

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

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**CO-PROSECUTORS' APPEAL AGAINST THE CASE 002/02 TRIAL JUDGMENT**

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**Filed by:**

**Co-Prosecutors**  
CHEA Leang  
Brenda J. HOLLIS  
(Reserve)

**Distributed to:**

**Supreme Court Chamber**  
Judge KONG Srim, President  
Judge C. N. JAYASINGHE  
Judge SOM Sereyvuth  
Judge Florence Ndepele MUMBA  
Judge MONG Monichariya  
Judge Maureen HARDING CLARK  
Judge YA Narin

**Accused**

KHIEU Samphan

**Counsel for KHIEU Samphan**

KONG Sam Onn  
Anta GUISSÉ

**Copied to:**

**Civil Party Lead Co-Lawyer**  
PICH Ang

## I. INTRODUCTION

1. In the Case 002/02 Trial Judgment, the Trial Chamber found that the “crime against humanity of other inhumane acts was committed through conduct characterised as rape in the context of forced marriage.”<sup>1</sup> However, while not expressly articulated as such, this finding applied only to women. In contrast, the Trial Chamber held that the *men* who were forced to consummate their forced marriages were *not* victims of rape because of the definition of rape that existed during the DK regime.<sup>2</sup> The Chamber then considered whether the conduct qualified as sexual violence of such gravity that it amounted to other inhumane acts.<sup>3</sup> The analysis, contained in a single paragraph of the Judgment, acknowledged that men who were forced to consummate their forced marriages had been subjected to sexual violence that was “contrary to human dignity”.<sup>4</sup> However, due to what the Trial Chamber called an “absence of clear evidence concerning the level of seriousness of this kind of conduct and its impact on males”, the Chamber stated that it was unable to find that the conduct constituted other inhumane acts.<sup>5</sup>
2. The Co-Prosecutors appeal this exclusion of the male victims of forced sexual intercourse from the conviction for the crime against humanity of other inhumane acts through two primary arguments.<sup>6</sup> First, the Trial Chamber erred in law by failing to apply the other inhumane acts legal test correctly by not considering whether forcing someone to have sexual intercourse constituted a serious attack on human dignity. Second, the Trial Chamber erred by failing to find that forcing men to have sexual intercourse caused serious physical or mental suffering or injury. The legal errors occurred when the Chamber failed to provide a reasoned opinion and consider relevant evidence, and the factual error occurred when the Chamber reached a conclusion no reasonable trial chamber could have reached based on the evidence and its own findings. These legal and factual errors invalidated the decision and resulted in a miscarriage of justice.

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<sup>1</sup> E465 Case 002/02 Judgement, 16 November 2018 (“Case 002/02 TJ”), para. 3700.

<sup>2</sup> E465 Case 002/02 TJ, paras 731, 3701 (emphasis added).

<sup>3</sup> E465 Case 002/02 TJ, para. 3701.

<sup>4</sup> E465 Case 002/02 TJ, para. 3701.

<sup>5</sup> E465 Case 002/02 TJ, para. 3701.

<sup>6</sup> Pursuant to Extraordinary Chambers in the Courts of Cambodia Internal Rules, Rev. 9, 16 January 2015 (“Internal Rules”), Rules 104, 105.

3. Consequently, the Co-Prosecutors request that the erroneous finding be set aside and that the conviction for the crime of other inhumane acts be corrected to include sexual violence (against the male victims) so that both male and female victims of the same act of forced sexual intercourse are properly recognised.

## II. PROCEDURAL HISTORY

4. On 16 November 2018, the Trial Chamber pronounced its verdict and sentence in Case 002/02, providing an oral summary of its findings and the disposition of the Judgment. The Chamber stated that the authoritative account of its findings would be made available in a written judgment in due course.<sup>7</sup> That written judgment was subsequently issued in Khmer, English and French on 28 March 2019.<sup>8</sup>
5. In response to requests from Nuon Chea and Khieu Samphan,<sup>9</sup> the Supreme Court Chamber (“SCC”) granted all Case 002/02 Parties an additional two months to file their notices of appeal, ordering that the notices be filed on or before 1 July 2019.<sup>10</sup>
6. On 21 June 2019, the Co-Prosecutors filed their Notice of Appeal,<sup>11</sup> making this appeal brief due on 20 August 2019.<sup>12</sup>

## III. APPLICABLE LAW AND BACKGROUND

### A. Admissibility

7. Internal Rule 105(1)(a) allows the Co-Prosecutors to file an appeal against the Trial Chamber Judgment.

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<sup>7</sup> **E1/529.1** Pronouncement of Judgment in Case 002/02, T. 16 November 2018, 09:34:35-09:36:02.

<sup>8</sup> **E465** Case 002/02 TJ.

<sup>9</sup> **F39/1.1** Khieu Samphan Defence Request for Extension of Time and Number of Pages to File Notice of Appeal, 3 April 2019; **F40/1.1** Nuon Chea’s Urgent First Request for an Extension of Time and Page Limits for Filing his Notice of Appeal Against the Trial Judgement in Case 002/02, 3 April 2019.

<sup>10</sup> **F43** Decision on Nuon Chea and Khieu Samphan’s Requests for Extensions of Time and Page Limits on Notices of Appeal, 26 April 2019, paras 11, 13.

<sup>11</sup> **E465/2/1** Co-Prosecutors’ Notice of Appeal of the Trial Judgement in Case 002/02, 21 June 2019.

<sup>12</sup> Internal Rule 107(4) (providing that the appeal brief shall be filed within 60 days of the date of the notice of appeal).

### B. Standard of Appellate Review

8. Appeals against a judgment of the Trial Chamber are permissible on two grounds: “an error on a question of law invalidating the judgment [...] or an error of fact which has occasioned a miscarriage of justice”.<sup>13</sup>
9. When an error of law is alleged, the SCC must determine whether the Trial Chamber’s findings on questions of law were correct, not merely whether they were reasonable.<sup>14</sup> If the error arose from the Trial Chamber’s application of a wrong legal standard, it is for the SCC to determine the correct legal standard and apply it to the evidence contained in the trial record, determining whether it is itself convinced to the relevant standard of proof as to the factual finding challenged.<sup>15</sup> The SCC may amend the Trial Chamber’s decision only if the error of law invalidates the judgment or decision.<sup>16</sup>
10. When an error of fact is alleged, the SCC must determine whether the finding was reasonable, not whether it was correct.<sup>17</sup> The SCC has previously agreed with the ICTY’s general approach of giving a margin of deference to a Trial Chamber’s findings of fact, stating that it “will not lightly disturb” such findings.<sup>18</sup> To overturn a decision of the Trial Chamber, the error of fact must occasion a miscarriage of justice, which means it must have been “critical to the verdict reached”.<sup>19</sup>

### C. Case 002 Jurisprudence regarding Other Inhumane Acts

11. In the Case 002 Closing Order, the Co-Investigating Judges (“CIJs”) found that imposing the consummation of forced marriages in coercive circumstances without the consent of the victims constituted rape.<sup>20</sup> They therefore charged the Accused with the crime against

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<sup>13</sup> Internal Rule 104(1). *Note* that appeals against procedural decisions are classified as errors of law or errors of fact. *See* **F36** Appeal Judgement, 23 November 2016 (“Case 002/01 AJ”), para. 96.

<sup>14</sup> **F36** Case 002/01 AJ, para. 85 *citing* Case 001-**F28** Appeal Judgement, 3 February 2012 (“*Duch* AJ”), para. 14.

<sup>15</sup> **F36** Case 002/01 AJ, para. 86 *citing* Case 001-**F28** *Duch* AJ, para. 16.

<sup>16</sup> **F36** Case 002/01 AJ, para. 86 *citing* Case 001-**F28** *Duch* AJ, para. 16.

<sup>17</sup> **F36** Case 002/01 AJ, para. 88 *citing* Case 001-**F28** *Duch* AJ, para. 17.

<sup>18</sup> **F36** Case 002/01 AJ, paras 88-89 *citing* Case 001-**F28** *Duch* AJ, para. 17.

<sup>19</sup> Case 001-**F28** *Duch* AJ, para. 19 *citing* *Kupreškić* AJ, para. 29.

<sup>20</sup> **D427** Closing Order, para. 1431.

humanity (“CAH”) of rape and stated that the facts could alternatively be categorised as the CAH of other inhumane acts through sexual violence.<sup>21</sup>

12. Subsequently, both the Pre-Trial Chamber (“PTC”) and the SCC held that during the ECCC’s temporal jurisdiction, rape was not yet a distinct CAH under customary international law.<sup>22</sup> However, “other inhumane acts” was a CAH before 1975, serving as a residual category to criminalise conduct that reaches the gravity of CAH but does not fit within one of the specified (enumerated) crimes.<sup>23</sup> Therefore, the charge of rape was re-characterised as a charge of other inhumane acts as a CAH.<sup>24</sup>
13. The SCC has held that the following elements must be proven for conduct to constitute the CAH of other inhumane acts:
  - i) there was an act or omission of similar seriousness to the other acts enumerated as crimes against humanity;
  - ii) the act or omission caused serious mental or physical suffering or injury or constituted a serious attack on human dignity; and
  - iii) the act or omission was performed intentionally.<sup>25</sup>
14. The Trial Chamber recited the SCC’s three-element test in its Judgment<sup>26</sup> and stated that such an assessment would be facilitated by setting out its own “understanding of the constituent elements” of the underlying conduct where it was “determined necessary to

<sup>21</sup> **D427** Closing Order, paras 1430-1433, 1525(v), 1545, 1548, 1551, 1554, 1613.

<sup>22</sup> Case 001-**F28** *Duch* AJ, paras 183, 213; **D427/2/15** Decision on Appeals by Nuon Chea and Ieng Thirith Against the Closing Order, 15 February 2011 (“NC and IT Closing Order Decision”), paras 149-154; **D427/1/30** Decision on Ieng Sary’s Appeal Against the Closing Order, 11 April 2011 (“IS Closing Order Decision”), paras 364-371.

<sup>23</sup> **F36** Case 002/01 AJ, paras 576, 578, 584; **E313** Case 002/01 Judgement, 7 August 2014 (“Case 002/01 TJ”), paras 435, 437; Case 001-**E188** Judgement, 26 July 2010 (“*Duch* TJ”), para. 367; **D427/1/30** IS Closing Order Decision, paras 371-372, 379-385, 398; **D427/2/15** NC and IT Closing Order Decision, paras 156-158, 165; **D427** Closing Order, para. 1314, fn. 5194. *See also* *Stakić* AJ, paras 315-316, fn. 649; *Kordić & Čerkez* AJ, para. 117; *Brima* AJ, paras 183, 198.

<sup>24</sup> **E306/7/3** Decision on Lead Co-Lawyers’ Rule 92 Submission on the Confirmation of the Scope of Case 002/02 Concerning the Charges of Rape Outside the Context of Forced Marriage, 30 August 2016, para. 16; **D427/1/26** Decision on Ieng Sary’s Defence’s Appeal Against the Closing Order, 13 January 2011, para. 7(2); **D427/4/14** Decision on Khieu Samphan Defence Appeal from the Closing Order, 13 January 2011, Disposition para. 2(2); **D427/2/12** Decision on Ieng Thirith and Nuon Chea’s Appeal Against the Closing Order, 13 January 2011, Disposition para. 1(2).

<sup>25</sup> **F36** Case 002/01 AJ, para. 580.

<sup>26</sup> **E465** Case 002/02 TJ, paras 723-727.

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ensure proper analysis”.<sup>27</sup> The Trial Chamber averred that this approach was in keeping with that adopted by other international courts when assessing other inhumane acts (forcible transfer) and sexual violence as an underlying act of persecution.<sup>28</sup>

15. In setting out its understanding of the “elements” of the underlying conduct, the Trial Chamber considered the more inclusive and gender-neutral definition of rape suggested by the Co-Prosecutors in their Closing Brief but found that such a definition went beyond the understanding of rape in 1975.<sup>29</sup> According to the Chamber, the 1975 definition of rape required, *inter alia*, sexual penetration of the victim.<sup>30</sup> Consequently, men “could not be the victims of rape in the context of forced marriage”,<sup>31</sup> as they were not sexually penetrated.
16. The Chamber then decided to assess whether forcing men to consummate their marriages could be characterised as sexual violence of such serious gravity that it amounted to other inhumane acts.<sup>32</sup> Unlike the definition of rape adopted by the Trial Chamber, it determined that sexual violence does not require penetration.<sup>33</sup> It also encompasses non-physical acts of a sexual nature which humiliate and/or degrade the victim in a sexual manner.<sup>34</sup> The Trial Chamber recalled that in assessing such conduct, “the only relevant issue for it to assess” was whether the conduct in question fulfilled the definition of other inhumane acts in accordance with the SCC’s three-element test.<sup>35</sup>
17. The Trial Chamber’s assessment was contained in one paragraph of the Judgment:

The Chamber understands sexual violence to entail “any act of a sexual nature which is committed on a person under circumstances that are coercive”.<sup>36</sup> The Chamber understands sexual violence to not be limited to physical invasion of the human body and may include acts that do not involve penetration or

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<sup>27</sup> E465 Case 002/02 TJ, para. 727.

<sup>28</sup> E465 Case 002/02 TJ, fn. 2230.

<sup>29</sup> E465 Case 002/02 TJ, paras 730-731. The Chamber relied upon Case 001-E188 *Duch* TJ, para. 362 for this definition, which cited, *inter alia*, *Kunarac* AJ, para. 127; *Semanza* TJ, paras 344-345; *Sesay* TJ, paras 145-146; *Furundžija* TJ, para. 177.

<sup>30</sup> E465 Case 002/02 TJ, para. 731.

<sup>31</sup> E465 Case 002/02 TJ, para. 731.

<sup>32</sup> E465 Case 002/02 TJ, paras 731, 3701.

<sup>33</sup> E465 Case 002/02 TJ, para. 3701 citing *Akayesu* TJ, para. 688.

<sup>34</sup> See, e.g. *Akayesu* TJ, para. 688; *Kvočka* TJ, para. 180; *Dorđević* AJ, paras 850-852; *Milutinović* TJ, Vol. 1, para. 201.

<sup>35</sup> E465 Case 002/02 TJ, paras 731-732.

<sup>36</sup> E465 Case 002/02 TJ, fn. 12325 citing *Akayesu* TJ, para. 688; *Kvočka* TJ, para. 180.

even physical contact.<sup>37</sup> The Chamber has found that men also could not refuse to consummate marriage. On one occasion, a husband had sexual intercourse with his wife following *Angkar*'s instructions and out of fear for the lives of him and his wife.<sup>38</sup> One Civil Party suffered greatly because he was not able to marry his fiancée.<sup>39</sup> However, **in the absence of clear evidence concerning the level of seriousness of this kind of conduct and its impact on males, the Chamber, while acknowledging that men were subjected to sexual violence that was contrary to human dignity, is unable to reach a finding on the seriousness of the mental and physical suffering suffered by these men.** Accordingly, the Chamber is unable to reach a conclusion to the requisite standard in relation to these incidents and **does not consider that they constitute the crime against humanity of other inhumane acts through sexual violence.**<sup>40</sup>

#### IV. SUBMISSION

##### A. The Trial Chamber erred in law by failing to apply the other inhumane acts legal test correctly

18. The Trial Chamber erred in law by failing to assess whether forcing men to have sexual intercourse *per se* constituted a serious attack on human dignity, which is one of the elements of the other inhumane acts test. Although the Trial Chamber correctly articulated the three material elements in the test to establish the CAH of other inhumane acts,<sup>41</sup> it failed to apply the second element correctly. The second element requires a finding that the act or omission caused serious mental or physical suffering or injury, or constituted a **serious** attack against human dignity.<sup>42</sup> The use of the conjunction “or” allows that if the act or omission *either* “caused serious mental or physical suffering or injury” *or* “constituted a **serious** attack on human dignity”, the *actus reus* is proven. A plain reading of this requirement mandates that if one alternative is not satisfied, the other alternative must be assessed. Yet the Trial Chamber failed to do so despite stating that “it was unable to reach a finding on the

<sup>37</sup> E465 Case 002/02 TJ, fn. 12326 *citing Akayesu* TJ, para. 688.

<sup>38</sup> E465 Case 002/02 TJ, fn. 12327 *citing* para. 3657 (Sou Sotheavy).

<sup>39</sup> E465 Case 002/02 TJ, fn. 12328 *citing* para. 3680 (Yos Phal).

<sup>40</sup> E465 Case 002/02 TJ, para. 3701 (emphasis added).

<sup>41</sup> See paras 13-14, *supra*.

<sup>42</sup> E465 Case 002/02 TJ, para. 724 (emphasis added). See also F36 Case 002/01 AJ, para. 580; ILC Draft Code of Crimes Against the Peace and Security of Mankind with Commentaries, *Yearbook of the International Law Commission*, Vol. II, Part Two, 1996, p. 50: “the notion of other inhumane acts is circumscribed by two requirements. First, this category of acts is intended to include only additional acts that are similar in gravity to those listed in the preceding subparagraphs. Second, the act must in fact cause injury to a human being in terms of physical or mental integrity, health *or* human dignity” (emphasis added).

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seriousness of the mental or physical suffering” occasioned on the men.<sup>43</sup> This error of law invalidates the finding that the conduct that the men were subjected to did not constitute the crime against humanity of other inhumane acts,<sup>44</sup> and requires SCC intervention.

19. Had the Trial Chamber followed the correct approach to assessing the second element of the other inhumane acts test, it would have concluded that the crime included the conduct against the male victims. The *Čelebići* Trial Judgment is of assistance, as it sets out this correct assessment. Although *Čelebići* concerned inhuman treatment (a grave breach of the Geneva Conventions) and cruel treatment (a war crime), the elements required to prove these crimes are the same elements required to establish the CAH of other inhumane acts,<sup>45</sup> and an “outrage upon personal dignity” is also comparable.<sup>46</sup>
20. In *Čelebići*, the Trial Chamber was presented with evidence that Mirko Kuljanin had been severely beaten before he was brought to the prison camp.<sup>47</sup> Upon his arrival, Mr. Kuljanin was taken to a wall inside the camp compound where other prisoners were being beaten, but he was unable to stand because of his previously inflicted injuries.<sup>48</sup> At the wall, Mr. Kuljanin was hit several times before authorities took him away.<sup>49</sup> The *Čelebići* Trial Chamber found that it did not have sufficient evidence before it to assess whether the

<sup>43</sup> E465 Case 002/02 TJ, para. 3701.

<sup>44</sup> E465 Case 002/02 TJ, para. 3701.

<sup>45</sup> In 2002, the *Krnjelac* Trial Chamber stated: “It is apparent from the jurisprudence of the Tribunal that cruel treatment, inhuman treatment and inhumane acts basically require proof of the same elements. [...] The definitions adopted for each offence in the decisions of the Tribunal vary only by the expressions used.” See *Krnjelac* TJ, para. 130. Similarly, the *Simić* Trial Chamber stated: “In assessing the content of cruel and inhumane treatment, the Trial Chamber finds that it is assisted by the Tribunal’s jurisprudence regarding other inhumane acts under Article 5 (i) of the Statute, inhuman treatment under Article 2 (b) of the Statute, and cruel treatment under Article 3 of the Statute. The elements of these offences are the same”. See *Simić* TJ, para. 74. See also *Naletilić & Martinović* TJ, para. 246; *Vasiljević* TJ, para. 234; *Kordić & Čerkez* TJ, para. 265; *Jelisić* TJ, para. 52; *Karadžić* TJ, fn. 1634. The *Karadžić* Trial Chamber also noted that the ICTY’s jurisprudence had established that the definition of cruel and/or inhumane treatment as an underlying act of the offence of persecution is the same (see *Karadžić* TJ, fn. 1634 citing *Gotovina* TJ, Vol. II, para. 1791; *Tolimir* TJ, para. 853; *Popović* TJ, para. 975). Thus, when examining whether conduct amounts to the CAH of other inhumane acts, reference can be made to analysis of acts amounting to cruel treatment (as a war crime) or inhuman treatment (as a grave breach of the Geneva Conventions) since the notions of the three offences have the same legal meaning and the same three elements must be established.

<sup>46</sup> Outrages upon personal dignity have been defined as “any act or omission which would be generally considered to cause serious humiliation, degradation or otherwise be a serious attack on human dignity” (see *Kunarac* AJ, para. 163 (underlined emphasis added) affirming *Kunarac* TJ, para. 507). See also *Kvočka* TJ, para. 169 comparing “outrages upon personal dignity” to the war crime of inhuman treatment.

<sup>47</sup> *Čelebići* TJ, para. 1024.

<sup>48</sup> *Čelebići* TJ, para. 1025.

<sup>49</sup> *Čelebići* TJ, para. 1025.



beatings that Mr. Kuljanin received inside the camp caused him the kind of suffering or injury required to constitute wilfully causing great suffering or serious injury to body or health.<sup>50</sup> However, the Chamber then turned to the alternative option for the *actus reus* requirement and found that the act of hitting someone who was already so seriously injured that he was unable to stand was, at a minimum, a serious affront to human dignity.<sup>51</sup> Thus, the physical mistreatment of Mirko Kuljanin was found to satisfy the *actus reus* requirement of inhuman treatment under Article 2 and cruel treatment under Article 3 of the ICTY Statute.<sup>52</sup>

21. In Case 002/01, the Trial Chamber's approach to attacks against human dignity as an other inhumane act reinforces the principle that either alternative can separately and independently establish the *actus reus* of other inhumane acts. There, the Chamber found that the conditions during phase two of the population movement "caused serious and lasting mental and physical suffering" and did not analyse whether they constituted a "serious attack on human dignity" because the *actus reus* requirement had already been satisfied.<sup>53</sup> *Ad hoc* jurisprudence supports this approach: if one alternative is satisfied, analysis of the other alternative is unnecessary.<sup>54</sup> In contrast, when the first alternative does not satisfy the requirement, *Čelebići* and other cases demonstrate that the second alternative must be assessed.<sup>55</sup>
22. As the *Čelebići* analysis indicates, whether an act constitutes a "serious attack on human dignity" is an objective assessment that can be made by the Trial Chamber without evidence of suffering. The *Čelebići* Trial Chamber found that the *actus reus* was satisfied because, objectively, hitting someone already seriously injured was a serious affront to human dignity

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<sup>50</sup> *Čelebići* TJ, para. 1026.

<sup>51</sup> *Čelebići* TJ, para. 1026.

<sup>52</sup> *Čelebići* TJ, para. 1026. *See also* *Čelebići* AJ, paras 426-427 (upholding the Article 2 conviction and dismissing the Article 3 conviction because of double counting/cumulative conviction considerations). As already noted in fn. 45, *supra*, these crimes are comparable to other inhumane acts because they have the same elements of proof.

<sup>53</sup> E313 Case 002/01 TJ, para. 644.

<sup>54</sup> *See, e.g.* *Lukić & Lukić* TJ, paras 963-966; *D. Milošević* TJ, para. 938; *Kvočka* TJ, para. 209; *Naletilić & Martinović* TJ, paras 271, 289, 303; *Karadžić* TJ, para. 5641; *Mladić* TJ, Vol. 3, paras 3293-3294; *Blaskić* TJ, para. 716; *Ntagerura* TJ, para. 800.

<sup>55</sup> Cases in which the Chamber considered both alternatives but found *neither* was satisfied by the evidence before it include *Ntakirutimana* TJ, para. 745; *Prlić* TJ, Vol. 3, paras 1121, 1211; *Limaj* TJ, para. 432; *Haradinaj* TJ, para. 170.

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– no specific evidence of the act’s impact on the victim was required.<sup>56</sup> In the Judgment at issue, the Trial Chamber acknowledged that “men were subjected to sexual violence that was contrary to human dignity” but failed to make the objective assessment of whether the conduct constituted a “serious attack on human dignity”. The failure to do so is evidenced by the Chamber’s express statement that there was an “an absence of clear evidence concerning the level of seriousness and of its impact on males”.<sup>57</sup> The objective test requires no such evidence.

23. Had the Trial Chamber applied the correct legal standard by examining whether forcing men to have sexual intercourse *per se* constituted a serious attack against human dignity, it could only have concluded that it does. Forcing men to have sexual intercourse is, objectively, as serious as other acts of a sexual nature that have been found to constitute a “serious attack on human dignity” or the comparable crime of an “outrage upon personal dignity”.<sup>58</sup> For example, in *Bagosora*, inserting a bottle into the vagina of the prime minister’s naked, bloody corpse and stripping women before killing them were found to constitute serious attacks on human dignity for the crime of other inhumane acts.<sup>59</sup> In *Kunarac*, forcing victims to strip and dance naked on a table while the accused sat on the sofa watching and pointing weapons at them constituted an outrage upon human dignity.<sup>60</sup> In the *Katanga & Chui* Confirmation of Charges decision, the PTC found an outrage upon personal dignity when a woman was forced to show combatants a weapons and ammunitions depot while wearing only a blouse and underwear and, later, only a blouse.<sup>61</sup> Other cases have found that humiliating and degrading treatment,<sup>62</sup> forced prostitution,<sup>63</sup> sexual violence,<sup>64</sup> and forced

<sup>56</sup> *Čelebići* TJ, para. 1026.

<sup>57</sup> **E465** Case 002/02 TJ, para. 3701.

<sup>58</sup> See para. 19 generally and fn. 46 specifically, *supra*.

<sup>59</sup> *Bagosora* TJ, paras 705, 717-718, 2219-2222, 2224. Note that the conviction for the defilement of the Prime Minister’s corpse was reversed on appeal because it convicted Bagosora for criminal conduct with which he was not charged, not because the serious attack on human dignity requirement was reversed. In fact, the Appeals Chamber specifically noted that the desecration of the corpse “constituted a profound assault on human dignity meriting unreserved condemnation under international law.” See *Bagosora* AJ, paras 727-729.

<sup>60</sup> *Kunarac* TJ, paras 766-774, 781, 782.

<sup>61</sup> *Katanga & Chui* Confirmation of Charges Decision, paras 373-376.

<sup>62</sup> *Kupreškić* TJ, para. 566; *Kvočka* TJ, para. 208; *Sesay* TJ, para. 1302-1305; *Iwańczuk v. Poland* Judgment, paras 59-60 (an unjustified strip search in which prison guards verbally abused and derided the applicant amounted to degrading treatment in violation of Article 3 of the European Convention on Human Rights).

<sup>63</sup> *Kupreškić* TJ, para. 566; *Kvočka* TJ, para. 208.

<sup>64</sup> *Muvunyi* TJ, para. 528 citing *Kamuhanda* TJ, para. 710; *Niyitegeka* TJ, paras 465-467 (sexual violence to a dead woman’s body would cause mental suffering to Tutsi civilians); *Kajelijeli* TJ, para. 916; *Brđanin* TJ,

nudity<sup>65</sup> constituted either other inhumane acts or the comparable offences that require the same elements of proof.<sup>66</sup>

24. The Trial Chamber's failure to find that, objectively, forcing men to have sexual intercourse *per se* constitutes a serious attack on human dignity violates the fundamental principle of international humanitarian law and human rights law, which is "the protection of the human dignity of every person, *whatever his or her gender*."<sup>67</sup> This error of law invalidates the decision that the conduct does not constitute other inhumane acts<sup>68</sup> and requires the intervention of the SCC.
- B. The Trial Chamber erred in law and fact by failing to find that forcing men to have sexual intercourse caused serious physical or mental suffering or injury
25. When it assessed the seriousness of the suffering that men were subjected to, the Trial Chamber erred in law when it failed to provide a reasoned opinion and consider relevant evidence, and erred in fact when it reached a conclusion no reasonable trial chamber could have reached based on the evidence and its own findings.<sup>69</sup> No reasonable chamber applying the correct law and considering all of the evidence could have concluded that these male victims did not experience serious mental or physical suffering or injury. These errors invalidate the decision and occasion a miscarriage of justice.

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paras 1012-1013 (forcing a woman to undress in front of cheering policemen and soldiers, running a knife along the breast of a Bosnian Muslim woman, and demanding that detainees perform sex with each other constituted sexual assault serious enough to rise to the level of crimes against humanity); *Čelebići* TJ, paras 1065-1066 (forcing brothers to perform fellatio on each other in front of fellow detainees).

<sup>65</sup> *Brđanin* TJ, para. 1013 (woman forced to undress in front of cheering policemen and soldiers); *Nyiramasuhuko* TJ, paras 6134-6135.

<sup>66</sup> As discussed in para. 19, *supra*.

<sup>67</sup> *Furundžija* TJ, para. 183 (emphasis added). In the same paragraph, the Trial Chamber continued: "This principle is intended to shield human beings from outrages upon their personal dignity, whether such outrages are carried out by unlawfully attacking the body or by humiliating and debasing the honour, the self-respect or the mental well being of a person."

<sup>68</sup> **E465** Case 002/02 TJ, para. 3701.

<sup>69</sup> **E465** Case 002/02 TJ, para. 3701.

*i. The Trial Chamber failed to provide a reasoned opinion and unreasonably contradicted the evidence and its own findings*

26. The Trial Chamber failed to provide adequate reasons<sup>70</sup> to explain why its own Judgment findings were insufficient to establish serious suffering. The Chamber found that male victims:

- were forced to engage in sexual intercourse;<sup>71</sup>
- were forced to inflict sexual intercourse on their spouse,<sup>72</sup> which caused the women serious mental and physical suffering or injury and constituted a serious attack on the women’s human dignity;<sup>73</sup>
- were **deeply traumatised** as a result of forced sexual intercourse;<sup>74</sup>
- were threatened with death if they did not comply;<sup>75</sup> and
- accordingly feared for their lives if they did not have sexual intercourse.<sup>76</sup>

However, the Chamber merely “acknowledged” that the conduct men were subjected to was contrary to human dignity, stating that it was unable to reach a finding on the seriousness of

<sup>70</sup> See, e.g. **D55/I/8** Decision on Nuon Chea’s Appeal Against Order Refusing Request for Annulment, 26 August 2008, para. 21 (and jurisprudence therein) (“The Pre-Trial Chamber finds that all decisions of judicial bodies are required to be reasoned as this is an international standard.”); **E176/2/1/4** Decision on Nuon Chea’s Appeal Against the Trial Chamber’s Decision on Rule 35 Applications for Summary Action, 14 September 2012, para. 25 (“all judicial decisions – whether oral or written – must comply with a court’s obligation to provide adequate reasons”); **E50** Decision on the Urgent Applications for Immediate Release of Nuon Chea, Khieu Samphan and Ieng Thirith, 16 February 2011, paras 23-27 (and jurisprudence therein); Decision Refusing Milutinović Leave to Appeal, para. 22 (“A Chamber must, as part of the fair trial guarantee, render a reasoned opinion. This requirement obliges the Chamber, inter alia, to indicate its view about [...] all of those relevant factors which a reasonable Trial Chamber would have been expected to take into account before coming to a decision.”).

<sup>71</sup> **E465** Case 002/02 TJ, paras 3660-3661, 3691, 3692, 3696, 3398, 3699.

<sup>72</sup> The Trial Chamber found in Case 001 that this is “the worst suffering a human being can inflict upon another”. See Case 001-**E188 Duch** TJ, para. 361 citing, *inter alia*, **Kunarac** TJ, para. 655; **Sesay** TJ, para. 144. See also Geneva Convention IV, art. 27 and its accompanying commentary (“Paragraph 2 denounces certain practices which occurred, for example, during the last World War, when innumerable women of all ages, and even children, were subjected to outrages of the worst kind: rape committed in occupied territories, brutal treatment of every sort, mutilations etc.”); Lieber Code, art. 44 (all rape of the inhabitants of an invaded country is prohibited under penalty of death or “such other severe punishment as may seem adequate for the gravity of the offence”).

<sup>73</sup> **E465** Case 002/02 TJ, paras 3684, 3691, 3697, 3698.

<sup>74</sup> **E465** Case 002/02 TJ, paras 3683 (emphasis added), 3684.

<sup>75</sup> **E465** Case 002/02 TJ, paras 3653, 3696.

<sup>76</sup> **E465** Case 002/02 TJ, para. 3696.

the suffering.<sup>77</sup> No reasonable Trial Chamber considering the evidence and its own findings elsewhere in the Judgment could have reached this conclusion.

27. In addition, the Chamber failed to provide a reasoned opinion detailing its analysis of the suffering that men were subjected to when they were forced to have sexual intercourse within a forced marriage. While the Chamber has the discretion to find some pieces of evidence more persuasive than others<sup>78</sup> and there is a rebuttable presumption that it properly evaluated all of the evidence,<sup>79</sup> it must be clear how each factual finding was made.<sup>80</sup> The Trial Chamber failed to provide this. Instead, without explanation, it ignored direct evidence that was materially relevant to the analysis and neglected circumstantial evidence entirely or gave it inappropriately little weight.<sup>81</sup> There is no discretion to simply ignore a large body of relevant evidence contradicting the findings with no explanation as to why that evidence was ignored and the selected evidence was preferred.<sup>82</sup> Moreover, an analysis limited to a select segment of the relevant evidentiary record is not sufficient to constitute a reasoned opinion.<sup>83</sup> Specific examples of evidence that the Chamber either ignored or to which it gave insufficient weight are detailed in Section IV.B.ii below.

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<sup>77</sup> **E465** Case 002/02 TJ, para. 3701.

<sup>78</sup> *Muvunyi I* AJ, para. 144.

<sup>79</sup> **F36** Case 002/01 AJ, para. 304 (and citations therein).

<sup>80</sup> *Bemba* AJ, para. 52; *Kordić & Čerkez* AJ, para. 385; *Kunarac* AJ, para. 41.

<sup>81</sup> **E465** Case 002/02 TJ, para. 3701. *See also* Section IV.B.ii below for detail regarding the evidence that was ignored.

<sup>82</sup> Internal Rule 101(1)(a) (“1. The judgment shall be divided into two parts: a) the findings, setting out the factual and legal reasons supporting the Chamber’s decision”); **F36** Case 002/01 AJ, para. 304; *Muvunyi I* AJ, paras 144, 147; *Gotovina & Markač* AJ, para. 61.

<sup>83</sup> *Perišić* AJ, paras 92, 95. In **E465** Case 002/02 TJ, para. 3701, the Chamber offered three sources of evidence that it had considered to reach its finding: (i) its own finding “that men also could not refuse to consummate marriage” (although this wording did not match any finding elsewhere in the Judgment and the Chamber did not specify in which paragraph such a finding was made, the most likely match is the finding in para. 3696 stating “Both men and women felt compelled to have sexual intercourse with their new spouse”, which was based upon evidence that was discussed in the “Coercive environment” and “Forced sexual intercourse between spouses” sections of the Judgment); (ii) transgender witness Sou Sotheavy’s testimony about the consummation of her forced marriage to a woman; and (iii) Civil Party Yos Phal’s evidence about the remorse he felt from being forced to marry a person other than his fiancée (notably, Yos Phal did not attribute his suffering to being forced to consummate the marriage by having sexual intercourse; he attributed it to having to marry someone he did not love while he still loved his fiancée).

*ii. The Trial Chamber failed to consider relevant evidence on the Case File*

28. Without explanation, the Trial Chamber ignored direct evidence that was material to its finding on male suffering. It also imposed an unduly high burden of proof by exclusively requiring direct evidence of suffering while neglecting circumstantial evidence entirely or, at best, giving it inappropriately little weight.<sup>84</sup> Had the Trial Chamber properly considered all of the evidence on the Case File in its assessment, it could have only concluded that the mental and physical suffering that the men were subjected to was “serious”, and that the acts committed were of similar seriousness to the other acts enumerated as CAH.
29. The Trial Chamber failed to consider plainly relevant evidence of men’s suffering caused by being both a victim of coerced sexual intercourse and being required to inflict that suffering on another human being on pain of death. For example, nowhere in its analysis did the Chamber consider Civil Party Em Oeun’s testimony that he and his wife had sexual intercourse as a result of being “under constant watch” and out of fear of being killed.<sup>85</sup> He recalled that despite such pressure, he agonised over the decision to consummate:

**[...] if I recall my past, I sometime cannot hold my tears. And I was a man; I suffer from it, but I could also imagine the feeling of the lady; she was suffering from it as well.** And when we -- at night, we discuss to each other, and if we refused, then we would be killed eventually. So we had to force ourselves in order to satisfy those who arranged for us. So we had to concede to this. **It took me approximately two weeks or so to decide to consummate the marriage with my wife. This was the suffering I had to endure at that time. And to date I cannot forget it,** and I could not even find out who ordered this heinous crime. I did not want to take any revenge, but I want to know who initiated this idea. [...] I was one of the victims and I believe that there were many more victims.<sup>86</sup>

Em Oeun’s evidence was relied upon in the Chamber’s analyses of consent for forced marriage<sup>87</sup> and the impact of forced marriage.<sup>88</sup> Yet without explanation, the Chamber ignored this evidence when assessing the seriousness of male suffering caused by forced

<sup>84</sup> E465 Case 002/02 TJ, para. 3701.

<sup>85</sup> E1/113.1 Em Oeun, T. 23 August 2012, 15.57.58-16.01.45.

<sup>86</sup> E1/113.1 Em Oeun, T. 23 August 2012, 15.57.58-16.01.45 (emphasis added).

<sup>87</sup> See E465 Case 002/02 TJ, fn. 12092 in Section 14.3.6.2 Consent.

<sup>88</sup> See E465 Case 002/02 TJ, fns 12274, 12287 in Section 14.3.12.1 Impact of “forced marriage”.

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consummation.<sup>89</sup> Moreover, the Chamber failed to offer any reasoning as to why this did not constitute “clear evidence of the level of seriousness of the conduct”.<sup>90</sup>

30. The Trial Chamber’s assessment of male suffering also overlooked material evidence from expert witness Kasumi Nakagawa. Based on her own and others’ extensive field research,<sup>91</sup> Kasumi Nakagawa testified that forced sexual intercourse had serious and long-lasting traumatising effects on the victims, particularly men:

Q: So the fact of having been monitored with the aim of checking if marriages were consummated, did you note that this is something that caused harm or suffering to the people you interviewed?

A: Yes, yes, and it impacted extremely and disproportionately impacted over the man because men were tasked and forced to rape a wife. [...]

[F]orcing a man to rape somebody is [an] inhuman act. Not all men could do it, first of all, but they were forced to do that. And the fear is unmeasurable how he was scared if he failed to do it. And many women apparently were very scared or they were showing the emotion that they don’t want to accept the husband. And under such terrible circumstances, men had to complete it. It’s an inhuman act and I cannot imagine how some men could have done that, and maybe that’s why many men were sent to re-education for failing to rape the wife. And I’m sure that it impacted over the marriage life, that the husband might have been feel[ing] guilty to the wife or he [was] worried or scared that his wife would never love him and that might have remained as a scar or a trauma for a long period of time until he could recover his masculinity and to ensure that – he could ensure that his wife actually accepted him. So the impact was huge and it’s really [an] inhuman act against the man. [...] In my opinion, it was legalized rape. The rape had to be done in order to follow the instruction of the Khmer Rouge.<sup>92</sup>

<sup>89</sup> See **E465** Case 002/02 TJ, Sections 14.3.8.2, 14.3.8.3, 14.3.12.2, para. 3701. As noted in para. 33, *infra*, Sections 14.3.8.2 (Coercive Environment) and 14.3.8.3 (Forced Sexual Intercourse Between Spouses) were the assumed supporting evidence for the Trial Chamber’s first evidentiary basis “that men also could not refuse to consummate marriage”.

<sup>90</sup> **E465** Case 002/02 TJ, para. 3701 (stating that there was an “absence” of such evidence).

<sup>91</sup> Regarding her own research, see **E1/472.1** Kasumi Nakagawa, T. 13 September 2016, 09.49.58-10.09.30, 14.15.45-14.16.57. See also **E465** Case 002/02 TJ, para. 3534 (finding that Kasumi Nakagawa’s opinions were “generally well reasoned and consistent” and “demonstrated caution in reaching conclusions, limiting these to what she found in her research.”).

<sup>92</sup> See **E1/472.1** Kasumi Nakagawa, T. 13 September 2016, 15.43.13-15.48.27, 15.51.20-15.52.35 (*cited* in part in **E465** Case 002/02 TJ, fn. 12289 but not referred to in para. 3701). See also Rumney, P.N. and Morgan-Taylor, M. (1997), ‘Recognizing the Male Victim: Gender-Neutrality and the Law of Rape: Part 2, *Anglo-American Law Review* 26: pp. 330-356 at 346 (“Acts which involve a man being required to penetrate another

31. The Trial Chamber relied on Kasumi Nakagawa’s above testimony in Section 14.3.12.2 of the Judgment (Impact of forced sexual intercourse on victims),<sup>93</sup> yet failed to consider it as part of the evidentiary basis for its analysis of male suffering. The testimony so directly addresses the seriousness and impact of the suffering that men experienced as a result of being forced to have sexual intercourse that its conspicuous absence from the analysis demonstrates that the Chamber did not take it into account at all.<sup>94</sup>
32. In addition to its failure to consider the material, direct evidence described above, the Trial Chamber erroneously disregarded circumstantial evidence in its analysis of male suffering. The Chamber’s finding that the “absence of *clear* evidence” regarding male suffering<sup>95</sup> can only be interpreted as a requirement for *direct* evidence and indicates that little to no weight was given to *circumstantial* evidence. Such a requirement imposed an unduly high burden of proof.
33. Circumstantial evidence of male suffering and its impact inherently underpinned the Trial Chamber’s first stated basis of evidence in the analysis of male suffering. The finding “that men also could not refuse to consummate marriage” was not specifically identified in the analysis of male suffering, but it was most likely the finding that was supported by evidence cited in the sections entitled “Coercive environment” and “Forced sexual intercourse between spouses”.<sup>96</sup> These two sections of the Judgment discussed evidence that cadres closely monitored whether consummations were completed,<sup>97</sup> that couples risked their lives by going against *Angkar*,<sup>98</sup> that there were numerous possibilities of negative consequences

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do appear capable of creating serious levels of trauma and cannot be easily dismissed from the ambit of rape. Such assaults may be particularly traumatic because they give rise to a situation in which a man is forced to actively sustain penetration to the point of ejaculation.”).

<sup>93</sup> See E465 Case 002/02 TJ, para. 3684.

<sup>94</sup> E465 Case 002/02 TJ, para. 3701.

<sup>95</sup> E465 Case 002/02 TJ, para. 3701.

<sup>96</sup> As discussed in fn. 89, *supra*.

<sup>97</sup> E465 Case 002/02 TJ, paras 3645-3646, 3650, 3656-3657, 3660-3661.

<sup>98</sup> E465 Case 002/02 TJ, paras 3646 (Mam Soeurm’s testimony), 3653, 3657.



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for couples who refused to consummate,<sup>99</sup> and that “Individuals were *terrified* and therefore neither men nor women genuinely consented.”<sup>100</sup>

34. All of this evidence is circumstantially indicative of the mental suffering that men were subjected to under these conditions and the Chamber relied on exactly this kind of evidence to support its finding that forced consummation caused women serious suffering.<sup>101</sup> Yet none of it seems to have been given due weight by the Trial Chamber in its analysis of male suffering because it was looking for “clear”, i.e. *direct* evidence. The Chamber gave no reasoned explanation for such disparate treatment.
35. The Trial Chamber also failed to consider statements and research study accounts on the Case File which described the pressure men were under to consummate their marriages and their fear of consequences they would face if they failed to do so.<sup>102</sup> This pressure and fear

<sup>99</sup> E465 Case 002/02 TJ, paras 3645 (taken to the commune office), 3646 (taken away to be killed, called for re-education or refashioning, raped by cadres), 3650 (forced at gunpoint to have intercourse with her husband after they were overheard agreeing to pretend to “go along”), 3651 (raped by cadres), 3653 (threatened with death), 3656-3657 (summoned by authorities and threatened with consequences), 3658.

<sup>100</sup> E465 Case 002/02 TJ, para. 3654 (emphasis added), *citing* E1/472.1 Kasumi Nakagawa, T. 13 September 2016, p. 90, in which Kasumi Nakagawa testified: “The consent to the marriage, the forced marriage, was of course not their own free will and the decision to sexuality was also not their own. They were terrified and they were scared. So it was not from their genuine decision, both men and women.”)

<sup>101</sup> See, e.g. E465 Case 002/02 TJ, paras 3696-3698.

<sup>102</sup> See, e.g. E3/9824 Sum Pet WRI, A41 (“[I]n order to stop them from tracking us and so to avoid trouble we had slept together as spouses that night. Furthermore all of us knew that something would happen to any couples who *Angkar* regarded as not getting on well with each other.”). Note that Sum Pet’s evidence was cited only once, in E465 Case 002/02 TJ, fn. 12274 in Section 14.3.12.1: Impact of “forced marriage”; E3/9822 Vat Phat WRI, A354, 358 (“The regiment or battalion messenger conducted surveillance to find out if we got along after our marriage. He came to conduct surveillance for three nights. [...] I feel that I was forced to, therefore, I had to consummate the marriage with my wife”). Note that Vat Phat’s evidence was cited only once, in E465 Case 002/02 TJ, fn. 11892 in Section 14.3.1: Introduction (regarding the fact that weddings started to be celebrated from April 1975); E3/9833 Muol Eng WRI, A212 (“We had to consummate our marriage because they kept observing our relationship to see if something was out of the ordinary”). Note that Muol Eng’s evidence was cited only once, in E465 Case 002/02 TJ, fn. 12049 in Section 14.3.5.3: The authorising authority (explaining that his regiment commander arranged and presided over his wedding); E3/9662 Keo Theary WRI, A44-45 (“At that time he knew that I was afraid, but he needed to follow the order of *Angkar*. At that time we were not afraid of our parents, but we were afraid of *Angkar*. Q: If you had not slept with your husband, did you think that they would have known that? A: Yes, we were monitored every day.”). Note that Keo Theary’s evidence was not cited in the Trial Judgment at all; E3/2959 Kasumi Nakagawa, *Gender-based violence during the Khmer Rouge Regime*, December 2008, EN 00421895 (“I was very afraid and it was very difficult because we didn’t know each other. The next morning my husband said he was worried *Angkar* would take me away because I had refused to sleep with him ... I was worried but I also felt sorry for my husband because he was very gentle so in the end I agreed ... I slept with him on the third night.”); E3/9240 Rochelle Braaf, *Sexual Violence Against Ethnic Minorities During the Khmer Rouge Regime*, March 2014, EN 00992283 (“The following man’s account of being threatened for not having sex following forced marriage was typical of respondents’ experiences: ‘Militia men watched us secretly. If we didn’t have sex, early morning we would be called to attend Prachum Karsang [re-education meetings] three times. If we still disagreed to have sex, we

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often led men to coerce their wives into having sexual intercourse.<sup>103</sup> One male respondent in the Transcultural Psychosocial Organisation (“TPO”) study “Like Ghost Changes Body” told researchers that after he had been warned a second time to “respect *Angkar*’s path” in regard to “loving” his wife, he “had a ‘frank conversation’ with his wife to have sex to ‘save their lives’” even though “I did not have feelings to have sex with her or even keep her as my wife as I did not love her at all.”<sup>104</sup> Almost 40 years later, he still kept his experience to himself, even hiding it from his own children.<sup>105</sup>

36. Sometimes Khmer Rouge cadres forced couples into sexual intercourse under direct threat of violence. Civil Party Mom Vun testified about her experience when militiamen forced her husband at gunpoint to rape her:

As for us, we agreed that we should pretend to go a long well with one another and when there was peace in the country, if we disagreed, then we could go [our] separate way[s]. However, the militia people could hear us, then three of them got into the house and threatened us to sleep with one another. They pointed their guns at us. We were ordered to take off our clothes so that we could consummate the marriage. Militia people had a torch to shed light on us and they also had guns. We had no choice but to take off our clothes, but then I still refused to consummate the marriage. They threatened us again and they used the torch on us and they actually got hold off his penis and to insert it into my thing. It was so disgusting, but we had no choice. [...] And after we actually had sex, then they said, “Let’s move to another couple because this couple already had sex.” [...] We were afraid that they would shoot at us and we did what we were instructed to do in order to survive.<sup>106</sup>

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would be taken to be killed. Many couples were killed ...”); E3/3416 Bridgette Toy-Cronin, “*I want to tell you*”: *Stories of Sexual Violence During Democratic Kampuchea*, 18 December 2018, EN 00449490 (“Newlyweds were required to spend the first and often three or more nights together. For couples who had never seen each other before, the first night of their marriage was difficult. Almost all the informants reported that they believed that the *Angkar* required that they had sex with their new spouse. [...] Sophon, who was eventually forced to marry after refusing twice, said that after the wedding ‘the *chhlop* came to see whether we had sex or not if not they would take us to be educated. We were both willing to have sex because we were afraid of *Angkar*.”).

<sup>103</sup> E3/9614 Theresa De Langis, et al., *Like Ghost Changes Body: A Study on the Impact of Forced Marriage Under the Khmer Rouge Regime*, 2014, EN 01037067.

<sup>104</sup> E3/9614 Theresa De Langis, et al., *Like Ghost Changes Body: A Study on the Impact of Forced Marriage Under the Khmer Rouge Regime*, 2014, EN 01037067.

<sup>105</sup> E3/9614 Theresa De Langis, et al., *Like Ghost Changes Body: A Study on the Impact of Forced Marriage Under the Khmer Rouge Regime*, 2014, EN 01037075.

<sup>106</sup> E1/475.1 Mom Vun, T. 16 September 2016, 13.43.25-13.49.47. The Chamber relied upon Mom Vun’s evidence in E465 Case 002/02 TJ, para. 3650 and fns 12208-12210 in Section 14.3.8.3 Forced Sexual Intercourse Between Spouses.

37. Although Mom Vun's account is given from the female perspective, her husband was subjected to the same degrading treatment as she, and was under tremendous pressure to consummate their marriage. Not only was he physically molested, he was also expected to physically complete the act while ignoring his wife's unwillingness as well as any traumatic emotions he might have been personally experiencing. Yet while Mom Vun's rape evidence was referenced extensively in the Trial Judgment,<sup>107</sup> the Trial Chamber failed to give due weight to the evidence of the suffering that her husband experienced during the same act.<sup>108</sup>
38. While certain harms from forced sexual intercourse may be gender-specific (i.e. vaginal tearing and bleeding,<sup>109</sup> pregnancy<sup>110</sup>), there is no legal presumption that men suffer less than women from forced sexual intercourse. However, centuries of gender stereotypes have created a perception that men are always the perpetrators and never the victims of sexual crimes, and this has made the sexual victimisation of men difficult to comprehend.<sup>111</sup> Stereotypes that have contributed to this perception include (i) the belief that men value and enjoy sex and therefore view all sexual opportunities with women as positive,<sup>112</sup> (ii) the belief that men do not experience any emotional harm from heterosexual sexual experiences

<sup>107</sup> E465 Case 002/02 TJ, paras 3642, 3648-3650, 3658-3659, leading to the findings in paras 3697-3698.

<sup>108</sup> E465 Case 002/02 TJ, para. 3701.

<sup>109</sup> See E465 Case 002/02 TJ, para. 3697.

<sup>110</sup> E465 Case 002/02 TJ, paras 3685.

<sup>111</sup> Gender-biased laws often conceptualise men as perpetrators of sexual crimes and women as victims, creating the assumption that there is a gender distinction between offenders and victims and making the sexual victimisation of men difficult for individuals to comprehend (Fisher, N.L. and Pina, A. (2013), 'An overview of the literature on female-perpetrated adult male sexual victimization', *Aggression and Violent Behavior*, 18(1), pp. 54-61 available at <http://kar.kent.ac.uk/33378/>, at pp. 5, 12 citing Newburn, T. and Stanko, E. (1995), 'When Men Are Victims: The Failure of Victimology', pp.153-165 in T. Newburn and E. Stanko (eds), *Just Boys Doing Business: Men, Masculinities and Crime*, London: Routledge. See also Rumney, P.N. and Morgan-Taylor, M. (1997), 'Recognizing the Male Victim: Gender-Neutrality and the Law of Rape: Part 2', *Anglo-American Law Review* 26: 330-356 at pp. 330-332; Muehlenhard, C.L. (1998), 'The Importance and Danger of Studying Sexually Aggressive Women' in Anderson, P.B and Struckman-Johnson, C. (eds), *Sexually aggressive women: Current perspectives and controversies*, 1st ed. New York: Guildford Press, 19-48 at p. 29 (noting that gender stereotypes include the stereotypes that men are victimizers and women are victims and that men are always seeking sex and women either resist or acquiesce to male pursuit).

<sup>112</sup> See, e.g., Weare, S. (2017), 'Forced-to-Penetrate Cases: Lived Experiences of Men', Baseline Research Findings, Lancaster University Law School, p. 13; Weare, S. (2018), 'Oh you're a guy, how could you be raped by a woman, that makes no sense': towards a case for legally recognising and labelling 'forced-to-penetrate' cases as rape, *International Journal of Law in Context*, 14(1), pp. 110-131 at p. 122; Fisher, N.L. and Pina, A. (2013), 'An overview of the literature on female-perpetrated adult male sexual victimization', *Aggression and Violent Behavior*, 18(1), 54-61 available at <http://kar.kent.ac.uk/33378/>, pp. 13-14; Davies, M. and Rogers, P. (2006), 'Perceptions of male victims in depicted sexual assaults: A review of the literature', *Aggression and Violent Behavior* 11 (2006), 367-377 at p. 372.

even if non-consensual,<sup>113</sup> and (iii) the belief that it is physically impossible for a man to maintain an erection and complete the physical act of sexual intercourse if he is truly fearful or if the act is against his will.<sup>114</sup> These stereotypes “diminish the seriousness of male rape, or sexual assault, and create an assumption that such incidences are not offences because the male would receive pleasure from the activity”.<sup>115</sup> Numerous countries have begun to recognise these misconceptions and have expanded their penal codes to criminalise situations in which a perpetrator forces a victim to commit a sexual act, including penetration, against his will, either on the perpetrator or on a third person.<sup>116</sup> This is precisely the conduct that occurred during the DK regime within the context of forced marriage.

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- <sup>113</sup> Weare, S. (2017), ‘Forced-to-Penetrate Cases: Lived Experiences of Men’, Baseline Research Findings, Lancaster University Law School, p. 13; Weare, S. (2018), ‘Oh you’re a guy, how could you be raped by a woman, that makes no sense’: towards a case for legally recognising and labelling ‘forced-to-penetrate’ cases as rape, *International Journal of Law in Context*, 14(1), pp. 110-131 at p. 123; Rumney, P.N. and Morgan-Taylor, M. (1997), ‘Recognizing the Male Victim: Gender-Neutrality and the Law of Rape: Part 2’, *Anglo-American Law Review* 26: 330-356 at pp. 333-334, 339, 341; Sarrel, P.M. and Masters, W.H. (1982), ‘Sexual Molestation of Men by Women’, *Archives of Sexual Behavior* 11(2), 117-131 at pp. 127 (“The feeling that was prevalent among the men was the sense that they had responded sexually in circumstances in which a normal man would have been impotent. As a result, they came to regard themselves as abnormal”), 130 (“Even though [men] may respond sexually to the point of erection and ejaculation during such an experience, there can be a traumatic residual of sexual dysfunction or disorder.”).
- <sup>114</sup> See, e.g. Struckman-Johnson, C. and Anderson, P.B (1998) “‘Men Do and Women Don’t’: Difficulties in Researching Sexually Aggressive Women’ in Anderson, P.B and Struckman-Johnson, C. (eds) *Sexually aggressive women: Current perspectives and controversies*, 1st ed. New York: Guildford Press, 9-18 at pp. 11-12.
- <sup>115</sup> Fisher, N.L. and Pina, A. (2013), ‘An overview of the literature on female-perpetrated adult male sexual victimization’, *Aggression and Violent Behavior*, 18(1), 54-61 at <http://kar.kent.ac.uk/33378/>, p. 14. See also p. 18 (“[...] with regard to sexual intercourse, there is a double standard. Women are not expected to have intercourse unless they are in a committed relationship, whereas for men it is normally expected that they will have sex even when they are not in a relationship. Consequently, it is difficult to believe that a man would not have initiated sex or enjoyed forced sex by a woman.”); Sarrel, P.M. and Masters, W.H. (1982), ‘Sexual Molestation of Men by Women’, *Archives of Sexual Behavior* 11(2), 117-131 at p. 118 (“there has been a widespread belief that it would be almost impossible for a man to achieve or maintain an erection when threatened or attacked by a woman. Widespread acceptance of this sexual myth has had unfortunate implications for medicine, psychology, and law. Its persistence in our culture has meant that male victims of sexual assault have not been identified and that their psychotherapeutic needs have remained unmet.”); Amrita Kapur and Kelli Muddell, *When No One Calls it Rape: Addressing Sexual Violence Against Men and Boys in Transitional Contexts*, International Center for Transitional Justice, December 2016, pp. 11-12.
- <sup>116</sup> See, e.g. **South Africa**: Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, amended 2013, ch. 2, pt. 1, s. 4 (“Any person (‘A’) who unlawfully and intentionally compels a third person (‘C’), without the consent of C, to commit an act of sexual penetration with a complainant (‘B’), without the consent of B, is guilty of the offence of compelled rape.”); **Croatia**: The Criminal Code, 21 October 2011, arts 152-153 (Taken together, these provisions define rape as inducing another person, through force or threats of an attack, to engage without his consent in sexual intercourse with a third party.); **Norway**: The General Civil Penal Code, 22 May 1902, amended 21 December 2005, ch. 19, s. 192 (“Any person who [...] c) by means of violence or threats compels any person to engage in sexual activity with another person, or to carry out similar acts with himself or herself” is guilty of rape.); **Australia (Victoria)**: Crimes Act 1958, amended 1 March

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39. The Trial Chamber’s findings,<sup>117</sup> including its finding that men “could not refuse to consummate marriage”,<sup>118</sup> were in and of themselves sufficient to demonstrate the level of seriousness of this conduct and its impact on males. When added to the wealth of direct and circumstantial evidence of male suffering discussed above, the Chamber’s statement that there was an “absence of clear evidence” on the seriousness of male suffering<sup>119</sup> is demonstrably unreasonable. Had the Chamber properly considered all of this evidence, it could have only reasonably concluded that men who were forced to have sexual intercourse within forced marriage were subjected to serious suffering that constituted other inhumane acts. The Chamber’s errors invalidated its decision that other inhumane acts through sexual violence was not proven<sup>120</sup> and occasioned a miscarriage of justice.

#### V. REQUEST FOR RELIEF

40. The Co-Prosecutors request the Supreme Court Chamber to find that the Trial Chamber erred when it concluded that the males who were forced to consummate their marriages by having sexual intercourse were not victims of the crime against humanity of other inhumane acts. The Co-Prosecutors request that the erroneous finding be set aside and that the conviction for the crime of other inhumane acts be corrected to include sexual violence against male victims so that both male and female victims of the same act of forced sexual intercourse are

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2019, s. 39; **Singapore**: Penal Code of The Republic of Singapore, enacted 1871, revised 30 November 2008, cap. 224, s. 376; **United Kingdom (applicable in England and Wales)**: Sexual Offences Act 2003, ch. 2, pt. 1, s. 4; **Germany**: German Criminal Code, 13 November 1998, amended 10 October 2013, s. 177. *See also* that several criminal codes use ambiguous language that would allow for the punishment of someone who forced another person to sexually penetrate a third person: **Russia**: The Criminal Code of The Russian Federation, 13 June 1996, amended 1 March 2012, art. 133 (criminalises “Compulsion of a person to enter into illicit relations, pederasty, lesbianism, or the commission of other sexual actions by means of blackmail, threat of destruction, damage, or taking of property, or with the use of material or any other dependence of the victim”); **Denmark**: The Criminal Code, 27 September 2005, amended 21 December 2005, ch. 24, s. 216 (“Sexual Offences: (1) Any person, who enforces sexual intercourse by violence or under threat of violence, shall be guilty of rape”); **Czech Republic**: Criminal Code of The Czech Republic, 2009, amended 2011, part 2, ch. 3, s. 185 (“Rape: (1) Whoever forces another person to have sexual intercourse by violence or by a threat of violence, or a threat of other serious detriment); **Finland**: The Criminal Code of Finland, 1889, amended 2015, ch. 20, s. 1 (“Rape: (1) A person who forces another into sexual intercourse by the use or threat of violence directed against the person shall be sentenced for rape”).

<sup>117</sup> See para. 26, *supra*.

<sup>118</sup> E465 Case 002/02 TJ, para. 3701.

<sup>119</sup> E465 Case 002/02 TJ, para. 3701.

<sup>120</sup> E465 Case 002/02 TJ, para. 3701.

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properly recognised. This would be in keeping with Rule 110(4), as Khieu Samphan has already been convicted of the crime of other inhumane acts.<sup>121</sup>

Respectfully submitted,

Date	Name	Place	Signature
20 August 2019	CHEA Leang, National Co-Prosecutor	Phnom Penh	
	William SMITH, International Deputy Co- Prosecutor for Brenda J. HOLLIS, International Co-Prosecutor (Reserve)		

<sup>121</sup> E465 Case 002/02 TJ, paras 4198, 4326-4327.