Pausing just a moment, because it's a very complex question for me and my experience in association with, at times, NGOs in Cambodia sometimes as a consultant and the word 'independent consultant' sometimes gets compromised. So for example, I was a consultant to a project where I did, I thought, a thorough survey, but I think that I never saw the final report because my final report may not have been in favour with what some of the funding sources may have wanted to receive. [...] when NGOs are struggling very hard to keep the organization going, sometimes; not always, sometimes, there are compromises to take on projects with funds that compromise -- compromise outcomes or what I would consider to be neutral outcomes. [...] So, in that regard, I really wanted to not be associated with any agenda by any NGO, one way or the other, on this particular topic. This is a very -- has become and has been a very heated topic and I felt that heat very early on in just cursory discussions that became emotional."

[2362] <u>Kasumi NAKAGAWA</u>: T. 14.09.2016,**E1/473.1**, p. 33, 10.40.07.

[2363] <u>Kasumi NAKAGAWA</u>: T. 13.09.2016, **E1/472.1**, p. 39, 10.42.29

[2364] <u>Kasumi NAKAGAWA</u>: T. 13.09.2016,**E1/472.1**, p. 45, 10.49.20, p. 39, 10.42.29.

[2365] <u>Peg LEVINE</u>: T. 10.10.2016, **E1/480.1**, p. 53, 14.23.47: "Firstly, just to respond to your middle comment regarding Ms. Nakagawa's statement, yes, it's a family affair, but not one family; families' affairs, community affairs."

[2366] <u>OUM Sophany</u>: T. 23.01.2015, **E1/251.1**, pp. 104-105, 15.49.56.

[2367] <u>MEAS Laihuor</u>: T. 26.05.2015, **E1/305.1**, , p. 86, after 15.19.32.

got married at age 15 or 16 before Democratic Kampuchea came into being. She said that she did not know her husband until the day they got engaged, adding that her marriage was" [her] parents' decision" and moreover that "it is different from youth nowadays who knew each other before marriage".[2368]

2345. The consent of prospective spouses was therefore a non-factor in traditional Khmer marriages. For Expert NAKAGAWA, "the daughters were expecting the parents to decide on her marriage. So we would say that she was blindly agreed upon the proposal by the parents for a marriage because there was a mutual trust." She explained for example that the reason why she made reference to "force" in regard to marriage under the Democratic Kampuchea regime was because Khmer Rouge "failed to gain the trust by those married couple" who "could not regard [them] as their parents.[2369] However, "blind" trust in the parents' decision in traditional marriage as opposed to "force" under the Khmer Rouge conflicts with the fact that this type of arranged marriage can be experienced quite differently nowadays.[2370]

2346. The question here is whether only the parents had authority over both the choice to get married and the choice of a spouse, and whether it was socially acceptable to refuse a marriage.

3. <u>Refusing a marriage arranged by parents was impermissible</u>

2347. Based on the experts' remarks, the items of evidence set out *supra*, as well as witness and civil party accounts[2371] demonstrate that it was impermissible for the prospective spouses to oppose the parents' decision. Owing to the pressure of society and the two families involved, it was not impossible to renege on the agreement which had been negotiated and approved beforehand. Expert NAKAGAWA explained that it was utterly inconceivable to challenge parents on a matter of such import:

[2368] OM Yoeurn: T. 23.08.2016, **E1/462.1**, p. 26, 10.34.42.This perception must also be viewed in light of current statistics on the choice of a husband. See, on this subject: Report entitled "Gender Assessment", USAID Cambodia, 2010, **E3/10661b**, p. 14, ERN 01324462: "Only 19 percent of women chose their husbands on their own or in agreement with their future husbands. Instead, the choice is often made in discussion with "someone else" (29 percent), and over half of women (52 percent) did not participate at all in choosing their husbands.".

[2369] T. 14.09.2016, **E1/473.1**, pp. 9-11, 09.28.14.

[2370] For example, see article entitled "Arranged marriage blamed for failing families", A. MARCHER, *The Phnom Penh Post*, 20.08.1999, **E3/7288**, in which the reporter highlights the social problems arising from families being torn asunder due to forced marriages.

[2371] OM Yoeurn: T. 23.08.2016, **E1/462.1**, pp. 26-27, 10.34.42. OUM Suphany: T. 26.01.2015, **E1/252.1**, p. 22, 09.57.40. MEAS Laihuor: T. 26.05.2015, **E1/305.1**, pp. 85-88, 15.16.41 and 15.23.40. KANG Ut: T. 25.06.2015, **E1/322.1**, pp. 33-34, 10.54.00.

> "Traditionally, in Cambodian culture, as in many other cultures, children were not understood as a person who has the full rights. Parents (sic) were understood as not properties, but belongings to the parents. So parents thought they have to make a decision for everything about their children, including from the education to the marriage, which is the most important issues for many Cambodians. [...] It's not only for the marriage. Children's life were decided by the parents. [...] So there was no option to say no because they are waiting for their spouse to be decided by the parents."[2372]

2348. As a matter of fact, obedience of one's elders – also expected of boys[2373] – is among the distinctive features of traditional societies. In traditional marriages, refusal had far-reaching consequences for both the young people concerned and their families, not least because it implied losing face. In response to a question from the Trial Chamber as to whether it was possible to refuse marriage, Expert NAKAGAWA said: "to maintain the reputation of the family, it is fundamental, and the girls were obliged to take care of the good reputation of the family". While boys could initiate the process through their parents, they still had to accept the parents' choice. Expert NAKAGAWA is unaware of any instances of young men refusing to accept their parents' choice, and considers that, indeed, it was not uncommon for a young man to present a marriage proposal to his parents.[2374] The heavy burden of tradition on women is also to be viewed in light of women's status prior to the advent of Democratic Kampuchea.

4. Women's status and the men-women relationships in the pre-Democratic Kampuchea period

2349. The family's reputation and the duty of children to respect their parents are among the reasons why arranged marriages are so common. Indeed, Expert NAKAGAWA said: "I still see tradition that parents are arranging or forcing; particularly, their daughters to marry".[2375]

2350. This is also consistent with a traditional view of women's role as reflected in the traditional poem *Chbab Srey*, which is considered as a code of conduct for young girls and wives. This "code" of conduct, believed to encapsulate women's condition in the pre-Democratic Kampuchea period,

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[2372] T. 13.09.2016, **E1/472.1**, pp. 43-44, 10.50.25.
[2373] T. 13.09.2016, **E1/472.1**, p. 39, 10.42.29.
[2374] T. 13.09.2016, **E1/472.1**, pp. 39, 10.42.29, pp. 42-43, 10.49.20, p. 43, 10.50.25; T. 14.09.2016, **E1/473.1**, p. 20, 09.52.15, pp. 37-38, 10.51.00.
[2375] T. 14.09.2016,**E1/473.1**, pp. 45-46, 11.11.46.

exalts submission to the husband[2376] and acceptance of his behaviour whatever it may be.[2377] The *Chbab Srey*, which was part of the curriculum until only recently, is deeply anchored in Cambodian culture;[2378] is still the subject of considerable criticism due to its continuing consequences.[2379] Similarly, arranged marriages are still very common and are a reality for many, especially in rural areas.[2380] A proper understanding of the traditional views on marriage also helps gain an understanding of the cultural references of the cadres who oversaw marriages under the Democratic Kampuchea regime and have a less Manichean view of how those who contracted it and those who did not perceived it.

B. Conjugal duty and rape

2351. "Conjugal duty" is another crucial aspect of culture. The idea of marital rape is still difficult to grasp to this day; moreover, was not written into law until only recently.[2381] Marital rape, which is still quite common, should therefore be viewed in light of a traditional view of conjugal "duty",

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[2376] *Chhbab Srey, Women's Code*, MEUN Mai, **E3/10659**, ERN 01327694-95: "You should remember that you are the only personal servant of your husband and you should always highly obey your husband. […] If you don't take good care of your husband you will be full of disgrace. […] You should study Chhpap Srey, and worship your husband. […] You should forbear and tolerate everything"; **E3/10659**,ERN 01327697: "… even though her husband is very cruel and so furious that he strongly beats, kicks and swears at her she does not dare to reply or fight or argue back and forth, for fear that the family's issue could be overheard in long distance*"*.

[2377] *Chhbab Srey, Women's Code*, MEUN Mai, **E3/10659**, ERN 01327695-96: "You should be always patient because your patience can defuse your husband's anger. Don't try to revenge or protest against your husband. […] Even though your husband blames or insults you should go to bed and think about it as many times as possible. Then you come out [of bed] and speak with soft, gentle words and ask for his pardon to ride yourself of the guilt. […] if you don't listen cautiously warnings and orders can make disputes erupt. Disputes ruin your reputation if they happen frequently. […] Don't be lazy and idle when your husband asks you to do anything even the destination is far or close you should get up and move quickly; don't let your husband warn you"; **E3/10659**, ERN 01327697: "[...] No matter how her husband is outraged she does not dare to reply back or argue or protest": this patience will earn her religious grace: "she will enjoy happiness, peace and glory void of sufferings"".

[2378] Kasumi NAKAGAWA: T. 14.09.2016, **E1/473.1**, p. 56, 13.32.12. According to Kasumi NAKAGAWA, Chbab Srey was removed from the curriculum on the recommendation of the Committee on the Convention on the Elimination of all Forms of Discrimination Against Women, which regarded it as being a "reason for oppression of the woman in Cambodia", but it is reportedly still taught in family circles, in particular at important Khmer cultural ceremonies, during which principles "such as to be submissive, to be obedient, to be soft, nice, kind, […]have been taught as a foundation to be a good, traditional Cambodian women."

[2379] Article entitled "There Is No Place for 'Chbab Srey' in Cambodian Schools", Kelly GRACE and Sothy ENG, *The Cambodia Daily*, 09.06.2015, **E3/10660**, ERN 01324426-28. "Violence Against Women: How Cambodian Laws Discriminate Against Women", CAMBOW, 2007, **E3/10658a**, pp. 13-14, ERN 01324393-94.

[2380] T. 14.09.2016, **E1/473.1**, pp. 57-59, 13.34.37-13.39.13. Article entitled "Arranged marriage blamed for failing families", A. MARCHER, *The Phnom Penh Post*, 20.08.1999,**E3/7288.**

[2381] Law on The Prevention of Domestic Violence and the Protection of Victims, promulgated on 24.10.2005, articles 3 and 7. This Law on the prevention of domestic violence, article 3 of which refers to sexual aggression as an act of domestic violence (and article 7 of which notably defines domestic violence as an act of "*violent sex*"), was not promulgated until 2005. Read in conjunction with article 239 of the Cambodian Penal Code, which proscribes rape, it de facto criminalises acts of sexual violence between spouses. However, it has lacunae in that while a definition of "violent sex" may include lack of consent, the notion of consensual sexual relations is not clearly articulated.

which existed well before Democratic Kampuchea came into being. For example, a stanza of the poem *Chbab Srey* urges women to gratify the husband's sexual desires unquestioningly and with discretion:

> "The second fire is gratifying the sexual desires of your husband, your lord. You should fulfil this task (sex) perfectly and don't make him upset. You should be humble and don't consider him (your husband) as equal to you. No matter what, don't protest against your husband improperly and you should not tell the story to your mother or his mother."[2382]

2352. This stanza is perfectly in tune with the rest of the poem, which also applies to sexual relations between husband and wife. Expert NAKAGAWA confirmed that marital rape occurred before 1975 and continued well thereafter, in 2016. She remembered that "some women were told to be obedient to the husband in the night of the wedding" even though they had received no sex education.[2383]

2353. Marital rape, as it is known nowadays, is neither the brainchild nor the product of the Democratic Kampuchea regime. While legislation has produced positive change, the precepts of the *Chbab Srey*, among other factors, were the pre-existing drivers of behaviour for generations before Democratic Kampuchea came into being, and continue to be so to this day.

2354. However revolting it may sound, the idea that a husband can rape his wife and that the wife's consent was required but not always sought was not part of the collective psyche in Cambodia before 1975 or even between 1975 and 1979, and this continued to be the case until quite recently.

2355. Certain behaviours are therefore the result of cultural perceptions and not of an alleged CPK policy. It is an important to bear that in mind when analysing the evidence.

II. MARRIAGE UNDER THE DEMOCRATIC KAMPUCHEA REGIME

2356. A commonly held view is that Democratic Kampuchea abolished all traditions in order to lay down new rules in all fields and at all levels of society. However, analysis of marriage shows similarities with the practice in the pre-Democratic Kampuchea period. It is in the Trial Chamber's own interest to take into account pre-Democratic Kampuchea practices and how they evolved during the Democratic Kampuchea period.

2382 *Chhbab Srey, Women's Code*, MEUN Mai, **E3/10659**, p. 2, ERN 01327695.
2383 T. 14.09.2016, **E1/473.1**, p. 43, 11.08.24;T. 13.09.2016, **E1/472.1**, p. 52, 11.14.24.

A. Rules governing marriage

2357. Although consent is not a requirement for traditional Khmer marriages, it is nonetheless important to take a closer look at the content of testimonies relating thereto, notably in light of the foregoing observations about the tradition of arranged marriages and CPK principles.

1. Principles governing the arrangement of marriages

2358. The presumption that all marriages under the Democratic Kampuchea regime were forced is at odds with the facts. As discussed *infra*, while ceding parental authority to *Angkar* was couched in tradition, it must recognised that the CPK's brand of communism meant seeking to modernise the institution of marriage, for example, by advocating individual consent and a minimum marriage age.

a. "Legal" conditions: the 12 Moral Principles

2359. To start with, it is worth noting that the principle as set out in CPK documents expressly affirms the need to secure the consent of the prospective husband and wife. The sixth of the twelve moral principles cited in the *RevolutionaryYouth* issue of October 1978 is as follows:

> "As for the current issue of setting up a family there is no obstacle this just based on two principles of the Party: First both parties agree. Second the collective agrees and then it is done."[2384]

2360. The need to secure the consent of both partners was confirmed by many witnesses, including CPK cadres. PRAK Yut testified that marriage "took place only when both parties consented to it"; that was confirmed by YOU Vann, OR Ho, MAK Chhoeun and TEP Poch, and PECH Chim added that the law intended that "the two persons had to be consenting".[2385] PECH Chim testified further that the district authorised marriages based on information from the lower echelon, which implies that proposals came from that level.[2386]

2361. In his testimony, CHUON Thy confirmed his previous statement in which he stated that he personally heard POL Pot talking about requiring the consent of prospective spouses: "*Q: At that*

[2384] *Revolutionary Youth*, 10.1978, **E3/765**, ERN 00539994.
[2385] PRAK Yut: T. 19.01.2016,**E1/378.1(closed session)**, pp. 46-47, 11.26.00-11.30.26.YOU Vann: T. 14.01.2016,**E1/376.1 (closed session)**, p. 69, 15.34.53. AU Hau/OR Ho: T. 19.05.2015, **E1/301.1**, pp. 71-72, 14.35.53.CHUON Thy: T. 25.10.2016,**E1/489.1**, pp. 109-110, 15.56.58; T. 26.10.2016,**E1/490.1**, pp. 5-6, 09.09.45.MAK Chhoeun: T. 13.12.2016, **E1/512.1**, pp. 43-44, 11.16.03.TEP Poch: T. 22.08.2016,**E1/461.1**, pp. 83-84, 15.08.38. PECH Chim: T. 22.04.2015,**E1/290.1**, p. 44, 13.45.41.
[2386] T. 22.08.2016, **E1/461.1**, p. 86, 15.16.15-15.17.50.

*time, did POL Pot talk about how to select partners? **A** 29. POL Pot said it was up to them. If they agreed, arrange marriage for them, but do not force them.*"[2387] This statement therefore does confirm the tenor of the sixth moral principle.

2362. However, MOENG Vet said in this regard:

> "Although everyone attended the same meeting where the principles were announced, then individual understanding was different. […] And if everyone behaved in the same way, that would be an ideal situation, but in practice, the situation was different. Although the principles existed, the implementation was not consistent."[2388]

2363. The two foregoing testimonies again highlight the difference between the principle as enunciated and its implementation.

2364. Contrary to the Co-Prosecutors' claims, the evidence before the Trial Chamber reveals a much more nuanced picture, in that the experiences recounted by the witnesses and civil parties concerning their consent to marriage varied from individual to individual. However, in regard to forced marriages, such disparities should be considered as reflecting failure to apply the rules.

b. <u>Expressing of consent</u>

2365. While the consent of the individuals concerned is not a requirement in traditional Khmer marriages, the witnesses who got married during the Democratic Kampuchea period all spoke of a solemn undertaking that was intended to signify their consent to the marriage.[2389] Moreover, some clearly distinguished between marriages in the pre-Democratic Kampuchea period and "commitments" during the Democratic Kampuchea period.[2390] Others volunteered to marry,[2391] as reflected in a

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[2387] <u>CHUON Thy</u>: T. 26.10.2016, **E1/490.1**, pp. 16-17, 09.36.03; WRI, **E3/10713**, Q/A: 28.
[2388] T. 27.07.2016, **E1/449.1**, p. 44, 11.06.08.
<u>CHEANG Sreimom</u>: T. 29.01.2015, **E1/254.1**, p. 18, 09.52.54;T. 02.02.2015, **E1/255.1**, p.16, 09.45.45. <u>SOU Sotheavy</u>: T. T. 23.08.2016, **E1/462.1**, p. 81, after 15.11.15. <u>YOS Phal</u>: T. 25.08.2016, **E1/464.1**, p. 16, 09.42.32, p. 23, 09.59.42. <u>CHEA Deap</u>: T. 30.08.2016, **E1/466.1**, p. 72, 14.02.17. <u>NOP Ngim</u>: T. 05.09.2016, **E1/469.1**, p. 41,10.45.36, pp. 56-57, 11.22.20. <u>MOM Vun</u>: T. 16.09.2016, **E1/475.1**, p. 57, 13.42.08. <u>HENG Lai Heang</u>: T. 19.09.2016, **E1/476.1**, p. 15, 09.47.53. <u>CHOU Koemlan</u>: T. 27.01.2015,**E1/253.1**, p. 23, 10.05.09.<u>RY Pov</u>: T. 12.02.2012, **E1/262.1**, pp. 29-30, 10.16.38. <u>OR Ho/AU Hau</u>: T. 19.05.2015, **E1/301.1**, p. 72, 14.39.46. <u>SOU Soeun</u>: T. 04.06.2015, **E1/310.1**, p. 79, 15.11.52. <u>CHUM Samoeurn</u>:24.06.2015, **E1/321.1**, p. 64, 14.25.08. <u>SEN Sophon</u>: T. 27.05.2015, **E1/323.1**, pp. 80-81, 15.51.40. <u>PRAK Doeun</u>: T. 02.12.2015, **E1/361.1**, p. 99, 15.56.47. <u>NEANG Ouch</u>: 10.03.2015, **E1/274.1**, p. 33, 10.48.56. <u>PRUM Sarun</u>: T. 08.12.2015, **E1/364.1**, p. 85, 15.08.14.<u>IN Yoeung</u>: T. 03.03.2016, **E1/387.1**, p. 96, 15.24.28. <u>CHAO Lang</u>: T. 01.09.2015, **E1/339.1**, p. 75, 15.09.35. <u>UCH Unlay</u>: T. 01.03.2016, **E1/394.1**, p. 99, 15.44.54. <u>TEP Poch</u>: T. 22.08.2016, **E1/461.1**, p. 84, 15.12.05.
[2390] <u>PRUM Sarun</u>: T. 08.12.2015, **E1/364.1**, p. 85, 15.08.14 "No marriages were held during that period. There were only commitments during which couples were required to hold hands together and voice their commitments, no marriages were held." WRI, 29.12.2014, **E3/9736**, Q/A-10-11.
[2391] <u>HENG Samuot/MAM Soeurm</u>: T. 29.07.2015, **E1/325.1**, p. 28, 10.06.15. <u>SOS Romly</u>: T. 08.01.2016, **E1/372.1**,

number of documents.[2392]

2366. The question here is whether the consent required under Khmer Rouge regulations held any validity. Some witnesses were pressured by parents or relatives,[2393] while others were forced to make the commitment even after refusing to do so.[2394] Yet others explained that they did not dare manifest their refusal; that shows how difficult it was to refuse a traditional marriage.[2395] Lastly, some refused to marry but were not punished or in any way taken to task.[2396] Regarding that last point, it is noteworthy that those who were familiar with CPK principles felt free to say no. For example, while RUOS Suy recounted instances where people gave their consent due fear of reprisal, she also responded to the investigators as follows:

> "**Q**: You said that there was a plan to marry 100 per month Was that successful? **A** 81: No. Q. Why? A 82: Because some people agreed to get married as assigned whereas some who understood the plan or had learned Party policy through their friends refused to get married."[2397]

2367. In these circumstances, the clearly expressed need to seek the consent of the bride and groom, the diversity of testimonies and the fear of challenging authority without saying so outright preclude the firm conclusion that some marriages were forced.

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pp. 46-47, 11.12.48. IN Yoeung: T.03.02.2016, E1/387.1, p. 103, 15.41.02. OM Yoeurn: T. 23.08.2016, **E1/462.1**, p. 28, after 10.39.31.

[2392] *FBIS*, 09.1978, **E3/76**, ERN 00170426,ERN KH 01327012:"*RevolutionaryYouth*, Issue 10", 10.1978, **E3/765**, ERN FR 00540025 ERN KH 00376494 ERN 00539994.

[2393] SENG Soeun: T. 29.08.2016, **E1/465.1**, p. 26, 10.07.40.CHEANG Sreimom: T. 26.01.2015, **E1/252.1**, pp. 21-23, 09.55.15-10.01.13.MEAS Laihuor: T. 26.05.2015, **E1/305.1**, p. 85, after 15.16.41. SEN Srun: T. 14.09.2016, **E1/346.1**, pp. 56-57, 11.49.12-11.51.40.: "[W]e were forced to get married [...] my wife's family side actually consented to the marriage as my parents actually sought their agreement beforehand."

[2394] SUN Vuth: T. 31.03.2016, **E1/412.1**, pp. 13-14, 09.37.16.CHUM Samoeurn: T. 24.06.2015, **E1/321.1**, p. 64, 14.25.16. KHIN Vat: T. 29.07.2015,**E1/325.1**, p. 91, 15.40.38. YI Laisauv: T. 20.08.2015, **E1/334.1**, p. 59, 14.06.57.CHAO Lang: T. 01.09.2015, **E1/339.1**, p. 69, 14.35.37. BIT Na: T. 28.11.2016, **E1/502.1**, pp. 43-44, 11.28.43.

[2395] CHEANG Sreimom: T. 29.01.2015, **E1/254.1**, pp. 21-22, 10.02.12. KANG Ut: T. 25.06.2015, **E1/322.1**, p. 33, 10.56.18. HENG Samuot/MAM Soeurn: T. 28.07.2015, **E1/324.1**, pp. 92-93, 15.49.12. PRAK Yut: T. 19.01.2016, **E1/378.1 (closed session)**, pp. 41-45, 11.14.11-11.20.00.IN Yoeung: T. 03.03.2016, **E1/387.1**, p. 92, 15.14.02. PHOUNG Yat: T. 11.08.16, **E1/455.1**, p. 66, 14.00.56. YI Laisauv: T. 20.08.2015, **E1/334.1**, p. 57, 14.02.00. PRAK Doeun: T. 02.12.2015,**E1/361.1**, p. 98, 15.55.50. SOU Sotheavy: T. 23.08.2016, **E1/462.1**, p. 82, 15.14.21, p. 96, 15.49.56. YOS Phal: T. 25.08.2016, **E1/464.1**, pp. 14-15, 09.35.47-09.39.40, p. 27, 10.36.57. CHEA Deap: T. 30.08.2016, **E1/466.1**, p. 97, 15.25.05. CHEAL Choeun: T. 17.10.2016, **E1/484.1**, p. 25, 10.04.33. PREAP Sokhoeurn: T. 20.10.2016, **E1/487.1**, p. 92, 15.03.32; T.24.10.2016, **E1/488.1**, p. 15, 09.35.05.

[2396] NOP Ngim: T. 05.09.2016, **E1/469.1**, pp. 43-44, 10.49.18, p. 74, 14.08.48. PHNEOU Yav: T.17.02.2015,**E1/264.1**, pp. 33-34, 10.52.08. THUCH Sithan: T. 21.11.2016, **E1/500.1**, p. 69, 14.53.25. MEAS Laihuor: T. 26.05.2015,**E1/305.1**, pp. 85, 15.16.41. SUN Vuth: T. 30.03.2016, **E1/411.1**, p. 79, 14.40.12;T. 31.03.2016, **E1/412.1**, pp. 3-4, 09.07.47. EM Phoeung: T. 16.02.2015, **E1/263.1**, p. 56, 13.43.11. CHUON Thy: T. 26.10.2016, **E1/490.1**, pp. 5-6, 09.09.45. OR Ho/AU Hau: T. 19.05.2015, **E1/301.1**, pp. 71-72, 14.37.52.

[2397] WRI of RUOS Suy, 07.07.2015, **E3/10620**, Q/A 81-82.

2368. Since mobile units were only for unmarried people precisely because they moved from place to place, some witnesses considered being sent to such work units as a punishment for refusing to marry. In reality, married people generally tended to stay in co-operatives, because they catered for a family lifestyle. Moreover, some people volunteered to marry for that very reason, as lN Yoeung reported.[2398]

c. Marriageable age

2369. Attempts by the Prosecution and the Civil Parties to obtain evidence on early marriages were unsuccessful. Even the last-minute testimony of Civil Party CHEA Deap – in which she mentioned an alleged speech by KHIEU Samphan on marriage for the first time – did not serve their purpose. CHEA Deap, a civil party in Case 002 since 2009, had never mentioned KHIEU Samphan before 28 May 2014.[2399] In her testimony, she stated that she attended a speech by KHIEU Samphan in which he urged women to marry at the age of 19 in order to have children. She was unable to explain further.[2400] No other testimony or document corroborates hers; but by some odd coincidence, it reflects what is stated in the Closing Order concerning increasing the population. The fact that her testimony came at the eleventh hour makes it even less reliable.

2370. In any event, the practice emerging from the entire body of evidence is that the marriageable age was 20 years and above, because the Khmer Rouge had put an end to the practice of early marriage which prevailed in traditional society.[2401] This is confirmed by NOP Ngim and SENG Soeun and[2402] is consistent with the experience of the majority of the civil parties and witnesses who testified. OM Yoeurn was aged about 23 or 24 years; SOU Sotheavy was over 30 and people around him were aged between 20 and 30;YOS Phal and the others were aged between 23 and 25 years, PHAN Him was about 22; MOM Vun was about 26 while HENG Lai Heng was 25 in 1975.[2403] As

[2398] T. 03.02.2016, **E1/387.1**, p.74-76, 14.15.11, p. 103, after 15.42.02: "I volunteered and I decided to get married so that I would be sent to be working in the cooperative since the situation there was better."
[2399] CHEA Deap: Supplementary Information Form, 28.05.2014,**E3/5010a**, ERN01137888;Although she was a civil party in Case 002, during which she made highly incriminating statementsconcerning the regulation of marriage, on 28 May 2014, less than two months after the on 4 April 2014 Decision on Additional Severance (E301/9/1)on including marriage in the Case 002/02 crime base. See *supra*, para. 2325.
[2400] T. 31.08.2016, **E1/467.1**, pp. 56-58, 11.22.00.
[2401] OM Yoeurn: T. 23.08.2016, **E1/462.1**, p. 27, after 10.35.18. NGET Cat: T. 25.10.2016, **E1/489.1**, p. 20,09.44.05. See also instances of girls being married at a very young age reported in the near-contemporary period: Article entitled "Arranged marriage blamed for failing families", A. MARCHER, *The Phnom Penh Post*, 20.08.1999, **E3/7288** ERN 00993793.
[2402] NOP Ngim: T. 05.09.2016, **E1/469.1**, pp. 61-62, 13.33.55. SENG Soeun: T. 29.08.2016, **E1/465.1**, p. 41, 11.11.04.
[2403] OM Yoeurn: T. 22.08.2016, **E1/461.1**, p. 100, 15.58.35. SOU Sotheavy: T. 23.08.2016, **E1/462.1**, p. 70, after

concerns PREAP Sokhoeurn, in spite of the attempts of the International Co-Prosecutor to lower her age, she was probably 20 or 21 years old in late 1976 or early 1977. Finally, NGET Chat and SAY Naroeun were 20 at the time of their marriage, while KUL Nem was over 26.[2404] There were rarer cases. SUN Vuth stated that the marriage age for men and women was about 30 years, while MY Savoeun said it was around 20 years for women and 25 years for men.[2405] Therefore, the few instances of people of lower age than this group are exceptions, which were contrary to the requirements set forth by the CPK.[2406]

2. Role of the authorities in the choice of a spouse

2371. Paragraph 845 of the Closing Order states that the majority of the marriages were arranged by people other than the individuals concerned or their families. The evidence shows that the situation during the Democratic Kampuchea period was not so homogeneous and that it was similar in many respects to that in the pre-Democratic Kampuchea period.

a. Similarities and differences in the process

2372. There are many similarities between the marriages arranged during the Democratic Kampuchea period and the marriages arranged through tradition. Expert NAKAGAWA noted that in Democratic Kampuchea's reorganisation of society, young unmarried people were assigned to

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14.22.51 (SOU Sotheavy was in fact born on 08.12.1940); T. 23.08.2016, **E1/462.1**, p. 92, 15.39.22 ("Based on my knowledge and observation, their age were nearly equal. [...] Many of them were young, but not too young. So they were around 20 to 30 for the men."). YOS Phal: T. 25.08.2016, **E1/464.1**, p. 27, 10.36.57. PHAN Him: T. 31.08.2016, **E1/467.1**, p. 86, 14.11.57 and p. 74, 13.41.47 (the witness married in November 1978 and was 60 years old when called to testify in 2016). MOM Vun: T. 16.09.2016, **E1/475.1**, p. 40, 10.58.42. MOM Vun said that she was 67 old when she testified in court in 2016, which means that she was 26 years old in 1975, when she married. HENG Lai Heang: T. 19.09.2016, **E1/476.1**, p. 54, 13.47.19. PREAP Sokhoeurn: T.24.10.2016, **E1/488.1**, p. 3, 09.06.57.

[2404] PREAP Sokhoeurn said that her real age at the time of her in-court testimony in 2016 was 62 and that she probably married in late 1976 or 1977, which means that she was 20 or 21 years old at the time: T. 20.10.2016, **E1/487.1**, p. 80, 14.17.15 and T. 24.10.2016, **E1/488.1**, p. 74, 13.47.41. NGET Chat: T. 24.10.2016, **E1/488.1**, p. 123, 16.00.00. SAY Naroeun: T. 25.10.2016, **E1/489.1**, p. 32, 10.30.00 and p. 35, 10.37.06.KUL Nem: T. 24.10.2016, **E1/488.1**, p. 86, after 14.18.05.

[2405] SUN Vuth: T. 30.03.2016, **E1/411.1**, p. 86, 14.40.12; T. 31.03.2016, **E1/412.1**, pp. 6-7, 09.16.01. MY Savoeun: T. 17.08.2016, **E1/459.1**, p. 86, 15.26.01.

[2406] Regarding these rare cases, see: PEN Sochan: T. 12.10.2016, **E1/482.1**, p. 67, 13.42.57. PEN Sochan further stated that she was the youngest woman to marry: T. 13.10.2016, **E1/483.1**, p. 62, after 11.46.25. SEANG Sovida: T. 02.06.2015, **E1/308.1**, pp. 46-47, 11.07.23. Regarding the purported age of a witness in Case 003/004, see the observations of the Defence: T. 06.09.2016, **E1/470.1**, p. 73, 14.00.55;T. 08.09.2016, **E1/471.1**, pp.38-39, after 10.39.48. Witness YI Laisauv also stated that she got married at age 17.:T. 20.08.2015, **E1/334.1**, p. 60, 14.09.02, which is not consistent. Given that she was born in 1958, she was aged 17 in 1975: T. 20.08.2015,**E1/334.1**, p. 25, 10.27.37.Yet, she married her husband one month before the arrival of the Vietnamese, which means that she got married in 1978 and that she was therefore about 20 years old: T. 20.08.2015,**E1/334.1**, p. 63, 14.18.04.

mobile units under the responsibility of local cadres.[2407] The cadres exercised the authority that was normally assigned to parents or guardians under the previous regime. This therefore resulted in a reassignment of parental authority – including arrangement of marriage – to *Angkar*, but the process was akin to that in the pre-Democratic Kampuchea period.

2373. Expert NAKAGAWA made a clear distinction between forced marriages and the marriages authorised under Democratic Kampuchea regime. According to her, forced marriage was when at least one of the spouses had not given their consent, whereas authorised marriage was consensual, either through the choice of the parents or that of the Khmer Rouge.[2408] In her opinion, the arrangement involved the same stages in the pre-Democratic Kampuchea period, before being submitted to the local authorities for approval. Many a witness confirmed that such approval was granted by cadres at the proposal of the parents or the young people.[2409] Expert NAKAGAWA stated that local authorities did not play this role before 1975, but she acknowledged that they took part in the ceremonies, as was the case under the Democratic Kampuchea regime, validating the union through their presence.[2410]

b. Disparity in the testimonies on parental involvement

2374. In the other cases, while the arrangement of marriage by an authority other than the parents was not in keeping with tradition, the acceptance of the choice made by the new authority by the prospective spouses or the lack of explicit opposition thereto does reflect traditional respect for authority as exhibited in the acceptance of an arranged marriage. Even though authority changed hands (from the parents to the local authorities and to *Angkar*), the process was very similar to the arrangement made according to tradition.[2411]

[2407] Kasumi NAKAGAWA: T. 13.09.2016, **E1/472.1**, p. 42, 10.49.20, p. 68, before 13.46.24: "The mostly young women, single women, who are up to the reproductive age, was in the youth group or the 'kangchalat' mobile unit."
[2408] T. 13.09.2016, **E1/472.1**, p. 73, 13.57.32, pp. 67-68, 13.31.15-13.34.20.
[2409] TEP Poch: T. 22.08.2016, **E1/461.1**, p. 82, 15.06.55. PECH Chim: T. 22.04.2015, **E1/290.1**, p. 44, 13.45.41; T. 23.04.2015, **E1/291.1**, p. 5, 09.13.50.MEAS Laihuor: T. 26.05.2015,**E1/305.1**, pp. 11-12, 09.28.41. KANG Ut: T. 25.06.2015, **E1/322.1**, pp. 33-34, 10.56.18.UM Chi: T. 30.07.2015, **E1/326.1**, p. 114, 15.47.40.SEN Srun: T. 14.09.2015, **E1/346.1**, p. 57, 11.51.40.
[2410] T. 13.09.2016, **E1/472.1**, p. 44, after 10.45.49 ("And how it was authorized was that it could have been registered in the local authorities, but mostly, that local authorities such as village chief was invited to join the wedding ceremony. And this is a process to authorize the marriage."), and p. 51, 11.10.40.
[2411] KAN Thol: T. 10.08.2015, **E1/327.1**, p. 75, before 15.33.38. OR Ho/AU Hau: T. 19.05.2015, **E1/301.1**, pp. 53-54, 13.54.28.

2375. Many a witness and civil party reported parental involvement in marriage. For example, KANG Ut, AHMAD Sofiyah, Lay HENG Heang, MEAS Laihuor and SEN Srun were married through an arrangement whereby the parents were consulted.[2412] YUN Bin also reported parents being present at a wedding.[2413] PAN Chhuong also reported parental involvement, as did TEP Poch and NOP Ngim. Witnesses who did not give testimony also confirmed parental involvement;[2414] they include Expert NAKAGAWA.[2415]

2376. It is therefore hardly surprising that the harm generally alleged by civil parties and witnesses has more to do with the lack of rituals or the non-attendance of family members at weddings than with the way marriages were arranged.[2416] In fact, the family could still play a role in arranged marriages.

c. Bonds and feelings forming after marriage

2377. The fact that many marriages survived the Democratic Kampuchea regime is another similarity with arranged marriages. Some couples separated immediately after the demise of the Democratic Kampuchea regime, while others did so long thereafter, for reasons totally unrelated to the circumstances of their marriage.[2417] According to the experts, a majority of spouses remained with the partner they had married during the Democratic Kampuchea period.[2418] This was confirmed by in-court testimonies.[2419] Moreover, many witnesses and civil parties stated that marriage partners were urged to love each other when they took the vows.[2420]

[2412] KANG Ut: T. 25.06.2015, **E1/322.1**, pp. 33-34, 10.54.00. AHMAD Sofiyah: T. 13.01.2016, **E1/375.1**, p. 77, 14.36.59. HENG Lai Heang: T. 19.09.2016, **E1/476.1**, p. 51, 13.39.56. MEAS Laihuor: T. 26.05.2015, **E1/305.1**, pp. 11-12, 09.28.41. SEN Srun: T. 08.09.2015, **E1/346.1**, p. 57, 11.51.40.

[2413] YUN Bin: T. 15.08.16, **E1/457.1**, p. 39, 11.05.37. PAN Chhuong: T. 01.12.2015, **E1/360.1**, p. 37, 11.12.26.TEP Poch: T. 22.08.2016, **E1/461.1**, pp. 83-84, 15.08.38. NOP Ngim: T. 05.09.2016, **E1/469.1**, p. 70, 13.58.53.

[2414] WRI, 06.05.2014, **E3/9655**, Q/A 16. WRI, 23.04.2014, **E3/9666**, Q/A 7. WRI, 24.10.2013,**E3/9743**, Q/A 3.

[2415] T. 13.09.2016, **E1/472.1**, p. 63, 13.34.20.

[2416] Peg LEVINE: T. 11.10.2016, **E1/481.1**, pp. 51-52, 11.02.33-11.07.48. See also *supra*, paras. 2379-2390.

[2417] CHAO Lang: T. 01.09.2015, **E1/339.1**, p. 84, between 15.37.50 and 15.39.38 "I meant my in-laws family wanted a wealthier for my husband. The divorce was not because of our relationship, it was because the in-law family was not satisfied with me." MOM Vun: T. 16.09.2016, **E1/475.1**, p. 60, after 13.51.04. MEAS Laihuor: T. 26.05.2015, **E1/305.1**, p. 20, 09.50.42.

[2418] Kasumi NAKAGAWA: T. 14.09.2016, **E1/473.1**, pp. 20-21, 09.52.15. Peg LEVINE: T. 12.10.2016, **E1/482.1**, p. 35, 10.20.15. See also article entitled: "Forced to Wed, KR Couples Renew Vows by Choice", S. KHIMM and K. CHAN, 14.12.2006, *The Cambodia Daily*, **E3/7298**.

HENG Samuot/MAM Soeurm: T. 29.07.2015, **E1/325.1**, p. 31, 10.11.39.IN Yoeung: T. 03.03.2016, **E1/387.1**, p. 96, 15.24.28. PRAK Yut: T. 20.01.2016, **E1/379.1 (closed session)**, p. 33, 10.40.01. SUN Vuth: T. 31.03.2016, **E1/412.1**, p. 13, 09.35.52. YUOS Phal: T. 25.08.2016, **E1/464.1**, pp. 33, 10.55.47. NOP Ngim: T. 05.09.2016, **E1/469.1**, pp. 65, 13.46.45.

[2420] PHNEU Yav: T. 17.02.2015, **E1/264.1**, pp. 32-33, 10.48.20 "And people were instructed to make the resolution saying that: 'I commit to love my wife or my husband for the rest of my life', something like that." CHEA Deap: T.

2378. On this subject, Expert LEVINE explained that couples bonded after marriage through experiencing each other's kind-heartedness and overcoming challenges together. Moreover, marriage without traditional rituals did not impede the religious practice called *Ku Prean*, i.e. marriage arranged by Buddha. Depending on the case, marriage under the Democratic Kampuchea regime allowed for the special bond which holds together couples that are formed through traditional marriage.[2421]

3. Ceremonies and lack of rituals

2379. Paragraphs 843 and 844 concern mass ceremonies throughout the Democratic Kampuchea period, "ranging from two couples to over one hundred couples", with the majority involving 10 to 100 couples. This therefore represents a broad range. In fact, some witnesses recounted large "revolutionary engagement ceremonies", and many others also recounted smaller ceremonies intended for a small number of couples.[2422] Celebrating collective weddings was rationalised as a means to defray the costs incurred by *Angkar*.

2380. In the course of her research, Expert LEVINE analysed the nature of the suffering reported by couples in relation to their marriage. She noted that the couples in her study sample did not readily report the alleged coercion. Her anthropological study led her to conclude that the suffering among married couples during the Democratic Kampuchea period was not due to coercion, if any, that was brought to bear in order to secure consent, but rather to the abrogation of the nurturing

30.08.2016, **E1/466.1**, p. 70, 13.58.53. "*Angkar* gave us instructions [...] to love one another". PHAN Him: T. 31.08.2016, **E1/467.1**, p. 92, after 14.25.27: "Then they gave some instructions to live together as husband and wife, to love one another and to strive to work". MOM Vun: T. 16.09.2016, **E1/475.1**, p. 60, after 13.39.00: "Cadres [...] made an announcement that the newlywed couples had to love one another, to take care of one another." PEN Sochan: T. 12.10.2016, **E1/482.1**, p. 74, 13.59.35("we had to like each other." SAY Naroeun: T. 25.10.2016, **E1/489.1**, p. 43, after 10.49.44: "[we] have to repeat what the *Angkar* said. And we had to love each other from the time onward and had to work hard." SENG Lytheng: T.29.11.2016, **E1/503.1**, p. 43, 11.24.12: "There was small meal reception and there was an advice for us to love one another for life." MAK Chhoeun: T. 12.12.2016, **E1/511.1**, p. 100, after 16.01.00 "They encouraged us to build our life and love each other.... "

[2421] Peg LEVINE: T. 10.10.2016, **E1/480.1**, pp. 67-69, between 15.14.53 and 15.18.48.

[2422] CHOU Koemlan: T. 26.01.2016, **E1/252.1**, pp. 70-71, 13.49.58(the civil party mentioned three couples, a few couples and about 30/32 couples). CHEANG Sreimom: T. 29.01.2015, **E1/254.1**, p. 77, 15.20.04(this mentions four, five couples, and several couples), p. 89, 15.53.05 (six couples). RY Pov: T. 12.02.2015, **E1/262.1**, p. 61, 13.49.08 (2 couples), p. 64, 13.56.57 (34 couples). NEANG Ouch: T. 11.03.2015, **E1/275.1**, p. 44, 11.25.30 (4 or 5 couples). PECH Sokha: T. 20.05.2015, **E1/302.1**, p. 64, 14.11.23(30 to 40 couples). MEAS Laihuor: T. 26.05.2015, **E1/305.1**, pp. 3-4, 09.07.10 (25 couples). CHUM Samoeurn: T. 24.06.2015**, E1/321.1**, p. 64, after 14.25.08 (5 couples). KHIN Vat: T. 29.07.2015, **E1/325.1**, p. 91, 15.40.38 (1 couple). YI Laisauv: T. 20.08.2015,**E1/334.1**, p. 61, 14.12.08 (3 couples). CHHUY Huy: T. 24.08.2015, **E1/335.1**, p. 48, 11.28.10 (4 couples). SOS Romly: T. 08.01.2016, **E1/372.1**, p. 47, 11.14.19 (4 couples; more than 20 couples). YOU Vann: T. 18.01.2016, **E1/377.1 (closed session)**, p. 39, before 11.00.44 (8 couples).

traditional rituals surrounding marriage, a notion she calls *ritualcide*. She considers that the abrogation of rituals was traumatic in that it took away a form of protection, especially given that it related to Angkar's unknowable, mystical nature.[2423] This view is corroborated by examples of marriages which were celebrated well after the Democratic Kampuchea period in order to give couples that married under the Democratic Kampuchea regime the opportunity to celebrate rituals.[2424]

A. Aftermath of marriage

1. Alleged coercion

2381. The facts that could be characterised as forced marriages include coercion. Paragraph 849 of the Closing Order concerns among others fear of punishment for opposing the will of *Angkar*, as noted *supra*.[2425] Some witnesses reported that refusing to consummate a marriage could lead to being sent for re-education. Many testimonies are based on hearsay or personal conjecture.[2426]

2382. Moreover, in a broader sense, coercion should be analysed in light of the specific cultural features of Khmer society in the 1970s. As noted *supra*, the union of marriage was not based on the consent of two individuals, and, moreover, the Western model of marriage does not apply. Also, it important to note in addition to the observations concerning the *Chbab Srey* that Khmer upbringing disapproves of critical thinking and questioning authority; this could be part of reason why individuals could not overtly oppose an arranged marriage.[2427]

2383. The fact that defying authority was disallowed, and that the protection afforded by rituals no longer existed, and that *Angkar* as a "mythological or metaphysical feature" was omnipresent[2428] may explain the fear expressed by a number of witnesses and civil parties. Therefore, specifically in regard to marriage, such fear should be viewed as a consequence of cultural practices, and not of

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[2423] T. 11.10.2016, **E1/481.1**, pp. 51-54, between 11.02.05 and 11.09.31.
[2424] T. 11.10.2016, **E1/481.1**, pp. 51-52, 11.03.48;T. 12.10.2016, **E1/482.1**, pp. 4-6, 09.05.48, pp. 10-12, 09.20.25. Article entitled: "Forced to Wed, KR Couples Renew Vows by Choice", S. KHIMM and K. CHAN, 14.12.2006, *The Cambodia Daily*,**E3/7298**.[2425] See *supra*, paras.2365-2368.
[2425] See *supra*, paras.2365-2368.
[2426] RY Pov: T. 12.02.2015, **E1/262.1**, p. 62, 13.52.54. YOS Phal: T. 25.08.2016, **E1/464.1**, pp. 30-31, 10.45.56, p. 38, 11.08.57. NGET Chat: T. 25.10.2016, **E1/489.1**, pp. 3-4, 09.07.15. NOP Ngim: T. 05.09.2016, **E1/469.1**, pp.77-78, 14.17.20.
[2427] Book by P. SHORT, *Pol Pot Anatomy of a Nightmare*, 2004, **E3/9**, p. 34, ERN 00396226. See *supra*, paras. 2365-2368.
[2428] Peg LEVINE: T. 11.10.2016, **E1/481.1**, p. 7, 09.15.44.

an oppressive system. Where the CPK principles were applied to the letter – that is, where the consent of the prospective bride and groom was sought – they were in fact a step forward as compared to traditional marriage, and that precisely was their intended purpose.

2384. Finally, it is important to highlight Expert LEVINE's interpretation of the use of the term "forced". In her view, the choice of words can significantly influence one's perception of one's personal experiences. For example, she noted that the vast majority of the couples in her study sample did not perceive their marriage as having been forced until they heard arranged marriages under the Democratic Kampuchea regime being characterised as such.[2429] She explained further that less than 10% of the subjects in her study sample were married because they interpreted the threat to mean "violence", but none actually experienced any violence.[2430]

2. Consummation of marriage

2385. According to paragraphs 218 to 220 of the Closing Order, the evidence gathered by the Co-Investigating Judges shows that the Democratic Kampuchea regime instituted a policy of regulation of marriage consisting in forcing young people to marry in order to increase the population. According to paragraph 858 of the Closing Order, that policy was allegedly the reason why consummation of marriage was monitored by militias. The testimonial evidence relating to this issue and the nexus established by the Co-Investigating Judges are discussed *infra*.[2431]

a. Recommendations on consummation of marriages

2386. Some witnesses and civil parties stated that couples were pressured to consummate their marriage, including by re-educating those who did not get along. The re-education allegedly took place at the home of the village chief or the local chief's office.[2432] It mostly involved conversations between couples and the village chiefs or superiors in order to urge newly-weds to get along. It is worth

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[2429] Peg LEVINE: T. 10.10.2016, **E1/480.1**, pp. 46-47, 14.07.26, pp. 44-45, 14.04.33.
[2430] Peg LEVINE: T. 11.10.2016, **E1/481.1**, p. 41, 10.41.02.
[2431] See below, paras. 2430-2439.
[2432] IN Yoeung: T. 03.02.2016, **E1/387.1**, p. 93, 15.18.05: "Yes, they told us that we needed to consummate the marriage. If we refused to consummate the marriage, we would be taken to the commune office to make sure that we would consummate there". PHNEU Yav: T. 17.02.2017, **E1/264.1**, p. 35, 10.55.51: "They wanted to know whether the couple consummate their marriage, and if they did not do that, they were called for reprimand or for education.".PRAK Doeun: T. 02.12.2015, **E1/361.1**, p. 114, after 15.56.47 "They were advised by *Angkar* to consummate their marriage and to live together, and not to blame *Angkar*." YOU Vann: T. 14.01.2016, **E1/376.1 (closed session)**, p. 71, 15.40.03; PRAK Yut: T. 19.01.2016, **E1/378.1 (closed session)**, p. 52, 13.42.19. PRAK Doeun: T. 02.12.2015, **E1/361.1**, p. 99, 15.56.47.

noting that the involvement of village chiefs and local authorities in resolving family feuds was not uncommon and continues to this day.[2433]

2387. In response to questions concerning consummation of marriage in the pre-Democratic Kampuchea period, Expert NAKAGAWA said that because sex was a taboo subject, people in pre-Democratic Kampuchea society were unaware of sex education, including within the context of marriage. She added that even so, couples were expected to consummate their marriage. So some women were told to "obey their husbands during the wedding night". According to her, traditionally, the wife was expected to conceive quickly after marriage, which meant having sex even though there was no formal requirement to do so.[2434]

2388. Expert LEVINE also stated that people would discuss matters relating to sex by using salacious humour and sketches. Here again, sex was viewed in terms of procreation.[2435] She also likened the Puritanism of the Democratic Kampuchea regime – as described by THUCH Sithan – to that within Khmer culture. She observed that according to her research, under the Democratic Kampuchea regime, only a small number of couples were urged to consummate their marriage, adding that only a few did so because of that.[2436]

b. Testimonies on monitoring

2389. The testimonies relating to the consummation of marriage are unpersuasive especially when viewed in light of the puritanism of the Khmer Rouge and their conservative views about sex. Moreover, many of them are based on speculation and hearsay. Also, the ones relating to monitoring allege that it was performed by militias in their village, without providing any proof that instructions were given to that effect by the upper echelon.

2390. For instance, some witnesses stated that militias or soldiers monitored consummation of marriage by newly-weds.[2437] However, such testimony is mostly based on hearsay or speculation, and as

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[2433] "Violence Against Women: How Cambodian Laws Discriminate Against Women", CAMBOW, 2007, **E3/10658a**, pp. 13-14, ERN 01324392-94.
[2434] Kasumi NAKAGAWA: T. 13.09.2016, **E1/472.1**, pp. 52-54, 11.14.24.
[2435] Peg LEVINE: T. 10.10.2016, **E1/480.1**, pp. 82-83, 15.48.05-15.50.01.
[2436] Thesis by Peg LEVINE "A Contextual Study into the Wedding and Births under the Khmer Rouge: under the Khmer Rouge: The Ritual Revolution", **E3/1794**, ERN 00482540; T. 10.10.2016, **E1/480.1**, p. 81, 15.45.22.Expert LEVINE testified that although 40% of respondents (76 out of 192) were advised to consummate their marriage, only approximately 9% (19 out of 192) actually did so at the beginning of their marriages, with or without the urging of their local chief.
[2437] MEAS Laihuor: T. 26.05.2015, **E1/305.1**, p. 18, 09.46.36: "After my marriage, the militia came to to see whether

such, cannot establish the alleged facts.[2438] One civil party claimed for the first time in court that couples which did not get along were taken away by militias. The fact that the civil party revealed this only at that stage raises questions as to whether her testimony was truthful or whether it was simply opportunistic.[2439]

2391. Moreover, the majority of such witnesses failed to distinguish between monitoring consummation of marriage and monitoring a location. For example, SAY Naroeun stated that from a distance of about 50 metres he saw militias sitting under a nearby house, and therefore assumed that they were monitoring couples.[2440] At best, this is a personal deduction that is devoid of probative value, especially in view of the nature of the testimonies of cadres.

c. **Testimonies that monitoring and instructions to that effect never existed**

2392. The aforementioned testimonies contradict other testimonies concerning the absence of monitoring and especially, the absence of instructions to that effect. The counter-testimonies include those of several cadres from various localities. For example, SAO Han stated that he "did not see such event"; THUCH Sithan, MOENG Vet and NOP Ngim also testified to the same effect.[2441]

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we killed chicken to celebrate any religious ritual at home [or] burning the joss sticks." PRAK Doeun: T. 02.12.2015, **E1/361.1**, p. 99, 15.56.47.SOU Sotheavy: T. 23.08.2016, **E1/462.1**, p. 86, 15.24.14. YOS Phal: T. 25.08.2016, **E1/464.1**, pp. 30-31, 10.48.34.

[2438] RY Pov: T. 12.02.2015, **E1/262.1**, pp. 62-63, 13.54.40. EK Hoeun: T. 07.05.2015, **E1/298.1**, pp. 108-109, 16.03.30. SUN Vuth: T. 31.03.2016, **E1/412.1**, p. 4, 09.10.24. PHNEU Yav: T. 17.02.2015, **E1/264.1**, p. 38, 11.03.54, pp. 64-65, 14.14.54:"**Q**: [...] would it be fair to say that you are more describing, maybe, a general fear of possible measures, but that in reality no one was actually sent to re-education centres or Krang Ta Chan for violations like stealing coconuts or not? [...] **A**: Yes, that is correct."OM Yoeurn: T. 23.08.2016, **E1/462.1**, p. 8, 09.18.26: "I was afraid that I was being monitored because when we came there were seven or eight others who also came and I was afraid that I was being monitored. [...] They came to work in that office and, at night time, the guards monitored us. And if we did not consummate our marriage, then measures would be taken."). CHEA Deap: T. 30.08.2016, **E1/466.1**, pp. 73-74, 14.04.00: "No, I did not consummate with my husband since I was afraid of both the militiamen and my husband. I did not dare to make any sound." KUL Nem: T. 25.10.2016, **E1/488.1**, pp. 100-101, 15.08.17:"We were being monitored if we consummated the marriage or not, and that's what happened. We were afraid, so we had to consummate the marriage and that happened three days after the marriage. [...] we both were afraid and that's what we had to do and that's what we had to respect them, otherwise we would risk being killed or tortured."

[2439] SAY Naroeun: T. 25.10.2016, **E1/489.1**, p. 40, after 10.48.09: "I saw two militiamen [...] they took a couple [...] I saw the two militiamen came back. But I did not see the couple coming back with them. concluded that perhaps the couple did not get along with each other", p. 57, 11.30.28: "[...] since I sometimes forget. And later on, it came back to me and I recalls that during the time there were militia men and people were led away."

[2440] OM Yoeurn: T. 23.08.2016, **E1/462.1**, pp. 55-56, 13.44.38. SAY Naroeun: T. 25.10.2016,**E1/489.1**, pp. 41-42, 10.44.30.

[2441] SAO Han: T. 18.02.2015, **E1/265.1**, pp. 43-44, 11.13.32. THUCH Sithan: T. 21.11.2016, **E1/500.1**, p. 74, before 15.05.00: "No, the matter was not raised. During the times, this matter was not spoken of. This is in French morality or the morality issue that is in term of consummation of marriage, such matter was not spoken of."MOENG Vet: T. 27.07.2016, **E1/449.1**, p. 32, after 10.12.23: "I believe they were not subject to being monitored after they got married organized by *Angkar*. And that happened to married couples in my unit." NOP Ngim: T. 05.09.2016, **E1/469.1**, p. 77,

2393. CHUON Thy stated that no such monitoring existed, adding that he never heard the upper echelon giving to instructions to that effect.[2442] PHAN Him, PECH Chim testified that that "it did not happen", and so did YEAN Lun and KANG Ut.[2443]

2394. HENG Lai Heang corroborated his statements, saying: "The ones who monitored them were the people from within. [...] the people who monitored were the people from within the units".[2444] So in instances where monitoring took place, it was decided by the immediate superior of the individuals concerned, acting on his or her own initiative.

2395. Moreover, Duch characterised cadres who allegedly monitored the consummation of marriage as "immoral cadre", and even gave the example of one of them who was "punished for this: he was first made to apologise to the married couple".[2445] Duch thereby corroborated CHUON Thy's testimony that no instructions were given to monitor couples, and also explained that the practice attracted punishment, because it was considered contrary to CPK principles.

3. Civil parties' testimonies about marital rape

2396. The Defence recalls that the Trial Chamber is called upon to litigate only the allegations of marital rape. OM Yoeurn, MOM Vun, PREAP Sokhoeurn and PEN Sochan are the four civil parties who testified about the crime of rape.[2446] The testimonies of three of those witnesses lack credibility in many respects.

a. OM Yoeurn's testimony

14.17.20.

[2442] CHUON Thy: T. 26.10.2016, **E1/490.1**, pp. 6-7, 09.13.05: "of course, there was no process where those newlywed couples were monitored whether they consummated their marriage or not. It did not happen.", "I did not hear the upper echelon to relay instructions to monitor whether the couples consummate their marriage or not. However, I did not have any grasp regarding what happened at the base.".

[2443] PHAN Him: T. 31.08.2016, **E1/467.1**, p. 102, 15.07.21: "No, I did not hear anything about that". PECH Chim: T. 23.04.2015, **E1/291.1**, pp. 9-10, 09.25.02: "I did not know for sure about that, only later on I heard that militia did eavesdrop on those people. But to my understanding, it did not happen.". YEAN Lun: T. 16.06.2015, **E1/317.1**, p. 71, 14.43.13: "No, it's not true. No one was tasked to do that. It is not I was there, it's a shame to mention like this.." KANG Ut: T. 25.06.2015, **E1/322.1**, p. 39, before 11.14.40: "No, I was not aware of that, but I believed that they did not come and do that."

[2444] HENG Lai Heang: T. 19.09.2016, **E1/476.1**, pp. 56-57, 13.53.05.

[2445] WRI of KAING Guek Eav, 02.12.2009, **E3/5789**, ERN 00414335.

[2446] As stated *supra*, the testimonies of OM Yoeurn and MOM Vun are not discussed in relation to rape outside marriage. See *supra*, paras. 2333-2334.

2397. Between 2009 and 2014, Civil Party OM Yoeurn submitted several documents relating to her civil party application.[2447] She did not mention instances of rape in any of those documents. She only did so on the first day of her testimony, initially describing an out-of-scope-rape episode before going on to say that she too was raped by her husband. She also explained that the reason she did not include this detail in her previous statements was because "it came to [her] mind right then".[2448] She gave several answers to the question as to when the rape took place, which she was unable to explain, stating that she consummated the marriage with her husband 10 to 15 days after it was celebrated, then went on to say that this happened "a month or two after", whereas she had stated in her written record of interview that it happened one year after.[2449] Civil Party OM Yoeurn not only reported implausible out-of-scope facts at the eleventh hour, but she was also failed to explain flagrant inconsistencies in her testimony. Her testimony cannot be deemed credible owing to the many contradictions not to mention the tardy revelations.

b. MOM Vun's testimony

2398. Similarly, Civil Party MOM Vun recounted a marital rape committed by her husband on the orders and of militias and in their presence.[2450] Overall, her testimony was filled with contradictions, and hence not reliable. For example, she became idyllic just minutes thereafter and said that her first marriage was a disaster. Moreover, she recounted that her husband disappeared in 1975 when he was called to attend a study session, even though she did not mention his disappearance in her written record of interview, in which she stated that her husband was a palm tree climber in 1977.[2451]

c. PREAP Sokhoeurn's testimony

2399. PREAP Sokhoeurn also testified that she was raped by her husband. Her testimony is riddled with inconsistencies, and the explanations for those inconsistencies are unpersuasive: she never mentioned marital rape in her written record of interview. In fact, she even described her husband as a kind man. Yet, out of the blue, she decided to add that detail to the supplementary information

[2447] Civil Party Application, 04.08.2009, **E3/6011**; Supplementary Information Form, 28.05.2014, **E3/6011a**.
[2448] T. 23.08.2016, **E1/462.1**, p. 15, after 09.38.46, p. 5, after 09.12.36, p. 14, 09.37.21.
[2449] T. 23.08.2016, **E1/462.1**, pp. 42-43, between 11.18.53 and 11.21.58.
[2450] MON Vun: T. 16.09.2016, **E1/475.1**, p. 57, 13.43.25, pp. 103-105, between 15.55.03 and 15.59.23.
[2451] T. 16.09.2016, **E1/475.1**, pp. 57-58, 13.43.25, pp. 78-79, 14.39.23, pp. 111-113, between 15.55.03 and 15.59.23; T. 20.09.2016,**E1/477.1**, pp. 8-11, between 09.19.01 and 09.26.55.

she provided in 2014, and in court. She explained that earlier she was too shy to discuss the rape episode, but even so, nothing obliged her to describe her husband as a kind man.[2452] Also, she testified that she was urged to report the rape or else "there would be nothing as evidence", meaning that her testimony was elicited for the purpose at hand.[2453] It can be afforded only low probative value owing to the inconsistencies in her account.

Section IV. LEGAL CHARACTERISATION

I. "DEFINITION" OF OTHER INHUMANE ACTS (CRIMES AGAINST HUMANITY)

2400. Article 5 of the ECCC Law lists crimes against humanity separately from murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecution on political, racial or religious grounds, and concludes with "all other inhumane acts". The Supreme Court Chamber has held that under the terms of the principle of legality, rape was not recognised as a distinct crime against humanity in customary international law or in national law at the time of the facts and was therefore not chargeable before the ECCC.[2454] Concerning the additional category of "other inhumane acts", it has held that it was consistent with the principle of legality if interpreted and applied so as to restrain the scope of this residual category.[2455]

2401. The Supreme Court Chamber has held that the particular elements constituting this crime are an act or an omission:

> - there was an act or omission of similar seriousness to the other acts enumerated as crimes against humanity;
>
> - the act or omission caused serious mental or physical suffering or injury or constituted a serious attack on human dignity;
>
> - the act or omission was performed intentionally having been committed deliberately with the intention to inflict great mental or physical suffering on the victim or serious harm to the victim's physical or mental integrity or a serious attack on the victim's human dignity.[2456]

2402. While it is not required that the specific conduct was criminalised under international criminal law, it is nonetheless necessary to identify affirmative articulation of the rights and prohibitions

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[2452] T. 24.10.2016, **E1/488.1**, pp. 55-59, between 11.23.22 and 11.32.37, pp. 64-66, between 11.41.11 and 11.46.28.
[2453] T. 24.10.2016, **E1/488.1**, p. 58, 11.29.44.
[2454] *Duch* Appeal Judgement, 03.02.2012, paras. 174-183.
[2455] Case 002/01 Appeal Judgement, para. 578.
[2456] Case 002/01 Appeal Judgement, para. 580.

contained in human rights instruments, as applicable at the time relevant to charges of "other inhumane acts".[2457]

2403. The subsequent emergence of new and more specific human rights norms, including those of international criminal law, such as norms against forcible transfer or enforced disappearances, may serve: (1) to provide additional confirmation of the international unlawfulness of the prior specific conduct charged; and (2) as a tool to assess whether the conduct in question attains the requisite level of gravity; however, the existence of more specific norms does not in itself help determine whether the charge is in conformity with the principle of legality.[2458]

2404. When, as is the case for enforced disappearances and forced transfer, the crimes crystallised into separate categories of crimes against humanity after the Democratic Kampuchea period, analysis of what constitutes "inhumane acts" must focus on the elements of the category of "other inhumane acts" itself and not on the elements of the specific subsequent crime.[2459]

2405. According to the Supreme Court Chamber, the principle of legality is respected if the specific conduct which is found to constitute "other inhumane acts" violates a basic right of the victims and is of similar nature and gravity to the other enumerated crimes against humanity. That requires case-by-case analysis, in particular as to the impact of the conduct on the victims and whether the conduct itself is comparable to the enumerated crimes against humanity.[2460]

2406. The judges must therefore be particularly scrupulous in regard to this additional category by interpreting and applying it restrictively. The reason is because, at the time relevant to the facts which gave rise to the charge of "other inhumane acts", both in the aftermath of the Second World War and during the Democratic Kampuchea period, not every episode of human rights violation amounted to a crime against humanity. At that time, violation of human rights was not of similar nature or gravity as the crimes against humanity of murder, extermination, enslavement, deportation, imprisonment, torture and persecution on political, racial or religious grounds.

[2457] Case 002/01 Appeal Judgement, para. 584.
[2458] Case 002/01 Appeal Judgement, para. 585.
[2459] Case 002/01 Appeal Judgement, para. 589.
[2460] Case 002/01 Appeal Judgement, para. 586.

2407. As to whether the Co-Investigating Judges erred in charging forced marriage and rape under the definition of "other inhumane acts", the Pre-Trial Chamber and the Trial Chamber considered this to be a mixed question of law and fact, to be decided at trial.[2461]

II. LEGAL CHARACTERISATION OF THE FACTS

2408. In light of the totality of the factual and legal circumstances of the case, the conduct charged against the Accused in respect of forced marriages and marital rape did not at the time of the facts under review form part of the "definition" of the crime against humanity of "other inhumane acts". Indeed, that conduct was not of similar nature or gravity as the other enumerated crimes against humanity (A), as evidenced by the impact on the victims (B). Moreover, the acts were not committed with the specific intent to cause serious bodily and mental harm, physical or physiological integrity or serious attacks on human dignity (C).

A. Nature and gravity

2409. Marriage, as "regulated" under the Democratic Kampuchea regime and the sexual relations of the newly-weds are not of similar nature and gravity as the crimes against humanity of murder, extermination, enslavement, deportation, imprisonment, torture and persecution on political, racial or religious grounds, which were committed at that time.

2410. In considering in Case 002/01 that based on the facts that were established beyond a reasonable doubt, the evacuations amounted to the crime against humanity of other inhumane acts,[2462] the Supreme Court Chamber held, that, that the evacuation was of similar nature and gravity as other enumerated crimes against humanity is evidenced by the fact that a large number of individuals were affected thereby and that some of them were killed or died because of its conditions.[2463] It also considered that the conduct in question was "similar" to the incriminated conduct of enumerated crimes against humanity, notably deportation.[2464]

2411. In this instance, the incriminated conduct is not "similar" to any other conduct charged as a discrete crime against humanity. Affirmative articulation of the rights and prohibitions contained in human rights instruments applicable at the relevant time cannot be identified (1). Moreover, unlike the

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[2461] Pre-Trial Chamber Decision, 11.04.2011, **D427/1/30**, para. 397; Memorandum, 25.04.2014, **E306**, para. 2.
[2462] Case 002/01 Appeal Judgement, paras. 655-660.
[2463] Case 002/01 Appeal Judgement, paras. 656 and 659.
[2464] Case 002/01 Appeal Judgement, para. 656.

forced transfer which was subsequently categorised as a distinct crime against humanity under customary international law, the fact that more specific norms are only starting to emerge confirms that the incriminated conduct is not covered by any international instruments and that it does not attain the requisite level of gravity (2).

1. Lack of an affirmative articulation of the rights and prohibitions contained in the instruments applicable at the relevant time

2412. At the time relevant to the charge of "other inhumane acts", while the right to freely enter into a marriage was recognised under the 1948 Universal Declaration of Human Rights,[2465] common Article 3 of the 1949 Geneva Convention prohibited "at any time and any place whatsoever": "(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;(b) The taking of hostages;(c) outrages upon personal dignity, in particular humiliating and degrading treatment; (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court".[2466]

2413. While other international conventions recognised the right to free consent to marriage between the post-World War II period until the facts charged,[2467], Article 4 of the Second Protocol Additional to the Geneva Conventions in 1977 added collective punishment, acts of terrorism, rape, enforced prostitution, slavery and the slave trade in all its forms, and pillage to the prohibitions found in common Article 3 of the Geneva Conventions.[2468]

2414. For instance, denial of the right to freedom of consent in marriage was not considered a crime against humanity in the period between 1975 and 1979. This is evidenced by the fact that just as

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[2465] Article 16(2) of the Universal Declaration of Human Rights("Marriage shall be entered into only with the free and full consent of the intending spouses."). Article 2 of the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 07.09.1956 did not enshrine such a right. It provides that in order to bring an end to the practices of acquisition or the transfer of a wife and the inheritance of a widow, the States undertook to encourage the use of a procedure which allows both future spouses to express their consent to the marriage freely and to encourage the registration of marriages.

[2466] The preamble to Article 3 common to the Geneva Conventions "states what a minimum of humane treatment consist of". It applies to the "people taking no active part in the hostilities."

[2467] Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, 07.11.1962, Article 1 (Cambodia has not adhered to this convention); ICCPR, article 23(2); International Covenant on Economic Social and Cultural Rights, 16.12.1966, article 10(1) (Cambodia only adhered to these covenants in 1992).

[2468] Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), of 8 June 1977, Article 4 "Fundamental Guarantees".

forced marriage is not considered a crime under Cambodian law as it stood at relevant time and as it stands today, it has never been considered as distinct crime against humanity.

2. Fledgling emergence of more specific norms

2415. The charged conduct is not unlawful at the national and international levels and does not attain such gravity as to be qualified as a crime against humanity. That is reflected in the fact that no new more specific norms have since emerged.

2416. Unlike forced transfers and enforced disappearances, forced marriage was never part of the discrete category of crimes against humanity in any of the founding instruments of the international criminal courts. Moreover, is it not part of the definition of the crimes against humanity enumerated in the draft convention on crimes against humanity of customary international law of 2015.[2469]

2417. It was not until 2008 that for the first time forced marriage was deemed to amount to "other inhumane acts" by the SCSL Appeals Chamber in the *Brima* Appeal Judgement; the Appeals Chamber decided to consider the submissions made considering it an issue of importance that could enrich the jurisprudence of international criminal law.[2470]

2418. In spite of that new development and the fact that in 2016 the ICC for the first time charged a person with forced marriage as "other inhumane acts",[2471] this concerns situations where women were abducted and enslaved, as noted in *Amicus Curiae* Brief admitted by the Trial Chamber.[2472] Moreover, the authors of the *Amicus Curiae* Brief also called for practices characterised as forced marriage in Sierra Leone and other African States to be charged as enslavement, a position that found support in their research among "survivors of wartime abduction" in Sierra Leone, in which the range of captivity was between two months and eleven years.[2473]

2419. Not only are these facts not germane to those of the present case, but also it is obvious that the recent fledgling legal developments lend support to the fact that the conduct charged as forced

[2469] First report on crimes against humanity, 17.02.2015, A/CN.4/680, para. 177.
[2470] *Brima* Appeal Judgement (STSL), 03.03.2008, para. 181: "Notwithstanding the manner in which the Prosecution had classified 'Forced marriage' in the Indictment and the submissions made by the Prosecution on this appeal which is inconsistent with such classification, the Appeals Chamber will consider the submissions made as an issue of general importance that may enrich the jurisprudence of international criminal law". (*emphasis added*)
[2471] *Prosecutor v. Ongwen*, ICC-02/04-01/15, Decision on the Confirmation of Charges, 23.03.2016, paras.87-95.
[2472] *Amicus Curiae Brief*, 29.09.2016, **E418/4**, para. 26.
[2473] *Amicus Curiae Brief*, 29.09.2016, **E418/4**, para.21.

marriage and subsequent marital rape is not of such nature and gravity as to be qualified as crimes against humanity.[2474]

B. Impact

2420. A review of pre-Democratic Kampuchea period marriage arrangements reveals that Cambodian tradition did not require the consent the prospective spouses. Marriages arranged by the parents were the norm. With the advent of the Democratic Kampuchea regime, marriages were arranged by the local authorities. With that came the shift of responsibility from one authority to another, but with many similarities as to the choice of who was considered to be the right fit.

2421. Even though infringement of one's freedom of choice and of control over one's own destiny may be prejudicial, the harm resulting therefrom is not similar in nature to that resulting from the enumerated distinct crimes against humanity (or even to that resulting from marriages constituting "other inhumane acts" which are starting to emerge, for example in the context of conflicts in Africa). This is especially true given that during the pre-Democratic Kampuchea period there was no such thing as freedom of choice in terms of marriage, be it as a legal or societal norm.

2422. Therefore, as Peg LEVINE correctly pointed out, it was not such much marriage itself, but rather the absence of rituals at ceremonies that most respondents in her research considered to be particularly harmful. Other witnesses and civil parties also stated that they regretted not having had religious ceremonies in the presence of their families, or not having had a partner chosen by the parents.[2475]

[2474] While the authors of the *Amicus Curiae* Brief may be laudable for their militant disposition, they concluded after setting forth recent jurisprudence that "other inhumane acts" was recognised in customary international law in the period between 1975 and 1979, and that "international criminal law ha[d] evolved to include 'other inhumane acts' of forced marriage" (*Amicus* Curiae Brief, 29.09.2016, **E418/4**, para. 38).Also, concerning the recent distinction between marital duty and marital rape, see *supra*, paras. 2351-2355.

[2475] SOU Sotheavy: T. 24.08.2016, **E1/463.1**, pp. 70-71, 14.01.54-14.03.46; YOS Phal: T. 25.08.2016, **E1/464.1**, pp. 24-26, 10.04.10-10.07.46: "I was forced to marry and I, myself, did not even have a proper clothing. I only had the clothes that I was wearing, and they were stained with mud and dirt and they were torn. The scarf I had was also torn and I, myself, was so skinny. And if you look at the surrounding, I did not see any of my relatives." CHEA Deap: T. 30.08.2016, **E1/466.1**, p. 78, 14.17.12: "And you compare to what happened under the Khmer Rouge it's like you compare the earth to the sky. Of course, I felt upset when I thought of the way that I was married to the current practice. I am upset with my destiny." NOP Ngim: T. 05.09.2016, **E1/469.1**, p. 57, 11.24.12: "I did not have any other feeling besides upset. I was upset, but I did not think of having my parents present there because everybody was in the same situation." MOM Vun: T. 16.09.2016, **E1/475.1**, p. 73, 14.23.08: "And there were different because in the old days after the marriage that guests were fed with feasts, with a lot of food. But during the wedding in the Khmer Rouge regime, we were given water lily soup to eat. So, they were quite different." HENG Lai Heang: T. 19.09.2016,**E1/476.1**, p. 15, 09.47.53. PREAP Sokhoeurn: T. 24.10.2016, **E1/488.1**, pp. 19-20, after 09.41.24: "So the marriage did not give

2423. The absence of rituals or family ceremonies[2476] does not mean that the harm suffered was of such gravity that arranged marriages under the Democratic Kampuchea regime are to be considered as "other inhumane acts". It should also be emphasised that in many instances, the harm reported in the testimony of civil parties related to their overall life situation, and not to their marriage.[2477] Moreover, as noted *supra*, some people considered marriage as means to a better life.

C. Intent

2424. Marriages under the Democratic Kampuchea regime and marital sexual relations were not implemented with the specific intent to inflict great suffering or serious bodily or mental harm or for that matter, serious attacks against human dignity.

2425. In fact, while parental authority was replaced by local authority, the goal still remained that of enabling people to get married and start a family. The fact that prospective spouses were urged to love and take care of each other is in itself testimony that the aim was not to cause suffering. Moreover, since marital rape was not a household concept in Cambodia at that time, it cannot be argued that those who arranged marriages did so with the intent to inflict suffering.

2426. Civil parties' allegations of rape are not only rife with contradictions but also they also concern isolated cases and cannot serve as proof of specific intent to commit rape. Indeed, the Co-Prosecutors' theory on this subject is noteworthy. In their arguments concerning the application of JCE-3, they claimed that rape was a natural and foreseeable consequence of marriage.[2478] They thereby acknowledged that the specific intent to commit rape could not be established.

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us happiness because the marriage itself was not attended by our parents and relatives. The marriage was simply attended by the couples who were arranged to get married on that day and also attended by the Khmer Rouge cadres. It was not conducted in a traditional way, in a detailed way." NGET Cat: T. 25.10.2016, **E1/489.1**, p. 5, 09.12.35.

[2476] On this point, it should be recalled that several witnesses mentioned a choice of spouse by the parents validated or "authorized", to borrow again the term of Expert NAKAGAWA, by the local authorities. Others also mentioned the presence of family members at wedding ceremonies.

[2477] NGET Chat: T. 25.10.2016, **E1/489.1**, p. 30, 10.07.05. KUL Nem: T. 24.10.2016, **E1/488.1**, p. 116, 15.41.30. SAY Naroeun: T. 25.10.2016, **E1/489.1**, pp. 59-60, before 11.35.16. PREAP Sokhoeurn: T. 24.10.2016, **E1/488.1**, p. 79-80, from 14.01.30, p. 81, 14.06.30. PEN Sochan: T. 13.10.2016, **E1/483.1**, pp. 68-69, 11.58.22, p. 68, before 12.00.32. MOM Vun: T. 20.09.2016, **E1/477.1**, pp. 23-24, 09.48.23-09.51.21. SENG Soeun: T. 30.08.2016, E1/466.1, pp. 57-58, 11.38.03.

[2478] T. 30.07.2014, **E1/240.1**, pp. 32-33 EN (because the French version is of poor quality), after 10.13.39 (Initial hearing at which the Prosecution stated that ECC-3 was very important for 002/02 by citing rape as an example: "On the charges of rape in the Case 002/02, our view is, that clearly is a natural and foreseeable consequence of the other parts of the criminal plan to persecute, to murder, to torture, and to force couples into marriage.").

2427. The Trial Chamber ought to take account of all of those elements and find that in the period between 17 April 1975 and 6 April 1979, neither marriage nor marital sexual relations constituted "other inhumane acts".

Chapter II.ALLEGED POLICY ON MARRIAGE

2428. As notes *supra*, from a legal perspective, the facts characterised by the Co-Investigating Judges as "forced marriages and rapes" cannot be considered part of the definition of the "other inhumane acts" constituting crimes against humanity within the temporal jurisdiction of the ECCC.

2429. It is however worth examining the evidence produced so as to set the record straight regarding the regulation of marriage under the Democratic Kampuchea regime. The simplistic proposition that the CPK encouraged rape so as to increase the population is not reflected in the facts (Section I) and raises questions about the representativeness of the testimony of civil parties (Section II); their evidence must therefore be approached with utmost caution.

Section I. NO POPULATION GROWTH POLICY EXISTED

I. OFFICIAL SPEECHES

2430. The Co-Prosecutors, with the civil parties following suit, echo the Co-Investigating Judges' claim that regulation of marriage and organising collective marriages were aimed at increasing the population. While it is true that the CPK emphasised on many occasions that it was possible and necessary to increase the population, the aim was to help the country get back on its feet.

2431. In his testimony, CHUON Thy recounted remarks made by POL Pot at a meeting where he referred to marriage as vital, because they "needed the population" in post-war Cambodia,"[] a large country" whose "population did not really cover the whole area of the country".[2479] However, to argue that marriage was *the* recipe for increasing the population is to lose sight of the big picture.

2432. CHUON Thy clearly explained in his testimony why POL Pot discarded the idea of coercion in marriage,[2480] and also, and especially, concrete measures aimed at population growth were set out many official speeches.

[2479] CHUON Thuy: T. 26.10.2016, **E1/490.1**, pp. 16-17, 09.36.03.
[2480] See *supra*, para. 2361.

2433. For instance, in his speech at the United Nations in 1977, IENG Sary laid out the CPK government's plan to have a "population of 15 to 20 million in 10 years' time", and gave details about measures "in the social and health fields in order rapidly to improve the health of the entire population", with the training of "revolutionary doctors" and the production of medicines having pride of place.[2481] He made no reference to marriage.

2434. In a speech in 1977, POL Pot referred to the fight against many diseases "from the old society and certain addictions" and spoke at length about the campaign to eradicate malaria. He summed up the progress as being part of the efforts to improve "conditions of life of health of our people, because we hope to increase our population to 15 to 20 million of the next 10 years or more".[2482] Such speeches were common throughout the Democratic Kampuchea period and even in its aftermath.[2483]

2435. So while marriage did contribute to increasing the population, the increase was not the result of a specific CPK policy to bring about population growth. Therefore, advocating forced marriage was not part of the CPK's agenda.

II. DISPARITIES IN THE IN-COURT TESTIMONIES

2436. The majority of the civil parties testified during the trial segment on the regulation of marriage. Quite surprisingly, virtually all reported statements about the need "for producing children for *Angkar*". For example, Civil Party OM Yoeurn said that her unit chief spoke to that effect, whereas she had not mentioned this in her written records of interview.[2484] Similarly, CHEA Deap remembered in 2014 a speech that – by some odd coincidence – KHIEU Samphan made prior to

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[2481] United Nations General Assembly Thirty-Second Session, 11.10.1977, **E3/1586**, para. 60, ERN 00079815.
[2482] *Foreign Broadcast Information Service*, October 1977, **E3/290**, ERN 00168651.See also KHIEU Samphan's comment concerning Philip SHORT's interpretation of POL Pot's plans based on his study of a Standing Committee report cited by the author: Book by KHIEU Samphan, *Cambodia's Recent History and the Reasons Behind the Decisions I Made*, 2004,**E3/16**, ERN 00498284.
[2483] *Revolutionary Flag*, Special Issue, December 1976 - January 1977, **E3/25**, ERN 00491436. "For our population to constantly increase the livelihood of the people must rise and they must be in good health. So then this means quickly increasing production. The money obtained from exporting products for sale overseas is for expanding agriculture expanding industry and serving the livelihood of the people. It is not used for anything other than that." International Media Report entitled "Phnom Penh Rally Marks 17th April Anniversary",16.04.1978, **E3/562**,ERN S00010565. *Revolutionary Flag*, Issue No. 9, September 1978, **E3/215**, ERN 00488638. DK telegrams often concerned improving the people's living conditions. See for example: DK telegram, 16.07.1978, **E3/1092**, ERN 00289924. *SWB Part 3*, "Interviews with DK Leader on Population Policy and Struggle against Vietnam",02.11.1981, **E3/686**, ERN S00030349.
[2484] T. 23.08.2016, **E1/462.1**, p. 84, 15.17.35.

her marriage.[2485] SOU Sotheavy and MOM Vun testified to the same effect, as did PEN Sochan, PREAP Sokhoeurn, KUL Nem, NGET Chat and SAY Naroeun.[2486]

2437. In itself, the fact that all those civil parties gave similar testimonies would not be so much of an issue and would not appear to simply be aimed at serving the purpose at hand if witnesses and civil parties in other trial segments had reported such messages. However, when questioned about the matter, most of them said that they were not instructed to make "children for *Angkar*".

2438. For example, IN Yoeung, PHNEOU Yav, CHAO Lang, MY Savoeun, HUON Chourm, THUCH Sithan, SENG Lytheng, MAK Chhoeun, MEAS Laihouror even YI Laisauv did not say that they heard such instructions being given at the weddings they attended.[2487] Even Witnesses PHAN Him and NOP Ngim, who said that they did not wish to get married, did not report instructions about making children for the Party.[2488]

2439. It is therefore noteworthy that, as is the case for marital rape, civil parties' testimonies about the regulation of marriage differ significantly from all other testimonies concerning the gravity of the alleged facts, and inevitably point to more serious charges.

Section II. REPRESENTATIVENESS OF CIVIL PARTY TESTIMONIES

2440. Based on the foregoing submissions, it is reasonable to raise the question of the representativeness of civil party testimonies about the regulation of marriages.

I. OVERVIEW OF LIVE TESTIMONY IN CASE 002/02

2441. It is difficult to ascertain the percentage of marriages that civil parties in this case experienced as forced marriages without undertaking an in-depth inquiry. As Expert LEVINE emphasised in her

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[2485] T. 30.08.2016, **E1/466.1**, p. 67, 13.51.10.

[2486] SOU Sotheavy: T. 23.08.2016, **E1/462.1**, pp. 83-84, 15.17.35. MOM Vun: T. 16.09.2016, **E1/475.1**, p. 56, 13.40.24. PEN Sochan: T. 12.10.2016, **E1/482.1**, p. 75, 14.02.08; PREAP Sokhoeurn: T. 20.10.2016, **E1/487.1**, p. 104, 15.32.17. KUL Nem: T.24.10.2016, E1/488.1, p. 100, 15.12.49. NGET Cat: T.25.10.2016, **E1/489.1**, p. 11, after 09.27.30.SAY Naroeun: T. 25.10.2016, **E1/489.1**, p. 40, after 10.48.09.

[2487] IN Yoeung: T. 03.02.2016, **E1/387.1**, p. 95, 15.21.50. PHNEOU Yav: T. 17.02.2015, **E1/264.1**, p. 33, 10.51.10. CHAO Lang: T. 01.09.2015, **E1/339.1**, pp. 76-77, 15.13.17. MY Savoeun: T. 17.08.2016, **E1/459.1**, p. 69, 14.20.24.HUON Chourm: T. 18.10.2016, **E1/485.1**, p. 37, 10.56.07. THUCH Sithan: T. 21.11.2016, **E1/500.1**, pp. 68-69, 14.49.33. SENG Lytheng: T. 29.11.2016, **E1/503.1**, p. 44, before 11.27.13. MAK Chhoeun: T.12.12.2016, **E1/511.1**, p. 99, 15.58.05.MEAS Laihour: T. 26.05.2015, **E1/305.1**, p. 14, 09.36.40. YI Laisauv: T. 20.08.2015, **E1/334.1**, p. 64, 14.22.18.

[2488] PHAN Him: T. 31.08.2016, **E1/467.1**, p. 115, 15.41.00. NOP Ngim: T. 05.09.2016, **E1/469.1**, p. 52, 11.13.12. NOP Ngim only reported inoffensive teasing, for example by Peg LEVINE at a wedding, which according to her, was part of tradition. See: Peg LEVINE: T. 10.10.2016, **E1/480.1**, pp. 82-83, 15.48.05.

testimony, the aim is not to call into question the experience of the civil parties who gave testimony, but rather to place that experience within a broader context than that of the entire group of civil parties who are represented in the proceedings, and view it from a different perspective.[2489]

2442. Mere perusal of the testimonies of witnesses who did not testify on this particular segment already discloses a different picture. In addition to the civil parties and witnesses who testified regarding marriage, twenty-two witnesses testified that they got married during the Democratic Kampuchea period. Six clearly of those twenty-two said that they were forced to marry. They are: CHEANG Sreimom (Southwest Zone), CHAO Lang (Central Zone), KHIN Vat (West Zone), YI Laisauv (Northwest Zone), MY Savoeun (East Zone), THUCH Sithan (Phnom Penh).[2490]

2443. By contrast, twelve individuals clearly stated that they were not forced to marry during the Democratic Kampuchea period. They are: OUM Suphany (Southwest Zone), MEAS Laihour (Central Zone), KANG Ut (Central Zone), SEN Srun (Central Zone), AHMAD Sofiyah (East Zone), Duch (Phnom Penh), HUON Chourm (Northwest Zone), CHUON Thy (West Zone), BEIT Boeurn (Phnom Penh), SENG Lytheng (Phnom Penh), MAK Chhoeun (Southwest Zone) and IN Yoeung (East Zone).[2491]

2444. The disparity of the experiences is not zone-related and therefore reflects experts' view that while a number of forced marriages may have taken, that in itself does not prove the existence of a policy of forced marriage.

[2489] Peg LEVINE: T. 11.10.2016, **E1/481.1**, pp. 41-42, 10.41.02.

[2490] CHEANG Sreimom: T. 29.01.2015, **E1/254.1**, p. 18, 09.52.54; CHAO Lang: T. 01.09.2015, **E1/339.1**, pp. 69-70, 14.35.37.-14.38.13; KHIN Vat: T. 29.07.2015, **E1/325.1**, pp. 90-91, 15.38.30-15.40.38; YI Laisauv: T. 20.08.2015, **E1/334.1**, pp. 58, 14.05.02; MY Savoeun: T. 17.08.2016, **E1/459.1**, pp. 26-27, 10.11.42. THUCH Sithan: T. 21.11.2016, **E1/500.1**, p. 71, 14.57.00.

[2491] OUM Suphany: T. 23.01.2015,**E1/251.1**, p. 105, 15.54.01: OUM Suphany said that she was forced by her mother-in-law: T. 26.01.2015, **E1/252.1**, pp. 22-23, 09.57.10. MEAS Laihuor: T. 26.06.2015, **E1/305.1**, pp. 10-11, 09.25.45.KANG Ut: T. 25.06.2015, **E1/322.1**, pp. 53-54, 13.53.08. SEN Srun: T. 14.09.2015, **E1/346.1**, p. 57, 11.51.40.AHMAD Sofiyah: T. 13.01.2016, **E1/375.1**, p. 76, 14.36.59. KAING Guek Eav: T. 13.06.2016, **E1/436.1**, p. 20, 09.44.12. HUON Chourm: T. 18.10.2016, **E1/485.1**, pp. 39-40, 10.59.45 and 11.02.32. CHUON Thy: T. 25.10.2016, **E1/489.1**, p. 108, 15.54.32. BEIT Boeurn: T. 28.11.2016, **E1/502.1**, pp. 44-45, 11.16.48-11.19.05. SENG Lytheng: T. 29.11.2016, **E1/503.1**, p. 23, 10.04.10. MAK Chhoeun: T. 12.12.2016, **E1/511.1**, p. 98, 15.54.02.IN Yoeung: T. 03.02.2016, **E1/387.1**, p. 103, 15.41.02(who volunteered to return to the cooperatives). RY Pov could also be added as a 14th witness since he mentioned plans for an arranged marriage with a woman of his village which in the end did not take place because of the Vietnamese invasion: RY Pov: 12.02.2015, **E1/262.1**, pp. 28-29, 10.13.26. Nor was EM Phoeung forced to marry: EM Phoeung: T. 16.02.2015, **E1/263.1**, p. 56, before 13.43.11: "They kept silent; they ignored me until the liberation."

II. Nuanced findings of the experts

2445. The experts' testimonies must be viewed in light of the purpose of their research and the methodology they employed. For example, Expert NAKAGAWA's research focuses on victims of forced marriage and sexual violence. The deliberate choice she made in turn dictated the choice of study sample and, by implication, impacted the results she obtained.

2446. Expert LEVINE took a different approach, which she explained in detail. She decided not to use a "discretionary" sample in her research on marriages during Democratic Kampuchea period, but, instead, took the most neutral approach possibly in order to avoid making value judgements and prejudging the respondents' experiences. She was also made sure to collect time and space data enabling her to identify space-time variations and factors relating to the local authority.[2492]

2447. Yet, even though the experts adopted different approaches, they both arrived at similar conclusions.

2448. In regard to the existence of a policy and the monitoring of couples, Expert NAKAGAWA, said:

> "I think there was a policy from top level to organize mass weddings. But I don't have enough evidence to say that there was a policy from the top level to organize forced marriages."[2493]
>
> "I have to apologize. I have no evidence to answer to your question, but my impression is that not all forced marriage couples were monitored. So the assumption is that it depends on the local authority who decided in order to create more terror among the population."[2494]

2449. Responding to a question about a countrywide policy, Expert LEVINE said:

> "I want to clarify. It's important for me to clarify again because of the demographics that lie behind your question. I have no hesitation in believing that what civil party members have put forward as their experiences, I believe they are true what they put forward as their experiences when they describe their particular weddings as being forced. However, as a trend - as a trend, as a conclusion, were the weddings forced across time and place under DK, my answer is no."[2495]

2450. The scientific approach of the two experts provides food for thought. If only the most extreme examples are portrayed as the norm, as has been the case before the ECCC, then the evidence is distorted in order prove the existence of a countrywide policy and also to determine its alleged

[2492] Peg LEVINE: T. 10.10.2016, **E1/480.1**, pp. 39-40, 13.53.03, p. 63-65, 15.06.33, pp. 66-67, 15.12.55, pp. 75-76, 15.32.28; T. 11.10.2016, **E1/481.1**, p. 43, 10.45.16, pp. 47-48, 10.54.55, p. 48, 10.56.05.
[2493] Kasumi NAKAGAWA: T. 13.09.2016, **E1/472.1**, pp. 92-93, 15.04.24-15.06.10.See also the segments of her testimony on the local disparities. T. 14.09.2016, **E1/473.1**, p. 68, 13.55.39, p. 84, 14.04.46: "Yes, that's correct and that's why I said that I cannot find any evidence of centralized policy to force the people into the marriage."
[2494] T. 14.09.2016, **E1/473.1**, p. 77, 14.13.21.
[2495] T. 11.10.2016, **E1/481.1**, pp. 41-42, 10.41.02.

contents. Reference is made here to the preliminary remarks about on the evidence and the characteristics of the testimonies of civil parties who participated in the proceedings and who have a vested interest in securing the conviction of the Accused.[2496]

2451. With that in view, the Trial Chamber should address the question of whether civil party testimonies are representative. The international community and civil society take a keen interest in sexual crimes, and rightly so. However, the temptation to make examples and to offer token answers must not take precedence over the law or the objectivity by which a court of law must be guided. In any event, since the crime of other inhumane acts through forced marriage did not exist at the relevant time, the Trial Chamber will have no choice but to ascertain the truth and adjudicate, regardless of its conclusions as to whether or not a CPK policy existed.

[2496] See *supra*, paras.2321-2322.

Title IV. INDIVIDUAL CRIMINAL RESPONSIBILITY

Section I. CHARGES

2452. KHIEU Samphan is charged with crimes that are the subject of Case 002/02 through various modes of participation. With the exception some crimes against specific groups,[2497] he is charged with committing the aforementioned crimes through a JCE.[2498] He is also charged with planning, encouraging, aiding and abetting, and ordering all those crimes as a command superior.[2499]

2453. Since the Co-Investigating Judges having expressly decided not to charge JCE-2, KHIEU Samphan was sent for trial to answer to charges of participation a JCE-1.[2500] The Co-Investigation Judges considered that KHIEU Samphan was among the "driving force[s]" of the JCE,[2501] whose plan, shared by all the members, was:

> "to implement rapid socialist revolution by in Cambodia through a great leap forward and to defend the Party against internal and external enemies by whatever means necessary. The purpose itself was not entirely criminal in nature but its implementation resulted in and or involved the commission of crimes within the jurisdiction of the ECCC."[2502]

2454. According to the Co-Investigating Judges, the common purpose came into existence "before 17 April 1975 and continued until at least 6 January 1979."[2503] It allegedly escalated "from 1977" for the genocide of the Cham and from "April 1977" for the genocide of the Vietnamese. It is alleged that as from then:

> "the members of the JCE knew that the implementation of the common purpose expanded to include the commission of genocide of these protected groups. Acceptance of this greater range of criminal means coupled with persistence in implementation amounted to an intention of the JCE members to pursue the common purpose through genocide."[2504]

2455. KHIEU Samphan holds no illusions about the outcome of Case 002/001, given that he was definitively convicted in Case 002/01 for participation in the Democratic Kampuchea regime.

[2497] Persecution on political grounds, crimes against humanity and various serious violations of the Geneva Conventions: torture, inhumane treatment, causing great suffering or serious injury to physical integrity or health, intentionally of depriving a prisoner of war or civilian of the right to a fair and just trial, illegal detention of civilians.
[2498] Closing Order, paras. 1525, 1536-1537; Annex, List of paragraphs and portions of the Closing Order relevant to Case 002/002, **E301/9/1.1**, p. 5.
[2499] Closing Order, paras.1544-1545, 1547-1548, 1550-1551, 1553-1554, 1557-1560; Annex, List of paragraphs and portions of the Closing Order relevant to Case 002/002, **E301/9/1.1**, p. 5.
[2500] Closing Order, para. 1541.
[2501] Closing Order, para. 1540.
[2502] Closing Order, para. 1524.
[2503] Closing Order, para. 1528.
[2504] Closing Order, para. 1527.

While he will not cease to dispute the findings of the Trial Chamber and the Supreme Court Chamber concerning his role in and contribution to the crimes charged in Case 002/01, he sees no point in expounding on the arguments that he has consistently put forward, given the ECCC will continue to turn a deaf ear thereto.[2505]

2456. It is by now abundantly clear that the ECCC is prosecuting a regime and not just individuals. The Trial Chamber could not find KHIEU Samphan guilty if it were prepared to apply the rules of law relating to individual criminal responsibility and to evaluate the evidence impartially.

2457. Accordingly, in this segment on KHIEU Samphan's responsibility, the Defence focuses on a number of fundamental legal principles concerning the definition of modes of responsibility (Part II) and the interpretation of the speeches relating thereto (Part III).

Part II. DEFINITION OF MODES OF RESPONSIBILITY

Chapter I. JCE-1

2458. JCE-1 as a mode of responsibility was first defined by the *ad hoc* tribunals based on post-World War II instruments and jurisprudence.[2506]

Section I. MATERIAL ELEMENT

2459. The *actus reus* of JCE comprises three elements:

> (1) A plurality of persons, who need not be organised in a military, political or administrative structure.[2507]For a participant in a JCE to be held responsible for a crime committed by a person outside of the JCE, it is necessary to prove that the crime may be imputed to one of the members of the JCE and that such person – utilising the direct perpetrator of the crime – acted in furtherance of the common plan. Whether such a link exists is assessed case by case.[2508]
>
> (2) The existence of a common plan amounting to the commission of a crime defined in the Statute or implying one.[2509] While the criminal means to implement a JCE may change with time and extend to other crimes than those initially envisaged, the proof of the agreement on such extension is subject

[2505]Closing Brief in Case 002/01, 26.09.2013,**E295/6/4**; pleadings of 25, 28 and 31.10.2013, **E1/234.1**,**E1/235.1**, **E1/237.1**; Appeal Brief, Case 002/01.
[2506] See *supra*, paras. 432-437.
[2507] *Prlić* Trial Judgement (ICTY), 29.05.2013, Volume 1, para. 212, referring in footnote 430 of the *Stakić* Appeal Judgement (ICTY), 22.03.2006, para. 64and to the *Tadić* Appeal Judgement (ICTY), 15.07.1999, para. 227.
[2508] *Prlić* Trial Judgement (ICTY), 29.05.2013, Volume 1, para. 212, referring to footnotes 433 and 434 of the *Brđanin* Appeal Judgement (ICTY), 03.04.2007, paras. 410 and 413.
[2509] *Prlić* Trial Judgement ICTY), 29.05.2013, Volume 1, para. 212, referring to footnote 437 of the *Stakić* Appeal Judgment (ICTY), 22.03.2006, para. 64 and the *Tadić* Appeal Judgment (ICTY), 15.07.1999, para. 227.

to the same conditions as those governing the initial agreement.[2510]Moreover, the Chamber is required to make findings that the members of the JCE were informed of the expansion of criminal activities, that they did nothing to prevent this and persisted in implementing the expansion of the common design and determine at which precise point in time the additional crimes were integrated into the common design.[2511]

(3) The accused's adherence to the common purpose must involve perpetration of one of the crimes.[2512] The accused must participate of his own accord in one of the aspects of the common plan.[2513]This contribution may be in the form of assistance or contribution to the realization of the common plan.[2514] While the participation of the accused should not be a *sine qua non* condition without which the crimes could not have taken place, it must have been significant all the same.[2515]

Section II. *MENS REA*

2460. A chamber cannot find that an accused had the specific intent to participate in a JCE if this is the only reasonable inference to be drawn from the evidence before it.[2516]

2461. Regarding JCEC-1, the *mens rea* requirement is the intent to commit a given crime; it being the shared intent of all co-participants.[2517] The accused therefore needs to have had both the intent to participate in the common purpose and that of committing the crime.[2518]

[2510] *Prlić* Judgement (ICTY), 29.05.2013, Volume 1, para. 212, referring to footnotes 442 and 443 of the *Krajišnik* Trial Judgement (ICTY), 17.03.2009, para. 163 and the *Tadić* Appeal Judgement (ICTY), 15.07.1999, para. 227.
[2511] *Prlić* Trial Judgement (ICTY), 29.05.2013, Volume 1, para. 212, referring to footnote 444 of the *Krajišnik* Trial Judgement (ICTY), 17.03.2009, paras. 171, 175, 176, 193 and 194 and to the *Čelebići* Appeal Judgement (ICTY), 20.02.2001, paras. 192, 252, 255 and 256.
[2512] *Prlić* Trial Judgement (ICTY), 29.05.2013, Volume 1, para. 212, referring to footnote 445 of the *Vasiljević* Appeal Judgement (ICTY), 25.02.2004, para.100, and to the *Tadić* Appeal Judgement (ICTY), 15.07.1999, para. 227.
[2513] *Prlić* Trial Judgement (ICTY), 29.05.2013, Volume 1, para. 212, referring to footnote 446 of the *Tadić* Appeal Judgement (ICTY), 15.07.1999, para. 196.
[2514] *Prlić* Trial Judgement (ICTY), 29.05.2013, Volume 1, para. 212, referring to footnote 447 of the *Stakić* Appeal Judgment (ICTY) of 22.03.2006, para. 64, and to the *Tadić* Appeal Judgement (ICTY), 15.07.1999, para. 227.
[2515] *Prlić* Trial Judgement (ICTY), 29.05.2013, Volume 1, para. 212, referring to footnote 450 of the *Krajišnik* Appeal Judgement (ICTY), 17.03.2009, para.675 and to the *Kvočka* Appeal Judgement (ICTY), 28.05.2005, para. 98.
[2516] *Prlić* Trial Judgement (ICTY), 29.05.2013, para. 214, Volume 1, referring to footnote 451 of the *Krajišnik* Appeal Judgement (ICTY), 17.03.2009, para. 685 and to the *Brđanin* Appeal Judgement (ICTY), 03.04.2007, para. 429.
[2517] *Stanišić and Simatović* Appeal Judgement (ICTY), 09.12.2015, para. 77; *Prlić* Judgement (ICTY), 29.05.2013, vol. 1, para. 214; *Stakić* Appeal Judgement (ICTY), 22.03.2006, para. 65; *Vasiljević* Appeal Judgement (ICTY), 25.02.2004, para.101; *Tadić* Appeal Judgement (ICTY), 15.07.1999, para. 228.
[2518] *Stanišić and Župljanin* Appeal Judgement (ICTY), 30.06.2016, para.375; *Popović* Appeal Judgement (ICTY), 30.01.2015, para.1369; *Munyakazi* Appeal Judgement (ICTR), 28.09.2011, para.160; *Brđanin* Appeal Judgement (ICTY), 03.04.2007, para. 365.

2462. The accused must share the intent to commit the crime and not simply foresee its occurrence.[2519] JCE-1 requires intent in the sense of *dolus directus*, as the recklessness of *dolus eventualis* does not suffice.[2520]

2463. In regard to the crime of persecution, which requires specific intent, it requires proof that the perpetrator shared the discriminatory intent common to the participants in the JCE.[2521] Similarly, genocide requires proof that the perpetrator shared the discriminatory intent common to all the members of the JCE.[2522]

Section III. JCE-1 WITHOUT A CRIMINAL PURPOSE AS SUCH

2464. Attributing responsibility on the basis of a JCE requires, above all, the identification of a common criminal purpose.[2523] If in itself the purpose is not criminal, at least the crimes that were perpetrated in its realisation must be consubstantial with it.[2524]

2465. If in itself the purpose is not criminal, a distinction must be drawn between its criminal and non-criminal components:

[2519] *Sainović* Appeal Judgement (ICTY), 23.01.2014, para. 1014: "Pursuant to JCE I, the accused must share the intent for the commission of the crimes alleged in the Indictment and not merely foresee their occurrence." See also *Karemera and Ngirumpatse* Appeal Judgement (ICTR), 29.09.2014, para. 564: "The question of "foreseeability" relates to the extended form of joint criminal enterprise, not the basic form."
[2520] *Stanišić and Simatović* Trial Judgement (ICTY), 30.05.2013, Volume. 2, para. 1258 and footnote 2193: "The first form of the JCE requires intent in the sense of *dolus directus*, and […] recklessness of *dolus eventualis* does not suffice.". See also at para. 2332: "However, as above, the Trial Chamber understands such knowledge and acceptance of the risk that crimes would be committed to be insufficient for the first form of JCE liability."
[2521] *Prlić* Trial Judgement (ICTY), 29.05.2013, Volume 1, para. 214, referring in footnote 453 of the *Kvočka* Appeal Judgement (ICTY), 28.05.2005, para. 110, and to the *Krnojelac* Trial Judgement (ICTY), 15.03.2002, para. 487.
[2522] *Karadžić* Trial Judgement (ICTY), 24.03.2016, para. 549, referring to footnote 1745 of the 98 *bis Karadžić* Appeal Judgment (ICTY), 11.07.2013, paras.79 and 83.
[2523] *Šešelj* Trial Judgement (ICTY), 31.03.2016, para. 225, referring to footnote 225 of the *Krnojelac* Appeal Judgement (ICTY), 17.09.2003, para. 116.
[2524] *Šešelj* Trial Judgment (ICTY), 31.03.2016, para.225, referring to footnote 226 of the *Tadić* Appeal Judgement (ICTY), 15.07.1999, para.227, to the *Martić* Trial Judgement (ICTY), 12.06.2007, para.442 and to the *Martić* Appeal Judgement (ICTY), 08.10.2008, para.112, and to the *Brima* Appeal Judgement (STSL), 03.03.2008, para. 76.

2466. It must be demonstrated that "the accused has done far more than merely associate with criminal persons "but that "he has the intent to commit a crime", that "he has joined with others to achieve this goal, and he has made a significant contribution to the crime's commission."[2525] Indeed, in both international and domestic law, no one may be held criminally responsible for acts or transactions in which he was not personally involved or in some other way participated (*nulla poena sine culpa*).[2526]

2467. Consequently, it must be proven that the accused had the intent to contribute to the commission of the crime necessary to the achievement of the non-criminal purpose. JCE "is not an open concept that permits convictions based on guilt by association."[2527] Moreover, "not every type of conduct would amount to significant contribution to the common purpose, thus giving rise to the JCE liability."[2528] What matters in terms of law is that the accused lends a significant contribution to the commission of the crimes involved in the JCE.[2529]

2468. The accused may only be held responsible where all the necessary elements are satisfied beyond a reasonable doubt.[2530] For example, it was found unreasonable to infer the accused's intent to share the common criminal purpose from their mere presence at a ceremony.[2531]

[2525] *Martić* Trial Judgement(ICTY),08.10.2008, para. 172;*Brđanin* Appeal Judgement (ICTY), 03.04.2007, para. 431.
[2526] *Martić* Appeal Judgement (ICTY), 08.10.2008, para. 82;*Tadić* Appeal Judgement (ICTY), 15.07.1999, para. 186.
[2527] *Brđanin* Appeal Judgement (ICTY), 03.04.2007, para. 428.
[2528] *Sainović* Appeal Judgement (ICTY), 23.01.2014, para. 988 ("The Appeals Chamber recalls that not every type of conduct would amount to significant contribution to the common purpose, thus giving rise to the JCE liability."*)*,referring to footnote 3247 of the *Brđanin* Appeal Judgment (ICTY), 03.04.2007, para. 427 (the accused must have "participated in furthering the common purpose at the core of the JCE" and the actions of the accused must constitute a "significant enough contribution to the crime for this to create criminal liability for the accused").
[2529] *Krajišnik* Appeal Judgement (ICTY), 17.03.2009, para. 696 ("What matters in terms of law is that the accused lends a significant contribution to the commission of the crimes involved in the JCE." (*emphasis added*)), citing the *Brđanin* Appeal Judgement (ICTY), 03.04.2007, para. 430.
[2530] *Brđanin* Appeal Judgement (ICTY), 03.04.2007, para. 428.
[2531] *Mugenzi and Mugiraneza* Appeal Judgement (ICTR), 04.02.2013, para.139 and, more generally, paras. 136-141.

Chapter II.MODES OF RESPONSIBILITY BESIDES JCE

2469. In Case 002/01, the Trial Chamber did not find KHIEU Samphan responsible for ordering the crimes or for doing so as a command superior. For its part, the Supreme Court Chamber found him responsible only for JCE without taking account of the errors of law in the Trial Chamber's definitions of planning, instigating and aiding and abetting.

2470. For these reasons, the Defence expressly refers to the submissions articulated in its Case 002/01 Appeal Brief, according to which at the time of the facts charged, there was no direct intent as regards planning, instigating and aiding and abetting.[2532] As regards ordering, the Defence refers to the NUON Chea Defence's submissions to the same effect in Case 002/01.[2533] Also, the Defence endorses the Trial Chamber's definition of superior responsibility.[2534]

Part III. HATE SPEECH AND WAR PROPAGANDA

2471. Given that KHIEU Samphan is charged in Case 002/02 with, among others, the crimes against humanity of genocide and persecution through JCE and with instigating, and aiding and abetting, it is important to take a closer look at the role of speeches in light of those charges

2472. In light of international jurisprudence, it is important for example, to draw a distinction between, one the one hand, discourse commonly referred to as "hate speech" which is deemed to incite hatred towards a population, a community and even, in its more extreme form, persecution or genocide, and, on the other hand, discourse that is intended as war propaganda for purposes of drumming up support for the war effort and to mobilise the troops.

2473. It is important to take a closer look at the underpinnings of freedom of expression and the limits thereto in the event of incitement to discrimination and hatred, as well as acceptance of the various types of propaganda (1) before turning to the post-World War II jurisprudence (2) and that of the *ad hoc* tribunals (3) as it is relevant to the facts under review.

[2532] Appeal Brief, Case 002/01, paras. 74-79 (planning), paras. 80-86 (instigating), paras.87-92 (aiding and abetting), paras. 93-99 (participation by omission), paras.105-107 (accessibility and foreseeability).
[2533] NUON Chea's Appeal, 29.12.2014, **F16**, paras. 674-679.
[2534] Case 002/01 Trial Judgement, paras. 715-716.

Chapter I. BRIEF OVERVIEW OF INTERNATIONAL LAW ON FREEDOM OF EXPRESSION, INCITEMENT TO DISCRIMINATION, AND PROPAGANDA

2474. The international criminal tribunals have taken account of the question of freedom of expression when analysing speeches or statements by the accused which constitute direct and public incitement to commit genocide or otherwise instigating the main perpetrators to commit the crime of persecution or genocide.[2535]

2475. Many an international legal instrument recognises freedom of expression as a basic right.[2536] Nonetheless, it is not absolute right, and those very same international legal instruments protect individuals against discrimination and advocacy of national, racial or religious hatred. For example, some forms of propaganda are prohibited under the International Convention on the Elimination of All Forms of Racial Discrimination, Article 5 of which provides that:

> "States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law. States Parties shall condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination [...]."

2476. International law prohibits incitement to discrimination and propaganda advocating the superiority of one race, but it permits wartime use of propaganda in general. For example, Article 21 of 1923 The Hague Rules of Air Warfare permit the use of aircraft for purposes of disseminating propaganda.[2537]

2477. During the discussions on the drafting of the Genocide Convention, a distinction was made between propaganda for the incitement of genocide and propaganda for war. For example, the record on the discussions cites the representative of Lebanon:

> "Mr. AZKOUL (Lebanon) urged the necessity of mentioning in the Convention acts of propaganda constituting in some way a psychological preparation for the crime of genocide. However, he wanted to point out one difficulty: in war time it was not uncommon for a State to have recourse to press and radio campaigns aimed at arousing hatred against the enemy. It was clear that such campaigns which

[2535] For example: *Bikindi* Trial Judgement (ICTR), 02.12.2008, paras. 378-384.
[2536] See, for example: UDHR, article 19;ICCPR, article 19; International Convention on the Elimination of All Forms of Racial Discrimination, article 5; ECHR, Article 10(1); American Convention on Human Rights, article 13(1); African Charter on Human and Peoples' Rights, Article 9.
[2537] Rules concerning the Control of Wireless Telegraphy in Time of War and Air Warfare. Drafted by a Commission of Jurists at the Hague, December 1922 - February 1923, Article 21, available at: https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/ART/275-370033?OpenDocument&xp_articleSelected=370033.

helped to raise the morale of its citizens should not be considered as propaganda for the incitement of genocide."[2538]

2478. The representatives of France and the USSR were of the opinion that distinguishing and interpreting instruments on propaganda should be decided by the competent courts.[2539]

2479. According to international humanitarian law instruments, propaganda is generally accepted as a "ruse of war", a method of warfare which is not prohibited, unlike treachery. Article 37 of the 1977 Additional Protocol I concerns these two methods of warfare. However, international humanitarian law prohibits incitement to commit attacks or violence against a civilian population.[2540] For example, while speeches are not always directly at issue, international humanitarian law does not prohibit the use of propaganda as long as it is in compliance with international humanitarian law.

Chapter II. POST-WORLD WAR II JURISDICTION

2480. Particularly noteworthy are two cases of the International Military Tribunal (IMT), namely the one against Streicher, who was found guilty of incitement to murder and extermination (section I), and the one against Fritzsche, who was acquitted of those same charges (section II). These cases are germane the present case in that the charges against the accused included making speeches and disseminating propaganda during the Nazi regime.

Section I. *STREICHER*

2481. A publisher and editor-in-chief of an anti-Semitic weekly newspaper, STREICHER was convicted of incitement to murder and extermination under Article 6(c) of the IMT Charter.[2541] The Tribunal pointed to the number of newspaper articles containing hate statements: "As early as 1938 he began to call for the annihilation of the Jewish race. Twenty-three different articles of "*Der Sturmer*" published between 1938 and 1941 in which the extermination "root and "branch" was advocated, were produced in evidence. It then cited examples of these statements, including:

> "Typical of his teachings was a leading article in September, 1938, which termed the Jew a germ and a pest, not a human, being, but 'a parasite, an enemy, an evil-doer, a disseminator of diseases who must be destroyed in the interest of mankind'". Other articles urged that only when world Jewry had been annihilated would the Jewish I problem have been solved, and predicted that fifty years hence

[2538] E/AC.25/SR.5, p. 10, available at: http://dag.un.org/bitstream/handle/11176/264904/E_AC.25_SR.5-EN.pdf?sequence=1&isAllowed=y.
[2539] E/AC.25/SR.5, p. 12.
[2540] Additional Protocol I, Articles 51(1) and 57(2)(a)(i).
[2541] IMT Judgement, findings in respect of Streicher.

> the Jewish graves "will proclaim that this people of murderers and criminals has after all met its deserved fate" […] And in February, 1944, his own article stated:"Whoever does what a Jew does is a scoundrel, a criminal. And he who repeats and wishes to copy him deserves the same fate, annihilation, death"

2482. Moreover, STREICHER continued to produce and publish such propaganda whereas he was aware of the crimes committed against Jews in East Germany. For instance, the IMT found as follows:

> "Streicher's incitement to murder and extermination at the time when Jews in the East were being killed under the most horrible conditions clearly constitutes persecution on political and racial grounds in connection with war crimes as defined by the Charter, and constitutes a crime against humanity.

Section II. *FRITZSCHE*

2483. FRITZSCHE was head of a German government's news agency, which was incorporated into the Nazi Ministry of Propaganda, before he was appointed Director of the Ministry's press section.[2542] The charges against him included advocating, encouraging and inciting the commission of war crimes and crimes against humanity, and were based exclusively on his propaganda activities.

2484. The IMT stated that in addition to his important role in disseminating propaganda before and early in the war, by the end of the war:

> "Fritzsche became the sole authority within the Ministry for radio activities. In this capacity he formulated and issued daily radio 'paroles' to all Reich Propaganda Offices, according to the general political policies of the Nazi regime, subject to the directives of the Radio-Political Division of the Foreign Office, and the personal supervision of Goebbels.

2485. The IMT also noted that:

> "Excerpts in evidence from his speeches show definite anti-Semitism on his part. He broadcast, for example, that the war had been caused by Jews and said their fate had turned out 'as unpleasant as the Fuehrer predicted'. But these speeches did not urge persecution or extermination of Jews. There is no evidence that he was aware of their extermination in the East."

2486. Further, the IMT drew a clear distinction between propaganda directly inciting crimes and propaganda creating a general atmosphere of war, by holding as follows

> "It appears that Fritzsche sometimes made strong statements of a propagandistic nature in his broadcasts. But the Tribunal is not prepared to hold that they were intended to incite the German people to commit atrocities on conquered peoples, and he cannot be held to have been a participant

[2542] IMT Judgement, conclusions regarding *Fritzsche*.

in the crimes charged. His aim was rather to arouse popular sentiment in support of Hitler and the German war effort." (*emphasis added*)

Chapter III. JURISPRUDENCE OF THE INTERNATIONAL CRIMINAL TRIBUNALS

2487. The *ad hoc* tribunals analysed a number speeches of accused and the impact those speeches had on the perpetrators of the crimes. Many of the cases, some of which are cited *infra*, relate more specifically to direct and public incitement to commit genocide, which is a crime *per se* and not a mode of responsibility. That distinction notwithstanding, it is possible to draw from it a number of lessons on the factors to consider when analysing the Accused's speeches and statements, for example, their purpose as well as their cultural, historical and political context.[2543]

Section I. *NAHIMANA* (ICTR)

2488. The *Nahimana* or *Media* Case highlights the purpose of speeches. It is recalled in that case that in determining the scope of responsibility,"[it] emerges from the jurisprudence – whether or not the purpose in publicly transmitting the material was of a *bona fide* nature (e.g. historical research, the dissemination of news and information, the public accountability of government authorities).)"[2544]

2489. The judges emphasised of taking the context of a communication into account: "The jurisprudence on incitement highlights the importance of taking context into account when considering the potential impact of expression. [...] The context is taken into account in determining the potential impact on national security and public order."[2545]

2490. They considered, for example, that "some of the articles and broadcasts highlighted by the Prosecution convey historical information, political analysis or advocacy of an ethnic consciousness regarding the inequitable distribution of privilege in Rwanda."[2546] In particular, with regard to a programme in which BARAYAGWIZA recounted how in his childhood he had to work for the Tutsi and was not allowed to eat with them because they were the chiefs,[2547] they held as follows:

[2543] *Akayesu* Trial Judgement (ICTR), 02.12.1998, para. 557; *Nahimana* Trial Judgement (ICTR), 03.12.2003, paras. 1011, 1022-1023; *Nahimana* Trial Judgement (ICTR), 20.11.2007, paras. 698-703; *Bikindi* Trial Judgement (ICTR), 02.12.2008, para.247; *Nzabonimana* Trial Judgement (ICTR), 31.05.2012, para.1753; *Nzabonimana* Appeal Judgement (ICTR), 29.09.2014, para.134; *Šešelj* Trial Judgement (ICTY), 31.03.2016, para. 300.
[2544] *Nahimana* Trial Judgement (ICTR), 03.12.2003, para. 1001.
[2545] *Nahimana* Trial Judgement (ICTR), 03.12.2003, paras. 1004-1006.
[2546] *Nahimana* Trial Judgement (ICTR), 03.12.2003, para. 1019.
[2547] *Nahimana* Trial Judgement (ICTR), 03.12.2003, para. 345.

> "The Chamber considers that it is critical to distinguish between the discussion of ethnic consciousness and the promotion of ethnic hatred. This broadcast by Barayagwiza is the former but not the latter. While the impact of these words, which are powerful, may well have been to move listeners to want to take action to remedy the discrimination recounted, such impact would be the result, in the Chamber's view, of the reality conveyed by the words rather than the words themselves. A communication such as this broadcast does not constitute incitement. In fact, it falls squarely within the scope of speech that is protected by the right to freedom of expression. Similarly, public discussion of the merits of the Arusha Accords however critical, constitutes a protected exercise of free speech."[2548]

2491. However, in regard to the broadcast of lists of suspects with a warning that since the Government could not effectively protect them, they had to organise their own self-defence to prevent their own extermination, the judges deemed that to amount to incitement to violence.[2549] Concerning another broadcast, they stated: "Habimana told his followers: 'Just look at his small nose and then break it.' The identification of the enemy by his nose and the longing to break it vividly symbolize the intent to destroy the Tutsi ethnic group."[2550]

Section II. *BIKINDI* (ICTR)

2492. BIKINDI was "alleged to have participated in the genocide by composing songs extolling Hutu solidarity and encouraging ethnic hatred and the attacking and killing of Tutsi, which were then deployed in a propaganda campaign to target the Tutsi as the enemy and to sensitise and incite the listening public to target and commit acts of violence against the Tutsi."[2551]

2493. In interpreting the songs, the judges took account of "the cultural, historical and political context in which they were composed and disseminated."[2552] They found as follows:

> "The Chamber finds that Twasezereye, Nanga Abahutu and Bene Sebahinzi manipulated the history of Rwanda to extol Hutu solidarity and that Nanga Abahutu and Bene Sebahinzi were composed to disseminate anti-Tutsi propaganda and encourage ethnic hatred. In the context of rising ethnic tension in Rwanda during the early 1990s leading to the genocide, Twasezereye was later used as a vehicle for anti-Tutsi propaganda. In light of the inflammatory content of RTLM journalists' commentary accompanying the repeated broadcasting of Bikindi's songs and the testimonial evidence, the Chamber finds that Bikindi's songs were used by RTLM in a propaganda campaign to promote contempt for and hatred of the Tutsi population and incite the listening public to target and commit acts of violence against Tutsi. The Chamber concludes that in 1994 in Rwanda, Bikindi's three songs

[2548] *Nahimana* Trial Judgement (ICTR), 03.12.2003, para. 1020.
[2549] *Nahimana* Trial Judgement (ICTR), 03.12.2003, para. 1028.
[2550] *Nahimana* Trial Judgement (ICTR), 03.12.2003, para. 1032.
[2551] *Bikindi* Trial Judgement (ICTR), 02.12.2008, para. 186.
[2552] *Bikindi* Trial Judgement (ICTR), 02.12.2008, para. 247.

were indisputably used to fan the flames of ethnic hatred, resentment and fear of the Tutsi. Given Rwanda's oral tradition and the popularity of RTLM at the time, the Chamber finds that these broadcasts of Bikindi's songs had an amplifying effect on the genocide. Bikindi's criminal responsibility for the composition, recording and dissemination of these songs will be discussed in the Chapter on Legal Findings.[2553]

2494. Since it had not been established that BIKINDI played a role in the dissemination and deployment of the songs, he was not convicted of that charge.[2554]

Section III. *NZABONIMANA* (ICTR)

2495. NZABONIMANA was found guilty of the crime of direct and public incitement to commit genocide, as well as incitement to commit genocide.

2496. With regard to direct and public incitement to commit genocide, the judges emphasised the importance of the context from a language perspective:

> "In determining whether a speech constitutes 'direct' incitement to commit genocide, the principal consideration is the meaning of the words used in the specific context. The culture, including the nuances of the Kinyarwanda language, should be considered. A Chamber may consider how a speech was understood by its intended audience in order to determine its true message.[2555]

2497. As regards the conviction for the crime of incitement to commit genocide, the Trial Chamber emphasised, *inter alia*, the essential element of whether the accused's statements substantially contributed to any crimes subsequent crime. As for content, there was no doubt that the speeches incited to hatred and even direct calls to kill and exterminate the Tutsis.[2556]

Section IV. *ŠEŠELJ* (ICTY)

2498. In *Šešelj*, the accused was charged among others with the crime of persecution. In determining whether the Accused could be held responsible for inciting the main perpetrators of the crime of persecution, the judges, *inter alia*, analysed Accused's dissemination of ideology, for example through propaganda, and a detailed analysis of his speeches.[2557]

2499. With regard to analysis of the Accused's dissemination of ideology, the judges stated as follows:

[2553] *Bikindi* Trial Judgement (ICTR), 02.12.2008, para. 264.
[2554] *Bikindi* Trial Judgement (ICTR), 02.12.2008, para. 421.
[2555] *Nzabonimana* Trial Judgement (ICTR), 31.05.2012, para. 1753.
[2556] *Nzabonimana* Trial Judgement (ICTR), 31.05.2012, paras. 1706-1718.
[2557] *Šešelj* Trial Judgement (ICTY), 31.03.2016, paras. 297-343.

> "While the Chamber acknowledges together with the Accused that the propaganda of a "nationalist" ideology is not criminal in itself, contrary to the Accused's claims, it must analyse and qualify, in accordance with the law applicable in this matter, the statements made by the Accused and their potential impact on the perpetrators of the crimes referred to in the Indictment, in light of the cultural, historical and political context."[2558]

2500. With regard to the Accused's speeches, the judges immediately excluded the ones which could be assessed as nothing more than support for the war effort or as concerning territories that did not come under the geographic scope of the indictment.[2559]

2501. In the first speech they analysed, ŠEŠELJ "allegedly stated: "this entire area will soon be cleared of the Ustashas" and told the Catholics in the region that they would have nothing to fear if they did not cooperate with the *Ustashas* and join their units."[2560] The judges by majority did not consider those statements, which were reported in a newspaper article, as instigating a crime, as "[t]heir context rather suggest[ed] that these were speeches aimed at reinforcing the Accused's political party."[2561]

2502. Concerning another speech, witnesses testified that ŠEŠELJ told "high-ranking members of the Serbian forces that 'no Ustasha should leave Vukovar alive'." The judges noted that some witnesses had explained that the term "Ustasha" referred to Croatian soldiers and that everyone could have their own interpretation thereof. Other witnesses explained that they heard a call for the surrender of the Ustashi. It was emphasised that at the time of the speech, ŠEŠELJ had travelled to the front to take part in the fighting shortly before the fall of the town.[2562] Hence, the judges noted as follows:

> "[T]he Chamber notes the contradictions between witnesses and the variations between a number of statements by the same witnesses. These variations sow a seed of doubt as regards the exact content of the Accused's statements. Incidentally, even if the statements ascribed to the Accused in their most controversial version are accepted, the Chamber, by a majority, Judge Lattanzi dissenting, cannot dismiss the reasonable possibility that the speeches were made in a context of conflict and were aimed at reinforcing the morale of the troops on the Accused's side, rather than being an appeal to them to

[2558] *Šešelj* Trial Judgement (ICTY), 31.03.2016, para. 300.
[2559] *Šešelj* Trial Judgement (ICTY), 31.03.2016, para. 303.
[2560] *Šešelj* Trial Judgement (ICTY), 31.03.2016, para. 306.
[2561] *Šešelj* Trial Judgement (ICTY), 31.03.2016, para. 307.
[2562] *Šešelj* Trial Judgement (ICTY), 31.03.2016, paras. 304-3017.

show no mercy (for otherwise, calling on the Ustashas to surrender over a megaphone in the streets of Vukovar would make no sense."[2563]

2503. The judges analysed another speech by ŠEŠELJ in which he allegedly urged the "*balijas*" to take the direction of the east, where their place was.[2564] The accused also indicated that in referring to fundamentalist Islamists and pan-Islamists, he used the term *"pogani"*, meaning "waste" or "faeces".[2565]

2504. Even so, the Trial Chamber concluded as follows:

> "The Chamber, by a majority, Judge Lattanzi dissenting, is however not in a position to find, beyond all reasonable doubt, that by calling on the Serbs to "clear up" Bosnia of the "*pogani*" and the "*balijas*", the Accused was calling for "ethnic cleansing" of the non-Serbs of Bosnia. In fact, the majority considers that, given the context, the evidence provided by the Prosecution is not sufficient to exclude the possibility that this call by the Accused was more a matter of contributing to the war effort by galvanising the Serbian forces. Moreover, nothing has established that this speech – the words spoken that were described as a "brief conversation" in the police report tendered into evidence by the Prosecutor – had even a limited impact.[2566]

2505. With regard to a speech urging Croats to leave Serbia, the judges deemed that while the Accused had clearly called for the expulsion or forcible transfer of Croats from the locality no evidence showed that the speech was the reason for the departure of the Croats or the campaign of persecution that was carried out following the speech.[2567] The judges found likewise concerning other speeches which called for the expulsion of Croats,[2568] namely that those speeches could not be qualified as physical acts of instigation.[2569]

2506. Therefore, in that and other cases before the international criminal tribunals, it is important to take account of the context of the speeches. While in the ICTR cases the context of genocide was not in dispute and the speeches and songs clearly called for ethnic discrimination, in the *Šešelj* case, the speeches against Croats were made within the context of on-going fighting between Croatian and Serb forces.

[2563] *Šešelj* Trial Judgement (ICTY), 31.03.2016, para. 318.
[2564] *Šešelj* Trial Judgement (ICTY), 31.03.2016, para. 322.
[2565] *Šešelj* Trial Judgement (ICTY), 31.03.2016, para. 325.
[2566] *Šešelj* Trial Judgement (ICTY), 31.03.2016, para. 328.
[2567] *Šešelj* Trial Judgement (ICTY), 31.03.2016, para.333.
[2568] *Šešelj* Trial Judgement (ICTY), 31.03.2016, paras. 334-342.
[2569] *Šešelj* Trial Judgement (ICTY), 31.03.2016, para. 343.

2507. Therefore, the Trial Chamber should analyse the content of the speeches in light of their historical, political, cultural and, where applicable, linguistic context. With that in view, it is crucial to take account of the context of the armed conflict with Vietnam during the Democratic Kampuchea period.[2570]

[2570] See *supra*, Title II on the armed conflict, and also paras. 2235-2252.

CONCLUSION

2508. KHIEU Samphan was sentenced to life imprisonment on appeal in Case 002/01. Therefore, his Defence holds no illusions about his eventual release.

2509. Even so, he expects the case to be adjudicated according to the law and nothing but the law pursuant to the principles set out at the beginning of the present Brief. That entails excluding any and all facts that were illegally put before the Chamber and applying the laws only as they stood at the time relevant to the charges in the case at hand. The Trial Chamber's *intime conviction* must not "stand up against the required standard of proof and the dispassionate rigour it demands".[2571]

2510. To the extent that the portrayal of the CPK policies in the present case does not in any way reflect the ideals for which he stood, KHIEU Samphan strongly denies that he had the intent to commit or contribute to the commission of the crimes alleged.

FOR THESE REASONS

2511. The KHIEU Samphan Defence requests the Trial Chamber to:

- APPLY the law impartially;
- FIND that it is improperly seised of the segments of the Closing Order in reliance upon which it unlawfully sent him to trial, and DECLINE jurisdiction over those segments;
- ACQUIT him of all the charges.

KONG Sam Onn	Phnom Penh	
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[2571] See *supra*, footnote 607.